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WORKING PAPER SERIES, PUBLIC LAW & LEGAL THEORY  
WORKING PAPER NO. 05-16



## **INTELLIGENT DESIGN AND THE FIRST AMENDMENT: A RESPONSE**

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# Intelligent Design and the First Amendment: A Response

Jay D. Wexler\*

Although the struggle over teaching evolution in the public schools has never been far from the front pages of the nation's newspapers ever since John Scopes was convicted of teaching the theory in 1925,<sup>1</sup> the controversy has recently ascended to new heights.<sup>2</sup> In late 2004, the school board of the Dover School District in Pennsylvania passed a series of measures requiring teachers to inform students that evolution is incomplete and to make available to students a textbook on "intelligent design" ("ID"), a purportedly scientific theory suggesting that an intelligent agent created the universe and everything in it, including human beings.<sup>3</sup> Soon after the school board took these actions, the ACLU of Pennsylvania sued in federal district court to enjoin the school's policies.<sup>4</sup> The school board has refused to back down from its position, and a trial is expected to begin later this year.<sup>5</sup> Thus it would appear that nearly a decade after ID theory first emerged as a major weapon for evolution opponents, the courts will be called upon to evaluate

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<sup>1</sup> For a short history of the controversy over teaching evolution, see 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, 444-52 (1997).

<sup>2</sup> For a selection of recent accounts of the controversy in the mainstream press, see, e.g., Claudia Wallis, *The Evolution Wars*, TIME, August 15, 2005, at 26 (discussing, among other things, President Bush's recent support for discussing intelligent design in public school classrooms); H. Allen Orr, *Master Planned: Why Intelligent Design Isn't*, THE NEW YORKER, May 30, 2005; Editorial, *The Evolution of Creationism*, THE NEW YORK TIMES, May 17, 2005, at A20; Lawrence M. Krauss, *School Boards Want to Teach the 'Controversy'; What Controversy?*, THE NEW YORK TIMES, May 17, 2005, at F5; Peter Slevin, *Teachers, Scientists Vow to Fight Challenge to Evolution*, WASH. POST, May 5, 2005, at A3.

<sup>3</sup> See John Riley, *A Matter of Intelligent Design: A Pennsylvania School Board Is at the Center of a Controversial Approach to Teaching Creation as an Alternative to Evolution*, NEWSDAY, Jan. 14, 2005, at A10. Practitioners of ID generally do not specify the specific identity of the intelligent designer, and they do not describe the designer in Christian, Biblical, or other traditional religious terms. For more on the theory, see, e.g., Wexler, *supra* n. 1, at 441-42.

<sup>4</sup> *Id.*

<sup>5</sup> See <http://www.aclupa.org/legal/legaldocket/intelligentdesigncase.htm> (indicating that a trial is scheduled to start in September 2005).

whether the public schools may teach the theory consistently with the First Amendment.

In a series of recent writings, including a full length book and several articles, Baylor University professor Francis J. Beckwith has argued that public schools may constitutionally teach intelligent design.<sup>6</sup> In doing so, Beckwith has considered and critiqued a number of arguments I have previously advanced in my own writing,<sup>7</sup> calling them “hardly persuasive,”<sup>8</sup> “wide of the mark,”<sup>9</sup> “logically fallacious,”<sup>10</sup> “patently unreasonable,”<sup>11</sup> and “philosophically irrelevant.”<sup>12</sup> In this Essay, I respond to Beckwith’s arguments regarding ID, both those that specifically critique my own arguments, as well as those that stand on their own. I argue that many of Beckwith’s arguments in favor of the constitutionality of teaching ID fail, and that the question of whether public schools may teach the theory consistent with the First Amendment is far more difficult than Beckwith would appear to believe.

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<sup>6</sup> FRANCIS J. BECKWITH, LAW, DARWINISM, AND PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN (2003) [hereinafter “L,D & PE”]; Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J. LAW, ETHICS & PUB. POL’Y 461 (2003); 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 D. L. REV. 1311 (2002); Francis J. Beckwith, *Intelligent Design in the Schools: Is It Constitutional?*, 25 CHRISTIAN RESEARCH J. #4 (2003).

<sup>7</sup> In addition to the Note cited in n. 1, *supra*, see also Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751 (2003). A new piece on evolution—specifically the Scopes Trial—is forthcoming in the *Georgetown Law Journal*, although of course Beckwith has not commented on that particular piece. See Jay D. Wexler, *The Scopes Trope*, 74 GEO. L. J. (forthcoming) (book review). Beckwith and I debated the constitutionality of intelligent design at a Spring 2005 event sponsored by the Harvard Federalist Society. For one account of that debate, see the discussion at <http://www.pandasthumb.org/pt-archives/000974.html>.

Beckwith’s book was also the focus of a Harvard Law Review student book note, Book Note, *Not Your Daddy’s Fundamentalism: Intelligent Design in the Classroom*, 117 HARV. L. REV. 964 (2004), which started a bit of a controversy in the blogosphere when Brian Leiter attacked the author as “perpetrat[ing] (intentionally or otherwise) a scholarly fraud,” and argued that the “book note is riddled with factual errors and misleading innuendo from start to finish.” Brian Leiter, *Harvard Law Review Embarrasses Itself*, <http://webapp.utexas.edu/blogs/archives/bleiter/000878.html> (Mar. 10, 2004). For more on this controversy, see Lawrence VanDyke, *An Important Sunday Post*, [http://fedsoc.blogspot.com/2004\\_03\\_01\\_fedsoc\\_archive.html#107931360182005218](http://fedsoc.blogspot.com/2004_03_01_fedsoc_archive.html#107931360182005218) (Mar. 14, 2004) (responding to Leiter’s critique); Hunter Baker, *The Professor’s Paroxysm: A Scholar’s Attack on a Student Writer—and Academic Freedom*, National Review Online, <http://www.nationalreview.com/comment/baker200403150909.asp> (Mar. 15, 2004); Brian Leiter, *The Denouement to the VanDyke Debate about Intelligent Design Creationism*, <http://webapp.utexas.edu/blogs/archives/bleiter/000954.html> (Mar. 16, 2004).

<sup>8</sup> BECKWITH, L, D & PE, *supra* n. 6, at 151.

<sup>9</sup> *Id.* at 150.

<sup>10</sup> *Id.* at 156.

<sup>11</sup> *Id.* at 154.

<sup>12</sup> *Id.* at 156.

To be sure, I do not disagree with all of Professor Beckwith's positions. Indeed, we agree on a number of important points. For instance, I agree with Beckwith that courts will not get far by trying to demarcate scientific theories from non-scientific ones<sup>13</sup> (though I do not think this matters for constitutional analysis); that it is bad policy to teach evolution without teaching about alternative ways of thinking about origins<sup>14</sup> (though I would address this problem not by teaching intelligent design in science classes but by teaching about religion in stand alone comparative religion classes); and that ID should not be found unconstitutional simply because it lends support to Christianity and other monotheistic belief systems<sup>15</sup> (though I think it is constitutionally problematic for other reasons).

Despite these areas of agreement, I do disagree with Beckwith's ultimate conclusion that teaching ID in the public schools would likely be constitutional. In my view, teaching the theory would raise significant problems under the First Amendment. More specifically, I disagree with Beckwith in three important substantive areas, namely whether courts should find that ID constitutes a religious belief, whether the Court's decision in *Edwards v. Aguillard*<sup>16</sup> casts doubt on the constitutionality of teaching ID, and whether teachers have any first amendment academic freedom right to teach ID in direct contravention of clear school policy. In this three-part essay I address these issues in turn.

## I. Is Intelligent Design a Religion?

Beckwith argues that ID is not a religion because it is not a conventional religion like Christianity or Judaism but rather a "point of view based on philosophical and empirical arguments,"<sup>17</sup> one that simply provides answers to the same question that evolution answers, namely: "What is the origin of apparent design in biological organisms and/or other aspects of the natural universe?"<sup>18</sup> Beckwith also argues that ID is not a religion under the prevailing Court of Appeals test because ID does not address fundamental questions, is not comprehensive in nature, and is not accompanied by formal or external signs (like rituals, services, clergy, holidays) that are associated with those belief systems generally recognized as religious.<sup>19</sup> Beckwith's first

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<sup>13</sup> See *id.* at 23-28; Wexler, *supra* n. 1, at 466-68.

<sup>14</sup> See BECKWITH, L, D & PE, *supra* n. 6, at 120-26.

<sup>15</sup> See *id.* at 149.

<sup>16</sup> 482 U.S. 578 (1987) (holding that Louisiana's statute requiring equal time for the teaching of evolution and creation science violated the Establishment Clause).

<sup>17</sup> *Id.* at 149.

<sup>18</sup> *Id.* at 150.

<sup>19</sup> See *id.* at 152-53. The prevailing circuit court test can be found in the following cases: *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981) (denying a free exercise claim of a prisoner who belonged to an organization called MOVE); *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) (first articulating the test in a case involving

point is only partly true but is irrelevant in any event; his second point represents a correct application of a nonetheless inappropriate legal test for determining whether ID constitutes a religion. ID's status or non-status as religion requires a different type of analysis than the prevailing test provides, and thus whether the theory constitutes religion cannot be resolved by application of that test. Although the question of whether ID is religion cannot be determined by application of any existing precedent, the better view is that the theory is religious in nature because it espouses a concept—the world was designed by an intelligent creator—that is inherently religious.

Beckwith is correct, of course, to argue that ID is not a conventional religion like Christianity. By its own terms, the theory of ID does not incorporate the corpus of any particular religious tradition; it simply makes a claim about the origin and design of the universe without connecting that claim to any particular system of belief. Although it may be the case that most ID supporters are in fact Christians, and although it is certainly true that ID theory does lend some support to Christian beliefs, neither of these facts is constitutionally relevant.

Beckwith is also right when he argues that ID does not meet the prevailing test in the Courts of Appeals for determining whether a belief system constitutes a religion for First Amendment purposes.<sup>20</sup> That test, as articulated by the Third and Ninth Circuits, asks whether a belief system is comprehensive in nature, addresses fundamental questions, and is accompanied by “certain formal and external signs” common to traditional religions, such as symbols, rituals, holidays, and clergy members.<sup>21</sup> Beckwith argues that ID fails this test because it lacks these types of signs, is an isolated teaching rather than a comprehensive one, and does not “address fundamental and ultimate questions having to do with deep and imponderable matters.”<sup>22</sup> Although one might posit that ID does in fact address fundamental questions, and although the existence of “formal and external signs” is not a necessary precondition for religion under the relevant test,<sup>23</sup> Beckwith is on solid ground in claiming that ID fails the test because it is an isolated teaching rather than a comprehensive belief system.

As it turns out, however, this conclusion does not save ID from constitutional infirmity. The legal test Beckwith relies upon cannot be the right test for determining whether ID counts as religion for First Amendment purposes. If it were, then schools could encourage students to pray, since the concept of prayer, by itself, does not meet the three part test

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transcendental meditation training in schools); *Alvarado v. City of San Jose*, 94 F.3d 1223 (9<sup>th</sup> Cir. 1996) (holding that the city of San Jose could erect a sculpture of Quezacoatl, an Aztec God, without violating the Establishment Clause).

<sup>20</sup> See n. 19, *supra*.

<sup>21</sup> See, e.g., *Africa*, 662 F.2d at 1032; *Alvarado*, 94 F.3d at 1229.

<sup>22</sup> See BECKWITH, L, D & PE, *supra* n. 6, at 152.

<sup>23</sup> See *Africa*, 662 F.2d at 1032 (noting that “a religion *often* can be recognized by the presence of certain formal and external signs”).

either. Likewise, if Beckwith is right, then schools could teach the truth of reincarnation, karma, sin, or other indisputably religious concepts, because none of these concepts by itself would meet the three part test. What these obvious examples demonstrate is that a different test must apply when the question is whether some concept, practice, or belief in isolation is religious, as opposed to whether some broader and more integrated belief system constitutes a religious belief as a whole.<sup>24</sup>

The courts have not explicitly recognized this problem as of yet, but it seems to me that the right analysis for the question would ask whether the concept, practice, or belief in question sounds in religion rather than in some other area of intellectual inquiry, such that government promotion of the concept would be understood by a reasonable person as an advancement or endorsement of religion. Although I will not spell out here in any great detail what exact questions this test would ask, it would seem that reasonable inquiries would include such questions as whether a reasonable person would associate the concept primarily with religion; whether the concept is an important aspect of the religious traditions that people generally know about; whether the concept is also prominently associated with ideas or belief systems that most people do not view as religious; and whether, if the concept is associated with non-religious belief systems, it is more prominently associated with those belief systems than with religious traditions, or vice versa?

Although this test may be somewhat circular,<sup>25</sup> and although application of the test will be difficult at the margins,<sup>26</sup> the test is in fact quite easy to apply in the case of ID. Does ID sound in religion? Does the notion that an intelligent designer created the world and all of its inhabitants sound in religion? Sure it does. The intelligent design of the universe is the core concept of the major prominent Western religions, without which those religious traditions would be unrecognizable. Most reasonable people would

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<sup>24</sup> See Wexler, *supra* n. 7, at 815-17.

<sup>25</sup> This circularity, however, does not distinguish this test from other tests that address the question of what counts as “religion” for First Amendment purposes. For example, the three-part Third and Ninth Circuit tests discussed above, *see* n. \_\_, *supra*, by asking whether the belief system in question possesses some of the familiar “external and formal signs” of traditional religions, is essentially a circular inquiry: the belief system is a religion if it shares some of the characteristics of those things we already recognize as religious. Likewise, the scholarly position that this Third Circuit test most closely resembles—the so-called “analogical approach” to defining religion supported by Kent Greenawalt, *see* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 753 (1984) (“[C]ourts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved.”) is also quite circular in nature. The circularity does not undermine the soundness of the approach. Indeed, circularity is a common attribute of constitutional tests, and this circularity does not necessarily constitute an inherent problem for those tests. *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 377 (2002) (explaining why many “issues of structural constitutionalism end up in a circle” and why this is not a problem).

<sup>26</sup> It hardly needs pointing out that this characteristic does not distinguish the test from other constitutional tests.

associate the intelligent design of the universe with religion. There is no significant non-religious school of thought that has an intelligent designer or creator as a core concept, even if might be the case, as Beckwith suggests, that some have used the term “God” in a philosophical sense.<sup>27</sup> Finally, to the extent that Supreme Court language is relevant to the determination of important constitutional questions (which is a great extent indeed), the Court in *Edwards* specifically described the belief that “a supernatural being created mankind” as a “religious viewpoint.”<sup>28</sup>

In the context of addressing whether ID constitutes religion, Beckwith argues that evolution and ID “are *not* two different subjects (the first religion, the second science) but two different answers about the same subject.”<sup>29</sup> For example, in his full-length book, *Law, Darwinism, and Public Education: The Establishment Clause and the Challenge of Intelligent Design*, Beckwith responds to my claim that evolution differs from ID in that the former “deals only with proximate causes, not ultimate ones,” by claiming that my position is “wide of the mark” because: “Naturalistic evolution in fact provides an answer to the *very same* question ID provides an answer: What is the origin of apparent design in biological organisms and/or other aspects of the natural universe? Evolution answers the question by appealing to the forces of unguided matter, the latter to intelligent agency. Same question. Different answers.”<sup>30</sup>

It is not entirely clear what Beckwith is trying to do with this argument. Although it is included in the book’s section on ID’s constitutional status as religion, Beckwith ties the argument to his claim that “forbidding the teaching of ID . . . in public schools because it lends support to a religion, while exclusively permitting or requiring the teaching of naturalistic evolution unconditionally, might be construed by a court as viewpoint discrimination, a violation of state neutrality on matters of religion, and/or the institutionalizing of a metaphysical orthodoxy.”<sup>31</sup> To the extent that this is Beckwith’s main claim, it fails both as a descriptive matter and a normative one.

For one thing, schools likely do not forbid the teaching of ID, when they do so, because ID “lends support” to a religion, but rather because they believe either that it *is* religion (and thus cannot be promoted in the public schools) or that it is *bad science*, and therefore does not belong in a science classroom. Moreover, Beckwith’s suggestion that public schools must be viewpoint neutral in what they teach is clearly incorrect. While the government may not discriminate against private speakers on the basis of

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<sup>27</sup> BECKWITH, L, D, & PL, *supra* n. 6, at 164.

<sup>28</sup> *Edwards v. Aguillard*, 482 U.S. 578, 591-92 (1987).

<sup>29</sup> BECKWITH, L, D, & PL, *supra* n. 6, at 150.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 149.

viewpoint in an open or limited public forum,<sup>32</sup> there is no constitutional requirement that the state's own speech remain neutral.<sup>33</sup> If the Constitution did impose such a requirement, then schools could not endorse any controversial moral or factual viewpoint whatsoever. They could not tell students, for example, to stay away from drugs, that gender equality is something worth striving for, or that the Holocaust actually occurred, without also presenting the arguments to the contrary.

To the extent that Beckwith is trying to use this “two answers to the same question” argument in some way to establish that ID is not religion for constitutional purposes, the argument also fails. For one thing, it is far from clear that evolutionists would agree that the question they are seeking to answer is how to explain the apparent design of the universe and its biological organisms. But even if at some level of generality this were the question they were addressing, they would be addressing the question in such a different fashion than ID theorists that they could hardly be said to be asking the same question in any meaningful way. For evolutionists the question would be something like: “What is the best naturalistic explanation that we can study and test and measure using the scientific method for the universe's apparent design?” whereas the ID theorists are asking a much different question, namely: “What is the best explanation for the apparent design, period?” ID theorists answer this question by pointing to a supernatural intelligent designer, but evolutionists claim that such an answer is out of bounds with respect to their question because it is impossible, at least at this point in human development, to say anything helpful or meaningful at all within the confines of the scientific method about such a designer.<sup>34</sup>

Beckwith claims that by responding to the claims of ID theorists in this way, evolutionists are committing themselves to so-called philosophical naturalism, an ontological world-view which inherently rejects the existence of supernatural phenomena.<sup>35</sup> This is simply not true. The fact that scientists apply the scientific method in their work reflects only a recognition that historically this method has produced tremendously successful results, in terms of explanation and prediction of natural phenomena (much better, for example, than looking to supernatural explanations, intuition, random

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<sup>32</sup> See, e.g., *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829-30 (1995).

<sup>33</sup> Indeed, there is not even a requirement that the government's funding of private speech (as opposed to regulation of that speech) be viewpoint neutral. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding regulations prohibiting grant recipients from recommending abortion to patients).

<sup>34</sup> See, e.g., Eugenie Scott, *Scott Replies to Dembski*, [http://www.ncseweb.org/resources/articles/3598\\_scott\\_replies\\_to\\_dembski\\_2\\_2\\_2001.asp](http://www.ncseweb.org/resources/articles/3598_scott_replies_to_dembski_2_2_2001.asp) (Feb. 1, 2001) (“One cannot use natural processes to hold constant the actions of supernatural forces; hence it is impossible to test (by naturalistic methodology) supernatural explanations . . . Whether a supernatural force does or does not act is thus outside of what science can tell us.”).

<sup>35</sup> See BECKWITH, L, D & PL, *supra* n. 6, at 6-7; 92-95.

number drawing, etc.), rather than any a priori metaphysical commitment to naturalism.<sup>36</sup> Indeed, many scientists, who use the scientific method regularly as part of their day-to-day work, are theists, which suggests that a commitment to methodological naturalism (the commitment to using the scientific method to explain and predict natural phenomena) does not in fact entail or imply a commitment to philosophical naturalism.<sup>37</sup> My original claim, then, that evolutionists and intelligent design theorists are in fact asking very different questions, is hardly “wide of the mark.” Instead, it is Beckwith’s critique that misses the target.

In any event, the most important point is that whether the two camps are asking different questions is simply irrelevant to resolving the constitutional question of whether ID counts as religion. The nature of an answer—in other words, whether that answer is “religious” or “scientific” or “political” or “literary” or whatever—turns on the content of the answer, not the question that it is answering. Different fields of study seek to explain the same phenomena all the time, but this does not mean that their answers should be lumped together under the same label.

To take one small example from the legal field, political scientists and legal academics approach the question of why the Supreme Court decides cases the way it does in very different ways. Legal academics tend to look at the specific nature of the legal question presented and the strength of the competing legal arguments, whereas political scientists tend to place far more emphasis on the ideological commitments of the Justices and which political party has been primarily responsible for the appointment of the particular Justices serving on the Court.<sup>38</sup> The two fields employ very different assumptions and methodologies, and come to very different conclusions. The fact that they happen to be addressing the same question does not justify grouping their answers together as representing the same field of inquiry. To take another example from the realm of religion, imagine a person wondering whether to eat a lobster. The person asks both a dietitian and an Orthodox Jewish rabbi what to do. The dietitian tells the person to eat the lobster

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<sup>36</sup> See, e.g., Brian Leiter, *The Denouement to the VanDyke Debate about Intelligent Design Creationism*, <http://webapp.utexas.edu/blogs/archives/bleiter/000954.html> (“The difficulty [with calling science’s naturalistic methodology ‘a priori’] is that science did not ‘a priori pick a naturalistic methodology’; it adopted, based on *evidence and experience* (i.e., a posteriori), the methods that worked: it turns out that if you make predictions, test the predictions against experience, refine the hypotheses on which the predictions are based, test them again, and so on, you figure out how to predict and control the world around you.”); Matthew Brauer, Steven G. Gey & Barbara Forrest, *Is It Science Yet?: Intelligent Design Creationism and the Constitution*, WASH. U. L. Q. (forthcoming)

<sup>37</sup> See Brauer, et al., *supra* n. 36, at \_\_\_\_.

<sup>38</sup> For a comparison of the two approaches to Supreme Court decision-making, see Theodore S. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1152-60 (2004).

because it is high in protein and low in fat;<sup>39</sup> the rabbi tells the person not to eat the lobster because it is not kosher. The two advisors have answered the same question, but is there any doubt that the rabbi's answer is religious and the dietitian's is not?<sup>40</sup>

Thus, even if evolutionists and ID theorists *were* asking the same question, it would not mean that their answers should be categorized the same way. When the evolutionist answers the question of “what is the origin of apparent design in biological organisms and/or other aspects of the natural universe” (assuming, again, that this is what the evolutionist is asking), by responding “the apparent design of biological organisms can be explained by evolution through natural selection,” the answer does not sound in religion. When the ID theorist, on the other hand, responds by saying “we can explain this apparent design by reference to an intelligent creator who created the universe and everything in it,” that answer sounds in religion.<sup>41</sup> The two answers are fundamentally different in kind and category, even if we assume that the two questions are the same. The Establishment Clause simply prohibits the government from teaching the religious answer (but not the non-religious answer) as truth.

All this wrangling over whether ID constitutes “religion” may, however, be beside the point. After all, although public schools cannot promote or advance or endorse or teach the truth of any religion, they are perfectly free to teach *about* religion as much as they want.<sup>42</sup> They can teach *about* Christianity, *about* Judaism, *about* Zoroastrianism, and *about* Raelianism.<sup>43</sup> Not only can they teach about religion, but they should teach about religion, and they do not teach about religion nearly enough.<sup>44</sup> So, if public schools can teach about religion, why shouldn't they be able to teach about ID? To some degree they certainly can. For example, if a public school chose to teach about the ID movement in a current affairs class, or about the philosophical claims of ID in a philosophy of science class, or about the truth claims of ID in a comparative religion class, most likely these choices would pose no constitutional problem at all.

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<sup>39</sup> This is true. See <http://www.nutritiondata.com/facts-001-02s037v.html> (noting that, despite having 104 milligrams of cholesterol, 1 cup of cooked northern lobster has thirty grams of protein and one gram of total fat.

<sup>40</sup> The dietitian's answer—to the effect it might cause a religious believer on the fence to eat the lobster because of its healthy qualities—may have the effect of influencing the believer's religious practice, but this doesn't make the answer religious any more than, for example, a government policy outlawing all uses of peyote, including religious uses.

<sup>41</sup> See text accompanying notes 24-28, *supra*.

<sup>42</sup> For an extended consideration of the constitutional issues involved in teaching about religion, see Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1243-62 (2002).

<sup>43</sup> Raelianism is a relatively new religious movement that believes aliens created the human race 25,000 years ago. See *The Raelians*, <http://www.carm.org/raelians.htm>.

<sup>44</sup> For an extended argument that schools should teach about religion, see Wexler, *supra* n. 42, at 1200-20.

Things are very different, however, when schools propose to teach ID in a science classroom as an alternative scientific theory to evolution. As I have discussed elsewhere, the fact that science teachers generally do not teach science objectively but rather present the best thinking in the field as the current state of knowledge poses the significant risk that even well-intentioned teachers may end up leaving students with the impression that ID is in fact true.<sup>45</sup> This problem is exacerbated by the lack of adequate materials for teachers to use to teach evolution and ID together in an objective fashion.<sup>46</sup> Most important, however, even a policy that urges schools to use an objective approach to teaching about ID might constitute an unconstitutional endorsement of religion, such that the very adoption of the policy would be unconstitutional, even if teachers were able to teach successfully about ID in an objective manner. Whether this would be the case turns in large part on the proper understanding of the Supreme Court's decision in *Edwards*, to which the Essay now turns.

## II. What About *Edwards*?

Professor Beckwith and I agree that the Supreme Court's 1987 decision in *Edwards v. Aguillard* is the most important existing precedent for evaluating the constitutionality of teaching ID in public schools, but we disagree on which way the case points.<sup>47</sup> In *Edwards*, the Court struck down Louisiana's attempt to require its schools to teach both creation science and evolution whenever they taught one of those subjects. The Court found that the statute was animated by an improper religious purpose. In my view, the Court emphasized four problems with the Louisiana creation science equal time statute which are relevant to addressing the constitutionality of any ID policy: (1) the poor fit between the means of the statute and its ends (the goal of promoting academic freedom); (2) the historic link between religion and

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<sup>45</sup> See Wexler, *supra* n. 7, at 821.

<sup>46</sup> See *id.* at 822.

<sup>47</sup> As I have explained elsewhere, I think that the *Edwards* case is relevant to understanding not only how the Court might review an ID policy's purpose, but also how it would review the claim that an ID policy endorsed religion in violation of the Establishment Clause. The Court in *Edwards* considered the former and not the latter, but it seems that the same factors that led it to conclude that the legislature there had no secular purpose would also have led it to conclude that the statute endorsed religion. See Wexler, *supra* n. 7, at 827. Thus, I analyze the same factors for both possible constitutional objections. My personal belief is that the endorsement analysis is superior to the religious purpose analysis in a case in which the legislature articulates a secular purpose.

Of course, the Court's recent decision in *Van Orden v. Perry*, No. 03-1500, slip op. (2000), particularly Justice Breyer's controlling concurrence in that case, in which he writes that there is "no test-related substitute for the exercise of legal judgment," *id.* at 3 (Breyer, J., concurring in judgment), casts some doubt on the state of the law in the area of government sponsorship or endorsement of religion. Without further elucidation from the Court or Justice Breyer, however, I would suggest that the same analysis provided in this Essay would apply to the sort of "know it when I see it" approach of Justice Breyer as well as to a purpose or endorsement approach.

critiques of evolution; (3) the singling out of evolution from among all possible topics of reform; and (4) statements from the legislative history indicating an intent to promote religion. All of these factors are present in the ID controversy.<sup>48</sup> Stated in a very strong form, the constitutional case against ID can be phrased in terms of these four factors as follows: Against a long visible historic background of obviously religious opposition to the teaching of evolution, once again another movement arrives that often speaks in very religious terms and singles out evolution from among all topics in the school curriculum for change, in order to achieve the purported goal of informing students about a significant scientific controversy when in fact no such controversy exists. What message does a school send to the reasonable observer if it embraces such a movement? It seems likely that the received message would be that the government is reforming the curriculum for religious reasons, which is exactly what the Court in *Edwards* said the government cannot do.<sup>49</sup>

For Beckwith, *Edwards* supports the constitutionality of teaching ID because (1) ID is historically and textually distinguishable from Genesis's accounts of creation as well as the creation science involved in *Edwards*; and (2) the Supreme Court in *Edwards* recognized that teaching scientific alternatives to evolution for some secular purpose might be legitimate.<sup>50</sup> I disagree that either of these arguments help the legal case for teaching ID.

#### A. Historic Taint

On the first of these arguments, Beckwith contends that "ID's intellectual pedigree is of a different order than the creation science the Court repudiated in *Edwards*."<sup>51</sup> He notes that "ID is neither historically connected to *Scopes* nor is its literature . . . transparently derived from the Book of Genesis."<sup>52</sup> Furthermore, he describes as "patently unreasonable"<sup>53</sup> my purported claim "that because ID has *some* historical connection to the creation/evolution controversy, it would not pass the *Edwards* standard,"<sup>54</sup> and accuses me of making "the genetic fallacy a principle of constitutional jurisprudence."<sup>55</sup>

To clarify, my position has never been that schools are barred from teaching any subject or theory that bears some historical connection to

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<sup>48</sup> *See id.* at 826-27.

<sup>49</sup> *See Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

<sup>50</sup> BECKWITH, L, D & PE, *supra* n. 6, at 154-64.

<sup>51</sup> *Id.* at 154.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* According to Beckwith, "The genetic fallacy occurs when the origin of a viewpoint or argument, rather than its merits, is employed to dismiss it out of hand." *Id.* at 171 n. 67. I believe that it is quite clear that I did not dismiss any argument "out of hand" but rather dismissed it on the basis of sound analysis.

religion.<sup>56</sup> Indeed, I have argued at length that schools can and should teach about religion,<sup>57</sup> an argument that would make no sense if I really wanted to make the genetic fallacy a principle of first amendment law, for what could be more closely related to religion than religion itself? Far from arguing that teaching ID is unconstitutional simply because it has some historical connection to the long-standing controversy over evolution, my argument rather is that under the Supreme Court's endorsement test,<sup>58</sup> singling out evolution from all the topics in the school curriculum for reform by teaching students a purportedly scientific critique of evolution that has no support within the scientific community will likely be understood by a reasonable observer as continuing the long tradition of trying to reform the school curriculum to promote a religious belief.

Beckwith is correct that ID is somewhat different from creation science and its previous iterations. ID is based on purportedly scientific theories and explanations for observed data, such as William Dembski's notion of an explanatory filter to detect the existence of design in natural systems<sup>59</sup> and Michael Behe's theory of irreducible complexity that claims certain biological systems are too complex to have come into existence through evolutionary processes alone.<sup>60</sup> Of course, both Dembski's and Behe's arguments have been widely critiqued,<sup>61</sup> but this does not mean that ID theory is the exact same system of thought as the creation science put forward in *Edwards*. By itself, however, this means little. There may be some areas of law in which a party may be able to make small adjustments to its practices to fall outside the letter of a legal prohibition, but constitutional law, and certainly First Amendment law, is not one of them. For better or

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<sup>56</sup> See, e.g., Wexler, *supra* n. 1, at 464-65 (arguing that a particular iteration of intelligent design would fail the endorsement test for a variety of reasons, including historic similarities to past practices).

<sup>57</sup> See generally Wexler, *supra* n. 42.

<sup>58</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (adopting the endorsement test first articulated by Justice O'Connor's concurrence in *Lynch*). The Court recently reiterated the endorsement standard in striking down displays of the Ten Commandments in the courthouses of two Kentucky counties. See *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, Slip Op. No. 03-1693, at 19-21; *id.* at 3 (O'Connor, J., concurring).

<sup>59</sup> See WILLIAM A. DEMBSKI, *THE DESIGN INFERENCE: ELIMINATING CHANCE THROUGH SMALL PROBABILITIES* (1998).

<sup>60</sup> SEE MICHAEL J. BEHE, *DARWIN'S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION* (1996).

<sup>61</sup> On Behe, see, e.g., Kenneth Miller, *Review of Darwin's Black Box*, 16 CREATION/EVOLUTION 36 (1996), available at <http://biomed.brown.edu/Faculty/M/Miller/Behe.html>; H. Allen Orr, *Darwin v. Intelligent Design (Again)*, BOSTON REV., Dec. 1996/Jan. 1997; see generally Behe's Empty Box, <http://www.simonyi.ox.ac.uk/dawkins/WorldOfDawkins-archive/Catalano/box/behe.shtml#reviews> (collecting reviews). On Dembski, see, e.g., Massimo Pigliucci, *Chance, Necessity, and the War Against Science*, 50 BIOSCIENCE 79 (2000); Branden Fitelson, Eliot Sober & Elliott Sober, *How Not to Detect Design—A Review of William Dembski's The Design Inference*, 66 PHILOSOPHY OF SCIENCE 472 (1999).

for worse, the Court has created an Establishment Clause doctrine that requires courts to use common sense to figure out what message the government sends through its actions.<sup>62</sup> This, in turn, requires courts to seek to understand, with some sensitivity, the entire context of the challenged practice.<sup>63</sup> As the Supreme Court has made clear, one of the most important elements of this context is the practice's historical background, which in the case of ID,<sup>64</sup> means the entire history of religious opposition to evolution.

The fact that the ID movement is different in some senses from the iterations that came before it does not demonstrate that it is not in important senses the same: it has very close religious cognates (Paley's 19<sup>th</sup> century argument<sup>65</sup>); it singles out evolution from among all topics in the curriculum; it contends that evolution is too materialistic and naturalistic; it uses the same kind of language and discourse to attack evolution as previous religious attempts to discredit evolution;<sup>66</sup> its audience is overwhelmingly constituted by adherents of traditional religions;<sup>67</sup> it argues that a supernatural entity created all of mankind, which is what *Edwards* said was so problematic about creation science;<sup>68</sup> and its leaders and implementers are generally very religious and often speak in explicitly religious terms.<sup>69</sup> Putting all of these factors together, the reasonable observer viewing the introduction of ID into the public school curriculum would likely identify ID with a specific religious project.

To return to Beckwith's criticism of my position, then, might it be the case that at least as a practical matter, my approach to ID would make it impossible for those who seek to reform the public school curriculum's

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<sup>62</sup> Of course, the Court's endorsement test has been widely criticized by scholars. See, e.g., Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement Test,"* 86 MICH. L. REV. 266 (1987); Michael W. McConnell, *Religious Freedom at a Crossroads,* 59 U. CHI. L. REV. 115, 117-34 (1992).

<sup>63</sup> See *Allegheny*, 492 U.S. at 595-97 (Blackmun, J.).

<sup>64</sup> See *id.* at 629-31 (O'Connor, J., concurring).

<sup>65</sup> See WILLIAM PALEY, *NATURAL THEOLOGY* (1845).

<sup>66</sup> See Wexler, *supra* n. \_\_\_, at 464-65 (arguing that the ID textbook, *Of Pandas and People*, uses the same anti-evolution arguments as previous anti-evolution iterations).

<sup>67</sup> See, e.g., Memorandum from Rebecca Wittman to Mark Edwards, *Re: Zogby America Report*, [www.discovery.org/articleFiles/PDFs/ZogbyFinalReport.pdf](http://www.discovery.org/articleFiles/PDFs/ZogbyFinalReport.pdf) (Sept. 21, 2001) (reporting that overwhelming majority of those questioned who believe in intelligent design and the teaching of intelligent design are Protestants); Zogby Poll, [www.nmidnet.org/OhioZogbyPoll.pdf](http://www.nmidnet.org/OhioZogbyPoll.pdf) (May 8, 2002) (reporting that 80% of those Ohioans questioned who strongly agree with the notion that students should learn about scientific evidence in favor of intelligent design are Catholic or Protestant); *Survey: Protestants Support Intelligent Design*, THE CHRISTIAN POST, May 26, 2005, available at <http://www.christianpost.com/article/education/822/full/survey.protestants.back.intelligent.design/1.htm> (poll reports that among doctors most proponents of intelligent design are Protestant).

<sup>68</sup> See *Edwards*, 482 U.S. at 591-92.

<sup>69</sup> For an account of the religious views and discourse of ID supporters, see, e.g., BARBARA FORREST & PAUL GROSS, *CREATIONISM'S TROJAN HORSE: THE WEDGE OF INTELLIGENT DESIGN* 15-33 (2004).

presentation of science and religion to make any significant impact on that curriculum? Have I placed an insurmountable barrier in front of those who oppose evolution and support religious views on origins? Will reforms invariably be tainted by their historical associations? I do not think so. It is true that because of the long and very visible history of religious opposition to evolution, opponents of the way our public schools teach science and religion will have to make special efforts to disassociate themselves from what has gone before in order to defuse the message that they are sending with their reforms. For one thing, if any reform is to pass constitutional muster, it will probably have to go beyond singling out evolution to address a broader subsection of the curriculum. But this does not mean that reform is impossible. For example, schools would most likely fall within constitutional limits if they taught a wide variety of minority views in science as a way of teaching students how the scientific process works, taught about religion and religious views on origins (including creation stories from different cultures and traditions, in addition to the Biblical ones) in history or comparative religion classes, or taught about the evolution controversy in history or current affairs classes.

#### B. Secular Purposes.

Beckwith's second argument regarding *Edwards* is that the case establishes that public schools can teach ID so long as they do so to further some secular purpose.<sup>70</sup> This argument, too, does not win Beckwith the day. Two preliminary points are worth making before exploring the four specific secular purposes that Beckwith proposes could animate an ID policy. First, of course, although a secular purpose is a necessary condition for a policy's constitutionality, it is not a sufficient one. A statute or regulation or any other form of government action may be unconstitutional, even though it is animated by a secular purpose, if it advances or promotes or endorses religion.<sup>71</sup> Indeed, in most cases in which the Court has invalidated government activity under the Establishment Clause, it has done so even after finding the activity supported by some secular purpose.<sup>72</sup> Second, *Edwards* clearly demonstrates that, at least in the area of teaching evolution in the public schools, the Court will not accept uncritically the government's recitation of a secular purpose. Instead, the Court (and lower courts faithfully following Supreme Court precedent) will examine the actual relationship between the means of the policy and the purported secular goal of the policy to test whether that purported secular goal is in fact the real purpose underlying the policy. If the relationship between the means and

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<sup>70</sup> See BECKWITH, L, D & PE, *supra* n. 6, at 156.

<sup>71</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (proceeding to analyze effects of voucher program after concluding that the program was enacted to serve a secular purpose).

<sup>72</sup> See Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 329 (2002) ("While a few cases have been decided under the religious purpose element, the overwhelming number of Establishment Clause cases coming before the Court have been decided under the religious effect element.").

ends is too attenuated, the Court will not hesitate to find the policy unconstitutional.<sup>73</sup>

Beckwith argues that a government body could adopt an ID policy for one of four possible secular purposes: (1) to introduce students to an important new body of scholarship;<sup>74</sup> (2) to “enhanc[e] and protec[t] the academic freedom of teachers and students” who support ID or disagree with evolution;<sup>75</sup> (3) to erase the perception that the curriculum favors, or endorses, an irreligious point of view;<sup>76</sup> and (4) to maintain neutrality between religious belief and non-belief.<sup>77</sup> The following discussion treats these four purposes in turn, grouping the latter two together because of their similarity. In each case, the discussion addresses both whether courts should view these purposes as sincere and whether a policy adopted pursuant to such a purported secular purpose would likely advance or endorse religion in violation of the Establishment Clause, despite that purpose.

### 1. Introducing Students to Important Scholarship

Beckwith first argues that schools could defend an ID policy on the basis that they are introducing students to an important body of scholarship. Citing the Court’s statement in *Edwards* that “teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction,”<sup>78</sup> Beckwith argues that “[a] state could appeal to the importance of exposing students to reputable scholarship that critiques the methodological naturalism behind naturalistic evolution and the ontological materialism entailed by it.”<sup>79</sup> The notion that schools can teach students ID to introduce them to a new and important body of scholarship suffers, however, from the same flaw that the creation science statute in *Edwards* itself suffered—namely a significant gap between the means and ends of the policy. Because there is no significant scientific disagreement about the basic soundness of evolution and the weakness of ID as a scientific theory,<sup>80</sup> courts reviewing an ID policy justified on the grounds that the policy is intended to introduce students to an important body of scholarship may very well be correct to find that the purpose is in fact a sham or that the policy endorses religion despite the articulated purpose.

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<sup>73</sup> See *Edwards*, 482 U.S. at 586-90. This could be either because the Court finds that the legislative purpose is in fact religious, or because it finds that the policy endorses religion.

<sup>74</sup> See BECKWITH, L, D & PE, *supra* n. 6, at 160. I have changed the order of the four secular purposes to facilitate my discussion. His order puts numbers 3-4 before numbers 1-2.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 156.

<sup>77</sup> *Id.* at 157-60.

<sup>78</sup> *Edwards*, 482 U.S. at 594.

<sup>79</sup> BECKWITH, L, D & PE, *supra* n. 6, at 160.

<sup>80</sup> See text accompanying notes 81-85, *infra*.

Unlike evolutionary theory, which the scientific community widely supports and believes to be one of the most important, central, and robust theories in all of biology (if not all of science),<sup>81</sup> ID theory has been roundly rejected by mainstream scientists.<sup>82</sup> Although scientist Michael Behe's foundational ID book, *Darwin's Black Box*, has been sporadically cited in the scientific literature, for the most part ID theory has been completely absent from the peer reviewed literature.<sup>83</sup> For example, one very recent study showed that only seventeen articles cited any ID terms in an ID-specific sense, and some of those citations came in the context of criticism of those concepts.<sup>84</sup> As Professors Brauer, Forrest, and Gey have persuasively demonstrated, the status of ID theory in the scientific literature pales in comparison even to the widely rejected theory that the HIV virus does not in fact cause AIDS.<sup>85</sup>

In his defense of ID's importance, Beckwith notes that the theory has been the subject of much popular and journalistic writing and even academic reviews, responses, symposia, and conferences.<sup>86</sup> This is hardly surprising, however, given that ID is undoubtedly an important social, cultural, political, and even religious phenomenon, but it is also entirely irrelevant to the idea's status as a scientific theory. Journalists write about ID, and academics discuss and respond to the claims of ID not because ID has attained any success within the scientific community but because it has gained hold among religious conservatives and politicians and thus has helped reshape the cultural and educational landscape in important ways. Indeed, it may even be accurate to describe some of ID's success in the popular literature as owing much to ID's scientific shortcomings rather than its strengths; one aspect of ID that might have attracted journalistic attention is the success the theory has attained among politicians and the public *despite* its failure among scientists.

Beckwith intriguingly argues that the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>87</sup> suggests that success in the peer review process should not be considered highly relevant in assessing a theory's scientific merits.<sup>88</sup> In that case, the Court held that Rule 702 of the Federal Rules of Evidence did not limit scientific expert testimony to those theories that have become "generally accepted" in the scientific community,<sup>89</sup> as the then Court of Appeals for the District of Columbia had previously held in a 1923 case called *Frye v. United States*,<sup>90</sup> which pre-dated the adoption

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<sup>81</sup> For a collection of citations on this point, see Wexler, *supra* n. 7, at 804-05, nn. 234-35.

<sup>82</sup> *See id.* at 805-07, n. 236.

<sup>83</sup> *See id.* at 807, n. 237.

<sup>84</sup> *See* Brauer, et al., *supra* n. 36, at \_\_\_\_.

<sup>85</sup> *See id.* at \_\_\_\_.

<sup>86</sup> *See* BECKWITH, L, D & PE, *supra* n. 6, at xiii-xvii.

<sup>87</sup> 509 U.S. 579 (1993).

<sup>88</sup> *See* BECKWITH, L, D & PE, *supra* n. 6, at 23.

<sup>89</sup> *See Daubert*, 509 U.S. at 589.

<sup>90</sup> 293 F. 1013 (D.C. Cir. 1923).

of the Federal Rules. Because the Court noted in *Daubert* that peer review acceptance “is not a *sine qua non* of admissibility” and “does not necessarily correlate with reliability,”<sup>91</sup> Beckwith concludes that the test of ID’s scientific legitimacy should turn on “arguments and their soundness” and not their “popularity.”<sup>92</sup>

Though the argument is inspired, *Daubert* in fact provides no support for ID’s constitutionality. For one thing, the Court did recognize the importance of peer review, when it wrote that, “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.”<sup>93</sup> Moreover, to the degree that ID is animated by a rejection of methodological naturalism, or the scientific method, *Daubert* undermined the scientific legitimacy of ID when it explained that the “scientific knowledge” standard of Rule 702 “establishes a standard of evidentiary reliability” and that “to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method.”<sup>94</sup>

More importantly, because *Daubert* concerns a fundamentally different issue than whether public schools can constitutionally teach ID, it actually—when understood correctly—hurts the case for ID’s constitutionality. In *Daubert*, the Court held that Rule 702 allows the introduction of some expert scientific testimony into federal court even though the proffered science is not “generally accepted.” In reaching this conclusion, the Court engaged in a run-of-the-mill statutory interpretation exercise, and it found that Congress, through its enactment of Rule 702, had intended to broaden the range of evidence allowed into federal courts substantially beyond that which previously was allowed.<sup>95</sup> Because Congress had intended to allow this broad range of evidence into the federal courts, the Court concluded that even evidence which had not been subject to extensive peer review could be admitted into court.<sup>96</sup> Thus, if *Daubert* stands for any general principle regarding the prerequisite of peer review, it stands for the notion that if there is a general rule which seeks to allow a very broad range of evidence into a forum, then peer review need not be required as a prerequisite for admission.

Public school classrooms, however, are entirely different from federal courtrooms. In public schools, the general standard of admissibility for the discussion of scientific theories in science classes is far stricter than Rule

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<sup>91</sup> *Daubert*, 509 U.S. at 593.

<sup>92</sup> BECKWITH, L, D & PE, *supra* n. 6, at 23.

<sup>93</sup> *Daubert*, 509 U.S. at 593.

<sup>94</sup> *Id.* at 590.

<sup>95</sup> *See id.* at 589 (“Given the Rules’ permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention ‘general acceptance, the assertion that the Rules somehow assimilated *Frye* is unconvincing.”).

<sup>96</sup> *See id.* at 593.

702.<sup>97</sup> Schools generally teach only the best, most-settled scientific theories—the ones that have gained the greatest foothold in the profession and are the most robust and persuasive theories in their field—rather than teaching any theory that can lay any claim at all to plausibility.<sup>98</sup> Public school science classrooms are thus governed not by a liberal admission rule like Rule 702 but by a rule, customary though it may be, that is even stricter than the *Frye* rule that preceded Rule 702. Thus, *Daubert* is completely inapplicable to the ID context, and indeed can be read to undermine the case for ID’s constitutionality, to the extent that it suggests non-peer reviewed theories should only be allowed into a forum if some governing authority specifically provides for extremely broad admission of evidence.

Because the authority in the public school context is of course set by custom or school policy (whether formal or informal) and can thus be altered by the school itself, one could read *Daubert* as lending some support to a school that wanted to broaden what types of theories it teaches students generally. For example, if a school decided that it would no longer restrict itself to teaching the most successful scientific theories but would also begin discussing as possibly true a variety of minority or fringe theories, it could plausibly point to the Supreme Court’s language in *Daubert* as support. It could, for instance, as a rhetorical matter, say to parents and the community that, “Hey, the Supreme Court has allowed fringe theories into the federal courts, why shouldn’t we be able to allow fringe theories into the classrooms?”<sup>99</sup> But that, of course, is not what the ID proponents want to do. They do not suggest that schools change their approach to teaching science generally; rather, they argue that schools should make an exception to their general strict admission rules in the one isolated instance of ID. If a school generally operates under the principle that it will only teach students about the best scientific theories, the ones that have fared the best under the rigorous peer review process that is at the heart of the scientific professions, and it then makes a single exception to allow its teachers to teach about one theory that has been entirely unsuccessful under that process, then reasonable observers would likely understand that the school has decided to teach that one theory for some reason other than to teach students about a new and important body of scientific scholarship.

## 2. Protecting Academic Freedom

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<sup>97</sup> That the standard is more than likely set by custom, rather than rule, does not make it less important for these purposes.

<sup>98</sup> See Wexler, *supra* n. 7, at 821.

<sup>99</sup> To be consistent with federal court practice, the school would have to add the very important caveat that it would also teach students about how mainstream science has critiqued the relevant fringe theory. One of the basic premises of federal evidence law is that anything introduced into a courtroom can be tested and subjected to critique by the other party. This could be a problem for ID, to the extent that a school allows the teaching of ID but does not require that students be made aware of ID’s failure to succeed in the scientific community and of the numerous critiques of ID theory as terrible science.

Second, pointing to a number of instances in which ID supporters were met with “marginalization, hostility, and public ridicule because of their support of ID and/or doubts about [evolution],”<sup>100</sup> Beckwith argues that schools could defend an ID policy on the basis that they are protecting the academic freedom of their teachers and students. Beckwith suggests that public school teachers in fact possess a first amendment right to exercise their academic freedom by introducing ID,<sup>101</sup> and that a policy recognizing this right would “simply be affirming by statute or written policy what is already a fixed point in constitutional law,”<sup>102</sup> but in fact public school teachers possess no such constitutional right, as will be discussed below.<sup>103</sup> Nonetheless, even in the absence of such a *right*, one could perhaps imagine a school wanting to enact an ID policy for the purpose of promoting the academic freedom *interests* of its teachers.

This argument, however, is unpersuasive, although the precise reason for its lack of persuasiveness differs depending on what policy the school already takes towards allowing teachers to introduce materials of their own choosing into the classroom. If the school already places no limits on what the teacher can introduce as a general matter, then a policy that specifically allows the teaching of ID cannot plausibly be said to be promoting the academic freedom of teachers, since they already possess that freedom as a matter of underlying policy. This is precisely what happened in *Edwards*, where the Court held that the Louisiana statute could not possibly have furthered the state’s purported interest in promoting academic freedom since nothing prevented the teachers from exercising that freedom in the first place.<sup>104</sup>

On the other hand, if the underlying school policy restricts teachers from teaching material that is not specifically included in the curriculum, then Beckwith’s rationale makes somewhat more sense, in that at least the school would be allowing teachers to teach something they would otherwise not be able to teach. However, like Beckwith’s first argument, this one too suffers from a substantial disconnect between means and ends. If the true interest of the state or school board or school was really to promote the academic freedom of teachers who want to introduce controversial topics into the classroom, why would it implement a policy that provides an exception to the general “no teaching material not specifically included in the curriculum”

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<sup>100</sup> BECKWITH, L, D & PE, *supra* n. 6, at 160.

<sup>101</sup> *See id.* at 73-76.

<sup>102</sup> *Id.* at 163.

<sup>103</sup> *See* text accompanying notes 138-157, *infra*.

<sup>104</sup> *See Edwards*, 482 U.S. at 587 (“The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. Indeed, the Court of Appeals found that no law prohibited Louisiana public school teachers from teaching any scientific theory.”). Moreover, for similar reasons, ID policies cannot be justified on grounds that they further the academic freedom of *students*, as presumably no government policy exists that would prohibit students from learning about ID on their own if they so choose.

rule *only* in the context of teaching about alternatives to evolution, and not in the myriad other contexts in which it might be appropriate?

The only plausible reason to adopt such a limited policy would be either that ID supporters suffer disproportionately more (or more severe) hostility than holders of other unpopular beliefs or that hostility over ID is more troubling than the same type and amount of hostility toward other unpopular beliefs. The latter seems constitutionally problematic, in that it would represent a judgment by the public school that ID is normatively more worthy than other beliefs, and the former seems implausible. Polls consistently show that the great majority of Americans believe that an intelligent designer exists and that more than half reject evolution and believe God created human beings in essentially their current form.<sup>105</sup> Surely there are beliefs held by substantially less than half of the population that would also require protection by a state that is truly interested in protecting the interests of teachers to introduce unpopular subjects and perspectives. What about the teacher who wants to discuss in class his belief that there is no God, or that using drugs is mind-expanding, or that having sex with many partners is particularly fun, or that the Holocaust never occurred, or that gender inequality is justified? If the school really wants to protect the academic freedom interests of teachers who hold unpopular beliefs, wouldn't it protect at least some of these teachers as well as the one that wants to discuss ID theory?<sup>106</sup>

Of course, there is no general legal requirement that government actors attempt to solve problems comprehensively, as opposed to incrementally.<sup>107</sup> That is, as a general matter, nothing would prohibit a school from promoting the academic freedom of its teachers in one area but not others, even if it would make sense for the school to promote academic freedom in all areas equally. The problem for ID advocates is the Establishment Clause, and particularly the Court's analysis in *Edwards*, as well as the Court's endorsement test, understood in light of that case. *Edwards* says that at least in the area of teaching evolution and its alternatives, courts must look closely to the relationship between means and ends in evaluating whether an articulated purpose is actually a sham;<sup>108</sup> in other words, the Court has shifted the burden to evolution opponents to enact changes to the

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<sup>105</sup> See, e.g., CBS News Poll, *Poll: Creationism Trumps Evolution*, <http://www.cbsnews.com/stories/2004/11/22/opinion/polls/main657083.shtml> (Nov. 22, 2004) (reporting that 55% of all Americans believe "God created humans in present form" and another 27% believe that "Humans Evolved, God guided the process")

<sup>106</sup> This would seem particularly true in light of poll results that show that almost two-thirds of Americans would like creationism taught alongside evolution in the public schools.

<sup>107</sup> See, e.g., *Williamson v. Lee Optical*, 348 U.S. 433 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." (citations omitted)).

<sup>108</sup> See *Edwards*, 482 U.S. at 586-88.

school curriculum in such a way that the court is convinced that the real motive for change is not to promote a particular religious viewpoint. To put it another way, a court will likely find that a policy in this area that at all resembles past unconstitutional policies will send a message of endorsement, unless the advocates for change make special efforts to defuse that message. The fact that there's no particular reason to promote or protect academic freedom with respect to ID as opposed to other controversial topics weighs heavily in favor of finding a policy backed by the academic freedom rationale to be unconstitutional.

### 3. Promoting Neutrality and Erasing Endorsement

Finally, Beckwith contends that schools might teach ID either to “erase [the] perception” “that a certain disputed, irreligious point of view is favored,”<sup>109</sup> or to ensure that by balancing the teaching of evolution (which “presupposes a controversial epistemology . . . entails a controversial metaphysics . . . and is antithetical to traditional religious belief”) with ID, it will “remain neutral . . . between religion and irreligion.”<sup>110</sup> These two arguments are worth treating together, because they both basically assert the same thing, although in slightly different terms.<sup>111</sup> Both suggest that the state acts with a secular purpose when it enacts a policy intended to restore balance to a school curriculum that in some way disadvantages religious points of view. This is certainly an interesting argument, and it will take a bit of a detour through the current state of church-state law to understand why the argument ultimately fails.

Government neutrality towards religion and non-religion of course sounds like a laudable goal. Why should the government intentionally take a position that is harmful to religious belief or practice? More specifically, it perhaps seems unfair and overly intrusive at first glance for a public school to send a message that is at odds with somebody's sincere religious beliefs? On closer look, however, it becomes quite apparent that true substantive neutrality towards religion is impossible. The key to understanding this point is to recognize both the numerous ways that the government takes positions in public life and the countless viewpoints embraced by the numerous religious groups that populate the nation.

The government takes positions in all sorts of ways in its everyday operations, through everything from the speeches of public officials to the funding of certain groups and viewpoints to the monuments it establishes on public property to the criminal and regulatory laws it promulgates to the curricula adopted by public schools. Because the country is so religiously diverse, these government positions inevitably conflict with at least

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<sup>109</sup> BECKWITH, L, D & PE, *supra* n. 6, at 156.

<sup>110</sup> *Id* at 157.

<sup>111</sup> Even Professor Beckwith says that the two arguments are substantially the same. *See id.*

somebody's religious viewpoint. For example, some<sup>112</sup> Quakers are pacifists; some Christian scientists do not believe in conventional medicine; some Mormons believe in polygamy; groups like The Creativity Movement (formerly the Church of the World Creator) and the Christian Identity preach violence against blacks and Jews;<sup>113</sup> some people believe that the Bible establishes that the Earth is flat;<sup>114</sup> The Church of Satan believes in indulgence, vengeance, and engaging in sins for purposes of gratification;<sup>115</sup> Raelians believe that aliens created the human race about 25,000 years ago;<sup>116</sup> some practitioners of Vodun (commonly referred to as Voodoo) believe that dead people can be revived after being buried;<sup>117</sup> some Wiccans believe that they can communicate with the dead through séances;<sup>118</sup> some Jains believe it is wrong to kill any living thing at all, including bugs and vegetables,<sup>119</sup> and may wear masks to avoid breathing in microscopic organisms;<sup>120</sup> and some adherents of Falun Gong believe they can harness their life force to cure illnesses, see into other worlds, move objects by telekinesis, walk through walls, and fly.<sup>121</sup>

It is certainly not the case that the government, in the messages it sends, must be neutral with respect to all of these religious beliefs. For example, the state can take the position that racial intolerance and violence is wrong, that eating vegetables is not a sin, that the world is round, that people ought not to be vengeful, that war is sometimes justified, that it is wrong to marry more than one person, that conventional medicine works, and that it is impossible to walk through walls and fly, no matter how well one manages his or her life force. The government can punish hate crimes, run public service ads urging citizens to eat their vegetables (or create a food pyramid to

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<sup>112</sup> Just to emphasize this caveat to the following list, my point here is only that there are some (perhaps only a few) members of each religion listed that believe in the noted practice, not that every member believes in the practice. The citations provided, concededly superficial in nature, are not meant to establish anything more than this limited (but important) point.

<sup>113</sup> For information on these two groups, see, e.g., *The Creativity Movement*, <http://www.religioustolerance.org/wcotc.htm> (last visited June 22, 2005); *Christian Identity Movement*, [http://www.religioustolerance.org/cr\\_ident.htm](http://www.religioustolerance.org/cr_ident.htm) (last visited June 22, 2005).

<sup>114</sup> See, e.g., Robert P.J. Day, *Documenting the Existence of "The International Flat Earth Society,"* <http://www.talkorigins.org/faqs/flaearth.html> (1993) (last visited June 22, 2005).

<sup>115</sup> See <http://www.churchofsatan.com/home.html> ("The Nine Satanic Statements") (last visited June 22, 2005).

<sup>116</sup> See [http://www.rael.org/rael\\_content/rael\\_summary.php](http://www.rael.org/rael_content/rael_summary.php) (last visited June 22, 2005).

<sup>117</sup> See *Vodun (and related religions)*, <http://www.religioustolerance.org/voodoo.htm> ("One belief unique to Vodun is that a dead person can be revived after having been buried.").

<sup>118</sup> See, e.g., Hanna Nichols, *Paganism and the Search for Truth and Proof*, <http://www.iamnext.com/spirituality/paganism.html> (2004) (noting that modern Wiccans still engage in the practice of communicating with the dead through séances).

<sup>119</sup> See *Jain Dharma, a.k.a. Jainism*, <http://www.religioustolerance.org/jainism.htm> (last visited June 22, 2005).

<sup>120</sup> See *Jainism*, <http://en.wikipedia.org/wiki/Jainism> (last visited June 22, 2005).

<sup>121</sup> See, e.g., David Van Biema, *The Man With the Qi*, TIME MAGAZINE, May 10, 1999 (Interview with Li Hongzhi). Of course, whether Falun Gong constitutes a religion for constitutional purposes is an open question.

this effect), employ navigation systems that assume a spherical Earth, preach kindness and tolerance toward others, engage in war, criminalize polygamy, fund conventional medicine, and teach in its schools that people cannot fly (and indeed give detention to students who try).<sup>122</sup>

The Supreme Court used to recognize that the Free Exercise Clause placed some limits on the government's ability to burden religious believers through its actions. Prior to 1990, the Court applied so-called strict scrutiny to government action that placed substantial burdens on religious belief and practice,<sup>123</sup> although this scrutiny was often rather less than strict in practice.<sup>124</sup> During this period, the remedy granted by the Court to believers who were substantially burdened in the absence of any compelling government interest was an individual exemption from the government law or action, not an injunction against the government law or action itself.<sup>125</sup> Thus, even though the Court found that Wisconsin's compulsory education requirement was unconstitutional with respect to certain Amish parents who believed their children should not have to attend public school after the age of fifteen, the Court's remedy was to give the plaintiffs an exemption from the education law, rather than striking down the law itself.<sup>126</sup> Even this limited remedy, however, no longer exists under the First Amendment, ever since the Court decided in the (in)famous *Smith* case that the Free Exercise Clause does not prohibit the government from imposing substantial burdens on religious belief and practice through the application of neutral laws of general applicability.<sup>127</sup>

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<sup>122</sup> The Constitution presumably places some limit on the state's authority to explicitly criticize religion generally or a particular religion, through the Supreme Court's somewhat incoherent and certainly unexplored "disapproval" prong of the endorsement test. *See Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) ("Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.'"). But as *Smith* implies, a general law or practice that burdens religion somehow does not by itself constitute an unconstitutional disapproval of religion. Perhaps an explicit statement from the state to the effect that the religion in question is clearly wrong to believe what it believes would be unconstitutional, but the examples provided here do not rise to that level.

<sup>123</sup> *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>124</sup> *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting Free Exercise claim of soldier to wear yarmulke against military regulation because of special military context); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (rejecting claim of Native Americans that the Forest Service's plan to destroy sacred forest would violate their Free Exercise rights).

<sup>125</sup> *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>126</sup> *See id.*

<sup>127</sup> *See Employment Division v. Smith*, 494 U.S. 872 (1990). The Court has provided that certain laws burdening religion will continue to get strict scrutiny, including laws falling directly under the *Sherbert* line of cases, *id.* at 880, so-called hybrid claims involving the Free Exercise Clause and some other constitutional right, *id.* (distinguishing *Yoder*), and laws that are not truly neutral or generally applicable, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down local Florida ordinances for targeting the Santeria practice of animal sacrifice). Also, the Court has recently upheld against an Establishment Clause attack the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which provides for strict scrutiny review of laws that burden religious practice

Thus, after *Smith*, a religious believer who is burdened by a neutral and general government action, policy, or law cannot claim a violation of his or her Free Exercise rights. Instead, the believer is restricted to pursuing a legislative accommodation. The state, if it so chooses, may grant the believer an exemption from the generally applicable law through legislation, subject to some constitutional limits articulated by the Supreme Court.<sup>128</sup> These Establishment Clause limits require that the accommodation relieve a substantial burden imposed on the believer by the state; that the accommodation has a limited negative effect on nonbeneficiaries; and, importantly, that the accommodation be denominationally neutral to the extent possible.<sup>129</sup> On this last point, then-Professor Michael McConnell has explained that, “An accommodation must not favor one form of religious belief over another. Since the objective of religious accommodations is to enhance the freedom of choice, religious pluralism demands that, where possible, the government’s actions must not be permitted to affect the previously existing religious mix.”<sup>130</sup>

What, then, does all this have to do with Beckwith’s suggestion that a school might insulate itself from constitutional attack by enacting an ID policy with the goal of promoting neutrality in the school curriculum (or erasing the endorsement of irreligion in that curriculum)? For one thing, it makes it quite clear that Beckwith is wrong to the extent his arguments imply that public schools are constitutionally *required* to teach ID in order to maintain neutrality.<sup>131</sup> Beckwith is not alone in suggesting that the public school curriculum must be viewpoint neutral with respect to religion; many other thinkers and jurists have said the same thing.<sup>132</sup> The argument,

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in certain contexts, such as prisons that receive federal funds. *Cutter v. Wilkinson*, Slip Op. No. 03-9877 (May 31, 2005).

<sup>128</sup> See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (rejecting Establishment Clause attack on exemption from Title VII’s ban on religious discrimination in hiring for religious organizations).

<sup>129</sup> See, e.g., *Cutter*, Slip Op., at 9-10 (discussing these three constitutional requirements).

<sup>130</sup> Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

<sup>131</sup> I think that Beckwith’s language implies exactly this when he writes that: “[A]n ID statute could be justified on the basis of neutrality by arguing that to teach only one theory of origins . . . the state is in fact advocating, aiding, fostering, and promoting irreligion, which it is *constitutionally forbidden from doing*.” *Id.* at 157 (emphasis added). This suggests that an ID statute is arguably constitutionally necessary to dispel the constitutionally forbidden message that is currently being sent by the public schools. On the other hand, Beckwith has publicly stated that he does not think that public schools should, as a policy matter, at this point of time, teach ID, which suggests that he does not think that public schools must teach ID to maintain neutrality. See [http://pbaryngula.org/comments/495\\_0\\_1\\_0\\_C/](http://pbaryngula.org/comments/495_0_1_0_C/) (Beckwith claiming that he “has no horse in this race”). To my mind, however, this latter position is in some tension with what he has written regarding viewpoint neutrality and the public school curriculum.

<sup>132</sup> See, e.g., WARREN A. NORD, *RELIGION & AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* 243 (1995) (“The Court has given public schools permission to teach about religion, but it has never claimed that religion must be taught to restore neutrality to a curriculum that is hostile to religion. Yet, this *should* be its position.”); *id.* at 8, 131, 378

however, is completely unworkable, ignores the fact that there are many religions rather than just one, and misapprehends the nature of public schooling, which takes all sorts of positions on all types of important public issues in almost everything it does. If the argument were true, schools would have to teach racial hatred, flat earth theory, and flying in addition to ID to make sure they were not being non-neutral with respect to students who happen to believe in these things. Such a course is obviously undesirable and not required by the First Amendment.

The more important question is whether the state of the law affects either the secular purpose analysis or the endorsement analysis of an ID policy justified by such endorsement-erasing or neutrality-promoting concerns. Should such a purpose be considered secular for First Amendment purposes? Would articulation of this purpose truly erase any endorsement of religion under the Establishment Clause? These are difficult questions, but ultimately the non-neutrality/endorsement purpose cannot save ID policies from constitutional infirmity. Assuming for the sake of argument that such a purpose would pass scrutiny as a secular purpose under the very strict approach embodied by the Court in *Edwards*, an ID policy would still likely endorse religion even if it is put forward specifically as a way of balancing the curriculum between religion and non-religion.

As with Beckwith's two other possible secular purposes, this one too fails because of the looseness of the means-ends connection, which in fact strengthens the endorsement message that an ID policy would send, rather than erasing it. Teaching ID as a way of promoting the neutrality of the public school curriculum is patently underinclusive with respect to that goal. As explained above, the state acts non-neutrally with regard to religious views of all sorts, in all types of ways. If neutrality is really the goal, why would policy-makers focus only on one specific way in which the state's messages are non-neutral? Indeed, an ID policy would not even address the non-neutrality issue in the limited setting of the public school curriculum, much less in the sphere of government activity as a whole. An ID policy justified on neutrality or anti-endorsement grounds would in fact promote the specific religious belief in monotheism as compared to the myriad other religious beliefs that are treated in a non-neutral fashion by the state. Such a policy would send the message that some instances of government non-neutrality are more important than others, and that therefore some religious viewpoints are more important than others. More specifically, such a policy, by teaching ID but not polygamy, non-medical healing, or walking through walls (for example), would favor the religious belief in monotheism over the beliefs

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(making similar points); *Citizens for a Responsible Curriculum v. Montgomery County Public Schools*, Mem. Order, Civil Action No. AW-05-1194, at p. 20-21 (May 5, 2005) (Judge Alexander Williams, Jr. granting order enjoining a curriculum allegedly endorsing a pro-gay lifestyle, in part on grounds that the curriculum presents only one view of a controversial subject), available at <http://www.mdd.uscourts.gov/Opinions152/Opinions/CRC050505.pdf>

held by some Mormons, Christian Scientists, and Falun Gong practitioners.<sup>133</sup>

To see this more clearly, consider what would happen if the school sought to deal with the religious opposition to evolution using the one specific method approved (in some circumstances) by the Supreme Court: a discretionary accommodation. If an ID supporter sought an accommodation from the school board to allow his child to sit out the unit on evolution, and the school granted the exemption, could the school then deny an exemption to a Quaker who wanted her kids to sit out a discussion of why the Iraq war is just or to a Christian Scientist who does not want his child to learn about the terrific achievements of modern medicine? Assuming that the Quaker and Christian Scientist claim that the lesson is offensive or troublesome in basically the same way that the evolution-opponent claims, the school would have no justification in granting one exemption but not the other. Such a policy would run afoul of the requirement that accommodations be granted in a denominationally-neutral fashion<sup>134</sup> and violate the Court's ruling in *Larson v. Valente* that, "the clearest command of the EC is that one religious denomination cannot be officially preferred over another."<sup>135</sup> If a school cannot selectively grant accommodations, why should it be able to sidestep this prohibition by selectively altering the curriculum to favor one particular religious belief on the grounds that doing so is necessary to maintain neutrality?

The point here is not that the First Amendment generally bars schools from altering the curriculum in small ways to maintain religious neutrality. The point is ID specific; in light of all of ID's other problems, including its historical connection with previous unconstitutional efforts and complete lack of support in the scientific community,<sup>136</sup> enacting an ID policy with the articulated goal of maintaining neutrality or erasing endorsement in the school curriculum would not save the policy from sending the message that the curriculum was in fact being altered to promote a particular religious belief.<sup>137</sup>

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<sup>133</sup> See text accompanying notes 112-122, *supra*.

<sup>134</sup> See *Cutter*, Slip Op., at 10 (observing that courts "must be satisfied that [an accommodation's] prescriptions are and will be administered neutrally among different faiths").

<sup>135</sup> 456 U.S. 228, 244 (1982).

<sup>136</sup> See text accompanying notes 81-85, *supra*.

<sup>137</sup> Under the rubric of preserving neutrality, Beckwith also argues that teaching ID might be necessary to dispel the public school's coercion of a non-religious viewpoint. See BECKWITH, L, D & PE, *supra* n. 6, at 158-59 ("[P]ermitting or requiring public schools to teach the alternative to naturalistic evolution—Intelligent Design—would be a way to ensure that the Establishment Clause is not violated via the no coercion test."). Beckwith relies on the Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), but that case is inapposite. *Lee* stands for the notion that schools cannot coerce students into participating in religious exercises, even by placing them in a situation in which the coercion actually results from peer pressure, but the case says nothing about the government's authority to place burdens on religious believers, say by making them learn something that is at odds with their religious

### III. Academic Freedom?

Finally, Beckwith argues that public school teachers have some limited First Amendment academic freedom rights to teach ID in addition to teaching the prescribed biology curriculum.<sup>138</sup> Specifically, in commenting on a Minnesota Court of Appeals decision called *LeVake v. Independent School District*,<sup>139</sup> Beckwith contends that “bringing into the classroom relevant material that is supplementary to the curriculum (and not a violation of any other legal duties), when the public school teacher has adequately fulfilled all of her curricular obligations, is *protected speech* under the rubric of academic freedom.”<sup>140</sup> In support of this argument, Beckwith cites dictum from *Keyfishian v. Board of Regents*,<sup>141</sup> in which the Supreme Court opined that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom,”<sup>142</sup> as well as select quotations from other cases like *Moore v. Gaston County Board of Education*<sup>143</sup> and *Tinker v. Des Moines Independent Community School District*,<sup>144</sup> which are said to stand for the proposition that teachers possess First Amendment academic freedom rights to supplement the proscribed curriculum with their own materials and views.<sup>145</sup>

Beckwith is certainly correct in his claim that the First Amendment places some limits on the state’s authority to fire government employees, including public school teachers, and that those teachers do not forfeit their First Amendment rights when they accept a government job. The Supreme Court, in a case called *Pickering v. Board of Education*,<sup>146</sup> has held that teachers have a limited right (subject to a balancing test, in which the interest of the

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beliefs. Indeed, in *Smith*, the Court held that the government is free to impose such burdens, so long as it does so in a neutral and generally applicable manner. If a school wishes to protect a student from such a burden, it may exempt him from the evolution lesson, so long as it exempts other students from similar burdens on their religious beliefs, but attempting to accommodate the ID believer by teaching ID fails for the same reason that the neutrality/endorsement argument fails—it privileges ID compared to other religious viewpoints that are disadvantaged by the curriculum.

<sup>138</sup> See BECKWITH, L, D & PE, *supra* n. 6, at 73-76.

<sup>139</sup> 625 N.W.2d 502 (Minn Ct. App. 2001). Beckwith has written an entire essay about the issues raised by this case. See Francis J. Beckwith, *A Liberty Not Fully Evolved?*, 39 SAN DIEGO L. REV. 1311 (2002).

<sup>140</sup> BECKWITH, L, D & PE, *supra* n. 6, at 76. It is unclear what the phrase, “other legal duties,” means here. I assume that it does not mean a clear school policy prohibiting any discussion of ID, because only if such a policy existed would there be any need for a teacher to assert a First Amendment academic freedom right in the first place.

<sup>141</sup> 385 U.S. 589 (1967).

<sup>142</sup> *Id.* at 603.

<sup>143</sup> 357 F. Supp. 1037 (W.D. N.C. 1973).

<sup>144</sup> 393 U.S. 503 (1969). *Tinker* is particularly inapposite, since it concerned the speech rights of the students in the school rather than the teachers.

<sup>145</sup> See BECKWITH, L, D & PE, *supra* n. 6, at 74-76.

<sup>146</sup> 391 U.S. 563 (1968).

speaker is weighed against the relevant countervailing government interests) to speak as citizens on matters of public concern without facing employment-based retribution from their government employers.<sup>147</sup> But this right to speak out as citizens (for example, in newspaper editorials, meetings, and other public forums outside the classroom) is entirely different from the purported right to include material or views in the classroom against the orders of the state, school board, or school authorities. This latter right simply does not exist. It finds no support in Supreme Court precedent, is contrary to existing law and common sense, would undermine the democratic accountability of public schools, and would cause havoc in the nation's educational system.<sup>148</sup>

To begin with, the Court has never proclaimed any independent “academic freedom” right for public secondary school teachers or anyone else. Of course, the words “academic freedom” do not appear in the First Amendment, or anywhere else in the Constitution, and although the phrase can occasionally be found in Supreme Court dicta, the Court has never invoked an academic freedom rationale to invalidate any government law or practice and has never applied it at all to protect the rights of individuals, as opposed to academic institutions.<sup>149</sup> As the Fourth Circuit recently put it, “[T]he Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom. . . . to the extent it has constitutionalized a right of academic freedom at all, [the Court] appears to have recognized only an institutional right of self-governance in academic affairs.”<sup>150</sup>

Second, the Supreme Court has not adopted, and the lower courts that have recently considered the issue have, for the most part, explicitly rejected, the notion that government employees, including public school teachers, have any First Amendment right to speak, *in their role as employees*, contrary to the dictates of their democratically accountable supervisors.<sup>151</sup> In

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<sup>147</sup> *Id.* at 568. The *Pickering* line of cases also includes *Connick v. Myers*, 461 U.S. 138 (1983), and *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

<sup>148</sup> See text accompanying notes 149-157, *infra*.

<sup>149</sup> For a careful explanation of why the Supreme Court's dicta regarding academic freedom does not constitute any sort of holding or rule that would protect teachers in the context Beckwith discusses, see Malcolm M. Stewart, *The First Amendment, The Public Schools, and the Inculcation of Community Values*, 18 J. L. & EDUC. 23, 59 (1989).

<sup>150</sup> *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4<sup>th</sup> Cir. 2000).

<sup>151</sup> See, e.g., Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J. L. & EDUC. 1, 6 (2001) (“The Supreme Court has yet to squarely address what level of protection, if any, should be accorded to teachers' in-class speech.”); *id.* at 18 (“From a practical standpoint, none of the recent circuit decisions applying *Pickering* have found in-class speech to qualify as a matter of public concern.”). For key cases, see *Kirkland v. Northside Independent School District*, 890 F.2d 794, 802 (5<sup>th</sup> Cir. 1989) (“We hold only that public school teachers are not free, under the first amendment, to arrogate control of the curricula); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371 (4<sup>th</sup> Cir. 1998) (“In the case of a public school . . . it is far better policy . . . that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First

other words, even if a teacher may have a right to speak out as a private citizen in favor of ID (or drug use or Communism or any other unpopular idea) at a public meeting or in a newspaper editorial without fear of losing his or her job, the same teacher does not possess the same right to speak out on those same topics within the classroom, if the relevant authorities have given sufficiently clear notice that such topics or viewpoints are off-limits. Again, the Fourth Circuit articulated this position when it explained that prior to determining whether the *Pickering* balancing test even applies to a public employee, the court must determine whether the employee is speaking as a citizen or rather in her capacity as employee: “This focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs.”<sup>152</sup>

This analysis comports with common sense. If high level government officials lack the power to restrict the official government speech of their employees, then those employees (including teachers) who serve as spokespersons for the state would have near-complete authority to countermand the state’s official messages. The Fourth Circuit uses the example of an assistant district attorney at a formal press conference who criticizes his boss’s decision to pursue a murder charge,<sup>153</sup> but this is only one of countless possible examples in which Beckwith’s rule would disrupt the functioning of the government. One only has to imagine the President’s Press Secretary condemning the war in Iraq, an EPA scientist making an official statement that a particular type of pollution is far worse than the Administrator has recognized, or a state employment officer speaking out against the state’s affirmative action policies to understand the chaos of recognizing a First Amendment right in a subordinate speaking in his or her official capacity on matters of public concern.<sup>154</sup>

Recognizing this right would be just as problematic in the public schools as it would be elsewhere in the government. There does not seem to be any principled way to limit Beckwith’s rule to the ID context, and Beckwith does not suggest any. This means that teachers could teach their

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Amendment right to participate in the makeup of the curriculum.”); *but see* *Cockrel v. Shelby County School Dist.*, 270 F.3d 1036, 1051-52 (6<sup>th</sup> Cir. 2002) (rejecting approach of the Fourth and Fifth Circuits).

<sup>152</sup> *Urofsky*, 216 F.3d at 407.

<sup>153</sup> *See id.* at 407-08.

<sup>154</sup> For an important discussion of this issue, see Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1775 (1987) (“When administering its own institutions, the government is invested with a special form of authority, which I shall call ‘managerial.’ Managerial authority is controlled by first amendment rules different from those which control the exercise of the authority used by the state when it acts to govern the general public.”); *id.* at 1771-72 (using the example of a government subordinate who insists on presenting his position on some matter instead of the position that the superior has insisted be presented). *See also* Stewart, *supra* n. 149, at 66-68 & n. 136.

views on a whole array of controversial topics, with the school having no recourse against them whatsoever. Teachers could supplement a sex education class with their own views about whether condoms actually work or how HIV is really transferred, suggest that the federally-funded abstinence lesson they just taught is a “bunch of bunk,” mention at the end of their health lesson that drugs are in fact “kind of fun,” hint that the evidence showing the existence of the Holocaust is a “bit overstated,” or argue that slavery was a mutually beneficial economic arrangement for whites and blacks alike.

Ensuring that government supervisors can control the official statements of their subordinates serves to promote democratic accountability among government decision-makers for the state’s official messages.<sup>155</sup> Ultimately, those who speak on the state’s behalf are speaking for its citizens, and those citizens ought to have some recourse if the state decides to take an official position that the citizens find abhorrent, offensive, or just plain wrong. The electoral process provides this accountability check, but only for those officials at the highest level. It would stand to reason, then, that to preserve accountability, those highest level officials ought to have the final say with regard to what messages the state will adopt. If the courts adopted Beckwith’s position, then citizens would be deprived of any real power to hold the government accountable for its statements, in cases in which an employee exercises his or her First Amendment rights to make an official statement on a controversial issue that is contrary to the message that the state itself endorses. In other words, if a public school teacher decides to teach that the Holocaust never happened, the community ought to be able to pressure the school board (or other relevant decision-making body) to stop the teacher from promoting this view in the classroom. If the board can control the teacher’s speech, and the board agrees with the community, then the teacher will either stop speaking or be fired. If the board does not want to reprimand the teacher, then the community can vote the relevant board members off of the board. On the other hand, if the teacher has a First Amendment right to say what he or she wants, the community will have no legal or political recourse to stop the teacher from continuing to engage in the detested speech.<sup>156</sup>

Of course, Beckwith does not argue that a teacher has a First Amendment right to *replace* the prescribed curriculum by teaching ID theory

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<sup>155</sup> See Stewart, *supra* n. 149, at 27 (“[T]he basic principle of democratic theory is that decisions made by popularly-elected officials have the presumptive approval of the community. . . . When a court orders school officials to present in school programs messages which the officials have chosen not to present, it is in fact denying the majority of parents the right to educate their children as they see fit.”).

<sup>156</sup> The school or school board could presumably fire the board for appointing the teacher, but this would not stop the speech, and such a practice would encourage government employers to hire only the most non-controversial employees, when in fact, sometimes interesting and controversial speech can be good, so long as the employer can ultimately control it if it goes too far.

instead of evolution; rather he argues that a teacher has the right to *supplement* the existing evolution curriculum with ID theory.<sup>157</sup> But this distinction does not save the argument, because there is no reason to think that the analysis is any different just because the employee first says what he is supposed to say before putting in his own two cents. A First Amendment rule allowing supplementation but not replacement would still undermine the functioning of government and interrupt the lines of democratic accountability. Should the President's Press Secretary really be able to say at a press conference that "the President believes that the war in Iraq is just, but it's not"? Should a public school teacher be able to say, "Most people believe that the Holocaust happened, but they are wrong," or "the school thinks you shouldn't have sex, but I think you should," if the community strongly disagrees with these positions?

Finally, it is worth noting that nothing I have said here is meant to suggest that schools and school boards should regularly choose to restrict what their teachers may say or do in the classroom. There are certainly strong educational arguments in favor of allowing teachers wide latitude to teach the material they wish in the manner they wish, even if sometimes their teaching methods or materials are controversial. Providing teachers such leeway also sends the important message both to the community and to the teachers themselves that teachers are respected professionals whose work is incredibly important and central to the effective functioning of a democracy. Indeed, I would think that in the vast majority of cases, school boards should allow teachers vast freedom to do what they want when they are in front of their classes. But this argument is based on sound educational policy, not constitutional law. Saying that schools ought to allow teachers to supplement the curriculum with their own views in most cases is not the same thing as saying that teachers should have a First Amendment right to supplement the curriculum with their own controversial viewpoints in those few cases in which the community is strongly opposed to that viewpoint. The latter purported "right" has no basis in constitutional text or precedent and is contrary to common sense and the ideals of the political community.

### *Conclusion*

In the next few years, it seems likely that courts will start weighing in on whether public schools may, consistent with the First Amendment, teach ID theory as an alternative to evolution. The case currently pending in Pennsylvania may be the first; even if it settles or is decided on other grounds, there will surely be another case following soon after. When the

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<sup>157</sup> See BECKWITH, L, D & PE, *supra* n. 6, at 76. It is not clear, however, why Beckwith adopts this position as a matter of First Amendment free speech theory, since the First Amendment protects private parties from government compelled speech as well as prohibited speech. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that individuals have a First Amendment right to cover up state messages on license plates); *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (finding students have a First Amendment right not to say the Pledge of Allegiance).

courts do get around to deciding this very important issue, they should realize that although ID may in some ways be different from the anti-evolution iterations that have come before it, in many ways it is quite the same. It is best viewed as a religious belief, and teaching it in the public schools as a scientific theory when it has achieved no success within the scientific community will likely be understood by a reasonable believer as an endorsement of religious belief. Professor Beckwith has advanced some creative arguments in ID's favor, and critiqued some of my own along the way, but these ultimately unsuccessful contentions should not distract the courts from recognizing ID's inherent constitutional infirmities.