A LEGAL ANALYSIS OF THE LEGITIMATE PEDAGOGICAL INTEREST OF TEACHING ALTERNATIVES TO EVOLUTION IN PUBLIC SCHOOLS

A Thesis in

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by

Robert Lance Potter

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The thesis of Robert Lance Potter was reviewed and approved* by the following:

Preston C. Green, III  
Associate Professor of Educational Leadership  
Thesis Adviser  
Co-Chair of Committee

Jacqueline A. Stefkovich  
Professor of Educational Leadership  
Head of the Department of Education Policy Studies  
Co-Chair of Committee

J. Daniel Marshall  
Professor of Educational Leadership

Scott P. McDonald  
Assistant Professor of Science Education

*Signatures are on file in the Graduate School.
ABSTRACT

For decades schools and students have been caught in the middle of a scientific, educational, and cultural battle over the teaching regarding the origins of life. The theory of evolution is at the center of the controversy. Widely accepted by scientists as a reliable scientific theory, evolution is attacked by conservative Christians as against God and a literal interpretation of the creation story of the Bible. Recently, intelligent design has emerged as an alternative to evolution and creationism. Intelligent design proponents argue that life becomes so irreducibly complex as to lead to the conclusion that an unnamed intelligent power must have had a role in creation.

Over the years, the debate over teaching evolution in schools has waged in our nation’s court system. The Supreme Court and various lower courts have ruled against attempts to limit teaching evolution or require the teaching of creationism. Courts have also ruled against attempts to introduce disclaimers, either written or verbal, which question the primacy of evolution as the only explanation for the origins of life. Primarily courts reason that governing bodies have been motivated by a religious purpose to inhibit the teaching of evolution or advance the teaching of a religious view of creation which violates the Establishment Clause of the First Amendment of the U.S. Constitution.

This paper reviews the legal dimensions of the origins controversy and then introduces different perspectives to the traditional approach to the debate. Specifically, other aspects of Establishment Clause jurisprudence as well as freedom of speech in schools analyses are discussed. These cases show that schools can teach “about” religion so long as they do not endorse religion. They also show that school boards are the primary decision makers about what will be included in the curriculum of the schools in their jurisdiction. As such, they have only to show a “legitimate pedagogical concern” in support of their decisions. The cases also show courts’ preference for students to have access to a wide variety of information and be free to inquire into matters of interest. Educational literature and the culture generally also acknowledge the importance of students learning about religion in a neutral manner.

This paper then proposes a framework that details steps school boards may take to develop a policy for teaching about the origins controversy in science classes. The framework respects the protections of the Establishment Clause and freedom of speech from the First Amendment and incorporates the educational and cultural interest in teaching about religion and the origins controversy in a way that respects the findings of science and the beliefs of many students.
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Chapter 1 - Introduction

“In the beginning, God created the heavens and the earth.” Genesis 1:1.

“Darwin’s great contribution was the final demolition of the idea that nature is the product of intelligent design” -James Rachels, (Beckwith, pp. 464-465, 2003).

In Western Civilization, it was long taken for granted that God did create the heavens and the earth. Then in 1859 Charles Darwin published his science altering book, The Origins of Species. In it Darwin set forth the proposition that living things change slowly over time through natural selection to such an extent that new species may be formed. To some, Darwin’s theory means that life and the way it has developed is just a matter of chance, nothing more. This idea is antithetical to the beliefs of many who hold that God is the ultimate designer and the world unfolded according to a divine plan. Darwin’s theory began a controversy about the origins of life that wages even today. It is an issue loaded with bias, doctrine, and emotion.

Periodically, the evolution controversy spills over into the classroom. Understandably, teachers, students, administrators and parents are often confused and have many questions about just what can and cannot be discussed on the topic of evolution, creationism, intelligent design, and all thoughts in between in public school classrooms across the United States. As inevitably happens, the confusion in the classroom ends up in the courtroom. The most recent case to address concerns about teaching evolution in schools is Kitzmiller v. Dover (2005), which declared the district’s policy affecting the teaching of evolution to high school biology classes unconstitutional. This case is just the latest in a long line of cases pitting proponents of evolution against those who object in some way to its teaching. Kitzmiller is the first case, however, to address the issue of teaching intelligent design (ID) in school. Parents challenged the district’s new policy on the grounds it constituted an establishment of religion in violation
of the First Amendment to the U.S. Constitution. The judge not only ruled that the policy violated the First Amendment, but went on to decide that intelligent design is not science and cannot be taught in science class.

The judge in *Kitzmiller*, in his sweeping decision banning the teaching of intelligent design in the science classroom, runs directly afoul to the strongly held preference by courts in another line of education cases that encourages the free flow of ideas to ensure students’ exposure to not only the accepted ideas of the day but controversial ones as well. The Supreme Court in *Sweezy v. New Hampshire* (1957) noted that:

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate…. [The state cannot] chill that free play of the spirit which all teachers ought especially to cultivate and practice (p. 308).

In *Board of Education v. Pico*, (1982), the Supreme Court ruled against attempts to “deny access to ideas with which the petitioners disagreed” because permitting such intentions is exactly the kind of orthodoxy the Court condemns (p. 872). Scholars, judges, scientists and educators need to keep in mind the purposes of education when writing about controversial subjects such as teaching evolution in schools. “One purpose of a liberal education is to put students in a position to make ‘all things considered’ judgments, rather than to accept uncritically the conventional wisdom of any discipline, science included” (Nord, 1999, p. 31).

Every case involving the teaching of origins in school has come out in favor of the teaching of evolution, yet the controversy persists. It is time that lawyers, judges, educators, scientists, and commentators look beyond the rhetoric and the science and examine the roots
of the controversy: namely, the origins controversy is not a scientific controversy. Rather, it is a cultural controversy. As science has shown over and over again, evolution through natural selection is observable fact. How evolution takes place, and leading back to the origins of life is theory. Assertions about evolution as proof that creation occurred without the creative influence of a divine power are not scientific, rather philosophical and thus beyond the proper domain of science. The foregoing statements are not radical interpretations of the truth or profound insights never before offered in the public square. Up until now however, they have received far too little attention by those who actually decide what is taught in our public schools.

As public education struggles to serve a pluralistic populace, intentionally recognizing the role of religion in America is important for the education of our children to take their place as citizens in our democratic society. Our schools are caught up in what has been referred to as a culture war (Hunter, 1990) that has resulted in increasing animosity and separation between religious and social conservatives, and their opposite number. The proliferation of private Christian schools and homeschooling are at least partially attributable to the feeling of alienation from the process of public education felt by many parents in this country.

The national media has taken up an interest in this cultural controversy. *Time* magazine featured the cover story: “The case for teaching the Bible” (Van Biema, 2007). *Education Week* also featured a story about growing grassroots support for the idea that teaching evolution does not conflict with religious convictions (Cavanagh, 2005). In the same year *Time* featured another story called “Evolution Wars” (Wallis, 2005) highlighting the emerging battle between evolutionists and intelligent design advocates.
As a society, it is in our best interest to work toward becoming a people who can live better with our differences. This idea of tolerance does not require accepting the value of an abhorrent viewpoint. It does, however, require respecting the right of others to hold that viewpoint and acknowledging the importance of such respect in a free and vital democracy. The question is how can schools begin to mend broken fences? Is teaching alternatives to evolution in science class a step in the healing process? Is it legally possible, educationally defensible and culturally responsible? The answer to the first question is indeed critical to the vitality of public education in America but far too daunting to receive more than cursory attention here. In reality though, the answer to the first question, in part, can be found in the answer to the latter questions.

“[T]he clash between evolution and religion is not about to go away anytime soon” no matter how much members of the scientific establishment wishes it were (Miller, 1999, p. 54). Therefore it is important that our schools come up with some way to address this “clash” that allows us to move forward, past the endless bickering between groups of divergent beliefs, and get on with the important tasks of educating our children.

Given the Supreme Court’s stated preference for the free flow of ideas and its obvious charge to protect the mandates of the Constitution, courts and educators should be looking to perform a balancing act between protecting students from the religious agendas of some while allowing students a broad exposure to issues relevant to their education. It is not difficult to imagine a truly secular purpose for allowing discussions of not only ID but even creationism in science class.
This dissertation will explore the controversy surrounding the teaching of evolution in schools and issues related to it and examine whether it is possible to even entertain this controversy within school walls. In particular we ask the following questions

1. Given the competing concerns of protecting students from religious indoctrination but exposing them to a broad array of ideas and issues in the classroom, can alternatives to evolution be legally taught in science class?

2. Is teaching alternatives to evolution in science class, defensible as a legitimate educational purpose?

3. How would a district formulate a policy to include teaching alternatives to evolution in science class that is likely to satisfy the courts?

*Background*

Before becoming immersed in the legal, educational, and social implications of the origins controversy, it is necessary to establish the basic information needed to think responsibly about the topic.

*Creationism v. Evolution? It is Not That Simple*

Many people within and outside the debate regarding what should be taught in science class about evolution assume incorrectly that there are essentially two positions: creationists versus evolutionists. There is good reason for this because each side caricaturizes the other as consisting of extremists defending their positions in the face of all attacks with unflinching dogmatism. While there are elements that fit these descriptions, the majority of people fall somewhere in between. It is essential to the understanding of the debate, therefore, to define the positions.
Creationism.

Minimally, creationism is the belief that the entire universe could not have come into existence without a supreme being as its ultimate cause. There are several variations of creationism, however. Strict creationism, also called creation science, young-earth creationism, and Biblical creationism, is commonly understood to refer to a strict literal interpretation of the story of creation as found in Genesis, the first book of the Bible. This view is most often associated with fundamentalist Christianity and generally holds that creation was completed by God in six days, not more than 10,000 years ago. Other general principles include the belief that the laws of nature, the galaxies, stars, planets, and all life were created directly by God and that all living things have remained largely unchanged since that time (Addicott, 2002). For the purposes of this paper, people who adhere to this line of thinking will be referred to as “strict creationists”. When creationism is discussed in legal contexts, it is generally this kind.

Proponents of evolution tend to lump all people who believe that God had a role in creation into this strict creationist category. Their simplification of the positions further complicates and emotionalizes the discussion. It is also not true. Many Christians understand the creation story to be a figurative account of life’s beginnings exemplified by the fact that there are actually two different creation stories in Genesis. This is not a novel concept. At least as far back as 400 AD, early Christian theologian, St. Augustine considered creation “a continuing and unfolding process in which the commands of the Creator were fulfilled progressively, not instantaneously” (Miller, 1999, p 255). Augustine also cautioned early Christians to avoid taking positions that would bring ridicule upon them by non-believers because of their implausibility (Miller, p. 256). Kenneth Miller (1999) a scientist and a
Christian articulates this point: “[T]he most effective weapons used by the agents of disbelief are those that believers have handed them willingly. By insisting that Genesis is a scientific document—not a spiritual one—they have made it almost too easy to do exactly what Augustine feared: ‘to show up vast ignorance in a Christian and laugh it to scorn’” (p. 270).

Old-earth creationism holds that God created the heavens and the earth but did so billions of years ago. Old-earth creationists maintain, “that unguided evolution is not capable of producing the features we see in our universe - not the universe itself, life, its actual variety, and not humankind” (Beckwith, 2003, p. 461, internal citation omitted). Many old-earth creationists “simply interpret the ‘days’ of creation as blocks of unspecified time” (Addicott, 2002, p. 1551).

One may also include theistic evolution or “fully gifted creation” as a form of creationism. Theistic evolution holds that a complete and exhaustive description of origins and nature in wholly material terms is in principle compatible with the existence of God (Beckwith, 2003, p. 461). For proponents, even if life came about in a step-by-step "evolution of nature" on God's behalf, the theory of evolution cannot ultimately rule out God or his sustaining activity as some evolutionists attempt to proclaim (Addicott, 2002, p. 1552).

Not only do Christians differ on their views of creation, it is important to note that not all Christians endorse teaching creationism. Many Christian churches have spoken against legislation promoting creationism in schools including the United Methodist, Episcopalian, Roman Catholic, African Methodist Episcopal, Presbyterian, and Southern Baptist churches (NSTA, 2003). Pope John Paul II in 1996 and Pope Pius XII in 1950 endorsed the notion that evolution and religion can coexist (Dean, 2005).
Evolution.

No one, not even strict creationists, deny Darwin’s natural selection theory where the fittest survive to pass on their genes. If all that is meant by evolution is that biological species adapt over time to changing environments and pass on those adaptations genetically to their offspring, there would be very little argument. Even high school textbooks do not hint at the extent of the controversy with their definitions of evolution. For example, Miller and Levine (2004) define evolution as the, “process by which modern organisms have descended from ancient organisms (p. 1093). Another popular textbook defines evolution as “A cumulative change in the characteristics of organisms or populations from generation to generation” (BSCS Biology, 2006, p. 760). Changes occur through mutations in organisms. Miller points out that: “Mutations are a continuing and inexhaustible source of variation, and they provide the raw material that is shaped by natural selection. Since mutations can duplicate, delete, invert, and rewrite any part of the genetic system in any organism, they can produce any change that evolution has documented (1999, p. 49)

Miller (1999) describes evolution as both a fact and a theory. “It is a fact that evolutionary change took place. And evolution is also a theory that seeks to explain the detailed mechanism behind that change” (p. 54). It is important to note that even within the scientific community, what the theory of evolution means is subject to debate. Scientific meetings on evolution are “filled with argument and disagreement” (Id.). Miller notes that this intellectual conflict is good for science, as it requires scientists to test their ideas through experiments and observation (Id.).

The key to the way scientists view evolution is what Miller calls scientific materialism. “Scientific materialism assumes that the objects and events of the natural world
can be explained in terms of their material properties” (1999, p. 27). By definition, science does not seek divine reasons for natural events. That does not mean they do not exist, it merely means that science is not engaged in the search for divine reason. That is the providence of religion.

*Intelligent Design.*

The idea of intelligent design stems from the work of William Paley, a theologian who, in 1802, wrote *Natural Theology—or Evidence of the Existence and Attributes of the Deity Collected from the Appearances of Nature*. He is known for a famous metaphor about a watch and its watchmaker. He said that if someone found a watch with fine design and precision, it would not be logical to assume it had always been there. Rather, the watch must have had a maker who designed its use, understood its construction and made it so it would work. Paley then compares creation as the work of God, to the watch and the watchmaker, for how else can one explain something as intricate as the human eye except that it had a designer (Alexander & Alexander, 2005)?

Proponents of intelligent design theory accept evolution up to a point, but are convinced that natural selection alone cannot account for the complexity of life. Their theory is meant to be read together with the theory of evolution. In this context, intelligent design literature shuns theological arguments and relies on a strict template designed to see if a particular observable biological complexity is consistent with their theory (Addicott, p. 1577).

Just as creationists and evolutionists do not agree within their own ranks, even among intelligent design activists, there are differences on what ID entails. Miller (1999) notes that Phillip Johnson and Michael Behe, two of the better-known ID proponents do not share
identical ideas about the origins of the species. Johnson rejects the idea of a common ancestry for humans and other animals but Behe has no problem with the common ancestry of humans and the great apes. Strict creationists maintain that all species were separately created.

Some critics, such as Forrest and Gross (2004), believe the intelligent design movement is just a ploy to get religion into school and take over the science curriculum. Miller thinks the differing views within ID and between ID and strict creationism, makes this unlikely. In addition to differing ideas about common ancestry, Behe and Johnson accept the scientific age of the earth and universe, and what paleontologists tell us about the sequential appearances of species in the fossil record. Strict creationists, “reject all of this, and they view such concessions as logically fatal to their cause” (p. 164). To Miller, it is difficult “to imagine these folks getting together to conspire about anything” (Id.).

Reasons for the Controversy

While there are certainly scientific and religious implications inherent in the discussion, the origins controversy is not about science nor is it about religion. Rather it is about culture and how we make sense of our world. Miller explains that evolution is, by definition, a story of origins. This means, however powerful its scientific support, it really does supersede another creation story—in particular, the creation story at the core of the Judeo-Christian narrative” (1999, p. 56-57). As such, evolution threatens the sense people have that humans are “the centerpiece of creation” (p. 58).

It is important to point out, that accepting the logic of evolution does not require giving up a belief in a creator. “Just as it is wrong-headed to portray all creationists as having
identical criticisms of evolution, it is a distortion to portray all evolutionists as having identical positions on religion and creationism” (Brickhouse & Letts, 1998, p. 228). Miller concurs noting that “The discovery that naturalistic explanations can account for the workings of living things neither confirms nor denies the idea that a Creator is responsible for them” (1999, p. 268).

Both scientists and evolution opponents, however, use evolution to argue about God and this is one reason the controversy persists. Miller believes arguments about God and evolution have “very little to do with the science of evolution, and everything to do with how that science is misapplied to the larger questions of human existence” (p. 63). For example, some scientists such as Edward O. Wilson, author of On Human Nature, use evolution to rule out God with statements such as: “If humankind evolved by Darwinian natural selection, genetic chance and environmental necessity, not God, made the species” (Miller, 1999, p. 15). Douglas Futuyma, another prominent scientists states: “Some shrink from the conclusion that the human species was not designed, has no purpose, and is the product of mere mechanical mechanism—but this seems to be the message of evolution” (p. 269).

The understandable response to conclusions that evolution “leads to the exclusion of God from a meaningless universe, is to fight evolution at every opportunity (p. 186-187). As we witness in our schools and society generally, “This clash of two cultures extends over a battle line encompassing every moral, ethical, and legal issue of modern life” (p. 189).

Miller, a professor of biology at Brown University and a Christian understands the tension between evolution and Judeo-Christian belief perhaps as well as anyone. He recognizes as an academic, that there is a widespread presumption of atheism or agnosticism not only in the field of biology, but in academe generally. Professor Miller believes that the
presumption of godlessness “affects any serious attempt to investigate the religious implications of ideas . . . [and] is the source of a powerful backlash that science ignores only at its peril” (1999, p. 19).

Positions

It is in the contentious atmosphere of clashing cultural viewpoints just described that the origins controversy in our schools plays out. Our main concern is how to handle the issue of evolution in schools. In the school context, there are two main positions with a small voice for a third choice. The strict evolutionist side wants only evolution taught in schools and no other competing ideas. Creationists, such as those involved in the Kitzmiller case are interested in injecting their religious viewpoint into schools, not for educational purposes but for religious purposes. Their preference would be to minimize or eliminate teaching evolution. Some proponents of intelligent design, liberal Christians, some educators and academics, and many people with no particular agenda, want competing interests to be able to share the school stage. This third position recognizes the importance of avoiding the establishment of religion while at the same time acknowledging the pluralist society we live in, where many millions of people hold sincere religious views.

Evolution only.

Evolutionists believe, and the courts agree, that strict creationism cannot be required to be taught in science class. While strict creationists still rattle their sabers, their claims are largely moot, except in the court of public opinion, due to the overtly religious basis of their argument. Evolutionists also think that ID is not science so it too should not be taught in
science classrooms (see e.g. Terry, 2005). To evolutionists like Eugenie Scott, “Intelligent design is a fancy way of saying ‘God did it’” (Cavanagh, 2004).

A source of contention in the argument is the use of the word “theory” to describe evolution and intelligent design. One line of reasoning used to argue against evolution is that it is “just a theory”. The National Science Teachers Association (NSTA) position statement explains how scientific theories differ:

The most important scientific explanations are called “theories.” In ordinary speech, “theory” is often used to mean “guess” or “hunch,” whereas in scientific terminology, a theory is a set of universal statements that explain the natural world. Theories are powerful tools. Scientists seek to develop theories that:

- are firmly grounded in and based upon evidence;
- are logically consistent with other well-established principles;
- explain more than rival theories; and
- have the potential to lead to new knowledge (NSTA, 2003).

While evolution fits this description of a scientific theory, creationism does not, and most scientists believe that proponents of ID have failed to show that intelligent design is a legitimate scientific theory as well.

Members of the science community also paint ID proponents as engaged in a conspiracy to insidiously manipulate the public into accepting ID without doing the hard scientific work needed to legitimate its inclusion in regular scientific dialog (see e.g. Forrest and Gross, 2004). Many in the science community argue that proponents of intelligent design “need science itself redefined to include the supernatural to conduct their research.” (Terry, 2005). Proponents of the ID idea, on the other hand, maintain that the scientific community is
closed to their ideas and deliberately stifling ID’s discussion while zealously guarding the sacred cow of evolution (Terry, 2005).

*Inclusion of competing ideas.*

Although evolution is widely accepted by scientists, there are still controversies regarding certain aspects of evolution by natural selection.

For example, the theory of punctuated equilibrium as an explanation for a fossil record that rarely shows a smooth progression from one species to another is still debated. Also, evolution is unable to provide answers for singular events such as the great diversity of flowering plants that cannot be traced to a single cause. Nor can population genetics predict the evolutionary pathway of a given population.


Scholars argue that while evolution by natural selection is good science, trying to use evolution as the means to explain the origins of life is not science but theology. Natural selection does not address the question of the origin of life though scientists, such as Carl Sagan, have attempted to address questions regarding the origin of life. These ideas have little to do with evolution by natural selection and are extremely controversial (Brickhouse & Letts, 1998, p. 226).

Addicott (2002) also notes that Americans are more likely to doubt the validity of the theory of evolution than the validity of God. He posits that “In part, this may be the result of committed ideologues … who have so deeply associated the theory of evolution with their metaphysical philosophy that no one in American culture can talk about the one without invoking the other” (p. 1563).
The logical way to address competing concerns is to allow differing ideas expression in the classroom. Allowing the origins controversy into the ‘marketplace of ideas’ that is public school, permits students to engage in a similar analysis required by adults, but under the supervision of teachers. Of course, the requirements of the First Amendment must be met, but as described in Chapter 4, there is legal justification permitting teaching about religious ideas, so long as those ideas are not presented as the truth of the matter.

Public Opinion

Americans have been divided for years on the evolution issue with about 45 percent accepting it and 45 percent rejecting it and the rest undecided. This rate of acceptance is highly unusual among industrialized nations where typically 80 percent or more of the people accept evolution, most of the rest are unsure, and very few reject the idea outright (Dean, 2005). A variety of polls reveal several interesting insights about how the public views evolution. Remarkably, public opinion on creation has changed little over the last 25 years. Gallup Polls conducted since 1982 show that those who believe God either guided the life process or created life in its present form has stayed steady at 82 percent and only 9 to 13 percent believe that God had no part in the process (Polling Report, 2007). A recent CBS poll found those numbers to be 76 percent and 17 percent (Id.). Any argument that writes God out of the picture completely will be opposed by 76 to 91 percent of the population (Id.). Is it any wonder that the teaching of evolution in schools faces such difficulty?

Whereas scientists may shy from debate on evolution, most Americans favor it. Polls are remarkably consistent in showing about 58-65% of the general population favors teaching not just evolution or creationism but both, including ID (Polling Report, 2007).
survey shows that 68 percent of the people believe that the scientific theory of evolution is compatible with a belief in God (PFAW, 2000). A Zogby International survey showed 71 percent of Americans believe that public schools should teach scientific evidence both supporting and disputing Darwin's theory of evolution. Furthermore, 78 percent of those surveyed believe that students should also learn about scientific evidence that points to an intelligent design of life when evolution is taught (Hacker, 2004, p. 343).

Teaching evolution in schools.

As a result of the controversy surrounding teaching evolution, many science and elementary teachers do not teach the topic at all or barely touch on it despite state standards that mandate the teaching of evolution in almost every state. For example, in Minnesota 40 percent of biology teachers spend little or no time teaching evolution. In Indiana 40 percent of high school biology teachers say their teaching of evolution falls in the category of “avoidance” or “briefly mention.” One-third spend less than three days teaching evolution (Moore, 2004).

In addition to avoiding evolution, many teachers teach or want to teach creationism. In Minnesota approximately 15 percent of biology teachers include creationism in their classes. More than 25 percent of biology teachers believe creationism has a scientific basis. In Indiana 20 percent reject or are unsure about the scientific validity of evolution. In Oregon 39 percent of biology teachers believe creationism should be taught in science classes and in Louisiana 29 percent of biology teachers want to teach creationism in their classes (Moore, 2004). Though the numbers vary from poll to poll, studies over an extended period of time indicate that about one-third of biology teachers support the teaching of creationism or ID
according to Gerald Skoog, professor of education at Texas Tech University and former
president of the National Science Teachers Association (Dean, 2005).

There are several reasons for the treatment of evolution in schools. Many biology
teachers avoid teaching about evolution because, like the public at large, they know relatively
little about the subject. Other teachers avoid teaching about evolution because they are
creationists or are afraid of reprisals from creationist parents or administrators.

Predictably, the failure to teach evolution in schools leads to a populace that does not
really understand creationism or evolution or both (PFAW, 2000). Of people polled, 95
percent of the people had heard of evolution but only 50 percent were able to identify the
correct definition (PFAW). On the other hand, only 53 percent had heard of scientific
creationism. Of those, 59 percent agreed with the strict creationist interpretation. The
resistance to evolution as an explanation for the diversity of life may be related to this poor
base in common knowledge about science and evolution (Lawton, 1998). It also may be the
resistance of the general population to the misplaced attempts of some scientists to use
evolution as a platform against the existence of God (Miller, 1999). Regardless of the
accuracy of the poll numbers and who is on what side, the fact that many adults, who for the
most part grew up in American public schools, do not understand evolution highlights the
poor job American schools are doing teaching it.

Teachers reflect the culture’s lack of scientific knowledge. For example, In
Pennsylvania, 33 percent of science teachers do not think that evolution is central to biology
(Moore, 2000). “The public and most anti-evolutionists think of science as direct experience
and direct observation. But there’s an enormous amount of science that’s not done through
direct observation,” says Eugenie Scott of the National Center for Science Education
(Lawton, 1998). If teachers understood science better and what its limitations are, some think many of the conflicts over evolution could simply be avoided. Evolution does not have to have all the answers to be important to science and to be important for students to learn. Science is tentative, the best answer that we have based upon the best evidence we have, explained Danine Ezell a science teacher for San Diego schools (Lawton).

One of the reasons science teachers lack appropriate knowledge is that they do not have a good grounding in evolution. Even those who major in one of the life sciences receive little if any instruction in evolution as its universal acceptance in the scientific community is assumed, not argued. A recent graduate in microbiology commented that she learned more about evolution in high school than college. Even though there was a class on evolution at her university, it was optional (personal communication with Nah Htee Ku, May 26, 2005). This anecdote reveals the academy’s ignorance of the significance of claims against evolution in the public square.

**Education’s Dilemma**

Miller (1999) and Katskee (2006) report how incredulous scientists and science educators are that the theory of core importance to biology is so widely disbelieved. They do not understand that disbelief in evolution is not predicated on the science of evolution but on cultural resistance to any idea whose advocates invoke it as evidence against God. Given the choice of belief in God and belief in a theory that they are told rejects God, people choose God (Addicott, 2002, p. 1563). Scientists like Richard Dawkins may “take pride that the theory of evolution ‘made it possible to be an intellectually fulfilled atheist,’ but such statements only exacerbate the acceptance of the theory and lend ammunition to those who
insist that evolution is a form of religion or an idea antagonistic to religion” (Addicott, p. 1563-1564, internal citations omitted).

Teachers obviously are in a very difficult position. Depending on the situation, they may be underprepared to teach concepts of evolution, pressured to teach evolution in a conservative Christian setting because it is part of state standards, or pressured not to teach evolution even when it is part of the standard curriculum. Wayne Carley, the executive director of the National Association of Biology Teachers said in 1996 that he was worried that the debate may have a “chilling effect” on teachers (Sommerfeld, 1996). Certainly in the years since Carley made his statement, the situation has gotten worse not better.

The result of this public tension between the forces of good and evil, (good depends on where one’s sentiments lie) is that the state of teaching evolution in our public schools is in disarray. While scientists regularly win in courts of law, they lose in the court of public opinion. Evolution is not universally taught in our schools. Scientists would like to think that creationism will go away, but it will not. Creationism’s widespread appeal, combined with many scientists’ dismissal of the controversy, ensures that creationism will remain popular (Moore, 2000). Interest in intelligent design is growing and must now be considered in the equation as well.

The argument about the science of evolution and opposing ideas is already quite complex and vigorous and has only been briefly touched on here. Further complicating the evolution debate are the legal issues and the realities of pressures from members of school communities on all sides of the matter. It is the task of educational leaders to parse the rhetoric from the substantive arguments in analyzing this issue and reach a decision on how to handle the origins controversy.
The dilemma that schools face is how to deal with this complex issue. Many would have schools avoid it. Some schools have unsuccessfully tried to develop disclaimers about it (Freiler, 1995, Selman, 2005, and Kitzmiller, 2005). Here we argue that since the origins controversy is vigorously debated in the public square, it should also be addressed in our public schools.
Chapter 2 - Methodology

This paper will utilize the legal research methodological framework used by educational law researchers and attorneys as described primarily by Russo in Legal Research: The “Traditional” Method (2006). “The legal method and other forms of research serve essentially the same purpose: they are interested in better understanding the problem at hand” (Russo, 2006, p. 6). The legal research method is neither qualitative nor quantitative. Rather, it is a historical, systematic inquiry “involving the interpretation and explanation of the law” (p. 6). Legal research looks to the past, present and future. “By placing a legal dispute in perspective, researchers in education law hope not only to inform policymakers and practitioners about the meaning and status of the law but also seek to raise questions for future research” (p.7).

The legal method requires the researcher to search exhaustively through past cases related to the issue of interest to determine what courts have decided already and upon what facts the decisions are based. Cases carry with them different weights of authority with United States Supreme Court decisions carrying overriding authority over all others. Any authoritative ruling “of the highest court in a given jurisdiction is binding on lower courts within its purview” (Russo, p.7). This concept of precedent, or stare decisis requires lower courts to make similar decisions on cases based on similar facts as have been made in higher courts having jurisdiction over them. In this manner, all courts, state and federal, must adhere to rulings of the United States Supreme Court. Federal circuit courts must follow the rulings of the Supreme Court but do not have to follow decisions of other circuit courts. Federal district courts must follow the decisions of the Supreme Court and the circuit court that covers its district but do not have to follow decisions of other circuit courts. Likewise, lower
state courts adhere to the rulings of higher courts in their states but do not have to follow the
decisions of other state courts or the federal courts, except for the Supreme Court.

Precedent allows and establishes stability, consistency, and predictability to the law. It may also, however, give rise to different interpretations of the same issues developing in
different circuits or different states. This can muddle the law and impact its predictability. If
the Supreme Court feels the issue is an important one, it will take a case to resolve this
conflict. At other times, if the Supreme Court does not believe the conflict is of sufficient
merit, it will ignore the conflict and allow it to continue. School dress code issues are an
example of this as some courts have allowed restrictions of student dress and appearance
while others have not, citing First Amendment free expression concerns (Fischer, Schimmel,
& Stellman, 2006).

When legal researchers study emerging questions, they look to see how past
authoritative decisions have dealt with the same issue (Russo, 2006). If their position is
supported by past decisions, they argue that their position should be followed. If past
decisions refute their positions, researchers must attempt to distinguish their position from
established precedent by showing that the facts of the instant case are sufficiently different,
or that the court failed to consider other relevant legal arguments.

Sources of Law

Within the legal method, Russo describes three “broad categories of information” that are relevant when examining a legal issue: primary sources, secondary sources, and research
tools (Russo, 2006, p. 7). The source of law one begins with depends on preference and the
experience of the researcher. The more experienced researcher may go directly to a Supreme
Court case, which is a primary resource, while an inexperienced researcher may have to seek the aid of a research tool, or a commentary or article. A law review article or an entry in a legal encyclopedia can provide information to help understand a given issue. In addition, such resources generally contain citations directly to applicable case law and other secondary sources. In this manner, “they lead to the cross-referencing of additional sources of information, not unlike the triangulation of data in qualitative analyses” (Russo, p.8).

Primary Sources – The Law

In legal research, the law is the primary resource and articles and commentaries are secondary resources. The law includes the constitutions of the United States and the various states, statutes and their legislative histories, regulations, and case law (Russo, 2006). Case law typically serves to interpret constitutions, statutes, regulations, and prior judicial decisions in light of the unique set of facts before the deciding court.

The United States Constitution.

The United States Constitution is commonly referred to as ‘the law of the land’. It “provides the framework within which the entire [American] legal system operates” (Russo, p. 8). Any government action from the national level to the states to localities must not contradict or limit rights protected by the U.S. Constitution as interpreted by the Supreme Court. This action includes federal statutes, regulations, state constitutions, state statutes, regulations, municipal ordinances, school board policies, right down to the behavior of local government actors such as police officers and teachers. Federal, state and local action may provide more protection than the U.S. Constitution, but not less.
Education is not mentioned in the U.S. Constitution. As such, through the Tenth Amendment to the U.S. Constitution, it is a power “not delegated to the United States by the Constitution nor prohibited by it to the States”. Therefore it is “reserved to the States respectively, or to the people”. That being said, the federal government can, and does, intervene in disputes involving education when states are alleged to have deprived individuals of rights protected by the Constitution and federal statutes.

Besides providing for individual rights for people in America, the Constitution establishes the three branches of the federal government: the legislative, executive, and judicial branches. This system also exists in every state. Each branch provides a primary source of law.

The legislative branch -- Statutes.

Legislatures make the law. Except in Nebraska, the federal government and the remaining states have two houses of legislature. These houses act independently proposing, amending, and passing acts. If an act passes both houses, but because of amendments emerges in different forms, the houses must agree on a final form of the act before passing it on to the President in the case of a federal law or the governor in the case of a state law. If the chief executive does not veto an act, it becomes law. When interpreting statutes, courts will often look at the legislative history if the plain meaning of a statute is unclear. The legislative history follows the course of a statute through legislative hearings. Reviewing comments of the bill’s author and others, and examining detailed findings and statements of purpose included with a bill can help guide a court by clarifying the meaning of the statute (Russo, p.13).
The executive branch -- Regulations.

The executive branch is charged with enforcing or carrying out a law. Often times, laws are merely broad directives. The appropriate department of the executive branch, as part of the law, is given authority to develop regulations that serve to provide necessary details to make enforcement possible and consistent. Federal departments may also issue policy letters to respond to inquiries from those concerned with conforming to the regulations. The letters are meant to “either clarify a regulation or interpret what is required by federal law” (Russo, p. 9). For our purposes as educators, The U.S. Department of Education develops and implements regulations for federal education laws like No Child Left Behind. State education departments and school districts provide the details at the state and local level.

The judicial branch -- Case law.

The judiciary in America creates what is referred to as common law or case law whenever it interprets a constitution, statute, or regulation as they apply to circumstances that may have been overlooked, ignored, or unanticipated by the executive and legislative branches. Federal courts and most state judicial systems have three levels, trial courts, intermediate appellate courts, and a court of last resort. At the federal level, these are the District Courts, Circuit Courts of Appeal, and the Supreme Court, respectively. State courts generally use similar names but there are variations.

As mentioned previously, precedent governs the authority of legal decisions. Decisions of the United States Supreme Court are binding on all courts in the country, federal or state. State supreme court decisions are binding only in that state. Appellate court decisions are binding only in within the jurisdiction or circuit of that court. Courts in other jurisdictions may choose to be guided by such decisions but are under no obligation to follow
them. Rulings of trial courts apply only to the facts at hand but are often generalized to apply within the jurisdiction of district court and used to guide other districts.

Opinions are written to explain the ruling in a given case. At the trial level the trial judge writes the opinion. At the appellate level, one of the judges or justices is assigned to write the opinion for the majority of the court once a case has been decided. The report of the case may also contain concurring or dissenting opinions, but only the majority opinion has binding authority (Wren & Wren, 1986). The opinion of the court contains a holding that is justified, often at length, in the text of the opinion. There are often also statements and commentary that “are not essential to the court’s resolution of the precise issues presented for decision” (Wren & Wren, 1986, p. 45). These remarks are know as “dicta” or “dictum” and are not binding authority. Sometimes it is hard to separate dicta from the holding. This can lead to misinterpreting a court’s decision by a subsequent lower court judge or researchers. Dicta may also provide insight, however, into how the court may rule on a related matter.

Those unfamiliar with the legal process may be confused over the respective roles of juries and judges in trial courts. Juries are called on to make decisions on their understanding of the facts in a given case. Judges rule on the law by applying existing legal precedent to the facts at hand, deciding whether evidence is admissible, and when necessary, instructing the jury on how to apply the law.

Parties unhappy with decisions rendered at the trial level can normally appeal to the appropriate intermediate appellate court. A party may choose to appeal if it believes the judge has inappropriately applied the law to the unique facts before the trial court. Thirteen circuits make up the federal appellate court. Each circuit encompasses the federal district courts of several states except the Federal Circuit and D.C. Circuit, which only handle
appeals that arise from the federal district court of Washington, D.C. States have similar appeals systems but may call them by different names. A panel of three judges typically hears arguments from attorneys from both sides of a dispute and considers briefs filed by attorneys representing the parties. Appellate courts rely on the facts as they have been presented and relied upon to make the decision at the trial level. New evidence is not generally permitted. Appellate courts review a case for errors made by the judge in determining or interpreting the law. The appeals court either affirms the trial court, reverses it, or something in between. For example in a recent case discussed in the literature review, the 11th Circuit vacated and remanded the trial court opinion (Selman v. Cobb County, 2006). This means the whole decision was thrown out and the trial court must address the issues described by the appellate court and render a new opinion. This process could require an entirely new trial.

If a party is still not satisfied after a decision by an appellate court, it may seek review from the court of last resort in its jurisdiction. The Supreme Court is the court of last resort for federal court cases but it chooses to hear only about 100 of the around 5,000 cases appealed to it by writ of certiorari. The Supreme Court will only hear a case if four of the court’s nine justices agree to hear an appeal. Otherwise, the writ is denied and the lower court ruling stands as issued. Typically the Supreme Court chooses to hear cases where the circuits are in dispute or that offer an interesting or compelling legal question. It is considered somewhat easier for an appeal to reach a state’s highest court (Russo, 2006).
Secondary Sources

“Secondary sources are writings about the law rather than the law itself” (Russo, p.16). One typical source is law review articles. Law review articles often critique the law or provide advanced arguments about what the authors believe the law should be. Though these articles have no authoritative value they “can and do, provide the impetus for argument to change the law” (Russo, p.16). Other commonly used secondary sources are digests, articles in periodicals, legal encyclopedias and dictionaries, commercial restatements of particular topics in law, and books and treatises. Russo offers that secondary sources are “particularly valuable to individuals who are neither familiar with nor comfortable with a search through the law itself” (p. 18).

The most useful secondary source for educators in the field of education law is probably West’s Education Law Reporter. The Education Law Reporter offers articles with “accurate, concise, and up-to-date analyses of current and emerging legal topics for academicians and practitioners.” Russo describes it as more “user-friendly” with a wider appeal than law reviews. Law reviews are edited by law students and generally are more “comprehensive and extensively referenced analyses aimed primarily at academicians”(p.17). Despite hundreds of law reviews, only a very few are devoted entirely to education issues. They are the BYU Journal of Law and Education, the Journal of Law and Education, and the Journal of College and University Law (Russo, p.17).
The Process of Legal Research

According to Wren and Wren (1986) there are three essential steps to doing legal research: finding the law, reading the law, and updating the law. Each of these steps will be examined in turn.

Finding the Law

The most important knowledge one must possess in order to do effective legal research is how to find the law. Supreme Court decisions are found in three main resources. United States Reports is the official government publication, but Supreme Court opinions are also found in Supreme Court Reporter by West’s and the Lawyers’ Edition. The latter two reporters have the benefit of summaries, commentaries and other aids to research such as West’s Key numbers. Circuit court opinions are published in the Federal Reporter Series (F., F.2d, & F.3d). Federal district court opinions are found in the Federal Supplement Series (F. Supp. & F. Supp 2d). Published opinions of state appellate courts can most readily be found in West’s National Reporter System, which consists of seven regional reporters: Atlantic, North Eastern, North Western, Pacific, South Eastern, Southern, and South Western (Russo, 2006). West also publishes separate reporters for over thirty states and some jurisdictions such as New Jersey and New York publish their own rulings.

Federal statutes are located in the United States Code (U.S.C.) or United States Code Annotated (U.S.C.A.). States have their own codes. Legislative histories of federal statutes are found in the Congressional Record, which provides a report of daily proceedings in Congress. Additionally, the United States Code Congressional and Administrative News publishes selected committee reports and copies of hearings and reports can often be
retrieved by contacting the committee or subcommittee that held the proceeding (Russo, 2006, p. 13). Federal regulations are located in the code of Federal Regulations (C.F.R.) and state regulations in their own titles. Policy letters are found in the Federal Register and often reproduced by law-reporting services. Individual administrative agencies also keep their own records of administrative rulings and decisions they make (Wren & Wren, 1986).

Citations.

In order to find an actual reference to the law the researcher needs to be able to read legal citations. All legal citations follow the same pattern. Take the citation *for Edwards v. Aguillard* for example: 482 U.S. 578 (1987). The first number stands for the volume number where the case is located. The abbreviation U.S. indicates the book or series where the case is found, in this example United States Reports. Only Supreme Court cases are found in United States Reports so one knows instantly that this is a Supreme Court case. The second number is the page number on which the case begins. The year the decision was issued is in parentheses. While the Supreme Court Reporter and the Lawyers’ Edition have their own parallel citations, the U.S. Reports citations will work if one chooses to use them. In lower court cases the circuit number or the district are also included in the parentheses so (11th Cir. 2006) tells the reader the case was decided in the Eleventh Circuit of the Court of Appeals, and (M.D. Pa. 2005) tells the reader the case was decided in the middle district of Pennsylvania. Statutes, regulations and state law follow the same format.

Searching the law

Traditionally, researchers spent most of their time looking through bound volumes of case law, statutes, and loose-leaf binders of regulations and advisory letters. Now, though universities, law schools and large law firms still carry hard copies, much of the research is
done using computers. There are two main legal search engines, LEXIS and Westlaw. The strategies involved when searching manually or using computers are substantially the same, and useful to discuss.

“How or where a researcher begins investigating a topic is undoubtedly related that person’s familiarity with the law and with legal research” (Russo, 2006, p. 19). Wren and Wren (1986) describe a number of research strategies but Russo (2006) focuses on three main strategies, which will be our focus.

Digests are compilations or indexes to the law organized by major points of law and briefly summarized in short paragraphs or head notes. The most comprehensive digest system is by the West Publishing Company (Russo, 2006). West’s system has seven major heading and more than 400 numbered and keyed topics typically referred to as key numbers. Key numbers are further subdivided into manageable units. Relevant to education law are key numbers for schools, colleges and universities, civil rights, to name a few. Since West has a uniform key number system for all of its federal and state reporters one can easily find cases pertaining to related topics.

The topic approach is often used when the researcher has little general knowledge of the areas of law involved in a research problem. The Index to Legal Periodicals lists articles from law reviews by topic and author. A person interested in science and religion in schools could thus look for entries under topics such as “Education”, or “Religion”, or “Schools and school districts” (Russo, 2006, p. 21). This strategy can also involve reading one or more secondary sources, such as an educational law book. The initial cases found for the analysis section of this paper were found in this way.
One useful strategy mentioned by Wren and Wren but not Russo is the Known Authority approach. It can be used when one knows the citation of a constitutional provision, case, statute, or regulation relevant to the research problem. Known cases can then provide case head note information such as digest topic and Key or section numbers to help locate additional primary authorities (Wren & Wren, 1986). LEXIS and Westlaw can be used to find cases that refer to the known case and find other relevant cases cited in the text of the known case.

As an experienced legal researcher, I did not utilize any digests. I did use educational law texts to reveal some foundational cases in my area of interest and for useful summaries of the status of the law. I used Westlaw and LEXIS extensively, but in two different ways. The main way I used them was to find other cases cited in cases I was reading, or that had cited the case I was reading. Both search engines have links to cited cases embedded in the text of the opinion. I also used Westlaw’s citation history function to find more recent cases that cited the case I was reading either with approval or to distinguish the facts of the instant case from the cited case.

In addition, I used Westlaw to search for law review articles on the origins controversy utilizing the search protocol required for the process. Once my search revealed numerous articles, citations in those articles led me to other earlier articles.

Reading the Law

Reading the law involves evaluating the usefulness of a case, statute regulation or secondary source and contains two steps, internal evaluation and external evaluation (Wren & Wren, 1986). Internal evaluation involves determining whether a particular case or other
legal authority applies to one’s research problem. It first requires an analysis of the facts of
the case to determine how similar they are to the facts of the research problem. Second the
authority’s legal significance and impact with respect to the research problem needs to be
analyzed (Wren & Wren, p. 80).

External evaluation requires a determination of the current validity of a case or other
legal authority. For court cases external evaluation focuses on how subsequent court
decisions have interpreted and applied cases relevant to the research problem (Wren & Wren,
1986). Subsequent and higher courts may limit or overturn a ruling. Though *stare decisis* is
the rule, the Supreme Court can and has limited and overturned past decisions.

External evaluation also involves “setting the case or statute you’ve found in its
broader legal context” (Wren & Wren, p. 90). The goal here is to determine the strength of a
ruling from a case. In performing such an evaluation one must look to see how recent court
decisions interpret or apply the primary authority or deal generally with the same issues (Id.).
For example the *Lemon* test, widely used in school religion cases has evolved over the years
and courts now also routinely apply the endorsement test (see e.g. *Kitzmiller v. Dover, 2005*).
Secondary sources may also be helpful when researching areas of changing or unsettled areas
of the law.

For my purposes, I relied extensively on case law in several areas concerning
education namely Establishment Clause cases dealing directly with the origins controversy,
Establishment and Free Exercise Clause cases dealing with the use of religion in school
generally, and Free Speech cases mostly in an education context. Regarding the origins
controversy, I also heavily utilized law reviews expressly on point, as well as some legal
book-length commentaries on the controversy. Regarding other aspects of my argument I
also utilized law review articles but turned to non-legal, education theory books about the role of religion in schools.

**Updating the Law**

Updating the law involves significant overlap with external evaluation but is important enough to merit its own attention. “This step involves making sure the legal rules you’ve determined apply to your problem are still valid law…Because outdated law is worse than no law at all, your legal research must include careful attention to updating the legal authorities that govern your problem” (Wren & Wren, 1986, p. 95). Shepardizing a case is a widely used method of updating the law. Using a reference called *Shepard’s Citations*, one checks the subsequent treatment of cases. What used to be a time consuming ritual, however, has now been largely replaced by computerized updates. In Westlaw, if a case has received negative treatment it will be “flagged”. One only has to click on the flag to find out what has become of the case of interest. Such electronic updating is used in this paper.

A relevant example of the importance of updating the law is the case of *Selman v Cobb County*. In early 2005 the federal district court rendered its decision on the matter of concern (*Selman v. Cobb County*, 2005). On appeal, however, the Eleventh Circuit Court of Appeals vacated and remanded the decision (*Selman v Cobb County*, 2006). As a district court decision, the case carried little authority but was cited extensively in *Kitzmiller v Dover* (2005). This development arguably serves to compromise the persuasiveness the *Kitzmiller* decision may have on similar cases that subsequently arise.
Limitations of the Study

This study is limited in that it only looks at cases involving the conflict between religion and teaching evolution in federal courts because, typically, it is where these cases are heard. Some state cases will be utilized in the analysis section particularly with regards to curriculum issues and school as the ‘marketplace of ideas’ since curriculum issues are also seen as a state matter. Any study using the legal research method primarily seeks to predict how a court will rule. It does not go “beyond the law to consider the attitudes, values, and beliefs of those affected by legal decisions” (Russo, 2006, p.22). Also, neither the author nor the legal method is particularly well equipped to discuss the scientific merits of evolution and alternate ideas for the origins of life. Although this is a valuable discussion, and I present the major arguments, it is being undertaken elsewhere. Instead, this study explores in more depth the constitutional viability as well as the educational and cultural value of teaching different sides to this controversial topic.
Chapter 3 - Literature Review of the Origins Controversy

The primary legal right of students implicated in the origins of life debate is that of freedom of religion as guaranteed in the First Amendment to the U.S. Constitution. In pertinent part the First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The first part of the freedom of religion clause is known as the Establishment Clause. The second part is known as the Free Exercise Clause. Almost all the teaching of evolution cases turn on the Establishment Clause.

Case Law

The first stop in our exploration of the legal dimensions of the origins controversy is to examine the Supreme Court decisions that provide the framework for legal discussions in all areas implicating religion and government action.

Establishment Clause Tests

Over the years, the Supreme Court has utilized several “tests” to examine whether government action has violated the Establishment Clause.

The Lemon test.

The baseline test used by the federal courts is referred to as the Lemon test. The Lemon test was developed in Lemon v. Kurtzman (1971). In Lemon the United States Supreme Court ruled against two different state statutes that unconstitutionally involved religion in the public schools in different ways. One was a Rhode Island statute that allowed the state to augment the salaries of teachers who taught non-religious subjects in private elementary schools. This statute created an excessive entanglement between government and
religion in that the state must consistently monitor the subsidized teachers to ensure that they
do not instruct students in religious matters. The second statute rejected by the Court in
*Lemon* was a Pennsylvania act that authorized the public school superintendent to provide
payment to any private school that supplied "secular educational services" for the state. Here,
the Court reasoned that the state's need to examine a religious school's financial records to
establish the nature of its expenditures would produce an impermissible “intimate and

The Supreme Court used a three part test to determine whether a given policy or law
violates the Establishment Clause of the First Amendment of the U.S. Constitution. First, the
statute must have a secular legislative purpose; second, its principle or primary effect must be
one that neither advances nor inhibits religion; and third, the statute must not foster “an
excessive government entanglement with religion” (p. 612). If a challenged policy or law
fails only one prong of the test it is ruled unconstitutional.

The *Lemon* test seems to be losing favor with the court. In fact, Justice Scalia, its
most vocal critic, in his dissent of denial of certiorari stated that he would like to “take the
opportunity to inter the *Lemon* test once for all” (*Tangipahoa v. Freiler*, 2000, p. 2708). Until
the Supreme Court grants Justice Scalia his wish, the lower courts are likely to use the test
when analyzing Establishment Clause issues in a school setting as the courts did in *Kitzmiller v. Dover* (2005) and *Selman v. Cobb County* (2005).

*Agostini v. Felton* (1997) collapsed the second and third prongs of the *Lemon* test at
least as it related to funding certain activities at private schools. *Agostini* involved the
provision of public teachers to private (including religious) schools in order to satisfy Title I
of the federal Elementary and Secondary Education Act of 1965 requirements to help eligible
students receive support in remedial education, guidance and job counseling (p. 209). Justice O’Connor recognized that there were many similarities between the factors used to examine the “effect” and “entanglement” prongs of the Lemon test. She concluded, “Thus, it is simplest to recognize why entanglement is significant and treat it…as an aspect of the inquiry into a statute's effect (p. 233).

*The endorsement test.*

Another test courts sometimes use is known as the endorsement test. Though it has not replaced the Lemon test, the federal courts in Establishment Clause cases often use it. Indeed, the courts in both *Selman v. Cobb County* (2005) and *Kitzmiller v. Dover* (2005) also used the endorsement test as part of their analysis.

Justice O’Connor first presented the endorsement test in her concurrence in *Lynch v Donnelly* (1984). O’Connor argued that “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community” (p. 688). She noted that the government directly infringes the Establishment Clause through “endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message”(p. 688).

An early application of the endorsement test by the Supreme Court was *County of Allegheny v. ACLU* (1989). This case concerned two recurring holiday displays located on public property in downtown Pittsburgh. One was a crèche set up on the Grand Staircase of the Allegheny County Courthouse. The second was a Chanukah menorah placed outside the City-County Building, next to a Christmas tree and a sign saluting liberty. A sharply divided
court and a fractured opinion found that the crèche was an endorsement of religion by government while the menorah displayed next to a Christmas tree was not. The fact that the crèche had a sign praising God and the menorah had a sign celebrating liberty influenced the decision.

Rossow and Stefkovich (2005) identify two prongs in the endorsement test. The first prong asks, “what message was intended” by the government. If the government intended to send a message that it “favors” religion or religiously oriented citizens, the action constitutes an Establishment Clause violation. If the court concludes that the message intended was neutral then it will move to the next prong. The second prong asks, “what message was received by citizens about the government endorsement or disfavoring of religion?” Regardless of the intent of government, if the message received is that government favors or disfavors religion, then an Establishment Clause violation exists. In order for the challenged government activity to stand, both prongs of the endorsement test must be satisfied (p. 730-731).

*The coercion test.*

Courts may also consider a third test, the coercion test, presented by Justice Kennedy in *Lee v. Weisman* (1992). The coercion test maintains that if someone is coerced to support or participate in a religious activity, that activity violates the Establishment Clause. In *Lee* a student and her parent sued to prevent inclusion of invocations and benedictions in the form of prayer in graduation ceremonies of city public schools. The Court in *Lee* ruled against the use of a prayer at a secondary school graduation event. The Court found that although attendance at the event was voluntary, graduation was such an important part of the school experience that one would be expected to come. Students should not be required to give up
attendance at the ceremony, an important event in their lives, in order to avoid unwanted exposure to religion. The Court held that a school cannot persuade or compel a student to participate in a religious exercise.

The Supreme Court seems unsettled on what test to use under what circumstances. In turn, the lower courts treat Establishment Clause cases unevenly, but with a decidedly cautious bent. With two new justices, John Roberts and Samuel Alito, on the Court, the Supreme Court is poised to revise the way to look at Establishment Clause cases. For now, however, the lower courts will apply one or all of the tests noted above.

**Evolution Cases**

To understand the legal rights of students in the origins debate, the legal history of the controversy must be reviewed. Over the years, there have been numerous laws passed and policies adopted that attempted to limit the teaching of evolution or promote the teaching of creationism. The most famous early case in the realm of creationism versus evolution is known as the “Scopes Monkey Trial.” In 1925 John Scopes was arrested and put on trial for teaching evolution in violation of a Tennessee law banning such activity. The trial aroused the interest of the entire country and pitted two of the most well known legal minds of the time against each other, Clarence Darrow and William Jennings Bryan. In a sensational trial that was fictionally adapted to the play and movie *Inherit the Wind*, Scopes was convicted and fined 100 dollars. His conviction was overturned later on technical grounds. The Tennessee law was never challenged and remained on the books for the next forty years.

The modern judicial history begins with *Epperson v. Arkansas*, a 1968 Supreme Court case, where the Court struck down a state statute that made it unlawful for teachers to instruct
on the Darwinian theory of evolution in public schools. Susan Epperson, a young teacher, was hired by the Little Rock school system to teach 10th grade biology. At the start of her second year with the district, in the fall of 1965, she was given a new textbook that contained material on evolution. To teach the material would have been in violation of the state law and made her subject to dismissal. She initiated the case in state court seeking a declaration that the Arkansas statute was void. The lower court found the statute void but the Arkansas Supreme Court reversed (p. 99-101).

The United States Supreme Court found that the law proscribed a particular segment from a select body of knowledge solely because it conflicted with a particular religious doctrine (p. 103). Justice Fortas wrote the opinion for the Court and noted that this was in violation of the First Amendment:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion” (p. 104, citations omitted).

The Court defended the appropriateness of using the Bible and the study of religions “from a literary and historic viewpoint, presented objectively as part of a secular program of education…”(p. 106). It held, however, that the Arkansas statute was unconstitutional because the prohibition of teaching evolution was clearly motivated by the religious beliefs of some of its citizens (p. 107).
Several lower court cases later dealt again with the question of origins. *Daniel v. Waters*, a 1975 Sixth Circuit decision, declared a statute unconstitutional that required a disclaimer to accompany all theories of origin except the Biblical theory of creation. The Tennessee statute required, among other things, that any textbook expressing an opinion about human origins was prohibited from use unless it specifically stated that the opinion was a theory and not represented as scientific fact. The statute also required that the Biblical account of creation and other theories of creation be printed at the same time with commensurate attention and equal emphasis and that only the Biblical account of creation as set forth in Genesis could be printed without any disclaimer. The court found that the result of the:

legislation is a clearly defined preferential position for the Biblical version of creation as opposed to any account of the development of man based on scientific research and reasoning. For a state to seek to enforce such a preference by law is to seek to accomplish the very establishment of religion which the First Amendment to the Constitution of the United States squarely forbids (p. 489).

An Arkansas law was challenged in federal court in *McLean v. Arkansas* and overturned in 1982. At issue was a statute that read in pertinent part, “Public schools within this State shall give balanced treatment to creation-science and to evolution-science” (1982, p. 1256). In *McLean*, the judge applied the *Lemon* test to rule that the statute was unconstitutional. The judge held that the “the evidence is overwhelming that both the purpose and effect of [the act] is the advancement of religion in public schools” (p. 1264). The court noted that the senator who introduced the act in the Arkansas Senate was “a self-described 'born again' Christian Fundamentalist,” whose efforts were “motivated solely by his
religious beliefs and desire to see the Biblical version of creation taught in the public
schools” (p. 1263). The senator understood he was sponsoring the teaching of a religious
document but felt it did not violate the First Amendment because it did not favor one
denomination over another (p. 1263, n 14).

In addition to finding that there was no secular purpose for the act, the judge ruled that
based on understood definitions of science, creation-science is not science. He noted that
creation science as described in the law failed to meet the essential characteristics of science.
(p. 1267).¹

The defining case on the topic of teaching evolution is *Edwards v. Aguillard* decided
in 1987 by the Supreme Court. In *Edwards* the Court struck down a Louisiana law that
prohibited teaching evolution unless creation science was also taught. No school was
required to teach either but if one was taught, the other had to be taught. Parents of students,
Louisiana teachers and religious leaders challenged the law. The Supreme Court applied only
the first prong of the *Lemon* test and found that the legislature did not have a secular purpose
for adopting the law.

*Edwards* turns on the fact that the statute clearly had a discriminatory preference for
the teaching of creationism over evolution as demonstrated by provisions in the act. One
goal forwarded for the act was to provide a more comprehensive science curriculum but the
Court noted that such a goal “is not furthered either by outlawing the teaching of evolution or
by requiring the teaching of creation science”(p. 587). Another goal of the act was to advance

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¹ The judge wrote that the essential characteristics of science are: (1) It is guided by
natural law; (2) It has to be explanatory by reference to natural law; (3) It is testable against
the empirical world; (4) Its conclusions are tentative, i.e., are not necessarily the final word;
and (5) It is falsifiable. (Ruse and other science witnesses) (p. 1267).
academic freedom. Again the Court refuted the proffered goal because “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” (p. 587). Furthermore, the act required curriculum guides for creation science but not evolution and provided for curriculum services for creation science but not evolution (p. 588). Finally, the act protected anyone from discrimination who chose to be a creation-scientist or teach creationism but did not offer similar protection to those who chose to teach evolution or refused to teach creation science (p. 588).

Since the Edwards decision, courts have addressed the constitutionality of teachers refusing to teach evolution and of disclaimers and stickers. Teachers have tried to get out of teaching evolution against the wishes of their district and have tried to teach non-evolutionary theories about the origins of life, claiming Free Exercise of Religion rights. In Peloza v. Capistrano (1994), a Ninth Circuit decision, a high school biology teacher brought action against his school district challenging its requirement that he teach evolutionism, as well as a school district order barring him from discussing his religious beliefs with students.

Peloza argued that evolutionism is a religious belief, not a valid scientific theory. The Court refused to accept Peloza’s definition of evolution “as a concept that embraces the belief that the universe came into existence without a Creator” (Peloza, p. 521). Instead, the Court defined evolution as “a biological concept: higher life forms evolve from lower ones. The concept has nothing to do with how the universe was created; it has nothing to do with whether or not there is a divine Creator (who did or did not create the universe or did or did not plan evolution as part of a divine scheme)” (p. 521, emphasis original). The Circuit Court
agreed with the district court that since evolution “is not a religion, to require an instructor to teach this theory is not a violation of the Establishment Clause” (p. 521).

In Freiler v. Tangipahoa Parish Board of Education (1999), parents of public school children sued to keep their school board from requiring that a disclaimer be read before the teaching of evolution in all elementary and secondary classes. The Fifth Circuit invalidated the disclaimer because the disclaimer had the primary effect of endorsing a particular religious viewpoint. The disclaimer approved by the Tangipahoa Parish board of Education read:

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept. It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion (p. 341).

The court held that the disclaimer violated the second prong of the Lemon test because it had the primary effect of protecting and maintaining a particular religious viewpoint as well as endorsing religion. Part of the problem was that the “Biblical version of Creation” was the only alternative theory explicitly referenced. It is important to observe that the court in Freiler also provided for the possibility of disclaimers being found acceptable when it stated, “We do not confront the broader issue of whether the reading of any disclaimer before
the teaching of evolution would amount to an unconstitutional establishment of religion (p. 341).

Another case involving a disclaimer is still active in Cobb County, the second largest school district in Georgia. The state curriculum mandates teaching evolution but the district did not teach evolution due to resistance from vocal members of the community. In the interest of teaching evolution and, at the same time, placating its conservative constituents, the school board voted to place a sticker in certain textbooks. The sticker read: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered” (Selman v. Cobb County, 2005, p. 1292). The result of their efforts was that, as inevitably happens, the board was sued in federal district court.

In federal district court the judge ruled that the sticker violated the Establishment Clause of the First Amendment of the U.S. Constitution. Applying the Lemon test, the court felt that on the whole the sticker appeared to advance the religious viewpoint of fundamentalist Christians. The judge acknowledged that the secular purpose of the disclaimer was not a “sham.” In fact, the school board members worked hard to design an acceptable disclaimer since they were conscientiously trying to get evolution taught in school.

The disclaimer instead fell on the second prong, which requires that the effect not favor a particular religious view. The judge held that the wording of the sticker implied that the sticker devalued the theory of evolution. The judge explained, “In light of the historical opposition to evolution by Christian fundamentalists and creationists in Cobb County and throughout the Nation, the informed, reasonable observer would infer the School Board's problem with evolution to be that evolution does not acknowledge a creator” (p. 1309).
Selman v Cobb County was appealed and the Eleventh Circuit Court of Appeals vacated the decision and remanded the matter back to the district court (Selman v. Cobb County, 2006). The circuit court stated that it vacated the district court’s decision because of what it saw as an unclear sequence of evidence. The court reasoned that there is no bright line test when it comes to Establishment Clause cases, but instead each one must be decided on a case-by-case basis. Since the “devil is in the details” wrote the court, the facts and their sequence are of critical importance (p. 1322). The circuit court made it clear that it was not ruling on any of the legal issues that “may have shaped the district court’s conclusions on the three Lemon prongs” (p. 1338).

The first case to address the issue of teaching intelligent design (ID) in school is Kitzmiller v. Dover (2005). Kitzmiller v. Dover arose when the school board of Dover Area School District, a small rural district of 3,700 students in south central Pennsylvania first passed a resolution in October of 2004 reading:

Students will be made aware of gaps/problems in Darwin’s theory and of other theories of evolution including, but not limited to, intelligent design.

Note: Origins of Life is not taught. (Kitzmiller v Dover, 2005, p. 708).

A month later, the school board decided to include a disclaimer to be read prior to the teaching of ninth grade biology classes about evolution. The disclaimer read:

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

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

Intelligent Design is an explanation of the origin of life that differs from Darwin’s view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an open mind.

The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments (p. 708).

Although Pennsylvania standards require that students learn about Charles Darwin’s theory of evolution, the subject of life’s origins was not taught in Dover. Any discussions of that topic were left to “individual students and their families” (Cavanaugh, 2004).

In *Kitzmiller*, the judge first applied the endorsement test and then the *Lemon* test. The court stated that, “the [endorsement] test consists of the reviewing court determining what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows the policy’s language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose” (*Kitzmiller*, p. 715, other citations omitted). The inquiry for the judge was whether the ID Policy had the effect of endorsement or disapproval of religion to an objective observer (p. 715).

The court in *Kitzmiller* applied the endorsement test three different ways. First it considered the perspective of an objective observer outside of Dover (p. 716). Among other
things, the court found that ID is an old religious argument traceable to Thomas Aquinas (p. 718), The works of notable ID authors promote an explicitly Christian viewpoint (p. 719). The “Wedge Document” developed by the pro-ID Discovery Institute expresses its goal "to replace materialistic explanations with the theistic understanding that nature and human beings are created by God."(p. 720).

Next the court considered what an objective student in Dover might perceive (p. 723). Each phrase of the disclaimer was analyzed to reveal an unacceptable effect such as how it singles out evolution for scrutiny but not other ideas, how it implies a disavowal of evolution, and how it endorses a particular book about ID but not evolution or other alternatives (p. 725).

Lastly it considered the issue from the lens of an objective Dover citizen (p. 729). Here the court recounted how the debate had been carried on in public using, expressly religious terms (p. 730). This included open board meetings (p. 731).

In short, the court found that all three objective observers would have understood the ID Policy as an endorsement of religion. The court reasoned that the disclaimer favored a religious viewpoint because ID is a form of creationism (p. 720), and it was singled out as the only alternative to evolution mentioned in the disclaimer (p. 725). Additionally, the board expressed its interest in adopting the policy for religious reasons (p. 730).

The court in *Kitzmiller* also applied the *Lemon* test. In examining the purpose of the ID Policy, the judge focused on the activities of the board and its members. He recounted in painstaking detail the religious agenda of many of the board members, their ignoring of attorney warnings, irregularities in board proceedings, lies and cover-ups, an utter lack of understanding of ID, and the passing of the ID Policy with “absolutely no discussion of the
concept of ID, no discussion of how presenting it to students would improve science education, and no justification…offered by any Board member for the curriculum change” (p. 758-759).

Addressing the first prong of the *Lemon* test, the court determined that there was no secular purpose to the ID policy. It noted that “the statement of such purpose be sincere and not a sham” (p. 763). The purpose of the policy was supposed to be to improve science education and critical thinking skills, but the board made no attempt to inquire how teaching ID would either improve science education or improve critical thinking skills.

For the effect aspect of the *Lemon* test the judge determined that the only real effect of the ID Policy was to advance religion, and the disclaimer implicitly endorsed religious theories of origins and implied that the school board approved of the religious principles. The overall effect of the school board’s actions was to impose a religious view of biological origins by adopting the curriculum change to the biology course (p. 764).

Critical to the decision of Judge Jones in this case were the actions of the school board prior to the passing of the ID Policy and the validity of intelligent design as a science. The judge offered numerous examples of board members’ actions that advocated for the ID Policy in “expressly religious terms with their comments reported extensively in the local newspaper” (*Kitzmiller*, p. 730) In another instance, the school board sent out “propaganda” advocating ID and denigrating evolution to every house in the district (p. 730).

The judge in the case not only ruled that the policy violated the First Amendment, but went on to decide that intelligent design is not science and cannot be taught in science class (p. 765). Some reasons for the judge’s determination that ID is not science are because it “has failed to publish in peer-reviewed journals, engage in research and testing, and
gain acceptance in the scientific community” (p. 745). After the trial, but before the court’s decision, in school board elections held in November of 2005, most of the Dover school board was voted out and replaced by candidates who opposed the teaching of intelligent design. Since the new board members agree with the finding of the court, there will be no appeal of this case.

Other Relevant Establishment Clause Cases

_Lynch v. Donnelly_ (1984) does not involve a school, but its implications for education are important to examine. Lynch concerned the display of a nativity scene during the holiday season at a park in a shopping district. Included along with the nativity scene was Santa Clause, his house and reindeer, a Christmas tree and a sign that said “Seasons Greetings.” In a 5-4 decision, the Supreme Court upheld the municipality’s participation in the display. Notably, the court drew a distinction between permitting some religious connection by government and violating the Establishment Clause:

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation...." _Committee for Public Education & Religious Liberty v. Nyquist_, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L.Ed.2d 948 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, e.g., _Zorach v. Clauson_, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952); _McCollum v. Board of Education_, 333 U.S. 203, 211, 68 S.Ct.
461, 465, 92 L.Ed. 649 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Zorach, supra, 343 U.S., at 314, 72 S.Ct., at 684. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." McCollum, supra, 333 U.S., at 211-212, 68 S.Ct., at 465 (p. 673).

Important to the Court was the history of the United States and the acknowledgement of the role of religion in it:

There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly: "We are a religious people whose institutions presuppose a Supreme Being"(p. 675, quoting Zorach v. Clauson 1952, p. 313).

The Supreme Court, with a point obviously missed by Judge Jones in Kitzmiller, established that each case must be looked at individually as “no fixed, per se rule can be framed” (p. 678). The courts’ role rather is to scrutinize the “challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so” (p. 678). When performing this role, the court acknowledged that the benefits to religion can be substantial and still not violate the Establishment Clause (p. 680). The benefit to religion alone does not make a law constitutionally invalid (p. 683).
The Establishment Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." (p. 678-679, quoting Lemon, p. 614). This approach then requires the courts to look past the religious content of an activity, curriculum, or enactment to the whole picture. To avoid doing so and instead “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause” (p. 680). The courts in both Kitzmiller and Selman did focus exclusively on the religious component of the activity involved, thus running afoul with Lynch.

In Kitzmiller, the judge did not err until he attacked the idea of intelligent design, found its content to have religious implications and found the idea a violation of the Establishment Clause. While his conclusion that the ID Policy, as presented in this case, was a violation of the Establishment Clause, his conclusion that ID is not science should do little to further his goal to “prevent the obvious waste of judicial and other resources which would be occasioned by a subsequent trial involving the precise question that is before us” (Kitzmiller, p. 735). The judge’s goal will be elusive because he fails to take into consideration that each case requires a fact specific inquiry.

The 11th Circuit Court summarized the findings in several cases and restated that the Establishment Clause requires neutrality between religion and nonreligion. Since “neutrality cannot be clearly defined for all times in absolute terms”, each case must look to the particular acts in question and decide whether they are intended to establish or interfere with religious beliefs or have that effect. Because the facts are so important, there can be no “bright-line” test in Establishment Clause challenges and each case must be decided on a case-by-case basis. (Selman v. Cobb County, 2006).
In Selman at the district court level, the court had to dig even further to create a connection between the disclaimer and fundamentalist Christian thought. Upon finding a religious connection, the matter at issue was deemed unconstitutional. Finding an action unconstitutional merely because it has a nexus to religion is simply inconsistent with the dictates of the Supreme Court in Establishment Clause matters as expressed in Lynch.

An observation by the Ninth Circuit in Kreisner v. San Diego (1993) provides useful insight into the proper handling of Establishment Clause cases. There the court said that Establishment Clause cases cannot be about the content of the message. “The Lemon test focuses our inquiry on the objective circumstances—such as its location and sponsorship—that measure the government's involvement in the religious display. The test thus avoids the serious risks associated with judicial scrutiny of the content of the message conveyed” (p. 781). The Ninth Circuit required that a state have a compelling interest in order to forbid erecting a display in a park because of the religious content of its message. The important point of Kreisner is that the content of the speech should not determine its constitutionality. Since it is a Ninth Circuit decision, the courts in Kitzmiller, and Selman did not have to follow its holding. For our purposes, and developing an acceptable origins policy, Kreisner lends support that schools should not be dissuaded from engaging in the origins debate because of the religious content of ID and creationism. Schools are well-advised however to be very cautious regarding the objective circumstances surrounding the handling of the controversy.

*Law Review and Law Journal Articles*
Despite the predictable result of any case brought to court regarding the issue of teaching the origins of life in schools, several legal scholars are convinced there is a place for teaching alternatives to evolution in schools. In the years just prior to the *Kitzmiller* decision, scholars examined the merits of intelligent design (DeWolf, Meyer, & DeForrest, 2000, Addicott, 2002, Wexler, 2003, Smith, 2005), the possible acceptable use of disclaimers (Hacker, 2004, Edgington, 2004) and the possibility of removing evolution from the curriculum (George, 2001). In the wake of *Kitzmiller*, legal scholars have been busy writing and publishing their analyses of the decision. What follows is a review of articles written both before and after *Kitzmiller*.

The literature has three camps. One camp is the intelligent design defenders. They argue on behalf of intelligent design’s scientific merits, against evolution’s science and religiosity, and in favor of the constitutional merit of teaching ID. A second distinct camp features evolution defenders who are critical of what they perceive to be the fundamentalist Christian agenda of ID supporters, point out the many flaws in the science of ID, praise the merits of evolution, and argue that the Constitution prohibits ID in the science classroom. A third camp is either nonjudgmental, or skeptical of ID but well aware of the power of its movement. By the same token it acknowledges the evolution camp’s blemishes, and is critical of the courts’ handling of Establishment Clause issues.

*Literature Prior to Kitzmiller*

*Intelligent design defenders.*

The intelligent design camp is led by scholars who are affiliated with the Discovery Institute, the major organization that backs ID. DeWolf, Meyer, and DeForrest (2000), write
an article from the perspective of a hypothetical high school science teacher faced with the realization that his high school biology text is a flawed and oversimplified, dogmatic presentation of biology let alone evolution. The authors point out some of the perceived shortcomings of high school texts including the characterization of what evolution means as a unitary concept shared by all scientists. They offer that evolution can mean everything from “the universal common ancestry thesis, to small-scale change, to large-scale innovation via a strictly mindless material mechanism” (p.43).

The authors offer several other criticisms of the treatment of evolution in high school texts. For one, they note that texts often omit mention that the Cambrian explosion of 530 million years ago, when most of the major animal body plans suddenly appeared, contradicts Darwin’s expectations that the fossil record would reveal a “gradual step-by-step change” (p. 42) They also posit that while natural selection “explains small-scale ‘micro-evolutionary’ changes (such as the beak size and shape of the Galapagos finches), it fails to explain the large scale ‘macro-evolutionary’ transformations required to build novel organs, body plans, and morphological structures”(p. 43). The authors then list ways that scientists writing in technical journals across the subdisciplines of biology have questioned neo-Darwinian theory on many evidential and theoretical grounds, including:

(1) The neo-Darwinian mechanism of natural selection acting on random variations does not seem sufficient to produce:

(a) novel specified genetic information,

(b) "irreducibly complex," "functionally integrated" molecular machines and systems (such as bacterial motors, signal transduction circuits or the blood clotting system),
(c) novel organs and morphological structures (such as wings, feathers, eyes, echo location, the amniotic egg, skin, nervous systems, and multicellularity), or

(d) novel body plans.

(2) Many significant mechanisms of evolutionary change do not involve random mutations as the neo-Darwinian mechanism requires, but instead seem to be directed by preprogrammed responses to environmental stimuli.

(3) The pattern of sudden appearance, missing transitional forms, and "stasis" in the fossil record--as seen in the "Cambrian explosion," the "marine Mesozoic revolution," and the "big bloom" of angiosperm plant life, for example--does not conform to neo-Darwinian expectations about the history of life.

(4) Evidence from developmental biology suggests clear limits to the amount of evolutionary change that organisms can undergo, casting doubt on the Darwinian theory of common descent, and suggesting a reason for morphological stasis in the fossil record.

(5) Many homologous structures (and even some proteins) derive from nonhomologous genes, while many dissimilar structures derive from similar genes, in both cases contradicting neo-Darwinian expectations.

(6) The (inferred) developmental programs among the metazoan animals of the Cambrian period are strikingly dissimilar (or "not conserved"), contrary to neo-Darwinian expectations.

(7) The genetic code has not proven to be "universal," contrary to neo-Darwinian expectations based upon the theory of universal common descent.
Further, biochemists and origin-of-life researchers have challenged the standard Oparin/Miller chemical evolutionary theory for the origin of the first life for many reasons including:

1. Geochemists have failed to find evidence of the nitrogen-rich "prebiotic soup" required by the standard chemical evolutionary model.
2. The remains of single-celled organisms in the very oldest rocks testify that life emerged more quickly than the standard model (or any other) envisions.
3. Geological and geochemical evidence suggests that prebiotic atmospheric conditions were hostile, not friendly, to the production of amino acids and other essential building blocks of life.
4. In virtue of (3), experiments (such as Stanley Miller's) allegedly simulating the origin of prebiotic building blocks have no relevance to actual early earth processes.
5. Origin-of-life researchers lack plausible explanations for the origin of the specified information in DNA necessary to build essential proteins.
6. Origin of life researchers lack any plausible explanations for the origin of the functionally integrated information processing system present in even the simplest cells. (p. 50-55 footnotes omitted)

The authors also ask three questions of ID. Is it science? Is it religion? Is it speech? For intelligent design theorists, they argue, the conclusion of design constitutes an inference from biological data, not a deduction from religious authority (p. 45-46). DeWolf, Myer, and DeForrest opine that design theory is science, not religion, and is speech and thus entitled to constitutional protection. They come to the conclusion that the controversy, including intelligent design, may be taught sensitively in a secular manner (p. 99). In addition to their
traditional Establishment Clause analysis, DeWolf, Meyer and DeForrest pose arguments in favor of teaching ID based on freedom of speech rights to be discussed in greater detail in Chapter 5. They rely heavily on *Tinker v. DesMoines School District* (1969) and *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) to argue that a science teacher has a First Amendment right to teach criticisms of evolution including ID. They do not, however, fully explore the rights of students to access knowledge or school districts’ ability to control the curriculum. Additionally, their analysis rests on the premise that ID is science. We have seen in one case already that such a position is not convincing the courts (*Kitzmiller v. Dover*, 2005).

One thing DeWolf, Meyer, and DeForrest present, along with Wexler (2006,) is criticism of the definitions of science that are simplistically advanced by the courts. That philosophers of science debate to this day the “demarcation” of what constitutes science, provides enough evidence that courts such as in *McLean* and *Kitzmiller* are poorly situated and have done a poor job of entering this realm. Indeed, the courts need not enter the realm at all. It is not the courts’ role to protect science from attack, either reasonable or unreasonable. It is the courts’ role to apply the Constitution to protect the people from government attempts to prefer or disfavor religion. By focusing on evolution, the courts and most legal commentators are butting their heads up against a tree in the midst of a large forest.

*Addicott* (2002) provides a general overview of the evolution versus creationism controversy and anticipates the coming constitutional challenge to teaching the theory of intelligent design in public schools. He makes a careful distinction between microevolution, which is indisputable scientific fact, and macroevolution, which he claims is not. Microevolution is observable evolution where plants and animals make gradual changes in
form and function over time and undergo limited degrees of modification under the agencies of mutation and natural selection (p. 1533). Addicott contends that microevolution cannot be extended to account for the appearance of all living things across the major divisions of nature. He notes, “Microevolution is based on fact; macroevolution is based on faith” (p. 1536)

Addicott goes to great lengths to offer criticism of the philosophical and religious aspects of macroevolution. He contends that evolutionism is anti-religious and evolutionists use evolution to assault the beliefs of others:

The real concern is how anti-theists wield the theory of evolution as an iconoclastic bludgeon in order to marginalize those who believe in God (to include many scientists who profess a belief in a personal God that they can pray to) and to proselytize all the rest of society into their philosophy of life. For those who adhere to evolutionism-i.e., Darwinian activists-the unbiased mind is absolutely obliged to interpret the theory of evolution in only one way-as an explains-all, materialistic philosophy that proves that God does not exist (p. 1562).

Addicott also argues that ID is not religious because it does not specify the creator, nor is it espoused by any particular religion (pp. 1577-1586.)

Addicott’s favored idea, however, is that the Anthropic Principle is both likely to pass constitutional muster and is uniquely suited as a bridge of common ground for both sides of this intense divide between evolutionists and creationists. The Anthropic Principle focuses on the idea that “many of the factors that are vital for life have little, if any, room for variance. . . If any of a number of the fundamental forces of nature was changed by a fraction of a
fraction, then atoms would not bind together, stars would not be born, and there would not be life on Earth” (p. 1588).

Beckwith (2003) is also critical of evolution in his writing, presenting “the case against methodological naturalism” (p. 466). He argues that “natural science assumes certain preconditions, some of which appear to be essential to its practice. But none of them is derived from science; they are philosophical presuppositions that make science possible” (p. 469). The main supposition he is referring to is requiring science to include only natural, unintelligent causes as explanations for the origins of life. Therefore, his argument goes, “evolution must be true even if there are many unanswered questions that seem incapable of being adequately addressed under the evolutionary paradigm” (p. 469). Beckwith thus echoes intelligent design sentiments that scientists should be flexible on what constitutes science. Who says science cannot seek supernatural explanations? Scientists do, not for scientific reasons but philosophical ones.

Marshall (2002) similarly presents his case for the constitutionality of requiring the teaching of intelligent design in public schools by examining how intelligent design would withstand constitutional scrutiny. Marshall contends that ID satisfies the Lemon test because it meets all three prongs. He argues that ID serves the legitimate secular purpose of promoting scientific literacy by teaching all of the evidence and explanatory theories so long as the government takes steps to neither promote or disapprove of religion. ID does not advance or inhibit religion because it is a scientific theory. Finally, ID makes no religious claims so it creates no excessive entanglement between government and religion (p. 785).

Edgington (2004) argues that disclaimers call for a critical approach to evolution and are constitutional. He posits that a liberal policy allowing for their placement in textbooks is
the most satisfactory solution to controversy surrounding the teachings of origins in the science classroom.

In partial justification of his stance, Edgington reiterates the position of other authors that evolution theory is harmful to theism because the two competing belief systems, natural and supernatural, are in direct conflict with one another. He quotes evolutionist thinker William B. Provine to illustrate his point:

Modern science directly implies that the world is organized strictly in accordance with deterministic principals or chance. There are no purposive principals whatsoever in nature. There are no gods and no designing forces that are rationally detectable. The frequently made assertion that modern biology and the assumptions of the Judaeo-Christian tradition are fully compatible is false (p. 154).

Edgington argues that by only teaching evolution as fact and giving no credibility to the creation model in the classroom, school boards and teachers are inadvertently endorsing a belief system that is incompatible with the central tenets of many religions, that the universe is a special creation of a supreme being. Since such teaching seeks to prove a theory that is "incompatible" with the religious beliefs of many students, Edgington reasons that it would seem to violate the prohibition issued by the Supreme Court in *Epperson v. Arkansas* that state action may not oppose religion (p. 155).

Edgington touches on the marketplace of ideas but ends his analysis there. Citing *Keyishian* he concludes his article stating that, “The classroom only becomes a ‘marketplace of ideas’ with a ‘robust exchange’ occurring when more sides to an argument and more opinions are presented than just one. It is important to the Court that this marketplace concept
be protected, and one way to do so is to allow a critical approach to the teaching of evolution through the use of disclaimers in science textbooks” (2004, p. 160).

Edgington makes a good point about evolution being incompatible with the religious beliefs of many. However, just because something taught in school offends the religious beliefs of some students does not give rise to an affirmative duty by the school to teach an opposing view. As Justice Jackson noted in his concurrence in *McCollum* (1948):

“Authorities list 256 separate and substantial religious bodies to exist in the ... United States.... If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result” (p. 235).

*Evolution defenders.*

The scholarly debate is far from one-sided in favor of teaching alternatives to evolution. Perhaps the most comprehensive attack against the proponents of intelligent design is the book *Creationism’s Trojan Horse*, by Barbara Forrest and Paul R. Gross (2004). In it Forrest and Gross methodically analyze the “Wedge Movement” of the Discovery Institute and rebut the scientific arguments of ID proponents such as DeWolf, Myer, and DeForrest (2000). The authors argue that ID proponents such as Michael Behe, the author of a well-known ID book *Darwin’s Black Box* target their work to “nonspecialist, biochemically naïve audiences” (p. 75). The authors’ goal is to show that the issue is not that biological sciences are in crisis. They are not. The issue is the nature and effectiveness of the public relations strategy that is the “Wedge” (p. 13). My purpose is not to make judgments about the scientific worthiness, or lack thereof, of evolution and ID, however, so Forrest’s and Gross’s book only serves as a science-based resource to reference if needed. My purpose instead is to
show that because of the public nature of the debate, students ought to be made aware of it, and be allowed to study it. Therefore, most of this literature review has to do with the legal and then educational arguments on both sides of the issue.

George (2001) focuses on the efforts of states to navigate Supreme Court decisions when defining the parameters for teaching evolution and creationism in public schools. She provides a brief overview of the history of the evolution/creationism debate and specifically addresses Supreme Court jurisprudence in this area. Then she shifts her focus to the 1999 Kansas Board of Education's announcement that it would change the state science curriculum, decreasing the reliance on evolution. She concludes that Kansas has failed to satisfy the Establishment Clause requirements set forth by the Supreme Court because it restricts access to evolution for religious reasons. The Kansas Board of Education keeps changing its mind on the subject, however, so it is questionable whether any decision it makes will remain in place long enough to wend its way through the legal process.

Wilson (2003) offers that one of the problems of Establishment Clause cases is the failure of the Supreme Court to define either science or religion. Seeing a definition of science as less problematic than a definition of religion, she claims if the Court established a definition of science, then it would be easier to know if a particular approach, in this case intelligent design, is science. Applying her definition to intelligent design, she concludes that intelligent design is not science. She then makes the common leap to the conclusion that since intelligent design is not science there can be no secular purpose for presenting it in science class. ID therefore fails the purpose prong of the Lemon test.

In addition, given the fact that most of ID’s high profile proponents are Christians who advance a religious agenda for wanting to introduce ID, Wilson argues that the effect
prong of the *Lemon* test would also stand in the way of ID’s introduction into the classroom. She argues that since intelligent design's focus on attacking evolution, and since some Christians historically have opposed evolution, a court could easily find that the primary effect of intelligent design is to advance religion (p. 239).

The obvious flaw in Wilson’s argument is to focus on intelligent design’s inadequacy as science as a means to claim it advances religion. The two are not inversely related. Additionally, if the use of an idea is impermissible solely because it advances religion, then the Bible could not be used in schools for any purpose because its overall purpose is to advance a religious viewpoint. The Supreme Court has clearly said that a religious document can be used in school if done so with a secular purpose (*e.g.*, *Stone v Graham*, 1980, *Abington School District v. Schempp*, 1963).

Brauer, Forrest, and Gey, (2005) argue that *Edwards* and *Epperson* clearly reject teaching Creationism because it is inherently religious. Then, they dissect in detail the religious roots of ID and its most vocal adherents. The conclusion they reach is that Creationism cannot be taught because it is inherently religious. Therefore, since ID is inherently religious, ID also cannot be taught (p.19). The authors also dismiss any First Amendment academic freedom claims that would allow ID to be taught because courts allow the government to regulate the curriculum (p. 132). The lack of teachers’ academic freedom at the K-12 level is indeed a barrier to teachers attempting to initiate teaching alternatives to evolution. School districts, which have more freedom and control of the curriculum, and students, whose right to access knowledge is given greater protection by the courts, are in a better position to pursue the inclusion of the origins controversy in school.
Middle of the road.

Wexler (2003) gives a thorough review of the prospect of teaching intelligent design in public schools using current Establishment Clause analysis. He points out, what many commentators miss, that the origins debate, from a legal perspective, is not about the scientific viability of the alternatives. Instead, it is about whether the controversial intelligent design position can be presented in public schools. He proposes that the idea can be taught in social studies class but that to teach it in science class is far more difficult. Wexler believes that it would be very difficult to present ID without violating the various Supreme Court tests because the appearance of a religious purpose or effect would be very hard to avoid.

While Wexler agrees that there is a place for teaching religion in schools, he sees little educational value teaching ID in science class and many pitfalls (p. 760, 811). The most important problem to him is that the mere singling out of evolution for reform sends an improper message to students and teachers that the purposes for the reform are religious. Following the reasoning in Edwards, courts would most likely invalidate any policy that requires teaching intelligent design (p. 826). Other problems he sees include the weakness of the argument that students will learn more about the nature of the scientific controversy over origins, because, there is no “significant substantive scientific debate over the basic premises of evolutionary theory”(p. 808). He further remarks that teaching ID would be underinclusive and counterproductive toward a goal of teaching students about controversial public issues (p. 809).

Another concern for Wexler is the argument that teaching the controversy will make science class livelier. He does not see this as “sufficient justification for changing the content
of a school curriculum” (p. 809). He does admit the importance of teaching students how to “think intelligently about broad-ranging controversial issues of public importance and to understand the nature and history of the scientific endeavor” (p. 811). He believes, however, that “teaching them about intelligent design by itself is poorly suited to achieving these laudable aims” (p. 811).

Wexler does present one attractive alternative by proposing that instead of reforming just the teaching of evolution, the science curriculum in general is reformed to “make sure that students understand that scientists themselves often differ about the correctness of certain scientific theories” (p. 831). With curriculum reform focused on the process of science, the origins debate would be just one part of a larger purpose. Just as quickly as he introduces the idea though, Wexler discounts it by invoking the likelihood that evolutionists and reformers could not agree on the proper balance and perspective (p. 833-834).

I disagree with Wexler’s dismissal of his own idea and with the educational value he places on teaching intelligent design in science class. For reasons discussed in Chapters 4 and 5 that is precisely where I believe ID should be taught. Additionally, by confining his reasoning to traditional Establishment Clause analysis, he misses the perspective and opportunity provided by other First Amendment lenses such as students’ access to knowledge. That the effort to teach the origins controversy would be difficult does not make it unworthy.

Hacker (2002) mentions the unsettled nature of academic freedom issues but concentrates his article on the constitutional validity of disclaimers. He argues that disclaimers can be constitutional and explains how he thinks they can be created. His position is not uncommon, and one that this author endorses: teaching students more than just
evolution is good for their education (Edgington, 2004, Brickhouse and Letts, 1998, Nord and Haynes, 1998). Hacker writes, “Adoption of evolution disclaimers in public schools will pave the way for students to engage in intellectual arguments about origin theories and enable them to reap the fruits of academic freedom by enhancing their critical thinking skills (p. 348). He sees the successful use of disclaimers as necessary predecessors to teaching alternatives.

Hacker is also sensitive to the perception the science establishment and the courts have about evolution. “With the current hostility toward teaching anything but evolution, disclaimers ease the transition pains for most educators. Ultimately, the best solution to teaching the science of origins includes teaching many different theories” (p. 348).

Greenawalt (2003), like Beckwith (2003) and Addicott (2002), discusses evolution, creationism and intelligent design in detail. He analyzes the scientific merits of all three and the religious implications of all three. He also explains how religious thought can coincide with science as well as conflict with science. Greenawalt then applies the Establishment Clause legal standards to each. He concludes, “that evolution definitely belongs in science courses and that any account approximating the literal reading of Genesis does not. Students should be informed of uncertainties and possible gaps in dominant evolutionary theory and told that, if any supplements are needed (a matter in doubt), intelligent design is one conceivable alternative” (p. 322). Creationism can be taught elsewhere in the curriculum, but not in science (p. 381). Greenawalt believes that “Science teachers should give students a sense of the relative certainty of various theories, insofar as scientists can now estimate that, but they should not present what seem to be extremely implausible alternatives” (p. 354).
While this may be a compelling educational argument, it is not a legal argument, a distinction that will be explored in Chapter 5.

One argument that Addicott (2002), Beckwith (2003), and Smith (2005) all make is that evolutionism is anti-religious. While not denying that there are those who think that way, Greenawalt counters that “when some scientists assert that evolutionary theory supports atheism or warrants strong skepticism about traditional religious views, they stray beyond the strict bounds of methodological naturalism (p. 344). He is the rare pro-evolution author I found who specifically addresses anti-theistic statements made by prominent evolution scientists, such as Richard Dawkins, Steven Gould, and James Futuyma. Another is Kenneth Miller, a professor of biology at Brown University and a Christian, whose views I discussed in some detail in Chapter 1 and will discuss in more depth in Chapter 4.

Ellerbe (2004), and Smith (2005) are much closer to my understanding of the educational issues in the origins of life debate than most. While previously mentioned authors focus on the validity of the science of intelligent design, or the religious implications of evolution, Ellerbe, and Smith pay more than lip service to the value of school as a place where ideas should be expressed.

Ellerbe (2004) discusses the origins of life topic generally and brings in academic freedom cases such as Keyishian v Board of Regents (1967) and Sweezy v. New Hampshire (1957). She even mentions Board of Education of Island Trees v Pico (1982). Ellerbe uses these cases to support her contention that origins of life discussions should include different viewpoints and points to parts of the State of Louisiana Science standards that would support the inclusion of alternatives to evolution. She does not, however, further articulate on how
Hazelwood, Pico and their progeny can provide a more substantial legal justification for her position.

Smith (2005) spends a great many pages rebutting Greenawalt’s "five fundamental premises" from his book Does God Belong in Public Schools? (2005). These premises are used to comment upon the boundaries of instruction in science class concerning the origin and history of life. Greenawalt’s premises are the following:

(1) Schools should not teach the truth of religious propositions. (2) For many people, the domains of science and religion overlap significantly. (3) Anyone's assessment of what is true, overall, will include an evaluation of all relevant sources of truth, including any religious sources he or she credits. (4) Modern science is committed to methodological naturalism. (5) Scientific conclusions can bear on the likely truth of religious propositions (Smith, 2005, p. 151).

Smith, with Greenawalt’s help, usefully defines “methodological naturalism,” as the way modern science exclusively concerns itself with material and efficient causes. It searches for explanations according to uniform laws. Formal and final causation is not part of modern scientific methodology, which refuses to appeal to the supernatural (p. 154).

Smith is critical of Greenawalt’s rendering of evolution as scientific fact and picks holes in many of Greenawalt’s most basic statements about evolution (p. 166-176). Smith’s greatest contribution to the literature is his eloquent defense of the school as a place for students to be exposed to ideas about which there is legitimate disagreement in the public square. This rationale will be enumerated and discussed in Chapter 5. That being said, he does not offer any new vehicle by which these ideas may be brought to the table.
**Literature Since Kitzmiller**

Since the decision in *Kitzmiller v Dover* was handed down in November of 2005, there has been a flurry of activity in the realm of legal scholarship on the issue. Most law review articles on the topic of teaching evolution in schools thoroughly discuss the subject under traditional Establishment Clause analysis. Some authors endorse the court’s decision wholeheartedly, while others are critical particularly of the decision’s findings on the scientific nature of intelligent design.

David Bauer (2006) analyzes the *Kitzmiller* decision and intelligent design under just such a traditional a rubric and sides with the court. Italiano (2006) also applies traditional Establishment Clause analysis but then criticizes the decision as unnecessarily broad: “The Kitzmiller court could have struck down Dover's policy under either the Lemon test's purpose prong or under the endorsement test without judging the scientific validity of intelligent design” (p. 46).

McCarthy (2006), reports the recent decision in *Kitzmiller*, highlights current political developments, and explores implications of the movement to "teach the controversy." In the end she offers insight that “The critics of evolution have adopted a smart approach in arguing that public schools have an obligation to ‘teach the controversy.’ This approach is far more politically palatable than mandating instruction about ID” (p. 461). She also offers that attempts to teach ID in science class may confuse students. She does not weigh in with her opinion on the matter. Instead, she predicts that legal challenges will continue and wonders how the newly configured Supreme Court will respond.
Kristi Bowman (2006) examines the origins debate in the wake of the Supreme Court’s decisions in *McCreary County v. ACLU* (2005). In *McCreary County* the Court applied the *Lemon* test and the endorsement test. Bowman notes that the Court expanded the reasonable observer role from actual government purpose to perceived government purpose and argues against the usefulness of such a strategy. Using the origins debate that took place in Dover, Pennsylvania as context, she passes no judgment on the merits of the *Kitzmiller* decision. Instead she uses the factual background of the case to highlight the problems she sees in the reasonable observer analysis undertaken by the Supreme Court in *McCreary*. Bowman argues that a strict reading of *McCreary County* leads to undesirable results. She believes that the detrimental effects result from what she perceives as the altered notion of: the constitutional harm and limited scope of the objective observer's review, the expansion of the objective observer's necessary knowledge of law yet contraction of knowledge of facts in what is at core a factual inquiry, and the mandatory change in the standard of review without sufficient justification will become obvious as courts grapple with issues such as the burgeoning evolution-intelligent design disputes”. (p. 489).

Bowman thinks instead that government purpose should not be perceived by “the distanced eyes of the objective, reasonable observer, but rather ascertained for actuality by the blinder-free eyes of courts”(p. 489-90). Thus Bowman reasons that the Court should retain McCreary County's focus on government purpose, but reject the expanded role of the objective observer.

Olin (2006) contends that intelligent design is inherently religious and conveys an impermissible message in violation of the Establishment Clause (p. 1130). He relies on the
court’s decision in *Kitzmiller*, where the judge ruled that intelligent design has a religious nature, to support this proposition.

Olin further contends that the concept of ID cannot be taught in science class but that it can be taught in social studies class, while secular criticisms of evolution, upon which ID is partially based, may be taught in science class. In this way “Schools, therefore, retain ample ability to present a full human origin education… Such a solution allows for a comprehensive education while avoiding the problem of religious endorsement that leads to an Establishment Clause violation” (p. 1145).

Wexler (2003) also argues that ID can be taught in social studies class but neither author presents a legal argument why the distinction of where ID is taught makes a difference to its constitutionality. Science class is not given heightened protection by the Constitution or the courts compared to other subject areas typically offered in public schools so one must wonder how something like intelligent design can be constitutional in one subject but not another.

Other law review articles are critical of current Establishment Clause doctrine. Louis Virelli (2006) argues that current Establishment Clause analysis “is ill-equipped to deal with evolution disclaimers, and particularly facially neutral disclaimers” (p. 428). He argues that a disparate impact test based on discrimination law would be a better course of action. Such a test would take into account “whether a provision causes a disparate impact, and, if so, whether that impact is the product of a discriminatory legislative purpose (p. 445). Kitcher (2006) also feels that current Establishment Clause doctrine is not up to the task. He proposes a test that takes into account the purpose of a policy combined with its scientific reliability. Kirwin (2006) reviews the application of endorsement clause analysis to *Kitzmiller* then
applies it to the Kansas science standards. He concludes that the Kansas science curriculum standards also violate the Establishment Clause. Lofaso (2006) utilizes her background in the law and the study of evolutionary theories to argue authoritatively that ID is not science. This leads her to the conclusion that to teach it in science class is to unconstitutionally advance a religious viewpoint.

Jay Wexler (2006a) counters Francis Beckwith’s several writings and discusses academic freedom issues but mostly from the perspective of teachers’ rights to teach controversial ideas. He never fully explores cases involving students’ access to the ‘marketplace of ideas’ set in motion by Sweezy v New Hampshire (1957) and Keyishian v. Board of Regents (1967). In this article Wexler does not address the Kitzmiller decision.


Jay Wexler and Arnold Loewy, two law professors, and Richard Katskee, one of the attorneys for the plaintiffs in the Kitzmiller case and the Assistant Legal Director, Americans United for Separation of Church and State share their thoughts on the Kitzmiller decision in three separate articles in the same issue of the First Amendment Law Review. Wexler (2006b) agrees with the outcome in Kitzmiller and much of the judge’s reasoning but, like Italiano (2006) and Potter (2006), takes exception to Judge Jones’s attempt to declare that ID is not science since “the overall question posed to a court is whether teaching ID endorses religion, not whether ID is or is not science” (Wexler, p. 93). Showing that ID is unsupported by the scientific community is not the same as saying that ID is not science. The latter claim is best left for philosophers of science to discuss in academic journals, not for inexpert judges to conclude in legal opinions, no matter how excellent those opinions may otherwise be (p. 103).
Though Loewy (2006) agrees with the outcome in *Kitzmiller*, he is more roundly critical of the decision. His argument relies less on the science of either side than on the notion that the Constitution protects ideas regardless of their religiosity and that school is an appropriate place to test the validity of ideas. Loewy’s main contention is that it matters not whether intelligent design is religion or science. “To allow all ideas about the origin of man that do not presuppose an intelligent designer, but forbid all theories that explore the possibilities of such a designer, expresses hostility, not neutrality, towards religion” (Loewy, 2006, p. 83). Loewy reasons that it is simply “not the Court's job to distinguish good science from bad in the realm of education. . . [T]he very purpose of the First Amendment is to allow for all ideas to be exchanged without judicial pronouncement of truth or falsity” (p. 85). In cases like in Dover where the board’s purpose was clearly to introduce religion, intelligent design could not be taught. But if the idea is presented neutrally, there is neither endorsement nor disapproval. He posits that ID would fall on its face from its own internal inconsistencies in a short period of time in the marketplace of ideas.

To me, Loewy’s approach to the issue is the most enlightened of any legal scholar I have read. To him, the free exchange of ideas is the important thing. While he mentions the *Pico* case as an example of the Court’s reluctance to allow schools to ban ideas (2006, p. 89), he does not further develop this line of reasoning in his short article.

Katskee (2006) obviously benefited from reading both Wexler and Loewy before crafting his article. As one might expect from an attorney on the winning end of the trial, he whole-heartedly endorses the judge’s decision, including his ruling that ID is not science. Katskee dismisses Loewy as misunderstanding the issue at hand (p. 114). Katskee’s criticism of Loewy focuses on the text *Of Pandas and People* that Loewy notes in passing does not
Katskee argues that the judge needed to determine that ID was not science, but instead a religious idea, in order to justify finding an impermissible purpose in the school board’s action:

In arguing that the court need not have addressed the question whether intelligent design is science, Loewy and Wexler share the view that intelligent design as a body of thought, as a political strategy, and as a cultural movement, can and should be divorced from the conduct of the school officials in Dover who embraced it. In reaching that conclusion, however, they also reveal fundamental misunderstandings about intelligent design, about science, and ultimately about the nature of the inquiry that, as both a doctrinal and a jurisprudential matter, the Kitzmiller court had a duty to perform (p. 118).

Katskee reasons that only by evaluating the scientific validity of ID could the court have fairly judged the secular justification offered by the Board for its policy.

Katskee’s bias would compromise his position except that the judge also happens to agree with him. In looking at the case with his partisan zeal, he misses the obvious point Wexler (2006b) and Potter (2006) make: all one has to do is look at the absurdly religiously motivated actions of the board that are well documented in the opinion to conclude that the board’s purpose to improve science education was a sham. The judge even makes clear in his decision that the Board had no idea what intelligent design is when he writes, “one
unfortunate theme in this case is the striking ignorance concerning the concept of ID amongst Board members” (Kitzmiller, p. 758-759).

If anything, the court should have focused on the Board’s understanding of ID, not the perspective of the Discovery Institute. The district court in McLean confined its decisions to creation science as understood by the parties enacting the legislation at issue (1982, p. 1264). The judge and Katskee ascribe the knowledge, motivations of the larger ID movement to a small group of bumbling board members to fulfill their own agenda of attacking the ID movement as a whole. While their attacks may have merit, the place for them is in law reviews and other media, not the supposedly neutral setting of the courtroom.

**Thesis Distinguished**

My thesis differs from these articles and any others I have found because it examines in depth a line of cases regarding the importance of the “marketplace of ideas” in schools and applies it directly to the evolution controversy. Until December 2006, no previous study has combined the evolution cases and the marketplace cases. Hackney (2006) is the first to truly understand that teaching evolution is at its heart a curriculum issue. Curriculum decisions are most often left up to the governing body that makes such decisions, usually the school board of a given district. Hackney contends that:

> reaching a conclusion about which theory of the origin of the species is correct, or even most probable, is not necessary in the context of public schools. The debate sparked by exposing students to both viewpoints, or at least to the fact that the theory of evolution is not universally accepted, may be precisely where the educational interest lies. Classroom debate over two competing options is a common learning
tool, and coming to a conclusion about which option is "correct" has never been considered an essential element of the academic value that stems from such exercises (p. 360).

Hackney argues that, “Intelligent Design, at its core, implicates academic questions more directly than religious ones by virtue of intelligent design's unique status as a nonreligious theory” (2006, p. 352). Since ID only indirectly concerns religion as it does not endorse any religion, or even religion in general, Hackney argues that Establishment Clause analysis is not necessary. Instead, ID should be examined as a curricular issue (p. 364). Unfortunately, the judge in *Kitzmiller* held that ID is religious (p. 718) and it is integral to his ruling that it is not permissible to teach ID in science class. Though Hackney does nothing to counter the court’s decision, her curriculum analysis is quite useful and will be explored in greater depth in Chapter 5.

My analysis differs from Hackney’s in important aspects. First, I will show that the religious status of ID should be irrelevant to its admissibility in the classroom. Second, my analysis will provide more depth particularly as to the nature of curriculum and the right of students to learn. Third, I include even creationism as worthy of inclusion in the curriculum.

While courts always maintain that the Constitution is neutral to religion (see e.g. *Selman v. Cobb County*, 2006) most cases rule against any government action arguably favoring religion. There are no instances where a court has found impermissible action by government against religion. This leads Pager (2006) to conclude that the purported neutrality of the constitution towards religion is really false. In fact, the courts rule against religion at every turn. While Pager argues against the value and constitutionality of teaching ID in science classrooms, he observes that antievolution proponents can and do take
measures to compromise the teaching of evolution in small predominantly homogeneously Christian schools, and by homeschooling (p. 58-59). In the end he wonders “whether legislatures and school boards are better equipped than the judiciary to evaluate school curricula and assess the status of scientific controversies, facts, and theories (p. 65).

I argue that by excluding Judeo-Christian, perspectives schools are arguably in danger of being hostile to religion, which is also prohibited by the Constitution. The current Establishment Clause analysis is inadequate to address the legitimate concerns of schools regarding teaching controversial materials, or materials with religious implications. What is needed is a new test balancing the protection of the Establishment Clause with the free flow of ideas in the classroom. With the changing make up of the Supreme Court in the last year, and the obvious disdain several justices, led by Antonin Scalia, have for the Lemon test, the time is right for the court to put forth a new perspective on Establishment Clause concerns especially as it relates to school curriculum matters.

Supreme Court decisions in the origins debate have been driven more by the purpose or motivation of those initiating efforts to teach alternatives to evolution than about the content itself. Any argument limited to the content of creationism and intelligent design runs the risk of violating the Establishment Clause because it disfavors a religious viewpoint. In fact, the Supreme Court, has been very hesitant to condemn the content of the speech in the origins debate as unconstitutional. In both Epperson and Edwards, Supreme Court focused mainly on the purpose of the legislation at issue. An element factoring into each decision was the attempt by the legislatures to restrict the teaching of evolution for religious purposes.

All the articles discussed in this review argue about the merits of a given proposition but none consider what it is we want our children to learn, how to teach it, and who is best to
teach them. This paper addresses all these issues. Chapter 4 will look more closely at decisions regarding school curriculum that show the courts’ preference for allowing students to be exposed to controversial ideas even though others may hold those ideas in disfavor. I propose that evolution and alternatives to evolution, though controversial ideas, deserve exposure in our public schools, not for the truth of the alternatives, but so students can understand the place these ideas on origin occupy in the cultural tug-of-war taking place in the public square in the United States.
Chapter 4 – Different Perspectives

The origins controversy is just one aspect of education that implicates the religion clauses of the First Amendment. Other cases involving schools and religion are instructive in the approach courts bring to the issue of the use of religion in schools.

Teaching Religion in Schools

Though courts most often rule against the use of religion at issue, they appear open to the idea of teaching about religion so long as schools do not endorse a religious truth or viewpoint.

Supreme Court Cases

The foundational case for the concept that religion may be taught in schools and not violate the Constitution is School District of Abington Township v. Schempp (1963). In this decision the Supreme Court dealt with the reading of Bible verses in two different districts, Abington Township and Baltimore City. Both districts read Bible verses to students over the school public address system or by teachers directly to the students. No comments were made about the readings, which were typically followed by reciting the Lord’s Prayer, the Pledge of Allegiance, and in Abington, at least, school announcements. Students were free to leave the room while the Bible reading was taking place. Parents in both districts filed suit claiming the practice was a violation of the Establishment Clause of the Constitution. Baltimore’s practice was approved by the Maryland Court of Appeals and Abington’s was found unconstitutional by federal district court. Parties in both cases appealed and the Supreme Court granted certiorari.
The Supreme Court reiterated the proposition from Everson v. Board of Education (1947) that the government is to be neutral towards religion neither favoring nor handicapping religions (p. 218). In the case at hand regarding reading Bible passages, the Court noted, “These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools (p. 223). As such the Court held the activities to be religious exercises prohibited by the Constitution.

Despite finding the Bible readings unconstitutional, the Supreme Court made it clear that its holding did not proscribe all things related to religion from schools. In fact, the Court as much as endorsed the idea of including instruction about religion in school, if done so appropriately:

[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. … It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. (p. 225).

Another case involving religion in schools, Stone v. Graham (1980), held that posting the Ten Commandments in every classroom was a violation of the Establishment Clause. Like the Bible reading in Abington, there was no teaching of the Commandments. They were merely posted. The Court found that the Ten Commandments were undeniably a sacred religious text and their posting without comment gave rise to the perception of government’s endorsement of them. The Court noted that “This is not a case in which the Ten
Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like” (p. 42, citing Abington, p. 225). Clearly, if there was a secular purpose for teaching the Ten Commandments, and they were taught in a manner that neither endorsed nor inhibited the practice of Judeo-Christian religions, their teaching would pass constitutional muster.

*Edwards v. Aguillard* (1987) also reinforced the educational validity of teaching about religion. Referring to Stone, the Court noted that:

its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization. “In a similar way, 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” (*Edwards*, p. 594, citing *Stone* at 42).

Justice Powell, in his concurrence provides a useful summary of the Supreme Court’s position on teaching about religion in school. He strongly suggested that not only can students be taught about religion, but that they should “be informed of all aspects of this Nation's religious heritage”(p. 606). He saw “no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government”(p. 606-607). Powell further approved of courses in comparative religion and reasoned that “since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events”(p. 607). Justice Powell
elaborated that the “Establishment Clause does not prohibit per se the educational use of religious documents in public school education” (p. 608) Instead it prohibits “the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief” (p. 608).

Lee v. Weisman (1992) involved the practice of prayer during graduation ceremonies. In Providence, Rhode Island school principals were allowed to select a member of the clergy to offer an invocation and benediction at public school graduation ceremonies. The Weismans filed suit that such prayer was a violation of the Establishment Clause of the First Amendment.

The Supreme Court found the practice to be a violation of the Constitution since it required those in attendance at a graduation ceremony to participate in a religious ritual. Justice Kennedy reasoned that since students were obligated to attend graduation and since the school controlled the ceremony, it amounted to subtle or indirect coercion to require students and others in attendance to listen to the prayers (p. 592, 598). This coercion is unconstitutional: “It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so’” (p. 587 quoting Lynch v. Donnelly, p. 678).

Even though the Lee decision is very restrictive, it still acknowledges that there is no obligation to rid all discourse of religion in public schools. Justice Kennedy states, “We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation” (p. 597). Later he again
affirms that it is not necessary to root out all religious innuendo when he writes, “A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students (p. 598-599 citations omitted).

While these Supreme Court cases say there is a place for learning about religion in schools, they all ruled against the constitutionality of the particular religious activity sponsored by the school. These activities, however, were not part of the regular curriculum. The prayer and Bible reading cases are obvious religious activities, whereas Stone is a subtler attempt at inculcating religious values. The only area the Supreme Court has actually ruled on that involves the teaching of a matter with a religious nexus is the creation cases of Epperson and Edwards. Even in these cases, one key to the decisions was government attempts to limit the breadth of the curriculum in favor of a religious viewpoint, Epperson by outlawing evolution and Edwards by requiring equal time for creation science and evolution or teaching nothing.

Lower Court Cases

The courts are justifiably suspicious of attempts to introduce religious topics into the school curriculum because the motives of the proponents of such action have generally been religious. The lower courts have been especially suspicious and some would say hostile to religion (Pager, 2005) in their attempts to prevent Establishment Clause violations in schools. As seen below, the courts are not reluctant to rule against the fundamentalist Christian
position, or even allow, for argument’s sake, a dubious religion a place in the curriculum. It appears that the underlying theme is to allow for a broad exposure to ideas and prevent contraction of the curriculum for sectarian purposes.

*Grove v. Mead School District* (1985) revolves around claims that the teaching of a novel, *The Learning Tree*, constituted the establishment the religion of secular humanism. The court did not decide if secular humanism is a religion. It did, however, find that *The Learning Tree* was used for secular purposes of exposing students to expectations and orientations of Black Americans and that it was included in a group of religiously neutral books in a review of English literature, as a comment on an American subculture. As such, “its use does not constitute establishment of religion or anti-religion” (p. 1534). It also did not violate the Free Exercise clause, since there was no coercion for the students to adopt the beliefs reflected in the book and because “the state interest in providing well-rounded public education would be critically impeded by accommodation of Grove's wishes” (p. 1533). The court referred to Justice Jackson’s oft-quoted statement from his concurrence in *McCollum v Board of Education* (1948): “If we are to eliminate everything that is objectionable to any of [the religious bodies existing in the United States] or inconsistent with any of their doctrines, we will leave public education in shreds” (*Grove*, p. 1533).

The concurrence in *Grove* furthers the court’s understanding of the place of religion in schools. Judge Canby elaborated: “[D]istinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspective prompted by religion” (p. 1543).
Smith v. Board of School Commissioners of Mobile County (1987), an Eleventh Circuit decision, involves attempts by parents to remove 44 different textbooks from use in Alabama public schools for violating the Establishment Clause of the First Amendment. Parents contended that the texts endorsed the religion of “secular humanism” and “inhibited theistic faiths” (p. 689). The district court found for the parents but the court of appeals reversed.

For purposes of its decision, the court did not determine if “secular humanism” is a religion because “even assuming that secular humanism is a religion for purposes of the establishment clause, Appellees have failed to prove a violation of the establishment clause through the use in the Alabama public schools of the textbooks at issue in this case” (p. 689). By the court assuming arguendo that secular humanism is a religion, this decision, therefore offers insight on how a court might view the inclusion of religious ideas in the curriculum.

Citing Schempp, the court reiterated that the state must be completely neutral towards religion, then it refined what that means as follows:

The establishment clause, however, has not been interpreted as requiring mechanical invalidation of all government conduct conferring benefit on or giving special recognition to religion, but rather has been seen as erecting a ‘blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.’”(p. 689, quoting Lynch v. Donnelly (1984), p. 678-679 (citations omitted)).

The court next applied the Lemon test to the facts of the case. The parties stipulated that the purpose of using the questioned texts was secular so the court focused on the second prong of the test, whether use of the texts had the primary effect of advancing or inhibiting religion (p. 690). Under the second prong, if government identification with religion conveys
a message of government endorsement or disapproval of religion then an Establishment Clause violation has occurred (p. 690). The circuit court then found that there was no primary effect of advancing or inhibiting religion.

The court justified its holding by first reviewing what finding a primary effect violation requires: First, to violate the effect prong, the government must do more than merely accommodate religion as the Constitution mandates accommodation (p. 691, citing Lynch v. Donnelly at p. 672) Second, the government conduct must confer more than an indirect, remote or incidental benefit on a religion (p. 691, citing Grand Rapids School District v. Ball, 1985 at p. 393). Third the effect must more than merely happen to coincide or harmonize with the tenets of a religion (p. 691, citing McGowan v. Maryland, 1961, at p. 442, and Lynch at 682). Fourth, for:

   government conduct to constitute an impermissible advancement of religion, the government action must amount to an endorsement of religion. Lynch, 465 U.S. at 681, 104 S.Ct. at 1363. Finally, the primary effect of challenged government action must be determined in light of the overall context in which it occurs: “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.” Id. at 679-80, 104 S.Ct. at 1362. (p. 692).

Using this standard, the court found no endorsement by the government of secular humanism or any religion. Instead the court found:

the message conveyed is one of a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making. This is an entirely
appropriate secular effect. Indeed, one of the major objectives of public education is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979)) (brackets in original). It is true that the textbooks contain ideas that are consistent with secular humanism; the textbooks also contain ideas consistent with theistic religion. However, as discussed above, mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion (p. 692).

*Mozert v. Hawkins County Board of Education* (1987) is a circuit court case related to *Smith* where parents objected to the reading curriculum, this time on grounds that it violated the Free Exercise Clause. The plaintiffs asserted that the values taught in the reading text series violated their sincerely held religious beliefs. Requiring their children to read the textbooks was therefore a violation of their rights to the free exercise of religion. The standard required to violate the Free Exercise Clause is “government compulsion to either do or refrain from doing an act forbidden or required by one’s religion, or to affirm or disavow a belief forbidden by one’s religion (p. 1066).

The plaintiffs were uninterested in any ethical, moral, or religious viewpoint but their own. The court noted, however that one of the roles of schools is to teach fundamental values "essential to a democratic society." These values "include tolerance of divergent political and religious views" while taking into account "consideration of the sensibilities of others." (p. 1068, citing *Bethel*). The court went on to explain that the "'tolerance of divergent ... religious views’ referred to by the Supreme Court is a civil tolerance, not a religious one. It
does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must ‘live and let live’” (p. 1069).

The court even observed that “When asked to comment on a reading assignment, a student would be free to give the Biblical interpretation of the material or to interpret it from a different value base” (p. 1069). The only action compelled in this case was for students to read the assigned material and listen to the comments of their classmates. The court held: “What is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff’s religion” (p.1069). Therefore there was no unconstitutional burden in violation of the Free Exercise Clause (p. 1970).

Two cases, Fleischfresser v. Directors of School District 200 (1994) and Brown v. Woodland Joint Unified School District (1994) involved the same elementary reading series called Impressions. Plaintiffs in both cases complained that the use of the series violated the Establishment Clause of the First Amendment. Fleischfresser also alleged violations of the Free Exercise Clause.

In Fleischfresser, the Seventh Circuit Court of Appeals applied the Lemon test to the facts at hand and found no violation of the Establishment Clause. Before beginning its analysis, the court addressed the plaintiff’s claim that the stories “presented religious concepts found in paganism and branches of witchcraft and Satanism” (p. 688). The court was highly skeptical that a few stories amounted to the establishment of an “amorphous religion”. Instead the stories seemed to the court:
like a collection of exercises in ‘make-believe’ designed to develop and encourage the
use of imagination and reading skills in children that are the staple of traditional
public elementary school education….The parents would have us believe that the
inclusion of these works in an elementary school curriculum represents the
impermissible establishment of pagan religion. We do not agree. After all, what
would become of elementary education, public or private, without works such as
these and scores and scores of others that serve to expand the minds of young
children and develop their sense of creativity (p. 688)?

The court further observed that "it is not enough that certain stories in the series strike
the parents as reflecting the religions of Neo-Paganism or Witchcraft, or reference religious
holidays. The Establishment Clause is not violated because government action ‘happens to
coincide or harmonize with the tenets of some or all religions'" (p. 689, internal citations
omitted).

Applying the Lemon test despite its skepticism, the court found no Establishment
Clause violation. The first prong of the test requires a secular purpose: but in order to find
that there was “no secular purpose, we must find that the action was ‘motivated wholly by
religious considerations.'”(p. 688 quoting Lynch, p. 680). The court found a clear secular
purpose for the reading series in teaching reading skills, imagination, and creativity
(Fleischfresser, p. 688).

Next the court found that the primary effect was not to advance or inhibit religion, but
to educate students, improve reading skills and develop imagination and creativity (p. 689).
In reaching this conclusion, the court applied the O’Connor’s endorsement test from her
concurrence in Lynch noting that in order for the board action to violate the constitution “that
action must amount to an endorsement of religion” (p. 688). To decide the endorsement question the court considered the whole reading series, not just the passages the parents found offensive and found the passages made up a very small part of the series and that “Any religious references are secondary, if not trivial” (p. 689).

Finally the court dismissed the claim of entanglement as totally without merit. “School boards have broad discretion in determining curricula in their schools. Surely, the mere exercise of this discretion cannot constitute excessive entanglement with religion” (p. 689).

The plaintiffs also claimed that use of Impressions violated the Free Exercise Clause. The court took this charge lightly noting that:

The burden to the parents in this case is, at most, minimal. The directors are not precluding the parents from meeting their religious obligation to instruct their children. Nor does the use of the series compel the parents or children to do or refrain from doing anything of a religious nature. Thus, no coercion exists, and the parents' free exercise of their religion is not substantially burdened (p. 690).

The Ninth Circuit also addressed a challenge to the use of the Impressions series in the same year. Brown v. Woodland (1994) is very similar to Fleischresser but differs in some respects. First the plaintiffs identify Wicca as a religion of witchcraft and contend that the readings and activities suggested by the series amount to practicing the religion. The court “assume[d], without deciding” that Wicca was a religion and applied the Lemon test (p.1378). The Browns did not challenge the secular purpose of the reading series so the court moved on to the primary effect inquiry.
In order to examine whether the reading selections had the primary effect of impermissibly advancing or disapproving of religion, the court looked to see if the school board practice was likely to be perceived by others as an endorsement by adherents of a religious belief or as disapproval by nonadherents of their religious choices. The court inquired “whether the government's action actually conveys a message of endorsement of religion in general or of a particular religion.’ Kreisner v. City of San Diego (9th Cir.1993) (internal quotations omitted)”(p. 1378).

The court chose to “analyze whether an objective observer in the position of an elementary school student would perceive a message of endorsement of witchcraft, or of disapproval of Christianity, in the Challenged Selections” (p. 1379). The court found that the selections were not religious in nature, rather secular, observing that the editors of Impressions drew the stories from various myths and folklore of different cultures. The coincidence of the stories “to the practitioners and practices of witchcraft does not cause state use of such folklore to endorse witchcraft or to cause students to believe reasonably that they are participating in religious ritual”(p. 1381).

As in Grove v. Mead (1985) and Fleischresser (1994), the court also noted that the challenged selections were a very small part of an otherwise nonreligious curriculum, which ensures that an objective observer in the position of an elementary school student would not view them as religious rituals endorsing witchcraft. Having dispensed with the primary effect of Impressions, the court quickly found no excessive entanglement of government with religion citing Fleischfresser and noting that a review of the curriculum in response to complaints does not amount to entanglement (p. 1384).
It is helpful in this discussion to examine a case where the school did overstep its bounds and violate the establishment clause. *Malnak v. Yogi* (1979) is one such example. Here was an effort on the part of educators to require students to participate in a ritual exercise of a religious nature. In a course that included the teaching of transcendental meditation, students performed a ceremony where they made offerings to a deity. The court found that such offerings mimicked a religious ritual and as such were a violation.

**Summary**

The cases discussed above are not exhaustive of those regarding the use of religion in schools, but they are representative of the courts’ holdings. Unfortunately, they do not address the use of material with a Christian orientation. Based on the cases involving the teaching of origins, it may appear that courts apply stricter scrutiny to the conservative Christian viewpoint. The courts, however, have not been afraid to grant some financial benefit to religiously affiliated schools, so long as that benefit is incidental to a greater secular purpose.

Before moving on, it is useful to summarize some themes that emerge from the courts’ rulings. Perhaps the most important concept is that schools have no responsibility to completely remove religion or ideas that offend believers of one religion or another from school. The state’s interest in providing a well-rounded education would be violated by excluding all offensive materials. Indeed, to do so would be to tear the curriculum to shreds.

Another theme in looking at Establishment Clause cases dealing with curriculum is the courts look at the offending material in context and in light of all the circumstances in a given setting. Additionally courts permit the teaching of religious ideas or beliefs as a way of
teaching “tolerance of divergent political and religious views,” which is a perfectly valid secular purpose. Indeed, teaching tolerance is seen as an obligation of schools. Tolerance of a religious view is a civil tolerance and does not require belief in that view. To violate the effect prong of the *Lemon* test, there must be more than mere accommodation of a religious idea, there must be endorsement of it. This endorsement must confer an actual benefit to religion, not one that is merely indirect, remote, incidental or coincidental. The Free Exercise Clause is not violated unless there is coercion by the state for students to adopt or practice the beliefs reflected in teaching materials.

**The Right of Students to Receive Knowledge**

One of the arguments for teaching alternatives to evolution is that choosing what to teach children is within the responsibility of the state or local school board to establish the curriculum. Exposing students, and allowing access to a wide variety of knowledge and ideas is favored by the courts to such an extent that a right to receive knowledge has even been forwarded by the courts (see e.g. *Pico*, 1982). This right is based in the freedom of speech guarantee granted by the First Amendment.

**Freedom of Speech in Schools**

Our exploration of the notion of freedom of speech in schools begins with *West Virginia Board of Education v. Barnette* (1943). The Supreme Court held that it was unconstitutional to require a student to salute the flag and recite the Pledge of Allegiance. Important in the holding was the “compulsion of students to declare a belief” (p. 631) which is a violation of the First Amendment’s right to free speech. The parents upset about the
pledge were Jehovah’s Witnesses who asserted that their religious beliefs hold God above earthly laws. Saluting the flag, was to them, a violation of the Ten Commandments prohibition of bowing before a graven image (p. 629). Even though the issue at hand was the student’s religious beliefs, the case was decided on freedom of speech grounds. This exemplifies the overlap inherent between religion and speech.

The Court emphasized the secular purpose of public education, “Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction” (p. 637). The Court also acknowledged the “important, delicate, and highly discretionary functions” of school boards but cautioned that these functions must be performed “within the limits of the Bill of Rights” (p. 637). Further, the Court pointed out the importance of education’s role of teaching students that basic rights in America have real meaning:

That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes (p. 637).

The Court further emphasizes the importance of respecting our differences:

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order (p. 641-642).
An essential part of people’s rights in the United States, including students, is that the
government cannot make compulsory what is proper thought to them. These oft-quoted
words eloquently summarize this maxim:

   If there is any fixed star in our constitutional constellation, it is that no official, high
or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or
other matters of opinion or force citizens to confess by word or act their faith therein.
If there are any circumstances which permit an exception, they do not now occur to us
(p. 642).

   The basic principles laid out in *Barnette* are referred to often in subsequent cases and
are important to building a case for the inclusion of controversial ideas in school curriculum.
To particularize these principles to a school setting finds that schools should not favor or be
an enemy to any race, class, religion, or political position. Schools should also encourage the
development of free thought and respect for diverse opinions and culture. Finally, schools
should teach the importance of our basic rights and model them, to the extent possible, to
show students that these rights are more than just empty words.

   *Sweezy v. New Hampshire* (1957) is another foundational case in all arguments about
academic freedom at both the university and public school level. Central to this case was the
Subversive Activities Act of 1951, an act of the New Hampshire state legislature. Under
authority of the act, the state attorney general summoned Sweezy on two occasions and
questioned him about his past conduct and associations with the Communist Party, the
Progressive Party, and his knowledge of any program to overthrow the government by force
or violence (p. 239). Notably, for our purposes, he was also asked about the content of his
lecture when he was invited to speak to a University of New Hampshire humanities class;
something he had done on previous occasions. Though he answered many questions, Sweezy refused to answer questions about his lectures or other questions that he felt “transgress[ed] the limitations of the First Amendment” (p. 240). He was called to court where he continued to refuse to answer the questions and was found in contempt of court and jailed. The New Hampshire Supreme Court upheld the lower court and Sweezy appealed.

The Supreme Court found that “there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread” (p. 250). Pertinent to our inquiry are these words by Chief Justice Warren,

No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . No field of education is so thoroughly comprehended by man that new discoveries cannot be made…Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die (p. 250).

Though this decision concerned a university lecture, it has been widely cited in lower school decisions as well for the proposition that students and teachers must be free to inquire and discuss ideas. Some examples of these cases will be forthcoming.

Another early case fundamental to academic freedom is Keyishian v. Board of Regents of the University of the State of New York (1967). In order to work for the state government, in this case the state university system, employees were required to comply with a state plan to prevent the appointment or retention of “subversive” persons (p. 591). Keyishian, and several other teachers at the University of Buffalo, refused to sign a
certificate that they were not Communists and if they were, had told the president of the university. The Supreme Court, in an opinion by Justice Brennan ruled the administrative regulations and particular parts of the governing state statute as unconstitutional.

Relevant to our interests are Brennan’s words on the importance of academic freedom:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, supra, 364 U.S., at 487, 81 S.Ct., at 251. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.' United States v. Associated Press, D.C., 52 F.Supp. 362, 372 (p. 603).

Even though, like Sweezy, this case involves a university, its proposition has often been applied in lower school settings. The danger of the “pall of orthodoxy” to our schools and students and the value of the classroom as the “marketplace of ideas” cannot be overstated as they are recurring themes in subsequent court cases on First Amendment issues involving schools. Though academic freedom is not allowed unfettered in our public schools, it is clear that the Supreme Court rests great importance on schools being places where students are free to inquire and discuss ideas both favored and disfavored by the government.

*Signature K-12 Freedom of Speech cases.*
There are three signature Supreme Court cases that define freedom of speech law for K-12 public schools; *Tinker v Des Moines* (1969), *Bethel v. Fraser* (1986), and *Hazelwood v. Kuhlmeier* (1988). These are the cases most often mentioned in discussions on First Amendment rights in schools and for that reason, a brief summary of each is presented here.

*Tinker v. Des Moines* (1969) took place at the height of protests against the Vietnam War. It is widely cited for two propositions. The first is that students and teachers have constitutional rights at school. The second is a balancing test for those rights consisting of the disruption exercising those rights may cause weighed against schools’ interest in maintaining an orderly and safe learning environment.

*Tinker* involved three students attending Des Moines public junior high and high schools. In protest of the war in Vietnam, they wore black armbands to school in defiance of a policy developed by school principals when they learned of the upcoming student protest. The students were suspended and sent home until they would come back without their armbands. The parents of the students sued and the case wound its way to the Supreme Court.

To begin with, the Court stated that, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (p. 506). Declaring that wearing the armbands was “akin to pure speech” the Court found that the “school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners” (p. 508). As such, their actions were in violation of the First Amendment.

The Court made clear that, “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action
was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” As there was no showing that wearing the armbands would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”, the prohibition could not be permitted (p. 509, internal citation omitted).

As a result of *Tinker* the baseline test for student and teacher free speech is a balancing one where students may express their opinions, if they do so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school, and without colliding with the rights of others (p. 513). On the other hand a student, “which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech” (p. 513).

*Bethel School District v. Fraser* (1986) reveals the opposite end of the free speech spectrum. Fraser, while a student at Bethel High School, delivered a speech at a school assembly regarding upcoming student government elections. His speech referred to the candidate he was endorsing “in terms of an elaborate, graphic, and explicit sexual metaphor”(p. 678).

After receiving numerous reports and complaints about the incident, the assistant principal called Fraser to the office, gave him a chance to explain his actions, then suspended him for three days. His parents sued the school district claiming his First Amendment rights to free speech had been violated. The district court and appeals court both sided with Fraser. The Supreme Court reversed their decision.
Integral to the Court’s reasoning was the distinction between the type of speech protected in *Tinker* and the speech made by Fraser:

The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences (p. 681).

Indeed, one of the objectives of public education is the inculcation of fundamental values necessary to the maintenance of a democratic political system:

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students (p. 681).

The Court concluded that Fraser clearly crossed the line of decency and the school had the right in its duty to prepare students for discourse in a civil society to admonish him. “Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others” (p. 683).

Several factors contributed to Fraser’s demise. One factor was that two teachers warned him before he delivered the speech that it was inappropriate. Another factor was that his speech elicited responses from hoots and yells and graphic demonstrations to
bewilderment and embarrassment. Additionally, at least one teacher had to take time out of class to discuss the speech. Finally, the school had a disciplinary rule prohibiting just such vulgar use of language.

The message from Fraser then is that schools have the duty to educate children in appropriate behavior in social discourse. That process includes teaching tolerance of the religious and political views of others. In doing so, schools do not have to allow indecent speech that offends both the teachers and other students of the school.

_Hazelwood School District v. Kuhlmeier_ (1988) involves the amount of editorial control school officials may exercise over a school newspaper produced as part of a journalism class. The principal at this high school typically had final say over the contents of the school newspaper before it was published. Prior to the publication of the final issue of the year, the principal objected to two articles, one about the experiences with pregnancy of three Hazelwood students, the other about the impact of divorce on students at school.

The Supreme Court held in favor of the school official’s ability to edit the paper. First the Court found that the school paper was not a forum for public expression, but rather a production of the curriculum as a regular activity for a journalism class. The Court then distinguished the present case from _Tinker_, noting that _Tinker_ was a matter of the personal expression of a student whereas this was a matter of school authority over curriculum.

A school must be able to set high standards for the student speech that is disseminated under its auspices…and may refuse to disseminate student speech that does not meet those standards….A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a
civilized social order," Fraser, supra, 478 U.S., at 683, 106 S.Ct., at 3164, or to associate the school with any position other than neutrality on matters of political controversy (p. 272).

The Court next held that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities that people of the community “might reasonably perceive to bear the imprimatur of the school” (p. 271), so long as their actions are “reasonably related to legitimate pedagogical concerns” (p. 273). The Court found that the principal’s concerns about the privacy of the girls portrayed in the article on teen pregnancy, and the message such an article might send, especially to younger readers, was reasonable. It also concluded that the principal’s concern was legitimate regarding the article about divorce, as the father of a named student was portrayed in an unflattering light but had not been given a chance to express his point of view.

**Hazelwood** is important for our analysis because it serves to severely limit the free speech rights of both students and teachers. Though it was the parents of students who raised the objection in Hazelwood, as we shall see, the case has been used as authority to limit teachers’ rights with regard to the curriculum as well.

*Other relevant Supreme Court free speech cases.*

Several other Supreme Court cases are worth noting for their contribution to free speech analysis in schools. *Shelton v. Tucker* (1960) brings us this oft-quoted maxim, “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools” (p. 487). The Supreme Court found the requirement that all teachers in Arkansas file an affidavit reporting their associations in violation of the First Amendment.
In *Griswold v. Connecticut* (1965) the Supreme Court found a Connecticut statute making it unlawful to distribute information about contraception unconstitutional. The holding reinforced the Courts’ predilection for freedom of access to information stating that, “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge” (p. 482). This passage is sometimes quoted in education cases to support the courts’ preference for allowing students access to ideas.

*Epperson v. Arkansas* (1968) was already discussed as an early origins case. It also offers valuable freedom of speech insight for schools. The Court in *Epperson* laid down the basic rule about the courts involving themselves in the running of schools. “By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values” (p. 104). In the same breath the Court restated the importance of vigilantly protecting constitutional freedoms in schools as set forth in *Shelton* (1960, p. 487) and not tolerating laws that cast a pall of orthodoxy over the classroom as set forth in *Keyishian* (1967, p. 603).

An important case about access to ideas in K-12 schools is *Board of Education, Island Trees Union Free School District v. Pico* (1982). In this case the school board challenged an appeals court ruling that found the removal of certain library books as a violation of the First Amendment. A divided Supreme Court affirmed the appeals court but could only muster three justices to agree on the whole decision written by Justice Brennan though five agreed on the outcome. Though only a plurality decision, *Pico* has been important in subsequent censorship decisions. In it, Brennan distinguishes between libraries
and the curriculum. The removal of books from the library requires stricter scrutiny than changes to the curriculum because of students right to receive ideas.

In *Pico* the school board tried to remove several books from the library that they deemed objectionable. Several parents protested the removal of the books. Eventually their suit reached the Supreme Court. The Court raised two questions. The first was whether the First Amendment imposes any limitations on the school board’s discretion to remove books from the school library. The second is if so, does the evidence, when construed most favorably to the parents, raise a genuine issue that the board might have exceeded those limitations (p. 863)?

In his decision, Justice Brennan reiterated several important positions held by the Court over the years. Among these is that school boards have broad discretion in the management of school affairs and that federal courts should not ordinarily intervene in the daily operations of school systems (p. 863-864). He agreed with school board’s contention that it be must be permitted to establish its curriculum in a way to reflect the values of the community. Despite the deference given to school boards, Brennan notes that boards must perform their functions in matters of education in a “manner that comports with the transcendent imperatives of the First Amendment (p. 863). By ignoring their own procedures for reviewing books and rejecting the books over the recommendations of the a committee of teachers and community members without explanation, the Court felt that the board’s actions raised enough questions to be addressed at a trial (p. 875).

The Supreme Court bolstered its stance that the expansion of information and knowledge is the most desirable end of education policy (Alexander & Alexander, 2005, p. 310). Citing precedents that focus on the role of the First Amendment “in affording the

Brennan states that the Court has held “in a variety of contexts ‘the Constitution protects the right to receive information and ideas’” (p. 867 quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969) and citing Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972)). He emphasizes that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom” (p. 867).

Considering the school context he understands that students’ First Amendment rights must be “construed in light of the special characteristics of the school environment” (p. 867 quoting Tinker v. Des Moines 393 U.S., at 506). He summarizes, however, that “just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members” (p. 868).

One more proposition worth noting in Pico is the distaste the Court finds for attempts to suppress ideas. After quoting West Virginia Board of Education v. Barnette (1948) Brennan then expounds on this doctrine:

Our Constitution does not permit the official suppression of ideas. Thus whether petitioners’ removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners’ actions. If petitioners intended by their removal decision to deny respondents access to ideas
with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette* (p. 871, emphasis original, footnote omitted).

*Pico* thus expresses the Supreme Court’s wariness when it comes to suppressing ideas. Since the decision was only a plurality, not a majority, it does not carry the same weight as precedent as a clear majority. It can and has served as guidance, however, to other courts that deal with censorship issues.

*Connick v Myers* (1983) is not an education case but relies on *Pickering v Board of Education* (1968) which is. These cases involve the free speech rights of public employees. Connick was an Assistant District Attorney in New Orleans, Pickering a teacher in Illinois. The issue in these cases is well stated by Justice White: “Our task, as we defined it in *Pickering*, is to seek ‘a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’ (p. 142 quoting *Pickering* at p. 568).

The Court distinguished between matters of public concern spoken as a citizen and matters of personal interest spoken as employee. *Connick, Pickering*, and cases discussed here subsequently have not provided teachers, or other public employees with clear guidance for what they can and cannot say in fulfilling their duties. Combined with the courts’ preference for school boards’ control of the curriculum, they do not lend much support for a
teacher to attempt to introduce the origins controversy as a matter of public concern in contravention to school board dictates.

Lower Court Curriculum Cases

Case law pertaining to free speech in schools in general and curriculum in particular can be neatly divided into two categories. The first is cases brought by parents on behalf of their children protesting an action by school officials, usually the school board, as violating the First Amendment freedom of speech rights. The second category is cases brought by teachers against school boards claiming violations of their free speech rights through action of the school officials restricting either their expression or the curriculum they can teach. We will examine several representative examples of each in turn.

Parents v. School Boards.

While the Supreme Court establishes points of law that must be followed, it falls to the lower courts to interpret their rulings and apply them to various fact scenarios. A well-crafted opinion in an early curriculum case at the state level is informative for our purposes. In Todd v. Rochester Community Schools (1972) a parent wanted the book Slaughterhouse-Five removed from a literature class at the local high school because it contained references to religion. The Court found the plaintiff’s challenge “legally repugnant” (p. 329) and noted, “By couching a personal grievance in First Amendment language, one may not stifle freedom of expression” (Id.) The Court then highlighted the ridiculousness of trying to remove reference to religion from the curriculum:

If plaintiff’s contention was correct, then public school students could no longer marvel at Sir Galahad’s saintly quest for the Holy Grail, nor be introduced to the
dangers of Hitler's Mein Kampf nor read the mellifluous poetry of John Milton and John Donne. Unhappily, Robin Hood would be forced to forage without Friar Tuck and Shakespeare would have to delete Shylock from The Merchant of Venice. Is this to be the state of our law? Our Constitution does not command ignorance; on the contrary, it assures the people that the state may not relegate them to such a status and guarantees to all the precious and unfettered freedom of pursuing one's own intellectual pleasures in one's own personal way (p. 329).

The court noted that there was “no allegation nor proof that Slaughterhouse-Five was being taught subjectively, or that the religious or anti-religious view contained therein were espoused by the teachers” (pp. 329-330). The judge in Todd was vehement in his distaste for censorship by the courts and also pointed out the importance of schools as the only place all students are exposed to a variety of ideas. “Schools are an institution, indeed the only institution, in which our youth is exposed to exciting and competing ideas, varying from antiquity to the present” (p. 340). This only serves to underscore the danger of the courts becoming involved in the censorship of ideas. The message from Todd is that the essential investigation that courts should make when faced with matters of curriculum with religious implications is not whether the material is religious or not, but whether the material is being taught subjectively or objectively with either a religious or anti-religious view forwarded by the teacher.

Keefe v. Geanakos (1969) is another early curriculum case. Parents objected to the use of a profane word in a magazine article presented in a senior level English class. The court upheld the use of the word for “demonstrated educational purposes” (p. 361). It then chided the parents who brought the suit noting that if the “shock is too great for high school
seniors to stand” and they “must be protected from such exposure, we would fear for their future” (p. 361). Important in this decision is the notion that if a student can access a book in the library, then teachers should be able to discuss the content of it in class (p. 362).

In *Pratt v. Independent School District No. 831* (1982) the school board tried to remove the movie “The Lottery” from the curriculum. The movie was based on a short story used in high school English classes and focused on a small town that chose one person every year by lottery to be stoned to death. Citizens complained about the violence of the film and the impact on the religious and family values of students. The court of appeals upheld the lower court’s finding that removing the film and its trailer was unconstitutional “because a majority of its members object to the films' religious and ideological content and wish to prevent the ideas contained in the material from being expressed in the school” (p. 733).

Following district guidelines, parents objecting to the films, initiated action to have the films removed from the curriculum. The committee formed by the school board recommended that the films only be used at the high school level with students able to opt out of viewing the films with parental permission. The school board rejected the recommendation by a 4-3 vote and chose to remove the films. They did so without explanation (p. 774).

The circuit court, citing *Keyishian*, held that when restricting the curriculum a school board must carefully explain its reasoning for limiting those rights or run the risk of creating a “chilling effect upon the exercise of vital First Amendment rights” (p. 778). Here the board only offered a conclusory statement to the district court as to why it removed the film that neither the district court nor the appeals court found satisfactory.
Pratt was decided in 1982 just before Pico and relies quite a bit on the appeals court decision in Pico. The court compared censoring the curriculum with materials in the library and noted that the First Amendment harms stemming from curriculum censorship are by far the more serious injury. It recognized that "What is at stake is the right to receive information and to be exposed to controversial ideas--a fundamental First Amendment right” (p. 779).

Hazelwood (1988) decided six years later sets the tone for subsequent cases allowing school boards more latitude in deciding what to include in the curriculum. The lesson of Todd, Geanakos, and Pratt endures, however, in the courts’ preference for the free flow of ideas not to be restricted because of parents’ or school boards’ opposition to the ideology reflected in disfavored ideas. Pratt is also instructive, and Kitzmiller (2005) reinforces the lesson that school boards must articulate the reasons they have for changing the curriculum when matters before them implicate First Amendment rights.

Virgil v. School Board of Columbia County (1989) is another curriculum case, this time following Hazelwood. It shows the renewed deference the courts will show school boards regarding curricular decisions based on legitimate pedagogical concerns. In Virgil, parents complained about the inclusion of two reading selections in a larger humanities text. One was Lysistrata by Aristophones, an ancient Greek writer. The other was The Miller’s Tale by Geoffrey Chaucer from the twelfth century. The school board deemed the works sexual and vulgar and removed the whole text from use in the curriculum, although the offending stories remained available in the library.

In upholding the action of the school board, the circuit court cited Hazelwood for the proposition that, “In matters pertaining to the curriculum, educators have been accorded
greater control over expression than they may enjoy in other spheres of activity”(p. 1520). The court considered that the course, though an elective, was part of the curriculum and likely to bear the imprimatur of the school. It also considered the fact that both parties stipulated that the motivation for the Board's removal of the readings has was related to the explicit sexuality and excessively vulgar language in the selection, which the court acknowledged is a legitimate concern (p. 1522). Since the parties stipulated to the reasons, the court did not inquire further into the motivations of the board, leaving the impression that if religious reasons were the root of the removal, a different outcome may have resulted.

The court noted that though the stories “are widely acclaimed masterpieces of Western literature”, the action taken by the board was reasonably related to its legitimate pedagogical concern regarding the appropriateness of the sexuality and vulgarity of the works for high school students (p. 1523). The court did not agree with the decision of the board but only commented “our role is not to second guess the wisdom of the Board's action”(p. 1525).

School community service requirements have also been challenged on free speech grounds. In Steirer v. Bethlehem School District (1993) some students and their parents challenged a district graduation requirement that called for students to perform sixty hours of unpaid community service. The community service requirement was very broad and flexible but had to be completed outside of school hours. The petitioners claimed that the requirement violated their First Amendment rights to free speech since “performing community service is expressive conduct because it forces them to declare a belief in the value of altruism”(p. 993).
The court disagreed and held that the community service requirement was “not an expressive act that ‘directly and sharply implicate[s] constitutional values’” (p. 997, quoting *Epperson*, p. 104). The court likened the requirement to ones that direct students to shared community values like avoiding drugs and premature sexual activity, being a good citizen and even eating. Therefore, it was not the court’s “role to say that a school system cannot seek to expose its students to community service by requiring them to perform it” (p. 997).

The court then cited *Ambach v. Norwick* (1979) and *Brown v. Board of Education* (1954) for the proposition that one of education’s functions is preparing students for citizenship (p. 997).

*Campbell v. St. Tammany Parish School District* (1995) is a circuit course case involving the removal of an objectionable book from a public school district’s school libraries. The book at issue was *Voodoo & Hoodoo*. A parent initiated district procedures to have the book removed from school libraries as she worried that it glorified the occult and gave instructions on how to perform over 220 spells. Two district committees reviewed the book and recommended the book be removed from general circulation but allow students to check it out with parental permission. The school board voted to remove the book completely. The circuit court reversed the district court’s summary judgment and remanded the case to trial because it argued there were issues of material fact that could only be resolved at a trial. Specifically the circuit court sought more information on the motivation of the school board in rejecting the recommendations of its two committees without explanation.

The court cited *Pico’s* (1982) concern that school boards not remove books if the “decisive factor” for their action was to deny students access to ideas with which the school
officials disagreed (p. 188). The court also noted that the scrutiny the removal of library books receives compared to matters of the general curriculum is greater (p. 189).

*Campbell* reinforces several points of law relevant to our discussion. The first is courts’ preference for more information being available to our students not less. The second is that schools have first say over matters of the curriculum and are subject to less scrutiny over curricular matters because of their “legitimate pedagogical interest” in establishing school curriculum. That discretion “must be exercised in a manner that comports with fundamental constitutional safeguards” (p. 188). Those safeguards include balancing interests of the school with the rights of students’ freedom of speech and expression. The recurring theme in *Campbell* is not the content of the book itself, but the motivation behind the school board’s decision.

*Monteiro v. Tempe Union High School District* (1998) is an important curriculum case for our purposes because it addresses another sensitive topic in American culture, race. The analogy between how the court handled curriculum offensive to a racial group is helpful to our own inquiry. In *Monteiro*, a parent complained about the use of two books, *Huckleberry Finn* and *A Rose for Emily*, claiming the use of the word “nigger” and other racial slights violated the Fourteenth Amendment and Title VI. The court framed the question at issue as follows: “In other words, may courts ban books or other literary works from school curricula on the basis of their content?”(p. 1028) The court answer that question with a firm no “even when the works are accused of being racist in whole or in part” (Id.).

The court reasoned that “a student's First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are removed from a mandatory reading list because of threats of damages, lawsuits, or other
forms of retaliation” (p. 1029). Removing the books as requested would both interfere with students’ First Amendment rights “and significantly interfere with the District's discretion to determine the composition of its curriculum” (p. 1029). Citing Pratt (1982) with approval, the court noted the serious injury that results from curriculum censorship. A successful attempt to use the courts to censor curriculum “could have a significant chilling effect on a school district's willingness to assign books with themes, characters, snippets of dialogue, or words that might offend the sensibilities of any number of persons or groups” (p. 1030).

In defending the use of the offending materials the court noted that students were not “asked to agree with what was in it” (p. 1031) and argued that “a necessary component of any education is learning to think critically about offensive ideas--without that ability one can do little to respond to them” (Id.). The court also reconfirmed what many courts have said before about deciding what to include in the curriculum: “Such judgments are ordinarily best left to school boards and educational officials charged with educating young people and determining which education materials are appropriate for which students, and under what circumstances” (p. 1031-1032). Instead of censoring ideas, “bad ideas should be countered with good ones” p. (1032). It is the role of the teacher to guide students and “to help them learn how to discriminate between good concepts and bad, to benefit from the errors society has made in the past, to improve their minds and characters” (Id.).

Counts v. Cedarville School District (2003) concerned attempts to remove the popular Harry Potter books from general circulation in the school district’s libraries and make them available only with parental permission. The court of appeals granted summary judgment in favor of parents protesting the restriction on the circulation of the books even though their daughter had read all the books and had permission to check them out.
The court looked to the motivations of the school board for their actions even though a committee appointed to look at the book found that the books should be accessed unconditionally. The school board members mentioned various reasons, one being the possibility of disturbance of the educational setting. The court was not persuaded noting “Such speculative apprehensions of possible disturbance are not sufficient to justify the extreme sanction of restricting the free exercise of First Amendment rights in a public school library” (p. 1004).

The school board also voiced its disapproval of witchcraft and the occult as reasons to remove the books. The court was similarly not persuaded by this argument: “In the words of Tinker, ‘students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.’” (p. 1003). The court further invoked Pico’s words against the official suppression of ideas (p. 1004). Finally, the court summed up its holding by stating that the school board could not “permissibly restrict access on the basis of the ideas expressed therein--whether religious or secular” (p. 1005).

Dean v. Utica Community Schools (2004) is a recent free speech case involving a school newspaper. Unlike Hazelwood (1988), the district court found that the school district had violated the student’s free speech rights by forcing the withdrawal of a student article. In this case, a student had written an article about a lawsuit pending against the school district over the effects of the district’s bus garage on the health of a resident living near it.

The court noted that none of the factors that permitted the district to withdraw the articles in question in Hazelwood existed. The reasons the district did offer for removal of the article were not deemed of “legitimate pedagogical concern” by the court. Importantly,
previous practice had established the paper as a limited open forum as prior to and since the incident the school district had never exercised editorial control over the paper, advertising paid for the publication, it was distributed both in and out of the school, and included contributions from the general public. Additionally, the subject matter of the article was in no way unsuitable for young readers, and attempts were made to represent both sides of the story. The judge also noted that the article did not bear the imprimatur of the district because the article stated that officials from the district refused to comment on the pending litigation.

Finally, according to the testimony of experts, the article met journalistic standards and was well written for a high school newspaper. To the judge, it seemed that the only reason the article was withdrawn was because the superintendent did not like it. In light of other cases granting discretion to the school board over curriculum, this case represents that indeed First Amendment rights still exist for students in cases where attempts to limit speech do not meet the standard of “legitimate pedagogical concern.”

*Teacher free speech.*

Despite the courts’ preference for freedom of speech and the free flow of ideas, school officials have authority over the curriculum and can limit teachers’ ability to speak as they wish on its content. This is the finding in *Webster v. New Lenox* (1990), *Peloza v. San Juan Capistrano* (1994) and *Downs v. Los Angeles Unified School District* (2000).

In *Webster v. New Lenox School District* (1990), Webster was a junior high social studies teacher who introduced a non-evolutionary theory of creation into his class to counter statements in the text that the earth was four billion years old. When a student complained, the school board directed the superintendent to direct Webster to stop teaching creationism. Webster contended that the prohibition violated his First Amendment rights to free speech.
The court did not rule on the merits of teaching a non-evolutionary theory of creation or whether Webster was advocating creation science or merely presenting it to open minds as he claimed. The court did find, however, that the school board’s concerns about possible Establishment Clause infringement were valid reasons for directing Webster to stop teaching (p. 1008).

The court took a pure curriculum stance, “Mr. Webster asserts that he has a first amendment right to determine the curriculum content of his junior high school class” (p. 1007). The court then cited several circuit court decisions and Hazelwood v Kuhlmeier to support the proposition that, “There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please” (p. 1007, quoting Palmer v. Board of Education, 1979, p. 1274).

Recall from Chapter 3 in Peloza v. Capistrano (1993) that Peloza objected to teaching evolution in his science class. He also was restricted from speaking to his students about his religious beliefs during the school day. Even though this was acknowledged by the court as a restriction on his right of free speech, the court noted that, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools" (p. 522, quoting Tinker 506-507). “[T]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment....”(p. 522, internal citations omitted). As in Webster, the school district's interest in avoiding an Establishment Clause violation in this case trumps Peloza's right to free speech (p. 522).
Boring v. Buncombe County Board of Education (1998) makes clear that teachers do not have control over the curriculum. Margeret Boring had four students perform a controversial play entitled Independence. Although she notified the principal of her intent to produce the play, it was not until after her students performed the play in a regional competition and won numerous prizes that a parent of a child not in the play complained. When the principal read the script, he met with Boring and expressed his disapproval of the play. He allowed her students to perform an edited version of the play at a state competition. Prior to the start of the following school year Boring was transferred to a different school against her wishes. She brought suit claiming that the transfer was retaliation for presenting Independence and a violation of her First Amendment right to free speech. The Circuit Court held that Boring’s “selection of the play Independence, and the editing of the play by the principal, who was upheld by the superintendent of schools, does not present a matter of public concern and is nothing more than an ordinary employment dispute. That being so, plaintiff has no First Amendment rights derived from her selection of the play Independence” (p. 368).

The court analogized to Hazelwood (1988) and to Kirkland v. Northside Independent School District (1989), which found a history teacher did not have a First Amendment right to develop his own reading list. The court reasoned that “The makeup of the curriculum … is by definition a legitimate pedagogical concern” (p. 370). Therefore “the school administrative authorities had a legitimate pedagogical interest in the makeup of the curriculum of the school, including the inclusion of the play Independence” (Id.). To the court, it is better “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 Amendment right to participate in the makeup of the curriculum” (p. 371).

*Downs v. Los Angeles Unified School District* (2000) involved a teacher that disapproved of a district wide campaign to foster tolerance for homosexuals. Across the hall from a bulletin board dedicated to “Gay and Lesbian Awareness Month”, he posted his own materials in opposition to tolerance of homosexuality. During June of 1997 and 1998, the principal of the school removed objectionable subject matter from Downs’s bulletin board. School administrators and district officials cautioned Downs on numerous occasions that he was not allowed to express his particular viewpoint on the matter (p. 1007-1008).

Downs brought his action claiming his First Amendment rights to free speech were being violated by the school district. The Ninth Circuit Court of Appeals found for the school district. The bulletin boards were not an open forum, but instead controlled by the school, much like the student newspaper in *Kuhlmeier*. Anything on the bulletin boards could reasonably be perceived to bear the imprimatur of the school district. The court reasoned that “Because the bulletin boards were a manifestation of the school board's policy to promote tolerance, … all speech that occurred on the bulletin boards was the school board's and LAUSD's speech….As applied here, the First Amendment allows LAUSD to decide that Downs may not speak as its representative. This power is certainly so if his message is one with which the district disagrees” (p. 1012). The school district did not, therefore, violate Downs’s First Amendment free speech right since he had no right to speak for the school district as one could assume his messages on a school bulletin board would bear the imprimatur of government. (p. 1017).
The foregoing cases appear to be potentially chilling to teachers’ willingness to express their opinion on curricular matters. The courts draw a distinction between speech that is a matter of public concern and that which is between an employer and employee. This limit on what teachers can say in the classroom seems to run counter to the Court’s words in *Tinker* that assert that teachers do not leave their First Amendment Rights at the schoolyard gate. The circuit courts do not agree on these limits on speech, however. The following cases reveal decisions more protective of teacher speech.

In *Cockrel v. Shelby County School District* (2001) an elementary teacher claimed she was dismissed for bringing actor Woody Harrelson to discuss the legal uses of industrial hemp in class in opposition to a Kentucky statute. Cockrel maintained that her discussion was protected by the First Amendment as a matter of public concern. The court agreed “that matters of public concern are those that can ‘be fairly considered as relating to any matter of political, social, or other concern to the community’” (p. 1050, quoting *Connick*, p. 146) The court found that Cockrel’s speech fell within the Supreme Court's understanding of speech touching on matters of public concern. The court cited *Pickering* (1968) and prior Sixth Circuit cases that require a balancing of a school’s interest in an efficient operation of the school and a harmonious workplace with the teacher’s First Amendment free speech rights.

In *Cockrel* the court sided with the teacher finding her speech constitutionally protected, reversed the lower court and remanded the case for trial. If Cockrel’s speech had been merely a matter of private interest it would not have been protected. The court was critical of the Fourth and Fifth Circuit decisions in *Boring* and *Kirkland* noting that those cases give “a teacher no right to freedom of speech when teaching students in a classroom, for the very act of teaching is what the employee is paid to do” (p. 1051).
Evans-Marshall v. Department of Education (2005) pitted a high school English teacher against the school district that fired her. She contended that she was fired in retaliation for her exercise of her First Amendment free speech rights. She was criticized for using books on her reading list that certain members of the community characterized as inappropriate. The main book in question was *Siddhartha*. Others were *To Kill a Mockingbird* and *Fahrenheit 451* and a PG-13 film version of *Romeo and Juliet*. The books were all approved and purchased by the school board, and the movie, since it was rated, PG-13 did not require prior approval. The board contended, on its motion to dismiss, that it was because of her teaching performance, not exercising her free speech rights, that she was dismissed. Prior to the controversy, however, Evans-Marshall had never received an unsatisfactory mark in any previous assessment of her teaching.

The court cited *Tinker* noting that the First Amendment applies to both teachers and students and that the control of the teacher’s speech as a matter of exercising control over the curriculum is not unfettered. “The assumption that the Court would draw a distinction between the schoolhouse gate and the doors of the classroom is counterintuitive” (p. 229). There was no question that the novels and movie were protected by the First Amendment. The court then inferred that Evans-Marshall taught the main themes of the works, which included race and justice in the American South (*To Kill a Mockingbird*), spirituality (*Siddhartha*), love and politics (*Romeo and Juliet*), and government censorship (*Fahrenheit 451*). “Such content is clearly a matter of public concern” (p. 231). The fact that the board had previously approved the books and that the movie needed no prior approval according to district policy, further hurt the school district’s case. The court thus ruled that Evans-
Marshall had sufficiently established protected First Amendment activity under the *Pickering* test and therefore the case should not be dismissed but should go forward.

**Summary.**

The curriculum cases set forth a line of reasoning that establishes a more lenient standard for school districts and courts to measure their actions than Establishment Clause cases. The board action must be “reasonably related to a legitimate pedagogical concern”. One could argue this logic should apply in the inclusion as well as the removal of curriculum. The inclusion of material in the curriculum that may be objectionable to some should be supported by the courts’ preference for expanding the curriculum when possible. If the board’s reasons are legitimate, which can be read as not primarily based on religious beliefs, a court should not question “the wisdom of the decision”.

The cases regarding parent/student challenges to board action provide a clearer standard than those involving teachers and school boards. When parents challenge the curriculum, the boards must be able to show support for their decisions based on legitimate pedagogical concerns rather than because their disapproves of the ideas forwarded by disputed materials. Teacher challenges seem to be divided between courts that follow the more school board friendly approach of *Hazelwood*, and the more teacher friendly approach of *Pickering* and *Tinker*. Mawdsley (2005) doubts that teachers would prevail in an attempt to teach the origins controversy claiming free speech rights. He recognizes that “courts have been reluctant to grant free speech protection to teacher comments within the classroom, and this appears to be especially true where those comments might be associated with religious views” (p. 12). Whether a teacher could teach alternatives to evolution against the school board’s wishes because origins of life is a matter of public concern is an interesting
question but not the focus of our efforts here. Instead my analysis will target the reasonableness of a school board allowing alternatives to evolution to be taught using the justification of the First Amendment free speech clause and the logic of the preceding curriculum cases.

The purpose of these cases is to demonstrate that it is the school district, not the teachers, parents, students, or judges who rightly decide the curriculum of a school. By definition, the school board has a legitimate pedagogical interest in the curriculum. That being so, the courts’ initial reaction to any curriculum issue should be deference, unless a matter of constitutional concern is implicated. Clearly the issue of teaching alternatives to evolution in science class concerns the First Amendment. The inquiry should be, however, not the content of the curriculum but the purposes for its teaching. Any legitimate purpose demonstrated by the board, should suffice as long as its actions support that purpose. In Kitzmiller, the purpose advanced of improving science education was not supported by the actions of the board, which plainly showed a religious purpose.

The educational benefit of teaching ID in science class lies in the fact that a science teacher can better show the scientific shortcomings of ID than a social studies teacher. Any teacher, however, ought to be able to present the issue in a value neutral manner. Given the holding in Peloza, Boring, Downs, and similar cases, even if science teachers disagreed with the inclusion of ID in the curriculum, as long as they are not told to show preference to it over evolution, they would have no case to argue against its inclusion.
Is Teaching the Origins Controversy a Legitimate Pedagogical Concern?

Aside from the legal issues involved, it is important to look at the educational value of teaching alternatives to evolution in science class. When looking to see whether alternatives to evolution have a place in the science classroom, it is necessary to expand the lens with which one looks at the issue. Beckwith (2003), Greenawalt (2003, 2005), Wexler (2003, 2006a), Hackney (2006), and others look at the scientific viability of the competing ideas of intelligent design and creationism as a measure of their place in the science classroom. Instead, here the context is broadened to look at the educational endeavor we as a society enter into as teachers, students, parents, administrators, and policy makers. The overarching question is what is the purpose of public schooling? The questions that follow are, is there a place for teaching about religion in that purpose, and does teaching alternatives to evolution fit within that place?

The Purpose of Public Education

Obviously, there is no one purpose of public schooling, rather there are many. The discussions of the purposes of public education have busied the minds of scholars for years and the debate has been and still is lively and impassioned. For our purposes, however, it is necessary to focus in on one purpose of public education upon which there is agreement both in the courts and among educators. That purpose is the preparation of students to take their place as informed citizens in our democracy.

The Supreme Court has reinforced its view of this purpose of public education on numerous occasions. For example, in Ambach v. Norwich (1979) the court states: “The importance of public schools in the preparation of individuals for participation as citizens,
and in the preservation of the values on which our society rests, long has been recognized by our decisions” (p. 76). Then the Court quotes *Brown v. Board of Education* (1954): "Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." (p. 76-77, quoting *Brown*, p. 493). The Court in *Ambach* then cites at least a half-dozen other Supreme Court cases reinforcing the civic value of education (p. 77)(see also *Pico*, 1982).

Educating children for their role in a democratic society is not just a legal goal of education, it is one of the main goals of the educational establishment. Gutman (1987) work on preparing children to take their place in democratic society emphasizes that one important purpose of schools is to educate children for their role as citizens. This theme is more recently given voice by writers such as Salomone (2000) and Welner (2003).

There is much less agreement of what education for preparing students to perpetuate democracy should entail. Salomone (2000) suggests there is a values debate between the principle of individualism and the ideal of civic virtue. Education for democracy instills “in students those political beliefs and values that are the bedrock of a liberal democratic state. Among these are the recognition of basic rights and freedoms, the rejection of racism and other forms of discrimination as affronts to individual dignity, and the duty of all citizens to uphold institutions that embody a shared sense of justice and the rule of law” (p. 197-198).

Within this civic purpose of education are two conflicting positions. Kevin Welner (2003) summarizes: “One perspective is the traditional view of schools as a vehicle for teaching American youth shared values and norms, as determined by an equitable and trusted
democracy...The other prominent perspective sees the school as a marketplace of ideas” (p. 965-966). Proponents of second perspective “believe that the classroom should be free from inculcation of traditional beliefs, values, and ideas” (Id.).

Whichever perspective one favors, a free and informed people play an important role in a healthy democracy. The protection of the First Amendment is necessary to the development of an informed populace. Welner draws the link to education: “[I]n order for the First Amendment to have meaning, it must ultimately ensure Americans' capacity to produce and to use knowledge in ways that are personally and politically effective” (p. 973).

Part of preparing our students as citizen is teaching them about controversial matters. Welner endorses this notion writing that “educational experts strongly support the instructional inclusion of controversial issues to foster the development of skills needed for effective participation as a citizen in a democracy, as well as the development of interpersonal and critical thinking skills” (p. 961-962).

In Welner’s mind, “The classroom exists in order to serve an exceptional function: to facilitate learning, sometimes inculcative but often analytic and critical” (p. 993). An acceptable, even encouraged path to this purpose is through teaching controversial issues.

Salomone (2000) in her book *Visions of Schooling: Conscience, Community, and Common Education*, echoes the principle purposes of education first by presenting the idealized notion of the common school from the mid- nineteenth century:

The public school was to be the crucible in which our democratic and republican roots would blend. School reformers of the mid-nineteenth century designed the common school with a view toward developing civic virtue and a national character through a shared set of values reflected in the curriculum….Mass compulsory
schooling would permit individuals across the economic spectrum to both realize their own potential and support civic purposes through enhanced participation as informed citizens sharing a public philosophy (p. 2).

Given widespread and longstanding support for preparing children to be citizens, and the role of inculcating the values necessary to accomplish that task, we next ask if teaching about religion can and should play a meaningful role in the process.

**Is there an educational purpose for teaching about religion in school?**

While the Supreme Court has often stated that teaching about religion in schools is constitutionally permissible, there remains considerable debate on whether, what, and how religion should be taught in public schools. As a matter of educational policy development, it is important to explore, albeit somewhat briefly in this context, the general educational arguments for including education about religion in public schools.

It is doubtful that educators would ever reach consensus on such matters, but the beauty of the American school system is they do not have to. Most educational policy decisions are made at the local level, many at state levels, and relatively few at the national level, leaving room for various interpretations of the value of including education about religion. Any such education must of course conform to constitutional guidelines.

The value of including religious perspectives in public education is generally supported even beyond church walls and judicial halls. The dilemma of how to accommodate the religious beliefs of students without impinging on the protections of the First Amendment has received attention from various secular and sectarian groups. The Anti-Defamation League published a handbook in 1992 to aid public schools in determining the place of religion in schools. In 1994, Jewish and protestant leaders presented Vice-President Al Gore
with a statement that affirmed the separation of church and state and that schools should not promote a religious perspective, while at the same time it encouraged schools to “acknowledge and protect the diverse religious perspectives of students” (Salomone, p. 137).

Another group, the Freedom Forum at Vanderbilt University put forth a statement in 1995 entitled “Religious Liberty, Public Education, and the Future of American Democracy” that pledged to soften the tone of the rhetoric and respect the views of others of the signatories, which included the PFAW (People for the American Way), the Christian Coalition, and Citizens for Excellence in Education. Later in 1995, the American Jewish Congress forwarded a statement joined by the ACLU and the American Jewish Committee, among others. Their statement affirmed the rights of students to use religious or anti-religious remarks in classroom discussions and express their religious beliefs in assignments. President Clinton even endorsed the statement and directed the Secretary of Education and Attorney General to draft guidelines on religion in schools (Salomone, p. 138-139). President Clinton’s statement noted that “nothing in the First Amendment converts our public schools into religion-free zones or requires all religious expression to be left at the schoolhouse door”(p. 139).

The point of these examples is to illustrate that more moderate religious organizations, secular organizations, and government institutions acknowledge and affirm the importance of religion in our culture and recognize that it has a limited place in public schools. While these expressions of tolerance and accommodation are encouraging and show progress toward neutralizing some religious extremism, Salomone (2000) is quick to point out that they do not carry the weight of law, none were endorsed by the more vocal
conservative Christian organizations, and schools across the country still regularly limit the appropriate expression of students (p. 140).

**The educational benefits of teaching about religion in schools.**

Having established that there is at least a fragile consensus that teaching about religion is educationally desirable, our next step is to briefly explore why it is educationally beneficial to include religion in public schools. Undeniably, Judeo-Christian religions have played an important role in the history of the United States. Though religion remains a vital and vibrant force in American culture, it is often excluded from conversations and considerations in the public square. The growth of vocal, politically conservative Christian organizations intent on foisting their views on the rest of America, is in no small part because of the marginalization of religious perspectives in government, education, and our public culture at large. Unfortunately these immoderate voices caricaturize the Christian faith as one monolithic unified force speaking for all Christians, when in reality there are many perspectives from within one overarching faith.

What such conservative voices lament, and others echo, is that the exclusion of religious perspectives from the educational enterprise compromises the educational endeavor by ignoring the significance of the role religion played in our past and trivializing the beliefs of many today. Wexler (2002) believes that “schools should teach about religion so that students can make fully informed decisions about laws and other government actions affecting religious belief and practice and so they can understand the myriad ways that religious beliefs affect the way that many Americans think and talk about issues of public importance, including law, in the clothed public square” (p. 1170). Wexler puts forward five reasons for teaching about religion in public schools. All have to do with preparing students
for citizenship in their community, in the nation, and in the world. The first reason is that teaching about religion teaches intellectual reasoning skills that students “might not develop in their other classes and pursuits” (p. 1200). When students learn about religion they learn to “analyze, evaluate, and articulate positions on public issues from within very different fundamental paradigms” (p. 1201). Students may learn how different religious traditions view a variety of philosophical, social, moral, and political issues.

A second reason Wexler advances for teaching about religion is to gain knowledge of religious history. “[B]y teaching students about the role that religious believers, religious communities, and religious ideas have played over the course of history, schools can improve those students' currently inadequate understanding of historical events, better preparing them for civic life” (p. 1202).

A third reason to teach about religion is so that students may make informed evaluations of government laws and other action affecting religious believers and communities (p. 1203). Wexler’s reasoning here is that at all levels of government, from international to local, actions taken can significantly affect religious belief and practice (p. 1207).

The fourth reason Wexler puts forward is that teaching about religion can further students’ understanding of the role religion plays in public debate and decision making (p. 1214). Teaching about religion can help bridge the lack of mutual understanding between people of different faith traditions or no religious faith and hopefully help promote more civil discourse on “some of our most divisive public controversies” (p. 1218).

Fifth, Wexler submits that teaching about religion can help promote “tolerance, empathy, and mutual respect.” Fostering these virtues is a goal of civic education in a
democracy. He contends that the "major rallying call of the movement to teach students about religion is the need to find ‘common ground’"(p. 1219).

In his book *Does God Belong in Public Schools?* (2005), Greenawalt explores the purposes of public education then looks to see how religion fits. He acknowledges religion’s central role in human culture through history, but that the place religion should take in the mix of public school education is controversial. He argues that teaching about religion is useful because “whatever the sources of one’s own public and private values, one will develop a better sense of how to treat others and make political choices if one grasps how people who do care about religion see themselves and the wider society”(p. 27).

Greenawalt expresses concern that some religious views will inevitably be favored over others. The difficulty of teaching religion in schools in a neutral manner is that what neutral is remains firmly in the eye of the beholder. Greenawalt writes of the “spillover effects” of teaching about religion in schools. Spillover effects are the unintended byproducts of teaching about religion. For example, if a school teaches as true what a religion asserts is false as in the theory of evolution, then the belief in the religion can be undercut (p. 29). There is even a spillover effect of not teaching religion in schools and that is to deliver the message to students that religion is not important (p. 29). From a societal standpoint, some spillover effects may be more beneficial than others but any approach to teaching religion runs the risk of favoring or disfavoring certain viewpoints, even if only unintentionally.

Nord and Haynes (1998) recognize two fundamental reasons to include religion in the curriculum:

First there are *civic* reasons. The American experiment in liberty is built on the conviction that it is possible to find common ground in spite of our deep religious
differences. It is rooted in the civic agreement we share as citizens, in our principled commitment to respect one another. Properly understood, this means that we not exclude religious voices from the public square or from public education, but take one another seriously…

Second, there are educational reasons for taking religion seriously. A good liberal education should expose students to the major ways humanity has developed for making sense of the world—and some of those ways of understanding the world are religious. An exclusively secular education is an illiberal education. Indeed, we cannot systematically exclude the religious voices in our cultural conversation without conveying the implication that religion is irrelevant, that religious views have no claim on the truth…(p. 8-9, emphasis original).

Nord and Haynes stress that these are not arguments for promoting religion or for indoctrinating students. Rather, they are arguments for taking religion seriously and including it in the curricular discussion (p. 9).

_How should religion be taught in schools?_

There is not much controversy in the general rhetoric previously advanced that teaching students to be citizens in a democracy includes teaching them to respect the contributions of religion to our history and culture as well as the societal benefit of honoring our diverse beliefs and the right to hold them. Actually putting such concepts into practice, however, raises warning flags and words of caution. How should religion be taught? Very carefully.

A publication endorsed by numerous educational and religious organizations suggests these guidelines for teachers teaching about religion in public schools:
1. The school's approach to religion is academic, not devotional.
2. The school may strive for student awareness of religions, but should not press for student acceptance of any one religion.
3. The school sponsors study about religion, but may not sponsor the practice of religion.
4. The school may expose students to a diversity of religious views, but may not impose any particular view.
5. The school may educate about all religions; it does not promote or denigrate any religion.
6. The school may inform the student about various beliefs; it does not seek to conform him or her to any particular belief\(^2\) (Haynes & Watson, 2001, p. 90).

Teaching about religion in accordance with these guidelines appears to satisfy the requirements of neutrality posited by the courts in Establishment Clause cases. To my knowledge, however, these guidelines have not been challenged in court.

**The Educational Purpose for Teaching the Origins Controversy in Science Class**

Another logical question is where should religion be taught in the public school?

Haynes and Watson, “Wherever it naturally arises” (2001, p. 91). The natural place to teach

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\(^2\) The signers included the American Academy of Religion, the American Jewish Congress, the National Educational Association, American Association of School Administrators, the American Federation of Teachers, the Americans United Research Foundation, the Association for Supervision and Curriculum Development, the Baptist Joint Committee on Public Affairs, the Christian Legal Society, the Church of Jesus Christ of Latter-day Saints, the Islamic Society of North America, the National Association of Evangelicals, the National Conference of Christians and Jews, the National Council of Churches of Christ in the USA, the National Council on Religion and Public Education, the National Council for the Social Studies, and the National School Boards Association.
about the origins controversy, then, is in science class. At this point in the process, many evolution advocates get very nervous. Their oft-repeated argument is that creationism and intelligent design are not science and thus should not be taught in science class. One problem with that argument is that the origins question is inextricably linked to science as it is to religion. Both science and religion seek answers to our ultimate beginnings, but using entirely different means.

One reason the controversy persists is because of scientists overstepping the bounds of science and making unwarranted philosophical or anti-religious conclusions. Miller (1999) concludes that many scientific writers are “inclined to use evolution as a weapon against religion” (p. 171). One of many possible examples is Richard Dawkins, who uses evolution as proof that in the universe there is “no design, no purpose, no evil and no good, nothing but blind, pitiless indifference” (p. 171).

Miller points out that there is little wonder that many people would take issue with such a statement. “Since such characterizations are presented as the direct implication of evolutionary theory, one might fairly conclude from that evolution itself is the enemy” (p. 171). William Provine, another prominent biologist states: “Modern science directly implies that there are no inherent moral or ethical laws, no absolute guiding principles for human society….There is no way that the evolutionary process as currently conceived can produce a being that is truly free to make moral choices” (pp. 171-172). Such incendiary statements are simply not scientific but certainly contribute to another reason the controversy persists: conservative Christian activists crossing the line of science in the other direction by making scientific conclusions based on faith principles or literal biblical interpretation.
With so much misinformation, disinformation, and misunderstanding, how can we begin to disabuse people of the improper notions advanced on both sides of the origins controversy? It is well within the purview of the school to decide that the science class is the best place to undertake this mission. Disagreements over the proper place to teach the origins controversy should be expected and accepted. The point here is simply to say there is a legitimate educational purpose for teaching alternatives to evolution in science class. Any teacher in any subject should be able to present conflicting ideas without endorsing one over the other. Science teachers should be the most informed about the subject matter and should understand and be able to explain the difference between scientifically supported conclusions and those that are not.

Salomone (2000) argues that education’s goal with regard to religious neutrality is to assure that students are capable of making decisions considering all things rather than merely accepting the conventional wisdom. This includes science, which Salomone (2000), Nord and Haynes (1998), and Brickhouse & Letts (1998) all argue has its own form of orthodoxy “immersed in a cultural context with no claim to historical objectivity” (Salomone, pp. 207-208). In fact, Salomone contends that science and religion are similar in that both look to explain events and relationships within a worldview that does not critically examine its basic assumptions (p. 207). Perhaps it is the lack of objectivity on the part of both science activists and religious activists that exacerbate the controversy and add to the need to teach the controversy in science class.

One consistent complaint of evolution opponents is that evolution is an anti-religious idea. This is simply not true and science class is a great place to show it. While evolution through natural selection is not against God, many prominent scientists are. In science class
teachers can best point out the limits of science. “[W]hile changes in life and the earth are within the purview of science, the question of the origin of life is the purview of theology. Science ought to stay out of that discussion. . . . Science teachers must be responsible and educated enough to help students understand these differences” (Brickhouse & Letts, 1998, p. 226).

Loewy (2006) argues that it is better for students to learn about the controversy in school than church because at least in school students can examine and evaluate propositions. Whereas someone at church may say "The Bible says God created the earth in six days. That's all you need to know" (p. 87), a teacher in school asks "What evidence is there of intelligent design?" (Id.). Loewy clearly grasps the advantage of learning about the controversy in science class, “Frankly, the intricacy of the question is such that it should not be left to the church. Students are entitled to the opportunity to study the question in a setting of exploration rather than indoctrination” (p. 88).

Brickhouse and Letts (1998), two science education professors also argue to include the origins debate in science class. In general they are critical of the way science is taught in schools complaining that “science is portrayed in schools as though the theories of science have no historical fingerprints, have no remaining controversial aspects, contain no metaphysical assumptions, and are oblivious to the social institutions that constitute and surround them” (p. 222). Instead, they continue, science should be taught in context and students should be taught in:

ways that acknowledge its dynamic nature, its relationship to broader cultural concerns, and the particular framework within which science operates. We believe this is important because it is honest and because it is potentially of tremendous
educational value. Furthermore, the inability to recognize that science operates within a particular framework (not a universal one) can lead to a dangerous scientism that is intolerant of other ways of understanding the world (p. 222, internal citations omitted).

Their view extends to teaching the origins controversy:

Although we do not believe that what people call “creationist science” is good science (nor do scientists), to place a gag order on teachers about the subject entirely seems counterproductive. Particularly in parts of the country where there are significant numbers of conservative religious people, ignoring students’ view about creationism because they do not qualify as good science is insensitive at best. One of the most common criticisms students make of their science classes is that the knowledge they learn is irrelevant to them. . . Perhaps allowing discussions about creationism in science classes might be an opportunity to address issues students care about (p. 227).

The authors’ criticism of the dogmatic approach to teaching science in school is not limited to evolution and should not be construed that way. They caution schools that “presenting evolution by natural selection as biased, limited, and problematic and the rest of science as the unquestionable truth would perhaps be the worst kind of distortion possible” (p. 228).

Nord and Haynes (1998) advance perhaps the broadest notion of including the origins debate in science class. The authors believe that students not only should be able to study the origins controversy, but must study it because “a good liberal education requires it. If students are to think in an informed and critical way about matters of controversy and
importance (like the origins of life), they must understand religious as well as secular points of view” (p. 154). Nord and Hayne argue that:

when we disagree about matters of great importance, we teach students the conflicts; we teach them about the contending alternatives. Indeed, if students are to think critically about science and its relationship to other domains of knowledge, their education can’t be limited to scientific perspectives on these relationships (p. 156 emphasis original).

When considering the authors’ position, and this paper’s as well, it is important to reiterate that it is not advocated that alternatives to evolution need to be included because of their scientific viability. In that regard, Greenawalt (2005) is correct in arguing for their exclusion from the science curriculum. Nord and Haynes explain:

Of course, if we take either intelligent design theory (or creation-science) for that matter) to be nothing more than science, there is no argument to be made for including either one in the curriculum as a matter of religious neutrality. If they are science, the argument for including them should be made in terms of good science education. We believe that scientists should be free to determine both what counts as good science and what range of alternative scientific theories should be included in the curriculum when scientists disagree among themselves. Given the number of its advocates, there may be no more obligation to include intelligent design in the science curriculum than any scientific theory held by a relatively small minority of scientists (p. 158, emphasis original).

The essence of the inclusion argument is that alternative ideas should be included to encourage religious neutrality, broaden the lens that students use to view the controversy,
attack the ignorance that extremists on both sides perpetuate, and reveal an unrepresented middle ground.

To provide students with alternative ways to understand controversial issues, those alternatives must be presented in context, not the abstract. In science class, they can learn how widely held the different views are within scientific and religious traditions. They can learn which are consensus views, which are controversial, and what each view says in its defense or in criticism of its detractors (Nord and Haynes, p. 159). In the end Nord and Haynes want students to be “in a position to make ‘all things considered’ judgments rather than accepting uncritically the conventional wisdom of any discipline, science included” (p. 158).

Critics of teaching non-scientific alternatives to evolution in science class argue that it will confuse students (McCarthy, 2006), and unnecessarily singles out evolution for heightened scrutiny, when there is no greater, and arguably less, scientific doubt about its validity than other areas of science. While teaching criticisms to all scientific theories makes educational sense, schools and teachers simply do not have time to examine every theory in depth. Indeed most will probably not choose to examine evolution in depth. It is common practice in education, however, to teach some topics in greater depth than others. For example, in U.S. History teachers often spend more time on the great wars than on social change movements. One could argue that the women’s suffrage movement deserves equal time with the Civil War, but ultimately that decision is an educational one.

Likewise, scientists may argue that the theory of Black Holes and the expanding universe is more controversial than evolution. The evolution controversy, however, captures the interest of our culture, and is likely to capture the interest of students. Its cultural
significance, not its scientific validity, is reason enough to single it out among other scientific theories. Wexler (2003) argues that because classes may be more interesting by teaching the controversy is not reason enough to teach it. With all due respect to Wexler, keeping students interest in the classroom is always a challenge for teachers and a great reason to teach something to students, especially when it is relevant to their lives and relevant to the greater culture in which they live.

With regard to confusing students, who is to say students are not already confused? The origins controversy is played out in churches and the media, focusing on sound bytes and extreme positions. Children may be subjected to the biases of their parents and the science establishment with no forum to examine and think through the issue. Additionally, teachers regularly intentionally confuse students in a variety of subject areas to stimulate thinking and sharpen analysis. There is no need for students to even reach a conclusion about what they think about the origins controversy. The educational benefit lies in the process of examining a controversial idea, looking at the arguments from different perspectives, and gaining an appreciation for the complexity of the issue. The classroom, as the marketplace of ideas, is just the place to engage students in this exploration about a topic that students care about.

Teachers and schools ought to embrace the opportunity to do it (Brickhouse & Letts, 1998, p. 229).
Chapter 5 - Analysis

In Chapter Three, traditional Establishment Clause cases and literature related to the origins controversy was reviewed. Chapter Four provided analysis of other perspectives applicable to the origins controversy that exist in the jurisprudence that have gone either unutilized or under utilized. Also Chapter Four provided educational justification for including discussions of alternatives to evolution in the science classroom. The purpose of this chapter is to take the existing case law, legal analysis and educational justification and craft a new way to examine the origins controversy.

Restatement of Legal Research

Initially, it is important to restate the main findings of the literature and bring them from their respective spectrums together. The goal is then to form a new paradigm for addressing the origins controversy in public schools that satisfies constitutional concerns, respects established science, values religious perspectives, advances educational goals, and benefits not only students, but society as a whole.

Establishment Clause Tests

The main Establishment Clause test used by courts is the *Lemon* test first used in *Lemon v. Kurtzman* (1971). The three-prong test looks first to see if there is a secular legislative purpose for a government action. Then it looks to see that the primary effect of the government action neither advances nor inhibits religion. Finally, the action must not result in an excessive entanglement of government and religion (p. 612).
The endorsement test is also commonly used in courts. Similar to the *Lemon* test, it looks to determine whether the government either endorses or disapproves of religion. The first part of the test examines what the government intended through its statute or other action. The second part examines what message was actually received by those impacted by the state action. This is often accomplished through an objective observer test. The court looks to see how it thinks a reasonable person might construe the government action.

Supreme Court Establishment Clause cases dealing with teaching alternatives to evolution in school have focused on the purpose and effect of such efforts. *Epperson v. Arkansas* (1968) and *Edwards v. Aguillard* (1987) are the only Supreme Court cases that deal directly with the topic. Both cases reflect attempts by state legislatures to restrict the teaching of evolution in public schools, not for educational purposes, but for what the Court found were religious purposes. In *Epperson* the Supreme Court found an Arkansas statute prohibiting the teaching of evolution to be unconstitutional in violation of the Establishment Clause. The Supreme Court found that the only reason for the law was because a religious group considered evolution to conflict with the biblical account of creation.

In *Edwards*, a Louisiana act required that evolution could only be taught if creation science was taught. The Court found the purpose of the act was religious because it sought to restrict the teaching of evolution by tying it to the teaching of a religious idea. The Court noted that act’s avowed purpose, academic freedom, was actually curtailed rather than enhanced by the bill since teachers already had the power to teach alternatives to evolution before the state acted.
Teaching About Religion in Public Schools

Through dictum, which means statements in a court’s decision that do not bear directly on the outcome of the case, the Supreme Court has often declared that though schools are to remain free from favoring a religious viewpoint, they may teach about religion. Indeed it has even recommended that schools do so. Starting with Abington v. Schempp (1963) and including Stone v. Graham (1980), Edwards v. Aguillard (1987), and Lee v. Weisman (1992) the Court has ruled against the particular religious action of the school while at the same time reiterating that “Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment” (Abington, p. 225).

Freedom of Speech

In public schools from kindergarten through the university level, the courts show a strong preference for freedom of inquiry. Often this is called academic freedom, but academic freedom as it exists in public colleges and universities does not exist in K-12 schools. Nevertheless, courts have often applied the protection of the Freedom of Speech Clause of the First Amendment in school settings. Sweezy v New Hampshire (1957) and Keyishian v. Board of Regents (1967) provide the backdrop for this preference. These two cases advance the idea that schools should be places where students are free to inquire and explore the world of ideas lest we cast a pall of orthodoxy over the classroom. Pico (1982) cautions schools about the censorship of ideas simply because the school board disagrees with them. While matters implicating these freedoms are often brought against religious conservatives seeking to limit the curriculum to
views that satisfy their wishes, the logic should run both ways. Just as a parents cannot restrict the curriculum to favor religious ideas, parents, should not be able to restrict the curriculum to keep out disfavored religious ideas, so long as those ideas are not presented in a manner to advance or inhibit religion.

K-12 school free speech standards.

*Tinker v. DesMoines* (1968) establishes that neither students nor teachers leave their freedom of speech rights at the schoolhouse gate, but the expression cannot materially disrupt the educational function of the school. *Bethel v. Fraser* (1986) limits student rights as it allows schools to censor student speech that is inappropriate for civil society. Included in this rationale is the duty of schools to teach “tolerance of divergent political and religious views even when the views expressed may be unpopular” (p. 681).

*Hazelwood v. Kuhlmeier* (1988) found that schools may regulate the content of school newspapers published as part of a regular curricular program subject to the control and supervision of the school “so long as their actions are reasonably related to legitimate pedagogical concerns” (p. 273). The Court explains that only when there is no valid educational purpose for school action is the First Amendment so “directly and sharply implicated as to require judicial intervention to protect students' constitutional rights” (p. 273, internal quotation and citation omitted). The rationale of *Hazelwood* has been extended to control teachers who wish to depart from the approved curriculum (*See, e.g. Boring v. Buncombe County Board of Education*, 1998).

School free speech cases all involve attempts to restrict the curriculum, or teacher and students voices. The courts consistently favor the discretion of the school boards so long as there are educational reasons for their action. Given the courts’ preference for the “robust
exchange of ideas” (Keyishian, p. 603), one could make a strong argument that courts would
look even more lightly on a school policy that expands the curriculum for legitimate
pedagogical reasons.

Shortcomings of Current Analysis

The current legal analysis and literature do not adequately address the origins
controversy as, for the most part; the courts and scholars bring an outsider’s perspective to
what happens in the classroom. Curriculum issues need a more specific focus than the
generalized Establishment Clause analysis provides.

Establishment Clause Tests Inadequate for School Curriculum Issues

The Lemon test and the endorsement test both are inadequate for addressing
curriculum issues. The Lemon test is on shaky ground already as Justice Scalia has been
critical of it for at least twenty years (See, e.g. Scalia’s dissent in Edwards, 1987), has had
support from other justices, and there are now two more conservative justices on the
Supreme Court.

As it pertains to the origins controversy, the Lemon test fails to adequately consider
the purposes of education and the nature of the classroom. Recall that Lemon v. Kurtzman
(1971) was about schools but it was not about what happens in the classroom. Instead, it was
about the payment for services in private schools for secular services. As such the facts of the
original case and the test itself did not consider the practical realities of the classroom. When
applied to curriculum cases, the test does not provide adequate guidelines for what needs
should be considered in such circumstances, particularly with regard to balancing the
freedom of inquiry that is so important in the classroom. The shortcomings of the *Lemon* test are made evident in the two recent cases that applied it.

In *Kitzmiller v. Dover* (2005) and *Selman v. Cobb County* (2005) federal district courts found an unconstitutional effect of proposed school policies that encouraged a critical look at evolution. *Kitzmiller* was an easy to decide because the school board’s efforts revealed an overtly religious purpose for its policy in violation of the first prong of the *Lemon* test that requires a secular purpose for any policy arguably implicating religion. The Dover school board abandoned its normal protocol for initiating curriculum change and ignored legal advice and input from science teachers in their attempt to inject a religious perspective into the school. The school board’s justification for its ID policy was to promote critical thinking and improve science education (p. 750). The court rightfully held this purpose to be a “sham” as the school board made no attempt to support its purpose through evidence of deliberation, scientific support, or educational rationale.

The court, however, overstepped the needs of the case, misconstrued judicial precedent, and added to the confusion over the origins issue by undertaking an analysis of the scientific viability of intelligent design. *Edwards* should have guided the court. In *Edwards*, once the Court found no secular purpose for the act, it ended its analysis. That is all the *Kitzmiller* court needed to do and should have done (Loewy, 2006, Wexler, 2006, and Italiano, 2006). Instead, the court continued and assumed incorrectly that by showing that ID had religious underpinnings and lacked scientific credibility, its very mention constituted a violation of the Establishment Clause. The court based this part of its decision on *Freiler’s* finding that “an urging to contemplate alternative religious concepts implies School Board approval of religious principles” (1995, p. 348).
Following the court’s logic, once it found that ID was a religious idea, that made it unconstitutional to teach it in school. The Kitzmiller court’s reasoning dictates that the mere mention of a religious concept constitutes an Establishment Clause violation. The flaw in this thinking is that it completely discounts religious concepts as viable ways of knowing and their secular presentation as constitutional. Such an approach can easily be taken as disapproving of religion just as Black feared in his concurrence in Epperson and O’Connor articulates in the endorsement test. The court does limit its ruling somewhat by enjoining the teaching of ID in science class, but it does not explain why or whether it would be acceptable to teach ID elsewhere.

*Smith v. Board of School Commisioners* (1987), an Eleventh Circuit case, more appropriately recognizes that mere accommodation of religion is not sufficient to violate the primary effect prong of the Lemon test. That religion is implicated in the origins controversy is only a statement of the obvious, not an endorsement of a religious view.

The court further erred by singling out the science classroom in its overbroad ruling. Holding that intelligent design could not be taught in science classes in the Dover school district creates the impression that science has constitutional rights. Essentially, the court protected science from sharing the classroom with an unscientific idea. There is absolutely no justification for such a finding either in the Constitution or by statute. The court would have been well to remember that the First Amendment protects people, in this case school children, from the actions of the government. The subject of science is not entitled to nor does it need protection from the government. Educationally, choosing to keep ID out of the science classroom may be justifiable but what is taught and where is a decision best left to the schools (*Epperson*, 1968).
All this is not to say that the school board was right. The school board still violated the Establishment Clause, if only because it intended to compromise teaching evolution and get religion back in school. The board’s action was undertaken not for educational purposes, which are acceptable, but for religious purposes which are not.

The court in *Selman* (2005) similarly erred in finding that the primary effect of the disclaimer was to advance a religious viewpoint. While there was certainly evidence that concern about the religious beliefs of an element of the population were taken into consideration, it can hardly be said that the wording of the disclaimer and the past history of fundamentalist Christian opposition to teaching evolution make a compelling case that the school board was trying to establish religion. In fact the court goes so far as to admit the point: “There is no evidence in this case that the School Board included the statement in the Sticker that ‘evolution is a theory, not a fact’ to promote or advance religion” (p. 1308). Nevertheless, the court found that the primary effect of the sticker was to advance religion (p. 1310).

As Justice Scalia noted in his dissent in *Edwards* : “[W]e do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths” (p. 615). It appears in *Selman*, that the board considered community input that included pressure from conservative Christian elements, but their motivation for including the disclaimer was not religious. To then assert that the primary effect of their disclaimer was to advance religion defies logic. There is great danger in invalidating policies and legislature merely because of the involvement of religious organizations. Scalia again: “To do so would deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced
Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims” (p. 615).

The endorsement test also reveals its weakness in its application in *Kitzmiller* and *Selman*. In *Kitzmiller*, the court goes to great lengths to reveal how three different reasonable objective observers would find an endorsement of religion. What is unclear with such a standard, however, is just how one determines what a reasonable observer would already know. In *Kitzmiller* the court attributed knowledge to its reasonable observers that no one on the school board possessed. At least this finding was consistent with the general disdain the court held for the school board and its action.

In *Selman*, the court also decided what a reasonable observer in Cobb County would know. The problem with this test is that the court can choose to assign or withhold knowledge from its fictitious observer on its own whim. As Bowman (2006) suggests in her analysis of the *McCreary* (2005) decision, the court would be better served to examine government purpose not by “the distanced eyes of the objective, reasonable observer, but rather ascertained for actuality by the blinder-free eyes of courts”(Bowman, p. 489-90).

The *Selman* and *Kitzmiller* courts exemplify the weakness of applying current Establishment Clause tests in curricular matters as neither the *Lemon* test nor the endorsement test consider valid educational purposes of government action. Both cases ignored useful precedent from within traditional Establishment Clause analysis and from within education curriculum analysis that referring to religion is not in and of itself a violation of the Establishment Clause (see e.g. *Smith*, 1987).

The line of argument and the reasoning used by the judges in these cases reveal a disturbing lack of understanding of the Supreme Court precedent in school curriculum
challenges involving the origins controversy. Surprisingly, legal scholars exhibit a similar lack of understanding. They regularly justify censoring the origins controversy because of the religious nature of creationism and intelligent design (see e.g. Wilson, 2003, Brauer, Forrest & Gey, 2005, Bauer 2006, and Katskee, 2006).

These cases and examples from the literature reveal a fundamental misconception of the Constitution that results from the limited utility of the Lemon test and the endorsement test. In the school curriculum context, neither test requires the examination of the potentially neutral presentation of religious concepts. Both tests require that the court look to see if the state action neither advances nor inhibits religion but the application of the tests does not seem to take a neutral stance (Pager, 2006). Instead the recent case law creates a presumption that all religious concepts are unconstitutional, which is in direct contradiction to both legal precedent and educational policy. Scalia points to court precedents that reinforce the notion that mention of religion is not unconstitutional in his dissent in Edwards:

Similarly, we will not presume that a law's purpose is to advance religion merely because it "happens to coincide or harmonize with the tenets of some or all religions," "Harris v. McRae, supra, at 319, 100 S.Ct., at 2689 (quoting McGowan v. Maryland, 366 U.S. 420, 442, 81 S.Ct. 1101, 1113, 6 L.Ed.2d 393 (1961)), or because it benefits religion, even substantially. Thus, the fact that creation science coincides with the beliefs of certain religions, a fact upon which the majority relies heavily, does not itself justify invalidation of the Act (p. 615-616).

Authors such as Beckwith (2003) forward arguments for justifying legislation in favor of ID using Establishment Clause rationale:
Thus, an ID statute could be justified on the basis of neutrality by arguing that to teach only one theory of origins (evolution)—that presupposes a controversial epistemology (methodological naturalism), entails a controversial metaphysics (ontological materialism), and is antithetical to traditional religious belief—the state is in fact advocating, aiding, fostering, and promoting irreligion, which it is constitutionally forbidden from doing. The state is not merely teaching what some religious people find antagonistic or offensive to their faith, which would not be unconstitutional. Rather, it is promoting a point of view—a metaphysical perspective—that "occupies in the life of its possessor a place parallel to that filled by" traditional belief in God (p. 503, footnotes omitted).

Bad Facts Make Bad Law

Often, it seems that the facts of the cases that come before the court do not lend themselves to useful or novel insights. *Kitzmiller* is a great example of this. It is the first case to consider the use of intelligent design in the classroom. Instead of giving a court a chance to examine the merits of teaching ID, the facts of the case invite the same old Establishment Clause analysis because of the obvious religious agenda of the school board. To make matters worse, the school board really had no idea what ID is (*Kitzmiller*, p. 758). These two factors made it easy for the judge to get distracted from his limited task at hand and delve into the ID question.

Since the conservative Christian members of the board understood ID to be “a religious view, a mere re-labeling of creationism, and not a scientific theory” (*Kitzmiller*, p. 726), the judge had no problem reaching that conclusion, too. At least in *McLean*, the judge
limited his opinion to the definition of creation-science as it was understood by the governing body that passed the law. The school board in Dover had no idea what ID really meant and the judge acknowledges this fact (p. 758), but then goes on to define it for the board and rule against it.

These are bad facts leading to bad law because the school board was so ignorant about what it was doing that the court’s decision should have made no attempt to advance the wisdom in this area. The judge did not have to rule on ID, or at the very most should have ruled on ID as the school board understood it, which was not at all. Instead, the case law provides little guidance to a conscientious school board seeking to maximize the education of its students and embrace the cultural battle that is the origins controversy.

_Shortcoming of Current Solutions_

The problem with most of the current options for addressing the origins controversy is that they do little or nothing to positively alter the educational landscape of our public schools. Rather, they either perpetuate the same arguments, misapply existing science, or fail to recognize the important role our schools can play in calming the storm of the origins controversy.

_Restricting Curriculum_

The status quo argument is that the religious creationism story of origins and quasi-scientific, quasi-religious intelligent design versions of the origin question do not belong in the schools. This argument has support based on how courts have actually ruled on the controversy. This strict church-state separationist argument fails to consider Supreme Court history of recognizing that there is a place for teaching about religion in schools, fails to
consider the educational role of schools, fails to recognize the voice of students and their families, and fails to consider placing the controversy in its cultural context.

The strict Establishment Clause approach also fails to consider that the cases on record are limited to the facts before them, and thus for the most part fails to inquire into the reality of today’s science classrooms and seek practical, innovative, and constitutional approaches to resolving the ongoing dilemma. Therefore, several lines of prior judicial reasoning such as: the purpose of education to inculcate values and prepare students for citizenship, the preference for making more rather than less information available to students in school on an age-appropriate basis, and the abhorrence of censoring ideas because the governing body disfavors them, have not been fully explored in the origins context.

Reliance on Scientific Viability

Those who argue that intelligent design should be taught in science class because it is a competing scientific theory to evolution needlessly limit themselves to relying too heavily on the controversial nature of ID’s scientific claims. According to their own logic then, if ID is not considered science, it does not belong in the curriculum. The problem with this argument is the Kitzmiller court has already found ID to be “a mere re-labeling of creationism, and not a scientific theory” (p. 726). The almost complete ignorance of the Dover school board did not slow the judge down in his race to be the first to condemn ID and any subsequent case will have to overcome the presumption forwarded by the court.

Another problem with relying on the science of intelligent design is that it almost capitulates to the notion that if an idea is not sufficiently scientific, it must endorse religion.
Relatedly, it perpetuates the notion that science, as a school subject is somehow afforded heightened constitutional protection compared to other subject areas.

The most compelling problem with the scientific viability of ID is that it is not very viable scientifically. Miller (1999), a molecular biologist and Forrest and Gross (2005) detail the scientific weaknesses of ID in their respective books. It is not the task of this paper to articulate in detail how science refutes its attackers but Miller succinctly summarizes the response of science to anti-evolution challenges: “Claims disputing the antiquity of the earth, the validity of the fossil record, and the sufficiency of evolutionary mechanisms vanish upon close inspection” (p. 264).

Teach Elsewhere in School

Olin (2006) and Wexler (2003) argue for teaching the origins controversy elsewhere in school, in either an appropriate social studies class or a religious studies class. Olin argues that teaching ID outside the science classroom, is not a presentation of the merits of ID but “an unendorsed description of its content” (p. 1145). At least this option acknowledges that religious ideas can be presented neutrally in a school setting for educational purposes. This is a viable option and one that schools may choose. I argue, however, that is not the best or even logical option. Teaching origins in social studies class or elsewhere ignores the fact that science is the place the controversy naturally lays. This is a conflict between people’s interpretation of science, religion, and the overlap between them. Further, it makes the unsupported assumption that by moving across the school hallway, the fundamental constitutional character of the origins debate changes. There is no evidence that students presume scientific viability just because an idea is mentioned in science class. There is also
no reason to believe that ID, or creationism for that matter, cannot be presented in a neutral manner in science class, especially if it can be so presented across the hall in social studies class.

Close But Not Quite

Hackney (2006) and Smith (2005) come the closest to forging a workable solution with their proposals. Hackney is one of the first to recognize that the origins controversy is really a curriculum matter and thus should be considered under the free speech analysis applied to questions of school board attempts to limit the curriculum (see also, Potter, 2006). She notes that ID is “not overtly religious; instead it implicates religion” (p. 375). Hackney also understands, as does Beckwith (2003), that the scientific viability of intelligent design is irrelevant: “Even if intelligent design is not scientific, it still may have its proper place in the classroom alongside the scientific theory if the school board so decides it permissibly enriches education, and that decision comports with free speech and freedom of expression analyses” (Hackney, p. 383).

Hackney is off to a great start. There remains a need to deepen her case however by presenting ways that including intelligent design enriches education and articulating how a school board policy can meet looming constitutional tests. Additionally, though I agree with Hackney that the issue should be addressed under free speech analysis, provisions need be made to meet an Establishment Clause challenge. Finally, while Hackney considers only intelligent design, I argue that creationism may be included in the origins debate as well.

Smith (2005) on the other hand, clearly understands the educational value of teaching the origins controversy. He recognizes that:
If a student in high school, for example, spends her summer reading, let us say, *The Origin of Species*, *The Blind Watchmaker*, and *Darwin's Black Box*, and is sufficiently enthusiastic about the topic of whether design in the biosphere is real or apparent to propound questions regarding the subject, the instructor should fully address her questions, and may even do so in the presence of the rest of the class if it will assist other students to understand the issues involved (p. 187).

Furthermore, Smith recognizes the danger of censoring the debate:

Courts should facilitate open and honest intellectual inquiry. When they foreclose public discussion and debate on an intensely disputed topic such as evolutionary theory, official state pronouncements pre-empt individual inquiry and decision. The result is often citizen resentment and cultural war (p. 188).

What Smith does not do is address the legal barriers and the courts’ predispositions against a debate about origins. He may think that a well-reasoned Establishment Clause argument will carry the day, and it might. Schools, and the lower courts need more help than that however. They need Smith’s educational rationale combined with Hackney’s freedom of speech approach and a little extra something else.

**A Balancing Test**

But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order (*Board of Education v. Barnette*, 1943, p. 641-642).

For too long, the origins debate has been oversimplified as a battle between the extremist positions of the strict evolutionists and the strict creationists leaving out the
majority of the people affected by the issue. It is time to find some middle ground, not to satisfy the extremes but to serve the needs of students and society. By applying what we know about jurisprudence in the origins cases, other religion clause cases, freedom of speech cases, and contemporary educational theory on the democratic role of public schools, we can forge a broader vision for teaching the origins question that not only satisfies the protections of the First Amendment, but achieves accepted educational goals. What is required is a balancing test between the real suppression of free speech that occurs when ideas are banned from the classroom and the potential violation of the Establishment Clause that may occur when teaching about ideas that implicate religion.

The question courts, scholars, and educators should be asking is not how to protect science from the intrusion of non-scientific or arguably scientific ideas. Rather, it should be how do we best prepare our children to engage in informed, civil discourse over issues that matter to them? After all, one important purpose of education is to prepare our children to take their place in democratic society. The legal, educational, and ethical question should be then, is it to students’ benefit to be informed about the ongoing debate being waged in our culture over the place of evolution and other ideas about the origins of life? If the answer to that question is yes, which I argue it is, the next question, is whether this topic can be taught in schools without the primary effect being to favor or endorse a religious viewpoint in violation of the Establishment Clause of the First Amendment? If so, how?
Framework for Teaching the Origins Controversy

My approach to addressing the origins controversy in schools balances constitutional, educational, scientific, and cultural concerns. First I will outline my framework, then I will explain and expand on each point in turn.

1. The initial presumption by all parties of interest is that the school board decides what will be taught in schools.

2. The board must articulate its reasoning for choosing its course of action.
   a. Its reasons should be secular, truthful, educationally sound, and legally defensible.

3. Any origins policy must be crafted to address the legitimate pedagogical concern of how to teach the origins controversy in school. Such a policy must:
   a. respect the findings of science, utilizing appropriate resources including science teachers, and educational literature;
   b. be sensitive to the values of the community, and
   c. allow student voices to be heard, without restricting the expression of their personal beliefs, religious or otherwise, while at the same time respecting the beliefs of others.

4. The policy must be neutral toward religion, neither advancing nor inhibiting it.
   a. Religious issues and perspectives should be acknowledged and respected but not control the shape of the policy or its passage.
   b. Teachers must be free to answer questions regarding origins even those that carry religious implications. Such answers may endorse scientific truth but must refrain from judging the religious beliefs of others.

5. The policy should expand the curriculum rather than narrow it.

Framework rationale.
1. The initial presumption by all parties of interest is that the school board decides what will be taught in schools.

This point reflects the legal landscape. It has been clearly established by the Supreme Court that “By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values” (Epperson, 1968, p. 104). Deciding what to teach and where to teach it, is the essence of the school’s role and courts should stay out of it unless constitutional values are “sharply” implicated.

Justice Black in his concurrence in Epperson notes some of the difficulties in the courts engaging in curriculum issues in general and the origins controversy in particular. First he notes the origins controversy is a thornier problem than the majority acknowledged: “Unless this Court is prepared simply to write off as pure nonsense the view of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court’s opinion” (p. 113). Lastly, Black criticizes the Court taking an active role in curriculum matters: “However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible” (p. 114). This serves as a reminder to teachers, parents, and the courts, where decisions should be made. It also warns school boards that they must be careful when dealing with issues, such as the origins controversy, that deal with basic constitutional values.

2. The board must articulate its reasoning for choosing its course of action.
In *Keyishian* (1967) the court emphasized that the government must be very careful when limiting First Amendment freedoms. Such limitations must be precisely regulated (p. 603) because of the danger of the ‘chilling effect’ upon the exercise of vital First Amendment rights. Any policy limiting such rights must utilize “sensitive tools which clearly inform teachers what is being proscribed” (p. 604).

The court in *Pratt* applied this rationale to a school curriculum case. There the judge was critical of the school board’s failure to explain its reasoning for banning certain previously taught material. The judge noted that “the First Amendment requires . . . that the school board act so that the reasons for its decision are apparent to those affected” (p. 778).

While *Keyishian* and *Pratt* involved limiting the rights of teachers and students, including the origins debate actually expands the curriculum. Given the courts’ preference for including ideas, one might think there would be a lower standard for adding to the curriculum. This may make sense but courts are very cautious in dealing with matters that implicate the Establishment Clause.

In a way, the school board in *Kitzmiller* was expanding the curriculum through its ID Policy, but it failed to support its policy in a manner that reflected a legitimate pedagogical concern. Though not citing *Hazelwood*, the judge in *Kitzmiller* was critical of the school board’s rationale for its ID Policy, calling it a sham and noting that “their contentions are simply irreconcilable with the record evidence” (p. 762). Therefore, any school district contemplating a policy concerning the origins controversy would be well advised to support any decision with sound educational rationale.
a. The board must abide by district protocols, articulate its reasoning for choosing its course of action, and its reasons should be secular, truthful, educationally sound, and legally defensible.

School boards should utilize their own protocols and the resources available to them when developing any policy. As seen in Kitzmiller (2005) and Pratt (1982) abandoning established procedures is a sure way to raise the suspicions of members of the community and ultimately the courts. Also, without input from science teachers, even a legal policy is likely to meet resistance from those destined to implement it. For example, in Dover the science teachers refused to read the ID disclaimer and in Cobb County the board ignored the disclaimer written by one of the district’s science teachers and favored by the administration.

Ideally, a school district that adopts an origins policy will have enlisted the community in its development and thus avoid litigation. But, it would be prudent to prepare for legally challenges. Sound preparation will only strengthen any policy if the school board articulates sound secular reasoning and avoids religious justifications. Just as the courts affirm that schools may teach “about” religion, school boards should be able to talk “about” the origins controversy without advancing a religious viewpoint. Some legitimate educational reasons for allowing the controversy to be taught in science class have been previously forwarded but are worth restating in the present context.

One important consideration is that the origins controversy is a dynamic and lively debate in the public square. As such it should be open for discussion in school. It seems illogical that everyone from the popular media to legal scholars can engage in the debate about the proper place for the controversy while keeping students completely isolated from it. Legal precedent encourages exposing students to a broad range of ideas. Indeed, schools may
be the only place all students are exposed to a variety of ideas. “Schools are an institution, indeed the only institution, in which our youth is exposed to exciting and competing ideas, varying from antiquity to the present” (Todd, p. 340).

In Todd v. Rochester (1972) the judge advanced a sound perspective noting that there was not evidence that the controversial books at issue in that case “were being taught subjectively, or that the religious or anti-religious view contained therein were espoused by the teachers” (pp. 329-330). It would seem that teaching any idea, including the origins controversy, should be possible in school as long as in doing so teachers teach it objectively and avoid favoring a religious or anti-religious view.

Another strong secular purpose for teaching the origins controversy is that access to controversial ideas helps prepare “students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members” (Pico, 1982, p. 868). Scholars likewise support this line of reasoning even whether they do (Nord & Haynes 1998, and Salomone, 2000) or do not (Greenawalt, 2005, and Wexler, 2003) support the idea of teaching the controversy in science class. Courts have gone so far as to rule that being exposed to controversial ideas is a fundamental First Amendment right (Pratt, p. 779), a value endorsed by Welner (2003) as well.

3. Any origins policy must be crafted to address the legitimate pedagogical concern of how to teach the origins controversy in school.

Hazelwood posits that school actions affecting the curriculum do not give rise to constitutional scrutiny if they have a viable educational purpose. By definition, the make up of the curriculum is a legitimate pedagogical concern (Boring, p. 370). It is better that school boards decide what to teach students than judges or teachers. Therefore it should be up to
school board to decide whether to allow alternatives to evolution in the curriculum or not. School boards or other policy making groups must be able to articulate an educational purpose for including alternatives to evolution into the classroom. This is a fairly lenient standard to meet (Virgil, 1989, p. 1521). This paper, Smith (2005), Salomone (2000), Nord and Haynes (1998), and Brickhouse and Letts (1998) provide ample educational justification for such an approach, both individually and collectively. Rationale that satisfies the legitimate pedagogical concern of Hazelwood should also satisfy the purpose prong of the Lemon Test.

Sound curriculum development takes into consideration three elements reflected in the framework points that follow. These elements are: the nature of the subject matter; the nature of society; and the nature of the individual (Marsh & Willis, 2007). This framework posits that any policy must:

   a. respect the findings of science, utilizing appropriate resources including science teachers, and educational literature.

   Any policy that involves any change from the status quo regarding evolutionary theory will be questioned as to its purpose. One just has to look at the Selman case to see how far a court will go when evolution is called into question. While it is appropriate to question the conclusions that some scientists draw from what is known about evolution, the basics of the theory are scientifically sound (Miller, 1999, Brickhouse & Letts, 1998). The science establishment is weary of attacks against evolution for religious reasons. While, some the attacks are of their own doing because of anti-theistic comments made in the guise of science, the inescapable fact is that evolution conflicts with a literal interpretation of the first
chapter of Genesis. It is also inescapable that there is a great deal of solid evidence, scientifically derived at, which supports at the very least, evolution by natural selection.

The first criteria Marsh and Willis (2007) posit when analyzing criteria is that the characteristics of the subject matter need to be considered. The external characteristics reflect how the chosen subject matter “represents the reality of the world beyond the student’s immediate experience” (p. 26). The accuracy of how a subject matter is represented is one of the most important factors to consider. By focusing on the accuracy of the science of evolution, this element of the framework satisfies the external nature of the subject matter.

Internal characteristics recognize that subject matter should be logically arranged (p. 27). Regarding evolution and alternative theories, there are a number of ways to design the curriculum. The logic of the sequence may influence its acceptance by science teachers, the community, and courts. For example one logical sequence could progress historically from creation stories including the Biblical versions, to Paley’s intelligent design, to Darwinian evolution.

b. be sensitive to the values of the community.

This consideration appears to receive short shrift from the courts in Kitzmiller and especially Selman. The courts, however, confirm that school districts may take the values of the community into consideration when making curriculum decisions (Pico, p. 863). Such decisions still must comport with the First Amendment, but schools have wide latitude about what they choose to teach and not teach their students (see e.g. Epperson, 1968).

Marsh and Willis (2007) consider the usefulness of the subject matter in the context of the society in which the student exists (p. 27). The society can reflect anything and everything from the local community, the state or region, the nation, to the world. It can also
consider the present usefulness and the future usefulness of the subject. Marsh and Willis recognize there are inevitable tensions in such an inquiry (p. 28). A school board should also recognize these tensions and include their rationale for resolving them when articulating the justification for its policy.

There is also the eminently practical reason to consider community values: school board members are elected. As seen in Dover, when the school board was ousted over its own origins controversy, the justice of the voting public is often swifter than the courts. The result of considering the nature of society is that community values may dictate that schools in an area will not teach the controversy, either because the community is unable to acknowledge and respect the religious beliefs of some of its members, or because the community is unable to engage in civil discourse on controversial subjects.

Nord and Haynes (1998) suggest a protocol for school districts to follow to engage the community in forming an origins policy that responds to the community’s interests and concerns. First, they suggest that the school board create a community task force to find common ground on the role of religion in the schools. The task force must include key stakeholders in the community that represent a broad range of viewpoints. The task force then establishes civic ground rules that can be used “for negotiating differences and working for consensus” (p. 28). They suggest principles of religious liberty that acknowledge the right of everyone to religious liberty or freedom of conscience, the responsibility we have to guard that right for every person, even those with whom we disagree, and respect not only for what is debated but how it is debated (p. 29).

Nord and Haynes contend that once a task force finds common ground on religious liberty issues, expectations in the community about school climate and performance improve.
They stress, however, the importance of follow through and communication with the community at large after a policy has been reached (p. 30). Because the threat of lawsuits is so real, a community that is unable to reach consensus on a policy should be advised to avoid teaching the origins controversy.

c. allow student voices to be heard without restricting the expression of their personal beliefs, religious or otherwise, while at the same time respecting the beliefs of others.

Marsh and Ellis (2007) lastly call for consideration of the nature of the individual when making decisions about curriculum (p. 28). When considering the individual student, the “purpose of the curriculum is not solely to teach subject matter…nor is it solely to bring each individual into conformity with how society is now or should be in the future” (p. 28). Instead curriculum should also consider the developmental growth of the individual. This purpose can be fulfilled as simply as by allowing students to ask questions reasonably related to the origins controversy.

Our schools can also perform the important educational function of teaching students skills in civil discourse (Bethel, 1986). This includes how to appropriately voice one’s opinion, support it with evidence, and then allow those who hold differing opinions to do the same. Within an appropriate context with appropriate supervision, students would then be able to express their opinions, thus living up to the standard West Virginia Board of Education v. Barnette (1945) set to not merely talk about our freedoms, but allow students to exercise them: “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes” (p. 637).
Schools must also tread cautiously because if they do not allow students to express a religious objection, or perspective to an idea, they may be perceived as being hostile to religion. While the school does not have to be viewpoint neutral in deciding what to include in the curriculum, it does have to be neutral when allowing students to speak. Conceivably, a teacher could present evolution without questions or discussions and thus avoid free speech concerns. Once students are allowed to ask questions, however, to prohibit questions with religious overtones would seem to fall into the endorsement test trap of disfavoring religion by showing that someone who has such a question is an outsider (*Allegheny v. ACLU*, 1989 p. 627). When the *Kitzmiller* court held that intelligent design could not be taught in science class, it precluded students from asking such questions because to answer a question on intelligent design necessarily means to teach about it. This type of ‘chilling effect’ is just what courts should protect against.

4. The policy must be neutral toward religion, neither advancing nor inhibiting it.

While this framework seeks to expand the current analysis beyond the Establishment Clause, any policy must reflect a purpose that does not offend current Establishment Clause precedents. While *Edwards* ruled against the act at issue, the Justice Powell did make a point in his concurrence that “a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events”(p. 607). While a policy may include religious beliefs, it must be careful not to favor religion or to interfere with the exercise of religion. “In short, distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion”(*Grove v. Mead*, p. 1543).
It is important to reiterate that the Supreme Court has never ruled against the idea of creation science or intelligent design. In fact, the Court is reluctant to rule against the presentation of any idea. Remember in *Pico* (1982), Brennan wrote: “Our constitution does not permit the official suppression of ideas” (p. 871, emphasis original). It is the purpose and effect of the presentation that is offensive to the First Amendment. As a reminder, the Court did not say there was anything wrong with reading the Bible in *Abington*. It ruled against reading it for religious purposes, not educational ones. Similarly, the Court did not rule against the Ten Commandments in *Stone*, it ruled against posting them without a secular instructional purpose. As Loewy articulates, “We must be careful not to confuse neutrality with either endorsement or disapproval. . .To allow all ideas about the origin of man that do not presuppose an intelligent designer, but forbid all theories that explore the possibilities of such a designer, expresses hostility, not neutrality, towards religion” (p. 83).

a. Religious issues and perspectives should be acknowledged and respected but not control the shape of the policy or its passage.

One thing the courts have made clear, is that religious perspectives and religious issues are permissible in the classroom. As the Supreme Court stated in *Abington v. Schempp*, and has reiterated numerous times since then, “Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment” (1963, p. 225).³

One’s religious beliefs may impact how a person reacts to an issue; this is not only permissible but also inescapable. Where religion becomes a problem is when a government

actor endorses a religious perspective, be it a teacher, principal, school board, or state legislature. This was clearly the case in *Kitzmiller*, not clear at all in *Selman*, and at least clear to five members of the Supreme Court in *Edwards*. When religious beliefs are the primary force behind curriculum decisions, courts will most likely strike the decision down, unless there are other more compelling reasons than religion for a school board’s action.

b. Teachers must be free to answer questions regarding origins, even those that carry religious implications. Such answers may endorse scientific truth but must refrain from judging the religious beliefs of others.

Similar to point 3c about students being able to ask questions, teachers must be able to answer them. The implication of those who lobby against teaching the origins controversy in science class is that science teachers will suddenly become unwitting pawns of the creationists, calling evolution into question and endorsing a religious viewpoint. All teachers are aware of their obligation to remain neutral in matters of religion and most probably are also neutral in matters of politics. There is no call to think that teaching the origins controversy will be any different. Loewy (2006) even thinks that advocates of intelligent design (and I would add, creationism) would soon be clamoring for its removal from the curriculum as its flaws are exposed for all to see.

5. The policy should expand the curriculum rather than narrow it.

Courts take a close look at school board attempts to narrow the curriculum, especially if there is evidence of a religious motivation for its action (e.g. *Mozert, Smith*). On the other hand, courts, particularly the Supreme Court, encourage the broad exposure of students to the marketplace of ideas (*Keyishian, Pico*). It is inconsistent “with the spirit of the First Amendment [to] contract the spectrum of available knowledge” (*Pico*, p. 866, quoting
The very purpose of the First Amendment is to allow for all ideas to be exchanged without judicial pronouncement of truth or falsity” (Loewy, 2006, p. 85 internal citation omitted).

The foregoing framework and rationale take into account not only the protections of the Establishment Clause, but the protections of freedom of speech as well. It is important to restate, however, that any policy on the origins controversy, or any controversial subject that implicates the Establishment Clause and freedom of speech, must balance respect for the protections of the Establishment Clause with respect for freedom of speech. A school board’s failure to balance these protections will likely result in a policy being found unconstitutional. Given past case history, courts will be especially leery of any policy that calls into question the favored place of evolution. This balancing act is a difficult task, but worthwhile. The educational benefits include more engaged and enlightened students. The societal benefits include soon-to-be adults with improved training in the skills of civil discourse, the eventual minimizing of stereotypical misunderstandings about the origins controversy, and increased knowledge and tolerance among the general populace of different perspectives.

Further Rationale

The main problem with the cases that have gone before is that no case has tried to approach the issue through a lens that looks to the students’ best interests. Objective educators should put to test the dicta of Edwards (1987), Stone v. Graham (1980), and Abington Township v. Schempp (1963). Those decisions and others, along with scholars, acknowledge that there can be a legitimate secular purpose for teaching about religion or the
Bible. The impression the courts gave in these cases is that it is not the content of the idea but how it is presented and for what purpose that matters.

No one, to my knowledge, has come forward and tried to justify teaching creationism and ID because they are religious ideas and are permissible to teach for secular purposes. Instead in *McLean, Freiler, Kitzmiller, and Selman*, and almost every law review article on the topic, the key issue is the scientific viability or religious nature of the offending action. A notable exception to this practice is Hackney (2006) who recognizes that teaching the controversy is really a curricular issue. She argues the Establishment Clause is not even implicated and the matter should be analyzed through First Amendment free speech principles. While I would not go so far to say that the Establishment Clause is not implicated in the origins discussion, I agree that a curricular analysis should predominate balanced by the watchful eye of the Establishment Clause.

Darwin’s theory was published only 150 years ago, and even then the scientific establishment still largely subscribed to the notion that the purpose of science was to glorify God’s creation (Brickhouse & Letts, 1998, p. 222). To say then, that religious perspectives are irrelevant in science class is to misunderstand the history of science and how religious perspectives contributed to or hindered its advancement.

It is important to distinguish between what I am proposing and what authors such as Gutmann, Wexler, and Greenawalt oppose. Their concern is teaching creationism (Gutmann) or ID (Wexler and Greenawalt) as science in the science classroom. I agree that creationism and ID should not be taught as science. I submit that teaching creationism and ID can take place in science class, not because it is science, but to distinguish it from science and
acknowledge the cultural concerns of a large percentage of the general population in the United States.

Gutmann, Wexler, and Greenawalt, and Judge Jones of the *Kitzmiller* decision, seem to assume, as do presumably many others, that one can only teach science in science class. But this assumption fails to consider the nature of schools and the nature of science. For some reason scientists attribute to themselves an objectivity that scholars of other subjects lack. Legal scholars and judges seem to blindly accept scientists’ claims to objectivity to such an extent that such claims are never even questioned.

Science, however, like all human endeavors, exists in and is defined by its historical and cultural context (Brickhouse & Letts, 1998, Nord & Haynes, 1998, and Miller, 1999). Ignoring this context leads to the dogmatic teaching Brickhouse & Letts, as well as Nord and Haynes protest. Any discussion of the history and social context of science, inarguably an appropriate discussion for a science class, could easily include both the concepts of creationism and intelligent design. In fact, Nord & Haynes (1998) would go so far as to say discussions on origin must include such perspectives. As Miller (1999) notes, “Evolution is partly the story of how the present is linked to the past, the story of what happened. In this sense, evolution is history.” (p. 37, emphasis original). Creationism and ID are ideas relevant to the discussion both historically and culturally. In such a context, a teacher could point to the religious nature of both arguments without endorsing or disapproving of either.

One of the persistent criticisms of evolution is that it is anti-religious. This is not a scientific claim, but a cultural claim. This is also a worrisome claim that could give rise to an Establishment Clause violation for inhibiting or disfavoring religion as claimed by *Peloza* (1995), feared by Justice Black (*Epperson*, 1968) and argued by Edgington (2004) and
others. Only one case (Peloza, 1995) that I found even addresses the claim of the anti-religious nature of evolution, and the court practically dismisses it out of hand.

Indeed, there is plenty of evidence to point to the anti-religious sentiments of prominent evolutionists. Their claims, however, exceed the bounds of appropriate scientific inquiry, as they violate their own rules of testability, verifiability, replicability, and falsifiability. Just as creationists are rightly excoriated in the media and by the science establishment for making unsupportable scientific claims, scientists should likewise be called to the carpet for venturing to presume that they can exclude the existence of an all powerful, all knowing, supreme being, simply because they cannot understand how God can exist in scientific terms.

As the Haynes and Watson (2001) suggest, religion should be taught, “Wherever it naturally arises” (p. 91). This idea along with guidelines for how to teach about religion in schools is sponsored by seventeen different educational and religious organizations. Because scientists make assumptions about religion and nonscientists make assumptions about science that are both inappropriate, a science class that includes material on evolution, the origins of life, or the origins of the universe for that matter, is one place religion naturally arises and is an appropriate place to address the issue.

Science teachers are the best suited to teach students the difference between scientific, nonscientific, and arguably scientific claims. Such a differentiation does not necessitate an impermissible advancement of religion. Instead, the differentiation acknowledges and teaches the distinction between scientific and theological inquiry, which offending evolutionists and creationists would have been well to learn when they were in school themselves. It also gives science teachers the opportunity to point out what kind of
questions science can answer and what it cannot. Merely acknowledging that there are legitimate questions that any religious inquiry seeks to answer that science cannot, no more implicates the Establishment Clause than a social studies teacher discussing the impact the Ten Commandments on the development of western religion, law, and culture; a concept the Supreme Court expressly permitted in *Stone v. Graham* (1980).

Because schools are so afraid to even approach this subject, misperceptions and misunderstandings perpetuate year after year and generation after generation. The battle will continue to wage regardless of court decisions and indignant offerings on both sides of the debate until and unless our schools take on the role of informed mediators in the dispute. Along the way, feelings may be hurt on both sides, but as the Supreme Court has advised the Constitution does not protect people from the presentation of ideas offensive to their beliefs (*McCollum*, 1948, *Weisman*, 1992). For one thing, no matter how evolution is presented, young-earth creationists will protest its teaching because it really does conflict with literal interpretation of the Bible. But, so long as teachers stick to scientific evidence and avoid drawing religious conclusions, they can even show preference to evolution because it is supported scientifically better than creationism or ID. None of this should be construed to mean that there is no divine creative power. In fact, science teachers can make clear that science is incapable of making such assertions.

Anti-religious claims that authors (*e.g.* Addicott, Beckwith), parents, and religious leaders attribute to evolution as a whole are attributable to individuals speaking outside the limits of science and can be distinguished as such by science teachers. Lofaso (2006) brings a good point to the table that needs repeating often, if only to comfort those who find evolution is anti-theistic. Science makes a conscious decision to limit scientific inquiry to natural or
material causes, and thus, to eliminate supernatural causes science is not equipped to evaluate
the supernatural explanations for observations. Lofaso notes that by eliminating supernatural
causes from consideration, science does not necessarily reject the existence of supernatural
differences. Accordingly, methodological naturalism is not philosophical naturalism, which
claims that only material causes exist - there are no supernatural causes, no God (p. 227-228).

The distinction is an important one and one that creationists and ID proponents often
blur in order to advance their arguments about the anti-religious nature of the evolution
camp. Unfortunately, evolutionists are not very good at drawing the line themselves which
leads to the confusion. In science class, a teacher could use the opportunity to teach students
the difference between methodological naturalism and philosophical naturalism. It is,
however, highly unlikely that a typical high school teacher would find it necessary to make
such a distinction if ideas like ID did not force the issue.

When school boards attempt to restrict the curriculum and the First Amendment is
implicated, the courts look to see what the school board’s reasoning is for doing so given the
preference for schools to be the marketplace of ideas. Allowing schools to teach the origins
controversy in science class satisfies well-established preferences of the Supreme Court to
expose students to competing ideas. Remember *Sweezy* (1957) and *Keyishian* (1967) as
applied to K-12 schools through lower court cases such as *Pratt* and *Smith* call for schools to
be the ‘marketplace of ideas’ and discourage government policies that cast a ‘pall of
even *Brown v. The Board of Education* (1954), encourage schools in their role of preparing
students for their place as citizens in a democracy. This includes teaching tolerance of other
people’s religious views (*Bethel*, p. 681).
There are tricky grounds to be walked in teaching about the origins controversy, but the difficulty of the endeavor should not be a barrier to it being undertaken. A predictable dilemma is whether a science teacher can endorse evolution. The clear answer has to be “absolutely”. Why? Because evolution is supported by scientific evidence. That scientific evidence points to the improbability of a literal interpretation of the creation story from Genesis 1 of the Bible, but so does the creation story from Genesis 2. What teachers cannot do, and this is no surprise, is use evolution to discount the existence of God or the place of God in the lives of students, or permit others to do so. Likewise, while teachers can permit students to express their religious opinion on the matter, they cannot use their personal views on religion as rationale to denigrate the scientific evidence of evolution or the differing views of students.

The trick and value of teaching the origins debate in school is that, through this process, students gain knowledge of great worth both of science and society. Of science students learn there are questions it can answer, and the proper methods for arriving at those answers. They also learn there are questions science cannot answer, and the limits of the scientific method for reaching philosophical or religious conclusions. Of life as a citizen in the larger society, students learn the skepticism to examine the motives and evidence people use to justify their beliefs. They also learn the skills important to a civil society that many of their parents would do well to learn. That is: how to listen to another perspective, respect the right of those holding a position that differs from one’s own, and still coexist in our pluralistic, multicultural nation. If enough schools decide to undertake this effort, there will be bad courses taught. “People will teach it as a Sunday-school class. And we’ll do what we always do when unconstitutional stuff happens in America. We’ll get court to tell us what to
do, and then we’ll fix it” (Van Biema, 2007, p. 46 quoting Stephen Prothero). In the long run, however, one can endeavor to hope that the origins controversy will become a topic that can be neutrally taught in schools, thus allowing students to understand the controversy from various perspectives, and come to a place where they can reach their own decisions on the matter and respectfully disagree with those who do not share their position.
Chapter 6 – Conclusion

In the foregoing chapters I have laid out the landscape of the origins controversy in public schools in the United States. We have seen that the efforts of fundamentalist Christians to infuse the science curriculum with their beliefs about the origins of humankind have been rebuffed by the courts. Lower court judges, legal scholars, and educational practitioners have understood the response of the courts as one that makes teaching the ideas of creationism and intelligent design in school unconstitutional. A closer look at the cases, however, reveals that the Supreme Court, at least, has never held the idea of creationism unconstitutional. Rather, it has found the reasons that two state legislatures have used to influence its use were impermissible.

It is the context not the content of an idea that governs the permissibility of its use in public schools. Schools must have a legitimate pedagogical interest in teaching matters that implicate First Amendment Establishment Clause protections. Critics argue that since creationism and intelligent design lack scientific viability they therefore have no legitimate place in the science classroom, if not schools. These critics fail to place the origins controversy in a broader context. For one, the controversy is not one limited to the extreme views of fundamentalist Christians on one end and atheistic scientists on the other. Instead, there is a range of views covering the spectrum including Christian scientists who believe that evolution actually coincides with the notion of an all powerful creator, who put in place the laws and material of the universe, through which life came into being and evolved to its present state.

Another important contextual observation is that the origins controversy really is as much about culture as it is about science. The scientific evidence that supports evolution is
methodological, sound, and consistent with scientific principles. By definition, science does not seek, nor accept theological, or supernatural explanations for natural phenomenon. This is not to say there is no divine power at work in creation, merely that science is not equipped to discern it.

The problem with the origins controversy lies in two places, both with scientific implications but cultural roots. The creationist side is better known. Its advocates trumpet their vision of a young earth to like-minded believers based on a strict, literal interpretation of the first chapter of Genesis and some non-Biblical reverse counting. They maintain their position in the face of mounds of physical evidence of an old earth and evolution, contradiction of their position within the Bible itself in the form of chapter two of Genesis, and the beliefs of more liberal-minded theists who view the creation story as an allegory rather than factual account.

Perhaps these believers cling so strongly to their religious beliefs in part because of the other side of the problem. Scientists through the years have used evidence of evolution to support their philosophical positions that there is no God. These atheistic claims exceed the bounds of science, but have not been subjected to the same level of criticism as the strict creationist view. Strict creationists often do not distinguish between the scientific evidence and the philosophical claims scientists make. They thus advance the notion that evolution science is anti-God, which appeals to the strong belief held by most Americans that there is a God. They argue to the choir that believing in evolution means not believing in God.

This conflict is exacerbated by what religious conservatives see as a strong anti-religious bias in the public schools. Commonly labeled secular humanism, Christians see schools making an overt attempt to eliminate religious influence and references from public
schools and replace them with relative morality and revisionist history. Education is perceived to be hostile to religious perspectives, and to trivialize religious beliefs as quaint anachronistic holdovers from a bygone time. Indeed, students have been denied the right to express their religious beliefs in the classroom, be it on assignments or in discussions.

The move to secularize schools has partly been driven by court cases that enforce constitutional notions of separation of church and state based on the First Amendment’s Establishment Clause. The courts and educators have sometimes understood the Establishment Clause to prohibit the teaching of religious ideas, such as creationism and the Ten Commandments. Indeed the courts have eliminated any ritualistic practices of religion from public schools such as prayer and Bible reading. The Supreme Court, at least has never ruled against teaching about religion, however. In fact, on numerous occasions the court has emphasized the need to learn about religion and its impact on the history, literature, and culture of the United States as essential to the type of education our young people need to become meaningful participants in a democratic society.

The understandable backlash from fundamentalist Christians to what they see as attacks on their belief system is a contributing factor in the growth of private Christian schools and homeschooling for religious reasons. By unreasonably excluding religious perspectives from the classroom, courts and educators are unwittingly hastening the withdrawal of Christian students from the classroom. This has potentially negative implications for both the students no longer participating in public education and those who are left behind. It also arguably exacerbates the growing unease and distrust that conservative Christians eye the outside world and the outside world (including most other Christians) eye conservative Christians.
Educators and policy makers must therefore examine the origins issue in the larger context of the societal purpose of public education, especially in light of societal efforts towards embracing diversity. Certainly any serious discussion of diversity must include respect for those of differing religious beliefs, even largely white, conservative Christians. One practical place to make significant inroads into reducing the cultural conflict between religious conservatives and others in our society is in our schools.

Schools need to understand that the expressions of religious perspectives are permissible in schools as much as any idea in the ‘marketplace of ideas’. In fact prohibiting such expression is arguably a violation of the Establishment Clause as government action that is not neutral to, but rather inhibits religion. Students may even express their opinions or beliefs whether they are religious or not. Because they are employees of the government, teachers must tread with more caution than students. They may present religious perspectives so long as they do not endorse or disfavor those positions.

Not only are religious perspectives legally permissible in schools, there is considerable academic support for their educational value. Taking into consideration the legal, scientific, educational, religious, and cultural perspectives about public education in general and the origins controversy in particular, leads to the framework I propose for teaching the origins controversy in public science classes. The framework is as follows:

1. The initial presumption by all parties of interest is that the school board decides what will be taught in schools.

2. The board must articulate its reasoning for choosing its course of action.
   a. Its reasons should be secular, truthful, educationally sound, and legally defensible.
3. Any origins policy must be crafted to address the legitimate pedagogical concern of how to teach the origins controversy in school. Such a policy must:
   a. respect the findings of science, utilizing appropriate resources including science teachers, and educational literature;
   b. be sensitive to the values of the community, and
   c. allow student voices to be heard, without restricting the expression of their personal beliefs, religious or otherwise, while at the same time respecting the beliefs of others.

4. The policy must be neutral toward religion, neither advancing nor inhibiting it.
   a. Religious issues and perspectives should be acknowledged and respected but not control the shape of the policy or its passage.
   b. Teachers must be free to answer questions regarding origins even those that carry religious implications. Such answers may endorse scientific truth but must refrain from judging the religious beliefs of others.

5. The policy should expand the curriculum rather than narrow it.

This framework is useful and beneficial in different ways on different levels. In the science classroom, it allows for students to express their beliefs and ask questions surrounding the origins controversy and give teachers the assurance that such questions are an acceptable part of the origins debate that can be discussed and answered in a manner that is respectful to and neutral to the truth of different students’ religious beliefs. The framework helps lift the ‘pall of orthodoxy’ that has shrouded discussions of evolution in classrooms across America for generations. Because of the controversial nature of evolution, not in the science community but in the culture at large, many teachers either minimize their teaching
of evolution or do not teach it at all. As a result, many Americans do not understand evolution or believe it.

These guidelines will give teachers confidence to teach evolution in a way that encourages the presentation of evolution’s scientific merits while respecting the religious views of many students and their families. If students are allowed to learn about the controversy, more students will learn about what the science community thinks constitutes science, learn the importance of scientific methodology, and thus develop a deeper understanding of evolution and science than would be probable without any discussion.

For schools generally, these guidelines help promote diversity and understanding. By acknowledging the value of religious perspectives but not favoring them, schools can promote understanding between students of different belief systems and backgrounds. The goal is not to change the beliefs of students, it is to increase their knowledge of other people’s perspectives and teach students tolerance of views that differ from their own.

Teaching the controversy provides a forum for teaching students civil discourse. Teaching students how to disagree with each other in a civil manner is a skill of great value and benefit to society, and acknowledged by the Supreme Court as a worthy purpose of education.

These guidelines respect the school board as the body that establishes the curriculum. For school boards and other school governing bodies these guidelines provide a template for their own policy on the origins controversy or other controversial subjects. How each school district proceeds will depend on the unique circumstances that exist in each community. Schools may choose to embrace the debate and fully teach the controversy in science class. Some would like this debate to take place away from science class, and others want to ignore
the controversy all together. But science teachers and potential scientists cannot remove themselves from the ethical and scientific issues imbedded in their subject.

Because the legal issues are not clearly settled, other schools may choose not to teach the controversy. Instead schools may choose to allude to the controversy in the form of a verbal or written disclaimer, then teach evolution without introducing intelligent design or any form of creationism. Special care needs to be taken with any written or official verbal disclaimer so that it does not run afoul with the community or existing case law. Though the school board did not approve it, the administration in Cobb County favored an alternate version for the sticker to be placed in science books written by a district science teacher that would probably pass constitutional muster. It stated:

This textbook contains material on evolution, a scientific theory, or explanation, for the nature and diversity of livings things. Evolution is accepted by the majority of scientists, but questioned by some. All scientific theories should be approached with an open mind, studied carefully and critically considered (Selman, 2005, p. 1295).

Some school leaders may feel that even limited treatment of the controversy is not possible given the culture of the community. While this framework is designed to withstand legal scrutiny, few school districts will want to utilize it if the school board knows it will invite the cost and hassle of a lawsuit.

**Implications for Schools**

Once ID is taught in schools, fundamentalist Christians may soon be clamoring for its removal from the curriculum as Loewy (2006) surmises. This is so because much of ID’s cachet is that most people (like those in Dover) have no idea what it is about. Once colleges
of education and science teachers learn about it, they will develop religiously neutral, scientifically based lesson plans that reveal its scientific flaws but acknowledge that science is incapable of judging the theological merits of its claims. Strict creationists on the other hand will come to understand that ID does not coincide with their fundamental belief in a literal interpretation of the Bible, since it allows for evolution up to a point and acknowledges an ancient earth.

Throughout her book, Salomone (2000) recounts the struggles and failures of public schools to live up to the nation’s standard of respect and tolerance for religion, especially when taking into consideration public schools’ failure to honor the religious values of many Americans. The courts have helped create this landscape with its handling of First Amendment cases creating within schools a no-win situation. If a school accommodates parents and exempts some students from certain programs or materials on free exercise grounds, it faces claims that it preferences a particular religion. But if a school removes curriculum in response to religious or political pressure, “then it arguably violates the free speech rights of other students” (p. 112). She contends that “one may reasonably conclude that when schools attempt to modify the curriculum offered to all students primarily to accommodate the religious beliefs of some students, the courts will not defer to their decisions” (p. 120).

The courts recognize the “public school’s role in preparing students for participation in a world replete with complex and controversial issues” (p. 132, citations omitted). To further that role, public schools should be permitted do address “complex and controversial issues” within the classroom. Additionally, courts “repeatedly uphold the authority of school officials to make curriculum determinations that arguably reflect the values of the local
community and of society” (p. 134). The dilemma, then, is how school officials can effectively use the curriculum to accomplish the multifaceted role of preparing students for democratic citizenship, addressing complex and controversial issues, educating students about and respecting the divergent religious views of other students and members of society, all while conforming to the Establishment Clause. For Salomone, the answer is to encourage the development of school choice, a limited solution, worthy of separate discussion. My answer is the proposed framework. While limited in its scope, and locally administered, its use could have broad benefits.

The origins controversy is symptomatic of a larger problem in our schools, and by extrapolation in our society, termed "culture wars" between those who rely on religion as a source of values and those who do not (Wexler, 2002, Hunter, 1990). The framework proposed here will not solve all of the problems attendant to our culture wars, nor will it even resolve the origins controversy. What the framework will do is help schools bridge misunderstandings and make it possible for students to understand each other's needs and interests when discussing public issues.

*Time* magazine took notice of a new trend in public school Bible courses (Van Biema, April 2, 2007). In that article Stephen Prothero, a professor of religious studies at Boston University contends that the academic study of religion provides a kind of middle space between the two sides of the culture wars. “It takes the biblical truth claims seriously and yet brackets them for purposes of classroom discussion…It works in a way that feels safe to both the believer and the unbeliever in the room…[People] are tired of the culture wars… There’s a broad middle who want to do something productive”(Van Biema, p. 44).
It is time for schools to do something productive in the tiresome controversy over the teaching of evolution in schools. School boards must stake out the middle ground, educate and engage students and forge a new path of religious tolerance and scientific understanding.
References


Brown v. Woodland Joint Unified School District, 27 F.3d 1373 (9th Cir. 1994).

Campbell v. St. Tammany Parish School Board, 64 F.3d 184 (5th Cir. 1995).


Cockrel v. Shelby County School District, 270 F.3d 1036 (6th Cir. 2001).


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


Downs v. Los Angeles Unified School District, 228 F.3d 103 (9th Cir. 2000).


Fleischfresser v. Directors of School District 200, 15 F. 3d 680 (7th Cir. 1994).


Grove v. Mead School District, 753 F. 2d 1528 (9th Cir. 1985).


Keefe v. Geanakos, 418 F. 2d 359 (1st Cir. 1969).


Kreisner v. San Diego, 1 F. 3d 775 (9th Cir. 1993), cert. denied, 510 U.S. 1044 (1994).


Malnak v. Yogi, 592 F.2d 197 (3d Cir.1979).


Monteiro v. The Tempe Union High School District, 158 F. 3d. 1022 (9th Cir. 1998).


Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (9th Cir. 1987).


Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994).


Pratt v. Independent School District No. 831, 670 F.2d 771 (8th Cir. 1982).


Smith v. Board of Commissioners of Mobile County, 827 F.2d 684 (11th Cir. 1987).


Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989).


Webster v. New Lenox School District No. 122 (7th Cir. 1990).


EDUCATION

PENN STATE UNIVERSITY, University Park, PA.
Ph.D expected August, 2007

PORTLAND STATE UNIVERSITY, Portland, OR.


LEWIS AND CLARK COLLEGE, Portland, OR.

SELECTED WORK EXPERIENCE


Instructor. Penn State University, Department of Education Policy Studies. May-June 2006.
Taught Educational Law for Teachers to undergraduate education majors.


Instructor. Penn State University, University Park, PA. January – May 1995.
Taught course in business law to undergraduates.


Taught English to Chinese college students.


CONFERENCE PAPERS


The Best Interests of Students and the Controversy of Teaching Evolution and the Origins of Life. The 10th Annual Values and Leadership Conference, Penn State University, October 10-13, 2005.