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In This Apple for Teacher an Apple from Eve - Reanalyzing the Intelligent Design Debate from a Curricular Perspective

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Is This Apple for Teacher an Apple from Eve? Reanalyzing the Intelligent Design Debate from a Curricular Perspective

INTRODUCTION 349
I. INTELLIGENT DESIGN AND EVOLUTION EXAMINED: ILLUMINATING THE DEBATE 352
A. *Historical Debate* 352
B. *Recent Cases* 355
C. *The Debate Today: Intelligent Design* 356
II. INTELLIGENT DESIGN TODAY: THE CURRENT ANALYSIS FOR CHALLENGES TO INTELLIGENT DESIGN POLICIES IN PUBLIC SCHOOLS 361
A. *The* Lemon *Test* 361
B. *The Test Applied to Intelligent Design* 363
III. INTELLIGENT DESIGN AS A CURRICULUM ISSUE 364
A. *A Look at Challenges to Other Controversial Curriculum Choices* 365
B. *Courts' Analyses of Religiously Based Curriculum Challenges* 372
IV. A MATTER OF CONTROL: ACADEMIC FREEDOM IN CURRICULUM DISPUTES 373
A. *Academic Freedom and School/Student Relationships* 373
B. *Intelligent Design Should Be Analyzed as a Curriculum Issue* 376
C. *The Major Flaw* 377
V. THE CASE FOR A NEW ANALYSIS 379
CONCLUSION 384

INTRODUCTION

"For God's sake, let the children have their minds kept open—close no doors to their knowledge; shut no doors from them. Make the distinction between theology and science. Let them have both. Let them both be taught. Let them both live. Let them be revered."[1] This was the closing plea of Dudley Field Malone, attorney for high school biology teacher John T. Scopes, in the stifling heat of the famous 1925 "monkey trial" that vetted Tennessee's statutory

1. JOHN T. SCOPES & JAMES PRESLEY, CENTER OF THE STORM: MEMOIRS OF JOHN T. SCOPES 153 (1967).

prohibition against teaching evolution in the national spotlight.[2] The inclusion of Darwin's evolutionary theory in public school curricula has long been a source of debate. Historically, the origin of the human species "has generated intense controversy and debate precisely because of its religious implications and the belief of some that science and religion cannot coexist."[3] Since the famous *Scopes* trial, which upheld the discharge of John T. Scopes for teaching evolution to his students,[4] the battle over the origin of the species has waged on in varying forms. Educators and parents alike have disagreed over the propriety of teaching evolutionary theory and its various criticisms in high school biology classrooms.[5] They have brought these competing viewpoints to light in a series of legal challenges that have morphed into several different contexts over the years, culminating in today's intelligent design debate.

The concept known as intelligent design rests on the belief that "human beings, because of their complexity, could not have evolved randomly by natural selection and, therefore, must be the product of a supernatural [organizing] force. In describing [intelligent design], supporters do not mention God but refer to an unidentified intelligent designer."[6] In contrast to older cases' descriptions of evolution as "the evolution of man from a lower order of animals,"[7] courts that have analyzed the issue recently have attempted to reframe evolution not as a theory explaining the origin of life, but rather as concerning "the origin of the diversity of life."[8] In this way,

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2. *See id.* at 101–56.

3. Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286, 1288 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

4. Scopes v. State, 289 S.W. 363, 364–65 (Tenn. 1927). *See generally* SCOPES & PRESLEY, *supra* note 1 (describing the *Scopes* trial from a personal and historical perspective).

5. *See infra* Part I.

6. Martha M. McCarthy, *Instruction About the Origin of Humanity: Legal Controversies Evolve*, 203 Educ. Law Rep. (West) 453, 457 (Jan. 12, 2006). Contrast this description with the idea of creation-science:

> "Creation-science" means the scientific evidences for creation and inferences from those evidences . . . [including:] (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds.

McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1264 (E.D. Ark. 1982).

7. *Scopes*, 289 S.W. at 367.

8. *Selman*, 390 F. Supp. 2d at 1289.

the debate appears to have shifted from whether evolution is sound science to whether its scientific basis may be challenged or contrasted with criticisms and alternate worldviews. Consequently, questions arise over whether these criticisms, such as intelligent design, may be considered part of a neutral academic inquiry, rather than an unconstitutional government endorsement of religion.

Historically, courts have generally applied the *Lemon* test[9] in cases challenging religious teaching in public schools. This test scrutinizes government policies that may implicate the Establishment Clause of the Constitution, which prohibits government endorsement of religion in public school classrooms.[10] Operating under the assumption that the theory of intelligent design is religious in nature, courts have applied the *Lemon* test in two recent cases challenging the teaching of intelligent design alongside evolution in public schools. Intelligent design, however, is distinct from other religiously oriented theories, as it is not an explicitly religious concept.[11] Instead, it is more like other controversial curriculum choices that courts have analyzed under the First Amendment's freedom of speech and expression doctrines. Applying these doctrines to intelligent design challenges may more fully capture and resolve the interests implicated in the current debate. Furthermore, the recent changes in the composition of the Supreme Court may make the Court more receptive to this curriculum-based analysis.[12] This alternate framework defers to the decisions of local school districts, which are most appropriately situated to make curricular decisions,[13] rather than giving into the temptation that courts may face to treat the intelligent design controversy in the same manner as other religious issues in the public education setting.

This Comment first attempts to clarify the debate surrounding the teaching of evolution and intelligent design in public schools. It then proposes a curriculum-based analysis in place of the current religious tilt employed by courts. 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. Part I examines the debate itself, by chronicling first the history of teaching evolution in public schools, and then the development of

9. The test, articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is discussed *infra* Part II.A.

10. *See* U.S. CONST. amend. I.

11. *See infra* Part II.B.

12. *See infra* notes 84–86 and accompanying text.

13. *See infra* Part IV.B.

intelligent design theory in its modern form. Part II focuses on the legal approaches courts have taken to tackle the debate. It examines the mechanics of the *Lemon* analysis first as generally employed by courts and then as applied specifically to intelligent design challenges. Part III explores other controversial curriculum challenges and discusses the ways courts have resolved those issues. Part IV examines the concept of academic freedom and the role of teachers and school boards in the adoption of curricular standards. Part V, using the reasoning from other curriculum-based challenges and the notion of deference to local school board decisions, suggests a new, more fitting analysis to resolve future intelligent design challenges.

I. INTELLIGENT DESIGN AND EVOLUTION EXAMINED: ILLUMINATING THE DEBATE

A. Historical Debate

During the 1920s, the tension between Darwin's evolutionary theory and Christian beliefs became a major source of conflict.[14] Using control of educational institutions as the major arena for their battles, fundamentalists and modernists disagreed over whether public education and religion could be reconciled, as many northerners and modernists believed, or whether modernism and evolutionary theory "shattered fundamentalist faith in planned and purposeful change,"[15] as southern fundamentalists believed. In 1927, the Tennessee Supreme Court in *Scopes v. State*[16] upheld the Tennessee Anti-Evolution Act, a statute that prohibited the teaching of any theory in conflict with the creation story articulated in Genesis.[17] The court employed an analysis based on deference to school authorities and the fact that the statute *required* the teaching of nothing, and therefore did not violate the Establishment Clause.[18] The *Scopes* decision reflected the mindset of a society with fairly homogeneous religious beliefs based on fundamentalist values.[19] Later decisions illuminated this worldview. *McLean v. Arkansas*

14. DOROTHY NELKIN, SCIENCE TEXTBOOK CONTROVERSIES AND THE POLITICS OF EQUAL TIME 13–14 (1977).

15. *Id.* at 13. *See generally* EDWARD J. LARSON, TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION (1985) (detailing the history of the creation-evolution debate in America and noting developments in the law between 1907 and 1985).

16. 289 S.W. 363 (Tenn. 1927).

17. *Id.* at 363.

18. *Id.* at 367.

19. NELKIN, *supra* note 14, at 13–15.

Board of Education,[20] for example, reflected a history of official opposition to evolution motivated by "beliefs in the inerrancy of the Book of Genesis."[21] A major concern about teaching evolution was that it "excluded the necessity of supernatural intervention and incorporated elements of chance and indeterminacy."[22]

The Supreme Court's 1968 decision in *Epperson v. Arkansas*[23] was a major landmark in education jurisprudence. The Court struck down Arkansas's statutory prohibition against teaching evolution in public schools.[24] It held that the statute violated the Establishment Clause because it was "motivated by the impermissible purpose of protecting the essential dogma of one dominant religious sect from scientific theories with which members of the sect disagreed"[25] and "tend[ed] to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach."[26]

For a time after *Epperson*, a form of teaching both evolution and creationism in the classroom, known as the "balanced treatment" approach, gained favor among creationists as a method of granting scientific legitimacy to creationism.[27] Advocates of the approach sought enactment of statutes that required equal amounts of classroom time to be devoted to "evolution-science" and "creation-science."[28] These types of statutes were struck down in two states

20. 529 F. Supp. 1255 (E.D. Ark. 1982).

21. *Id.* at 1255. *McLean* involved a state statute requiring public schools to provide equal classroom treatment of evolution and creation-science. *Id.* This trend is discussed further *infra* at notes 27–33 and accompanying text.

22. DOROTHY NELKIN, THE CREATION CONTROVERSY: SCIENCE OR SCRIPTURE IN SCHOOLS 25 (1982). For a historical perspective on the evolution-creationism debate, see Comment, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1051–55 (1968) [hereinafter *Developments*].

23. 393 U.S. 97 (1968).

24. *Id.* at 97.

25. Matthew J. Brauer et al., *Is It Science Yet?: Intelligent Design Creationism and the Constitution*, 83 WASH. U. L.Q. 1, 8 (2005). The Court based its analysis on the secular purpose and secular effect requirements of the Establishment Clause, articulating the key questions to be asked as follows: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson*, 393 U.S. at 107 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

26. *Epperson*, 393 U.S. at 100 (quoting from Chancery Court's unpublished decision).

27. McCarthy, *supra* note 6, at 454.

28. *See* Edwards v. Aguillard, 482 U.S. 578, 581 (1987) (examining Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, which forbade the teaching of evolution if it was not accompanied by creation-science instruction).

before the issue reached the Supreme Court.[29] The landmark Supreme Court decision in *Edwards v. Aguillard*[30] unequivocally reversed the "creation-science" trend. In that case, the Court overturned a Louisiana statute requiring that public schools teach "creation-science" in conjunction with evolution as a violation of the First Amendment's Establishment Clause.[31] *Edwards* ushered in a new era in the evolution debate: "the Supreme Court turned the proscription against teaching creation science in the public school system into a national prohibition."[32] The Court in *Edwards* operated under the assumptions that creationism was not science, and that the law was intended to advance religion by discrediting scientific data in violation of the Establishment Clause.[33]

Epperson and *Edwards* provide a framework for analyzing challenges to the teaching of evolution and creationism in public schools, while highlighting the strong beliefs of two opposing groups. Supporters of evolution, who attribute the origin of all life to random, natural causes, are usually found in direct conflict with those who oppose evolution and instead subscribe to the idea that some intelligent being must have been at work in order for the world to be created and develop as it has.[34] Intelligent design, in its current form, came into existence after the *Edwards* decision.[35] The concept of intelligent design is distinct from that of creationism because, instead of promoting a particular religious deity or ideal, it posits that evolution is so unlikely to have occurred that other, unidentified intelligent forces were at least partially responsible.[36] The theory has been promoted largely through the scholarship of Phillip E. Johnson, whose work, *Darwin on Trial*, questions the validity of evolution as a

29. *See* Daniel v. Waters, 515 F.2d 485, 489 (6th Cir. 1975) (overturning on Establishment Clause grounds a Tennessee statute that prohibited the teaching of evolution without a disclaimer stating that evolution is not a scientific fact); McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1274 (E.D. Ark. 1982) (holding the Arkansas Balanced Treatment for Creation-Science and Evolution-Science Act unconstitutional as excessively entangled with religion).

30. 482 U.S. 578 (1987).

31. *See id.* at 581–82.

32. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 712 (M.D. Pa. 2005).

33. *Edwards*, 482 U.S. at 591–94. However, the dissent countered with the academic freedom argument that "[t]he people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools." *Id.* at 634 (Scalia, J., dissenting).

34. *See* Peter Slevin, *Election Could Flip Kan. Evolution Stance*, WASH. POST, Aug. 1, 2006, at A3.

35. *Kitzmiller*, 400 F. Supp. 2d at 718.

36. *See* RICHARD DAWKINS, THE BLIND WATCHMAKER 1–18 (1986).

scientific theory and insists that an intelligent influence must necessarily have played a central role in the origin of the species.[37] In varying forms, the modern theory of intelligent design has been introduced and challenged in several school districts across the country.[38]

B. Recent Cases

The current intelligent design debate has taken shape in two similar court challenges thus far. Both cases involved disclaimers concerning evolution that were placed in high school biology textbooks. In *Selman v. Cobb County School District*,[39] the parents of high school students in suburban Atlanta sued the school district to prohibit its use of a sticker that had been attached to all biology textbooks stating that evolution is a theory rather than a fact.[40] The parents objected to the placement of the sticker, which had been approved by the school board, on the grounds that the policy violated the Establishment Clause of the First Amendment.[41] The court agreed, holding that the school board conveyed the message that it endorsed religion, despite the court's determination that the policy had a nonreligious purpose.[42] This decision has since been vacated and remanded to the district court for the purpose of gathering additional evidence and making new findings.[43]

A similar challenge to a school board policy arose in *Kitzmiller v. Dover Area School District*.[44] Parents in this case challenged the constitutionality of the school district's plan to implement a policy requiring that students be read a statement mentioning the concept of intelligent design as an alternative to Darwinian evolutionary theory.[45] The statement noted the existence of the theory of

37. *See* PHILLIP E. JOHNSON, DARWIN ON TRIAL 63–72, 145–54 (1991).

38. *See, e.g.*, *Kitzmiller*, 400 F. Supp. 2d at 709–10; Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286, 1288 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

39. 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

40. 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." *Id.* at 1292. The sticker did not mention intelligent design or any other alternate theory. *See id.*

41. *See id.* at 1297. The view of the school board was that the sticker be included to ensure that the curriculum was "planned and organized with respect for [certain] family teachings" in the Cobb County community that conflicted with scientific accounts of man's origin. *Id.* at 1289.

42. *Id.* at 1307.

43. Selman v. Cobb County Sch. Dist., 449 F.3d 1320, 1322 (11th Cir. 2006).

44. 400 F. Supp. 2d 707 (M.D. Pa. 2005).

45. *Id.* at 708–09.

intelligent design, but referred students to a reference book explaining the concept rather than providing the details of the alternative theory in the statement itself.[46] Opponents of the statement argued that the policy impermissibly constituted an establishment of religion by imposing a religious view of the origin of the species into the science class.[47] The court applied the *Lemon* test and concluded that, judging from the specific language of the statement, the policy had an impermissible religious purpose and effect and thus violated the Establishment Clause.[48] The *Kitzmiller* court's holding was broader than the *Selman* decision: it held that the teaching of intelligent design as an alternative to evolution in a public school science classroom was unconstitutional as a violation of the Establishment Clause.[49]

C. *The Debate Today: Intelligent Design*

In its current form, the concept of intelligent design posits three general precepts: "[1] Specified complexity is well-defined and empirically detectible. [2] Undirected [unintelligent] natural causes are incapable of explaining specified complexity. [3] Intelligent causation best explains specified complexity."[50] Intelligent design has similarly been described as the view that " 'various forms of life began abruptly, through an intelligent agency, with their distinctive features already intact—fish with fins and scales, birds with feathers, beaks,

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46. The proposed statement read, in pertinent 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.

Id.

47. *Id.* at 709.

48. *Id.* at 709, 746.

49. *Id.* at 765.

50. WILLIAM A. DEMBSKI, INTELLIGENT DESIGN: THE BRIDGE BETWEEN SCIENCE & THEOLOGY 247 (1999). "Specified complexity" refers to the "independently identifiable pattern" in which the complicated and unlikely events of design fit. *Id.* at 10.

and wings, etc.' "[51] Although the concept of intelligent design is in direct contrast to that of evolution, it is not an overtly religious theory: it does not promote a particular religion or deity, but rather a worldview to which many different religions subscribe. It focuses on the implausibility of evolution without the influence of an organizing force, without specifying who or what in particular that force might be. Of course, advocates for this theory are overwhelmingly Christian.[52] At its theoretical core, however, intelligent design does not amount to a religious theory. Instead, it functions primarily as a critique of the reasoning bolstering the theory of evolution that happens to be religiously motivated. Acknowledging this distinction is essential for understanding the analysis proposed in the remainder of this Comment.

In the United States, the debate over these conflicting theories is far from settled. Different states currently take widely varying approaches to the teaching of evolution and intelligent design in their public schools. Kentucky still permits public schools to teach creationism alongside evolution, although the word "evolution" replaced the phrase "change over time."[53] Curriculum standards in Florida, Mississippi, and Oklahoma are void of any reference to evolution.[54] Until 2006, Alabama textbooks contained a disclaimer describing the controversial nature of evolution.[55] The Kansas State Board of Education was thrust into the national spotlight over its evolution standards in 2005, when it authorized criticisms of evolution and the broadening of scientific inquiry beyond the traditional dependence on empirical evidence to explain the natural world.[56] The Kansas regulations neither promote nor prohibit intelligent design as

51. *Kitzmiller*, 400 F. Supp. 2d at 721–22 (quoting WILLIAM P. DAVIS, OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS 99–100 (1993)). *See generally* THOMAS WOODWARD, DOUBTS ABOUT DARWIN: A HISTORY OF INTELLIGENT DESIGN (2003) (detailing the emergence of the intelligent design movement).

52. Ralph Blumenthal, *Evolution's Backers in Kansas Start Counterattack*, N.Y. TIMES, Aug. 1, 2006, at A1.

53. McCarthy, *supra* note 6, at 459.

54. *Id.*

55. *Id.* It is worth noting that Alabama's revised science guidelines still encourage students to "explore unanswered questions and unresolved problems associated with evolutionary theory," but three anti-evolution bills that were introduced in the State's legislature in 2006 were not passed. *Id.*; *see* Nat'l Ctr. for Sci. Educ., Three Antievolution Bills Die in Alabama, http://www.ncseweb.org/resources/news/2005/AL/104_three_anti evolution_bills_die__5_5_2005.asp (last visited Oct. 29, 2006). Similar bills were also introduced, but not passed, in Michigan, Missouri, South Carolina, New York, and Utah. McCarthy, *supra* note 6, at 459.

56. McCarthy, *supra* note 6, at 459.

a component of this calculus.[57] However, in the midst of changing viewpoints on the origin of the species as evidenced by recent court and administrative activity, the concept of establishing statewide standards for such curricular topics is fairly new. The state boards of education entrusted with adopting such standards are typically vulnerable to political pressure from organizations and parents alike.[58] Thus, the intelligent design policies arising in various states are likely skewed or subject to continuous change and revision, offering only a marginally helpful depiction of public opinion.

Recent attempts to integrate the concept of intelligent design into high school curricula along with the theory of evolution have intensified the debate over evolution and its criticisms. In *Kitzmiller*, the challenged policy presented students with the option to explore the theory of intelligent design by reading the controversial book condoning intelligent design, *Of Pandas and People*, which asserts in part that " 'Darwinists object to the view of intelligent design *because it does not give a natural cause explanation* of how the various forms of life started in the first place.' "[59]

Much of today's debate concerns the motives driving those who advocate the teaching of intelligent design rather than the content of the actual theory itself.[60] This context is extremely pertinent when one considers the types of disclaimers advocated by intelligent design supporters, which implicate a complex curriculum issue. Proponents of such intelligent design policies classify disclaimers about the fallacies of evolution as an academic effort to "teach the controversy."[61] This view maintains that by exposing students to the

57. *Id.* In response to the implementation of these standards, two organizations, the National Academy of Sciences and the National Science Teachers Association, announced their plans to deny copyright permission to the Kansas State Board of Education to use the organizations' publications. Nat'l Acads., Kansas Denied Use of National Science Education Standards, http://www.nationalacademies.org/morenews/20051027.html (last visited Oct. 29, 2006); *see* Kan. State Dep't of Educ., Kansas Science Standards Public Hearing, Feb. 15, 2005, http://www.ksde.org/outcomes/hays21505.htm (last visited Oct. 29, 2006).

58. McCarthy, *supra* note 6, at 459; *see* Claudia Wallis, *The Evolution Wars*, TIME, Aug. 15, 2005, at 30.

59. Kitzmiller v. Dover Area Sch. Dist, 400 F. Supp. 2d 707, 736 (M.D. Pa. 2005) (quoting WILLIAM P. DAVIS, OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS 99–100 (1993) (emphasis added)).

60. *See, e.g.*, Margaret Graham Tebo, *An Evolving Conflict: Intelligent-Design Proponents May Have Lost a Battle, but They'll Continue To Fight*, A.B.A. J., Mar. 2006, at 20 ("The [intelligent design] argument is another red herring from those who want to include a biblical view in public school classrooms.").

61. McCarthy, *supra* note 6, at 461; *see* Jodi Wilgoren, *Politicized Scholars Put Evolution on the Defensive*, N.Y. TIMES, Aug. 21, 2005, at A1.

gaps in evolutionary theory and acknowledging that other explanations for the origins of life exist without explaining those other theories, instructors will help students to more fully appreciate the debate surrounding the origins of life.[62] This exposure, in turn, will provide academic and intellectual stimulation. In the context of intelligent design, however, scholars predict that it may be more difficult to win cases challenging efforts to "teach the controversy" over evolutionary doctrine than those that request that equal instructional time be given to both creationism and evolution because the former claims are more complex.[63] This complexity arises from the fact that a minority of scientists are highly critical of evolutionary theory, and, at least theoretically, "there can be no rationally defensible grounds for preventing teachers from exposing students to well-documented scientific critique of a theory."[64]

To be sure, a myriad of support, both scientific and philosophical, exists for both evolution and intelligent design.[65] Supporters of including intelligent design in public school science curricula stress its secular purpose: "to further scientific literacy by teaching all of the evidence and explanatory theories."[66] Biologists are increasing their attempts to explain gaps in evolutionary theory, rebutting criticisms that depend largely on the presence of intricate factors in nature that are "irreducibly complex."[67] The past forty years have produced significant evidence undermining traditional evolutionary theory and supporting a design hypothesis.[68]

Still, others assert that there is no scientific controversy inherent in intelligent design, since the theory itself cannot be classified as science,[69] and the scientific community overwhelmingly accepts the

62. *See* McCarthy, *supra* note 6, at 461.

63. *Id.* at 462.

64. David K. DeWolf et al., *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 85.

65. For an in-depth analysis of evolutionary theory, see generally DAWKINS, *supra* note 36. For an analysis of intelligent design, see generally JOHNSON, *supra* note 37.

66. Stephen L. Marshall, *When May a State Require Teaching Alternatives to the Theory of Evolution? Intelligent Design as a Test Case*, 90 KY. L.J. 743, 768 (2002).

67. *See, e.g.*, Stephen C. Meyer, Dir. of the Ctr. for Renewal of Sci. & Culture, Discovery Inst., Testimony to the United States Commission on Civil Rights Concerning the Teaching of Biological Origins (Aug. 21, 1998), *available at* http://www.arn.org/docs/meyer/sm_uscom.htm.

68. Marshall, *supra* note 66, at 769. One supporter of intelligent design commented that promoting the theory is "an uphill battle, because Darwinists can use their control of the microphone to cast their opponents as religious dogmatists regardless of what the opponents are actually saying." Phillip E. Johnson, *Inherit the Wind: The Play's the Thing*, 13 REGENT U. L. REV. 279, 287–88 (2001).

69. McCarthy, *supra* note 6, at 462–63.

theory of evolution as sound. These advocates assert that evolution is the only proper scientific theory to teach in schools despite its status as a theory, which positions it less reliably than a "fact."[70] Those holding this viewpoint, however, insist that "[s]ince critical analysis is the ongoing testing of all scientific knowledge, most scientists argue that singling out one concept for such critique is not appropriate and certainly will confuse students."[71] Even if the theory of intelligent design is not classified as "scientific," it may have continued, albeit limited, viability as a supplemental viewpoint expanding scientific understanding in public school curricula.[72] Of course, this viability is dependent on its status as a religiously neutral, validly academic, enrichment opportunity.[73] This raises the question of whether the medium of a courtroom is suitable in determining the propriety of the theory's inclusion in public school curricula, or whether the issue should instead be resolved by local school authorities.

A substantive debate exists over the scientific validity of intelligent design. Local school districts are far better suited than courts in deciding whether credence should be given to these competing theories,[74] and courts owe deference to their decisions. These decisions will likely depend largely on community structure and other cultural variables. On a theoretical level, 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. Of course, the question remains whether these competing theories have their proper place in a science classroom, as opposed to a historical or social perspective course.[75]

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70. *Id.* at 463.

71. *Id.*

72. *See supra* notes 61–63 and accompanying text.

73. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840–43 (1995) (holding that state university's funding of a student newspaper that expressed religious viewpoints did not violate the Establishment Clause because the newspaper was not created to advance religion, but was neutral toward it, and the newspaper provided secular services).

74. *See infra* Part IV.A.

75. Changing the setting in which intelligent design is taught may not, however, curtail conflict. Perhaps in response to the *Kitzmiller* court's exhortation that intelligent design

II. INTELLIGENT DESIGN TODAY: THE CURRENT ANALYSIS FOR CHALLENGES TO INTELLIGENT DESIGN POLICIES IN PUBLIC SCHOOLS

A. *The* Lemon *Test*

Historically, courts have analyzed claims challenging the teaching of creation-science and other balanced treatment policies in public school curricula under the Establishment Clause.[76] Accordingly, courts thus far have analyzed intelligent design policies solely in the context of First Amendment religious issues (specifically, the Establishment Clause), without examining a school's right to control curriculum choice outside the context of an endorsement of religion.[77] Instead, the familiar *Lemon* test has been used in determining whether school districts' intelligent design policies are constitutional. To survive a facial challenge under the *Lemon* test, a government action must satisfy these criteria: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[78] The test has often invalidated statutes and produced harsh results.[79]

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does not belong in a science classroom, one southern California school district decided to introduce intelligent design in the context of a philosophy class. *See* Tebo, *supra* note 60, at 20. However, parents in the district immediately sued, and the course was removed from the curriculum. *See* Complaint at 8–10, Hurst v. Newman, No. 1:06CV00036 (E.D. Cal. Jan. 10, 2006), 2006 WL 508579; Tebo, *supra* note 60, at 20; *see also* Louis J. Virelli III, *Making Lemonade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423, 427–28 (2006) (discussing the use of evolution disclaimers by various states to question evolution's scientific viability).

76. *See* Edwards v. Aguillard, 482 U.S. 578, 585–94 (1987) (analyzing Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act under the *Lemon* test); Epperson v. Arkansas, 393 U.S. 97, 107–09 (1968) (invalidating Arkansas's anti-evolution statute under precursor to *Lemon* analysis); McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1264–72 (E.D. Ark. 1982) (utilizing the *Lemon* test in declaring balanced treatment statute unconstitutional).

77. Courts have analyzed intelligent design claims under the mistaken assumption that the theory is overtly religious. *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 726 (M.D. Pa. 2005) ("The overwhelming evidence at trial established that [intelligent design] is a religious view . . . ."); *see also supra* Part I.C. (arguing that although proponents of intelligent design may be religiously motivated, the theory itself seeks to enrich the debate about the origins of life).

78. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

79. *See* Thomas A. Schweitzer, Lee v. Weisman *and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 113, 199–200 (1992).

The continued use of the *Lemon* test is controversial, and the Supreme Court has opted not to utilize it in several recent Establishment Clause decisions. Individual Justices' preferences regarding the use of the test can be linked to judicial philosophy. The test is favored by Justices who adhere to the strict separationist approach to the Establishment Clause,[80] but a majority of Justices on the Rehnquist Court had "expressed dissatisfaction with the test and . . . advocated alternatives, such as focusing on whether government action symbolically endorses religion or on deference to the government unless it creates a church or coerces religious participation."[81] Thus, the future of the *Lemon* test as the prevailing framework for analysis of Establishment Clause cases appears shaky at best.[82] However, despite misgivings about the formulation of the test, it has been utilized recently in contexts other than intelligent design, and it has not been expressly overruled or otherwise abandoned.[83]

With the new composition of the Court, triggered by the recent vacancies of Justice Sandra Day O'Connor and Chief Justice William Rehnquist, the *Lemon* test is likely to curry even less favor. The clout of the Court's four current strict separationists[84] will be tempered by new Chief Justice John Roberts and Associate Justice Samuel Alito, who will likely subscribe to a less rigid view of the Establishment Clause that is more sympathetic to religious advocates.[85] In addition,

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80. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1159 (2d ed. 2002). This viewpoint maintains that government and religion should be separated to the greatest possible extent. *Id.* at 1149.

81. *Id.* at 1159.

82. *See, e.g.*, Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 444–45 (2006) (noting the fractured nature of Establishment Clause doctrine, and that "[the Supreme] Court's almost haphazard use of or entire disregard for the *Lemon* considerations is now standard"); Alan Demmitt & Charles J. Russo, *Holistic Counseling and Religion: Questions for Practice*, 203 Educ. Law Rep. (West) 21, 23 (Dec. 29, 2005) (noting that the long-term viability of the *Lemon* test is questionable).

83. CHEMERINSKY, *supra* note 80, at 1159.

84. *See* Walter Weber, *Extreme Supreme: A Kerry Court Would Be Way Left*, NAT'L REV. ONLINE, Aug. 18, 2004, http://www.nationalreview.com/comment/weber200408180829.asp.

85. *See* Erwin Chemerinsky, *Assessing Chief Justice Rehnquist*, 154 U. PA. L. REV. 1331, 1355 (2006) (predicting that the votes of Roberts and Alito will give the Court the necessary five votes to overturn the *Lemon* test); Excerpts of Senate Judiciary Committee Hearings on the Nomination of Judge Samuel Alito to the U.S. Supreme Court, http://www.religionandsocialpolicy.org/news/article.cfm?id=3731 (transcript of Alito's Senate Judiciary Committee hearings pertaining to his stance on the Establishment Clause); Claire Hughes, *Alito's Paper Trail Includes Decisions Related to Church-State Issues*, ROUNDTABLE ON RELIGION & SOC. POL'Y (Nov. 1, 2005) http://www.religion

Justice Antonin Scalia has affirmatively expressed his desire to see *Lemon* overruled.[86] Although the future of the *Lemon* test may be uncertain, it remains the law today, and courts have continued to apply it.

B. The Test Applied to Intelligent Design

While only two courts have examined the issue, intelligent design has been framed as a religious question in each instance. However, intelligent design is not overtly religious, as it does not endorse any higher being in particular.[87] Courts' analyses in the intelligent design challenges thus far emphasize the importance of the motive behind those who advocate including criticisms of evolution in public schools.[88] Courts have unequivocally assumed that any proponent of intelligent design is motivated by religious beliefs and have applied *Lemon* under the assumption that the Establishment Clause is implicated.[89]

Under the *Lemon* test, as applied in *Selman* and *Kitzmiller*, the intelligent design policies in dispute have a "religious effect" only when one assumes that the theory of intelligent design is inherently religious. Even if this is true, a proper analysis should consider the notion that intelligent design is not necessarily accompanied by religious beliefs or disbelief in evolution.[90] To entertain this notion, one must draw out the subtle distinction between intelligent design

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andsocialpolicy.org/news/article.cfm?id=3422 (assessing Alito's experience and predicting his stance on the Establishment Clause).

86. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) ("[The *Lemon* test is like a] ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried .... It is there to scare us when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely ...." (citations omitted)); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (expressing dissatisfaction with the *Lemon* test).

87. *See supra* Part I.C.

88. *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 728 (M.D. Pa. 2005) (asserting that an objective student would know that teaching evolution as a theory, rather than a fact, is "one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations" (citing Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286, 1308 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006))).

89. The *Kitzmiller* court explicitly stated that intelligent design "is a religious view, a mere relabeling of creationism, and not a scientific theory." *Kitzmiller*, 400 F. Supp. 2d at 726. *But see id.* at 738 (detailing debate from experts on the presence of "irreducible complexity" as a negative argument against evolution and the notion that the "absence of evidence is not evidence of absence").

90. *See* CNN.com, Scientists Enlist Clergy in Evolution Battle, http://www.cnn.com/2006/EDUCATION/02/20/science.evolution.reut/index.html (last visited Feb. 20, 2006).

and creationism. While creationism endorses the Judeo-Christian God as the Supreme Being responsible for the origin of the human species, intelligent design instead focuses on the unlikelihood of evolution occurring without some intelligent influence. Although this intelligent influence is presumably tied to some religion, intelligent design does not endorse Islam, Christianity, Judaism, Buddhism, Hinduism, Animism, or any other world religion. Instead, its focus is on the unlikelihood of evolution and the probable influence of some unspecified higher being.[91] This link to religion, however, is insufficient to trigger the *Lemon* Establishment Clause analysis. Although intelligent design indirectly concerns religion, it is not a religious theory. Consequently, its propriety in the classroom should not be determined using the *Lemon* test, which assumes its inherently religious nature.

Removing this religious barrier, an analysis is possible under the proper regime, focusing instead on the curricular issues that are implicated when schools choose whether to include evolution and its criticisms in a classroom. Intelligent design is fundamentally different in form from creationism, and therefore a new, curriculum-based analysis must be crafted to capture adequately all the interests implicated.[92] Given the limitations on the usefulness in any context of the *Lemon* test as it stands today, and the actual nature of the intelligent design policies that have come before courts, using *Lemon* is inappropriate and misses the key issue implicated by these intelligent design policies: local schools' curricular choices.

III. INTELLIGENT DESIGN AS A CURRICULUM ISSUE

Scholars disagree on whether intelligent design necessarily implicates religion, as well as on whether the theory of intelligent design itself is "science."[93] In part because of this debate, examining the treatment of other controversial areas of the public school curriculum will illuminate where intelligent design fits into the public school curriculum scheme. The nature of the intelligent design disclaimers at issue in *Kitzmiller* and *Selman* is analogous to similar curriculum issues, such as the selection of controversial textbooks and other sensitive topics, and thus a similar analysis is appropriate.

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91. *See supra* Part I.C.

92. *See infra* Part V.

93. *See* NELKIN, *supra* note 14, at 60–64 (examining the view held by some creationists that the Bible is science); Brauer et al., *supra* note 25, at 75–101.

A. A Look at Challenges to Other Controversial Curriculum Choices

A tradition of deference by courts to the curricular decisions of local school authorities has long existed in this country.[94] This tradition is driven largely by the civic role of public education as an indoctrinator of values necessary for participation in American society and politics, the acknowledgment that judges lack specialized knowledge necessary to evaluate the worth of such materials, and respect for traditional local government control of public education.[95] In fact, this deferential tradition arguably "has translated into a reluctance to recognize any constitutional limitations on the power of local school boards to establish curricula."[96]

Various decisions over the past few decades have dealt with the injection of controversial and religious ideals into public school curricula in contexts other than intelligent design, but in ways that may be comparable to, and instructive for, the intelligent design debate. Each of these cases did not, however, involve overtly religious speech, such as prayer in schools or the placement of the Ten Commandments on school property.[97] Rather, they dealt with the inclusion of religiously objectionable information in the curriculum.

Textbook selection has been a frequent locus for claims involving controversial areas of the curriculum in public schools. Although most claims challenging the content of textbooks have been religiously oriented,[98] some concern other controversial areas of thought. Particular criticisms revolve around the selection of history books, which typically "avoid controversy, are one-sided in their presentation, or leave out crucial information altogether."[99] Cases have been litigated both over the racially discriminatory selection of

94. *See* Terri Jane Lavi, Note, *Free Exercise Challenges to Public School Curricula: Are States Creating 'Enclaves of Totalitarianism' Through Compulsory Reading Requirements?*, 57 GEO. WASH. L. REV. 301, 304 (1988).

95. *Id.* at 304–05.

96. *Id.* at 306.

97. *Cf.* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (holding that a Pennsylvania statute requiring schools to begin each day with a reading from the Bible violated the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 436 (1962) (holding that using a prayer composed by New York State officials as part of daily public school procedures violated the Establishment Clause).

98. Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 497 (1987).

99. *Id.*

textbooks[100] and the discriminatory nature of the curriculum in general.[101] In *Asociacion de Educación Privada de Puerto Rico, Inc. v. Garcia Padilla*,[102] the United States District Court for the District of Puerto Rico examined the justifications for textbook selection. It noted that a new textbook may be adopted for many reasons, including "the introduction of a new pedagogical approach."[103] The court generally observed that textbook selection controls what is taught and how it is taught.[104]

Courts have had many opportunities to examine which choices by teachers may be defined as "pedagogical." In *Evans-Marshall v. Board of Education*,[105] the Sixth Circuit considered a high school language arts teacher's use of literature with arguably "inappropriate themes" in her classroom.[106] The court first noted that "the Supreme Court has never removed in-class speech from its presumptive place within the ambit of the First Amendment."[107] The court analyzed the use of these novels as "speech" within the First Amendment's definition,[108] rather than under a religious framework, despite the fact that concerns about the use of the novels revolved in large part around their controversial, sometimes antireligious messages. The divisive novels, *Siddhartha*, *Fahrenheit 451*, and *To Kill a Mockingbird*, concern Buddhism, the absence of religion, and the

100. *See* Loewen v. Turnipseed, 488 F. Supp. 1138, 1149 (N.D. Miss. 1980) (addressing the racist undertones of a Mississippi school committee's recommendations for the use of certain history books).

101. For example, in *Grimes v. Sobol*, 832 F. Supp. 704 (S.D.N.Y. 1993), African-American students sued a school district, claiming that the curriculum deprived them of due process and equal protection because it did not adequately recognize African-American contributions and was "systematically biased against them." *Id.* at 706.

102. 408 F. Supp. 2d 62 (D.P.R. 2005).

103. *Id.* at 66.

104. *Id.* at 65–66.

105. 428 F.3d 223 (6th Cir. 2005).

106. *Id.* at 227.

107. *Id.* at 229.

108. The court analyzed the teacher's rights under the *Pickering* test, which analyzes a teacher's in-class speech by determining (1) whether he or she " 'was disciplined for speech that was directed toward an issue of public concern' "; and (2) whether "her 'interest in speaking as [she] did outweighed the [school's] interest in regulating [her] speech.' " *Id.* at 229 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968)). The concurrence noted that the school district had included the books on an approved list, and therefore the school district's speech was at issue rather than the individual teacher's. *Id.* at 234 (Sutton, J., concurring). Judge Sutton noted that "the school district bears responsibility for the speech, and for First Amendment purposes it is therefore the speaker and it therefore has the right to retain control of the speech—or, more precisely, to retain control over what is being taught in the classroom." *Id.* at 235.

presence of racism in the South, respectively.[109] They implicate the same sorts of religious controversies and dueling worldviews as the intelligent design debate, yet courts thus far have refused to analogize these types of claims.[110] The opponents of the literature used in *Evans-Marshall* were likely motivated by their personal religious beliefs in exactly the same manner as are supporters of intelligent design. However, some discrepancies are present. The opponents of the objectionable language in *Evans-Marshall* were fighting to keep the literature out of the curriculum, while the litigants in today's intelligent design debates are struggling to include information that others find objectionable. Regardless, the same tensions are present in today's debate, and using *Evan-Marshall*'s First Amendment free speech analysis is appropriate. Based on this free speech framework, courts traditionally afford a great deal of deference to the curricular decisions of school officials.

In *Borger v. Biscigilia*,[111] the court held that a school district's policy against showing "R" rated films such as *Schindler's List* did not violate a student's First Amendment rights because the policy was rationally related to a justifiable pedagogical goal.[112] The court analyzed the student's claim under the First Amendment right to freedom of expression, noting that although students are not stripped of all rights when they enter a public school building, "the scope of the First Amendment within the classroom must be tempered, and . . . the content of the curriculum is within the sound discretion of school officials, with exceptions in rare cases."[113] This respect for school officials supports the propriety of giving deference to intelligent design policies adopted by local school boards.

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109. *Id.* at 231.

110. There is an important distinction between requiring students to be exposed to a certain viewpoint and giving students the opportunity to explore such a viewpoint at their own election, as is the case in the intelligent design cases that have arisen thus far. Courts have analyzed the censorship of library books, outside of the curriculum, with greater constitutional scrutiny than curricular matters. *See* Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 188 (5th Cir. 1995); *see also* Pratt v. Indep. Sch. Dist., 670 F.2d 771, 779 (8th Cir. 1982) (holding that in-school censorship of materials produces a "chilling effect" on free speech that is not lessened by allowing students out-of-school access to the censored materials); Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 529 (1985) (asserting that "[t]he ideal education necessarily requires the location of an Archimedean point, a point positioned somewhere between critical reflection and grounding in the contingent circumstances of society").

111. 888 F. Supp. 97 (E.D. Wis. 1995).

112. *Id.* at 100–01.

113. *Id.* at 99.

The court in *Borger* forcefully noted that school boards enjoy considerable discretion in constructing their curricula, and that the First Amendment is implicated only when access to materials is limited " 'for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials['] disapproval of the ideas involved.' "[114] The *Borger* court recommended the use of the *Hazelwood*[115] standard, which asks whether a school's decision bears a "reasonable relationship to a legitimate pedagogical concern."[116] In fact, the *Borger* court noted that "reasonableness" is the only necessary prerequisite for curriculum decisions in a high school setting and emphasized the right of the school board to exercise its discretion in making those curriculum decisions.[117] That same deference should be afforded to school intelligent design policies. Applying the *Hazelwood* test in the intelligent design context, a reasonable pedagogical concern arguably exists: exposing children to differing viewpoints about the origins of the human species without defining which one is "correct." Critical thinking has long been valued as an educational tool that expands the minds of students and deepens understanding, and a proper balancing must occur before disclaimers commenting on intelligent design are curtailed.[118]

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114. *Id.* (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 879–80 (1982)). Other courts have opted to condition the use of certain materials in a school district's curriculum on parental consent. *See* Grosser v. Woollett, 341 N.E.2d 356, 368 (Ohio Ct. C.P. 1974) (allowing the use of controversial literature such as *One Flew over the Cuckoo's Nest* as part of a high school curriculum provided that parents consented to the use of the books with knowledge of their character); *see also* Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (holding that Amish parents were not required to keep their children in public schools past eighth grade). *See generally* KERRY L. MORGAN, REAL CHOICE REAL FREEDOM IN AMERICAN EDUCATION (1997) (arguing that parents, and not the government, should have ultimate control over a child's education).

115. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) involved a school administration's decision to censor a student newspaper. The Supreme Court held that the students' First Amendment free speech rights were not violated by the educator's editorial control of the school-sponsored newspaper. *Id.* at 272–73.

116. *Borger*, 888 F. Supp. at 100 (citing *Hazelwood Sch. Dist.*, 484 U.S. at 273); *see also* Virgil v. Sch. Bd., 677 F. Supp. 1547, 1550 (M.D. Fla. 1988) (holding that the *Hazelwood* test should be administered in a challenge to a school administration curriculum restraint). The *Borger* court also noted that local authorities should be outside of the scope of a court's reviewing power unless their decisions amount to the substitution of " 'rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute.' " *Borger*, 888 F. Supp. at 99 (quoting Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980)).

117. *Borger*, 888 F. Supp. at 100–01.

118. Although the cases discussed in this Section involve challenges to curricular decisions brought under the Free Exercise Clause, their lessons about the deference accorded to local school authorities' curricular decisions are instructive.

The Sixth Circuit discussed religiously based curricula decisions at length in *Mozert v. Hawkins County Board of Education.*[119] The court held that no unconstitutional burden on religion existed where public school students were required to study a basic reader series chosen by school authorities.[120] The plaintiff argued that the reader series offended her religious beliefs through its repeated use of themes such as "futuristic supernaturalism,"[121] magic, telepathy, visiting outer space, gender role reversal, emphasis on "one world or a planetary society," and false views of death.[122]

However, the court dispensed with her objections, characterizing the role of its inquiry in this way: "When asked to 'interpose,' courts must examine the record very carefully to make certain that a constitutional violation has occurred before they order changes in an educational program adopted by duly chosen local authorities."[123] In holding that the reader series did not implicate the Constitution, the court reasoned that "[t]he lesson is clear: governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required."[124] The court noted that one of the purposes of public schools is to instill fundamental values integral to society; those values include tolerance of contradictory religious views as a civil, rather than a religious, matter.[125] Although *Mozert* was decided under the Free Exercise Clause, and not the Establishment Clause, the court's lesson on the role of public education in promoting religious tolerance is instructive. This interpretation supports the argument that intelligent design has secular value (in academic critique) when divorced from the identities of its proponents, and that courts should not prematurely assume that schools' actions amount to a constitutional violation. Instead, courts must look to the facts of each intelligent design policy or textbook disclaimer, examining not the motivations behind its proponents, but

119. 827 F.2d 1058 (6th Cir. 1987).

120. *Id.* at 1070.

121. Plaintiff defined this category as teaching "Man as God," citing a passage describing Leonardo da Vinci as a creative mind coming close to "the divine touch." *Id.* at 1062. She also testified that children using their imaginations beyond scriptural authority's limitations amounted to an occult practice. *Id.*

122. *Id.*; *see also* LOUIS FISCHER ET AL., TEACHERS AND THE LAW 190–91 (7th ed. 2007) (debating whether the teaching of magic and witchcraft expands children's minds or encourages paganism).

123. *Mozert*, 827 F.2d at 1070.

124. *Id.* at 1068.

125. *Id.* at 1069 ("The 'tolerance of divergent . . . religious views' referred to by the Supreme Court is a civil tolerance, not a religious one.").

rather, its independent academic value in the particularized context. Only when this technique is employed can the proper analysis take place, deciding whether the Constitution is implicated at all. The reader series in *Mozert* was designed to expand the perspectives of children, just as, at least theoretically, an evolution disclaimer on a biology textbook would.

Many textbook cases with religious undertones have involved the concept of "secular humanism."[126] This term refers to the idea that a school system may advance the "religion of Humanism[,] ... unconstitutionally inhibit[ing] Christianity" and violating the equal protection, free speech, and free exercise rights of teachers and students.[127] In *Smith v. Board of School Commissioners*,[128] the petitioners argued that the use of certain textbooks unconstitutionally instilled secular humanism in students.[129] The petitioners particularly objected to the home economics textbooks, which they claimed urged students to use "the same process in deciding a moral issue that he uses in choosing one pair of shoes over another," and that "the validity of a moral choice is only to be decided by the student."[130] This decisionmaking structure, they argued, endorsed secular humanism in violation of the Establishment Clause.[131]

The Eleventh Circuit, however, held that the message conveyed by the government was a constitutionally permissible attempt to inoculate its students with "fundamental values necessary to the maintenance of a democratic political system."[132] The court dismissed the argument that the history textbooks involved gave insufficient credence to "the role of religion in history and culture" by painting a historical picture so inaccurate that it discriminated against religion

126. *See, e.g.*, Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684, 694 (11th Cir. 1987) (holding that textbooks did not advance the religion of secular humanism, and noting that "[w]hile these textbooks may be inadequate from an educational standpoint, the wisdom of an educational policy or its efficiency from an educational point of view is not germane to the constitutional issue of whether that policy violates the establishment clause"). *See generally* Paul James Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 BYU L. REV. 177 (discussing the Court's attempt to establish religious neutrality in the Nation's public schools).

127. *Smith*, 827 F.2d at 688; *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (holding that the government may not establish a "religion of secularism" by affirmatively showing hostility to religion, because this behavior prefers those with no religion over those who do practice a religion).

128. 827 F.2d 684 (11th Cir. 1987).

129. *Id.* at 688.

130. *Id.* at 690–91.

131. *Id.* at 688, 691.

132. *Id.* at 692.

and amounted to "ideological promotion."[133] Similarly, by acknowledging competing theories about the origin of the human species, the inclusion of intelligent design in science textbooks arguably educates students about such "fundamental values" rather than endorsing religion. The implications for intelligent design are a bit different from the secular humanism context. Instead of a government advancement of religion, intelligent design is seemingly offending the science of evolution (and in turn, evolution is offending religion in the absence of a textbook disclaimer).

Courts have often heard challenges to curriculum choices that are not overtly religious but carry religious undertones by virtue of their inclusion in the curriculum. In *Ware v. Valley Stream High School District*,[134] the court dismissed the claim of a religious group applying for an exemption from a school district's compulsory health education curriculum.[135] The court based its decision on the Free Exercise Clause.[136] The court ruled that the requirement that students receive instruction relating to topics such as AIDS and drug and alcohol abuse did not infringe on the petitioners' right to exercise their religious beliefs since the state was advancing a "compelling interest which is essential to the accomplishment of an overriding governmental purpose"[137] by educating students about these widespread dangers.

The petitioners in *Ware* argued that their religious beliefs required them to "remain 'simple as to evil' for even the 'details of evil are regarded as being subversive.' "[138] Accordingly, they contended that they were being burdened in the free exercise of their religion by being exposed to such details in contravention of their religion's instructions to avoid them.[139] However, the court upheld the health education curriculum under precedent allowing even fundamental rights, such as those protected by the First Amendment,

133. *Id.* at 693. The court noted that "[t]here simply is nothing . . . to indicate that omission of certain facts regarding religion from these textbooks of itself constituted an advancement of secular humanism or an active hostility towards theistic religion protected by the establishment clause." *Id.* at 694.

134. 545 N.Y.S.2d 316 (N.Y. App. Div. 1989) (per curiam).

135. *Id.* at 317.

136. *Id.* at 319. Again, although the constitutional provision at issue is different, the deferential analysis utilized by courts is instructive.

137. *Id.* at 320.

138. *Id.* at 319.

139. *Id.*

to be intruded upon "through the least restrictive means" when doing so results in the accomplishment of a compelling state interest.[140]

B. *Courts' Analyses of Religiously Based Curriculum Challenges*

In each of the curriculum-based disputes discussed above, courts analyzed the varied claims under similar frameworks, revolving around the rights of individual teachers and those of students and their guardians. Generally, most other challenges to controversial curriculum decisions are analyzed under frameworks that do not specifically implicate religion, despite their obvious religious motivations.[141] These religiously based claims share important similarities with today's intelligent design policies. In curriculum-related cases, courts tend to focus on the consequences of adopting a certain policy for students and teachers,[142] implicating First Amendment freedom of expression analyses[143] rather than First Amendment religion analyses, as courts have employed in the intelligent design context.

Obviously, when a school board's determination of the curriculum includes content that violates the Constitution, no freedom of expression analysis will rectify the curriculum's inequity.[144] However, intelligent design policies are as fact-specific as any other curricular inquiry, and deference must be given to the curriculum aspect of the issue without a premature assumption that such policies implicate the overarching "pall of orthodoxy"[145] that has been cast over it by courts. If a textbook disclaimer does not endorse intelligent design, but instead only mentions that criticisms of

140. *Id.* at 319–20.

141. *See supra* Part III.A.

142. *See, e.g.*, Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 230–31 (6th Cir. 2005) (weighing a teacher's interests in her free speech and its status as a "public concern").

143. Courts in older cases occasionally used a due process analysis in analyzing controversial curriculum issues. A cursory review of this analysis may be beneficial in molding the appropriate modern test for intelligent design. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399–403 (1923) (employing a due process analysis to determine whether instruction was permissible in languages other than English).

144. *See* Edwards v. Aguillard, 482 U.S. 578, 578 (1987). *But see* Grimes v. Sobol, 832 F. Supp. 704, 706, 713 (S.D.N.Y. 1993) (dismissing the claims of African-American students who claimed that the local school board's curriculum was "systematically biased" against them because of the school district's immunity and the plaintiff's failure to state a claim).

145. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("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.").

evolution exist, it should be analyzed using the curriculum-based analysis to determine whether a valid pedagogical interest exists. Of course, in some cases, a school board may go impermissibly far in endorsing religion. For example, if intelligent design is the only theory of the origin of the species taught in a high school biology classroom, the *Lemon* test or other Establishment Clause analysis should be used. Courts should establish the boundary of constitutionality where intelligent design is taught in tandem with evolution as an academically valuable criticism. Determining the outer limits of this boundary and which analysis should accordingly be used, however, is far from simplistic.

IV. A MATTER OF CONTROL: ACADEMIC FREEDOM IN CURRICULUM DISPUTES

A. Academic Freedom and School/Student Relationships

Public education in the United States is largely committed to state and local control.[146] Courts refrain from intervening in conflicts that arise in the course of daily school system operation unless they "directly and sharply implicate basic constitutional values."[147] The Supreme Court has noted that judicial interference in the operation of public school systems is problematic, and that courts should exercise care and moderation in doing so.[148] However, the courts have not failed to apply the mandates of the First Amendment "where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief."[149]

146. H.C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 59 (5th ed. 1999). State statutes often describe the makeup of the public school curriculum in detail, although specific decisions about curriculum choices are made by school boards, while teachers implement them. For example, North Carolina's Basic Education Program requires instruction "in the areas of the arts, communication skills, physical education and personal health and safety, mathematics, media and computer skills, science, second languages, social studies, and vocational and technical education." N.C. GEN. STAT. § 115C-81(a1) (2005). A U.S. Department of Education study reported that only thirty-seven percent of teachers felt that they had influence over the curriculum. JUDITH ANDERSON, U.S. DEP'T OF EDUC., WHO'S IN CHARGE? TEACHERS' VIEWS ON CONTROL OVER SCHOOL POLICY AND CLASSROOM PRACTICES 1 (1994) (Sup. Doc. No. ED 1.322/3:T22). This climate gives rise to a classroom setting in which much of what is taught, or is prohibited from being taught, is not in the hands of individual teachers and is instead dictated by the school boards and state legislatures.

147. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

148. *See id.*

149. *Id.*

Courts have generally given great deference to local schools' curriculum decisions when challenged on First Amendment free exercise grounds.[150] A great deal of authority exists supporting the notion that localities have the authority to determine what teachers are permitted to teach and are restricted from teaching in class,[151] and the Supreme Court also has a tradition of deferring to local school boards' educational decisions.[152] This concept, known as academic freedom, is based in the First Amendment and is defined as "the rights of teachers to speak freely about their subjects, to experiment with new ideas, and to select appropriate teaching materials and methods."[153] Academic freedom protection, though not absolute, extends to the rights of teachers "to evaluate and criticize existing values and practices in order to allow for political, social, economic, and scientific progress."[154]

However, this concept of academic freedom is more limited for teachers in the public school setting, as most of the decisions about what teachers may teach are made by the policies of school boards, provisions of statutes and constitutions, and decisions of courts.[155] Academic freedom exists in two different settings: it refers to both the ability of educational institutions to pursue their goals free from government interference and to the freedom of individual educators to pursue their goals free from the interference of their educational

150. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1079 (6th Cir. 1987) (Boggs, J., concurring) (noting that "the Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims").

151. Philip B. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 213 (1973) (stating that "states have assumed the major burden of their citizens' formal education"); *see also Developments*, *supra* note 22, at 1051–52 (discussing how courts allow the "educational institution or state to regulate curriculum and classroom speech").

152. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (recognizing that determination of appropriate and inappropriate material "rests with the school board"); New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985) (acknowledging the need for schools to have flexibility in establishing disciplinary procedures). *See generally Developments*, *supra* note 22, at 1051–55 (discussing the deference courts generally give to public schools' curricular decisions).

153. FISCHER ET AL., *supra* note 122, at 134. The idea of academic freedom evolved from a notion originating at colleges and universities in nineteenth century Germany that "scholars should be free to search for and to teach the truth without constraints imposed by their immediate superordinates or by government. Anything else would threaten the foundations of knowledge itself." HUDGINS & VACCA, *supra* note 146, at 249.

154. FISCHER ET AL., *supra* note 122, at 134.

155. EDWARD C. BOLMEIER, TEACHERS' LEGAL RIGHTS, RESTRAINTS, AND LIABILITIES 55 (1971). Many attacks against curriculum statutes involve the fact that teachers were not consulted in the adoption of such regulations. *See* Marshall, *supra* note 66, at 752.

institutions.[156] Academic freedom means "not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about *how* and *what* to teach."[157]

Against this backdrop, the Supreme Court has made clear that the protection of constitutional freedoms is vital in the context of public schools.[158] In regard to the rights protected by the First Amendment, the Supreme Court "has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies."[159] The Supreme Court frequently emphasizes the formidable latitude enjoyed by schools in crafting rules to promote their educational mission.[160] Accordingly, the Court has noted that school boards, and not the federal courts, should determine what manner of speech is appropriate in the classroom.[161] In *Boring v. Buncombe County Board of Education*,[162] a concurring opinion noted the danger of "remov[ing] from students, teachers, parents, and school boards the right to direct their educational curricula through democratic means. The curricular choices of the schools should be presumptively their own—the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them."[163] In light of courts' clear precedent, whether or not to include intelligent design in the curricula should be firmly left to the prerogative and discretion of local school districts. Instead of being impinged on by courts where a religiously based constitutional issue does not clearly exist, school districts should be

156. *See* Regents v. Bakke, 438 U.S. 265, 312 (1978); HUDGINS & VACCA, *supra* note 146, at 250.

157. Bd. of Regents v. Southworth, 529 U.S. 217, 237 (2000) (Souter, J., concurring) (emphasis added); *see also* Crowley v. McKinney, 400 F.3d 965, 969 (7th Cir.), *cert. denied*, 126 S. Ct. 750 (2005) (holding that academic freedom "includes the interest of educational institutions, public as well as private, in controlling their own destiny and thus in freedom from intrusive judicial [and governmental] regulation").

158. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 487 (1960) (noting that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools").

159. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 393 (6th Cir. 2005).

160. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (noting that "the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board rather than with the federal courts").

161. *Id.*

162. 136 F.3d 364 (4th Cir. 1998) (en banc).

163. *Id.* at 371–72 (Wilkinson, C.J., concurring); *see also* Krizek v. Bd. of Educ., 713 F. Supp. 1131, 1139 (N.D. Ill. 1989) (holding that *Hazelwood*'s "reasonable relationship" test should be applied to school administration curriculum restriction challenges).

guided instead by First Amendment freedom of speech and expression principles. Intelligent design is not overtly religious; instead, it *implicates* religion, just as *Mozert*'s reader series, *Ware*'s health curriculum, and *Evans-Marshall*'s literature did.

Deference to state and local control over public education is a theme ringing clearly in the jurisprudence of courts across the nation,[164] but this control is not completely unfettered. The Supreme Court has warned that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[165] Despite these admonitions, however, a Sixth Circuit concurrence has noted that the Supreme Court is generally hesitant to interfere with school boards' ability to set curricula based on First Amendment religion claims.[166] Indeed, courts have rarely invalidated curricular choices made by local authorities, excepting the recent, at least arguably activist,[167] intelligent design decisions.

B. Intelligent Design Should Be Analyzed as a Curriculum Issue

Applying the constitutional logic utilized by courts in cases challenging various controversial curriculum issues, intelligent design in the public school curriculum should be viewed through the lens of local authority and freedom of expression, rather than through the current religion-based analysis. Even the antiquated *Scopes* decision noted that school authorities were "quite free" to determine what is taught in schools, and that "[t]hose in charge of the educational affairs of the State are men and women of discernment and culture."[168] That court recommended legislative action as a remedy for undesirable curriculum decisions.[169]

Similarly, the *Evans-Marshall* concurrence discussed the appropriateness of analyzing curricular choices, including intelligent design, under freedom of speech principles, simultaneously observing

164. *See supra* note 150 and accompanying text.

165. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

166. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1079 (6th Cir. 1987) (Boggs, J., concurring). *But see* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637–38 (1943) (refusing to defer to the authority of state and local officials and holding a regulation requiring student to salute the flag unconstitutional).

167. *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005) (issuing an admonition that those opposed to the judgment would label the decision "activist"). *But see* Posting of Timothy Sandefur to Positive Liberty, http://positiveliberty.com/2005/12/%e2%80%9cactivism%e2%80%9d-in-kitzmiller.html#more-1030 (Dec. 21, 2005, 23:19 EST) (arguing that the *Kitzmiller* decision was in fact not an activist one).

168. Scopes v. State, 289 S.W. 363, 367 (Tenn. 1927).

169. *Id.*

that not every controversial curriculum decision amounts to a constitutional claim.[170] The concurrence noted the wisdom of entrusting school administration with curricular decisions.[171] That concurrence made the following remark:

> Permitting federal courts to distinguish classroom vulgarities from lyrics or to decide whose method of teaching *Siddhartha* is superior ... not only disenfranchises the ... community but also tests the boundaries of judicial competence. If even the most happily married parents cannot agree on what and how their own children should be taught, as I suspect is not infrequently the case, what leads anyone to think the federal judiciary can answer these questions?[172]

The analysis of instructional content employed in cases like *Evans-Marshall* addresses the same concerns implicated by intelligent design policies. The teaching of intelligent design alongside evolution implicates the accommodation of school board discretion in curriculum determination. The proper analysis should thus revolve around the various individual educational interests involved, rather than the accommodation or endorsement of religion. In *Selman*, for example, the school board's regulation instructed teachers to moderate the discussion of the theory of the origin of the species in order to

> promote a sense of scientific inquiry and understanding of scientific methods, and to distinguish between scientific and philosophical or religious issues. It may be appropriate to acknowledge that science itself has limits, and is not intended to explain everything, and that scientific theories of origin and religious belief are not necessarily mutually exclusive.[173]

This proposition, while certainly rebuttable, should be accepted so long as it falls within the scope of school board discretion, instead of questioned by courts in the manner we have seen thus far.

C. *The Major Flaw*

Proponents of intelligent design appear to concede that the motivations behind the inclusion of intelligent design in the

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170. *See* Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 238 (6th Cir. 2005) (Sutton, J., concurring).

171. *Id.* at 235–38.

172. *Id.* at 238.

173. Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286, 1296 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

curriculum are wholly religious. Speaking religiously, many proponents of intelligent design are doctrinally opposed to evolution's view of the origin of the species.[174] Thus, the debate over mutual exclusivity of one belief over another arises in the public school context. Creationists are characterized as substantively and fundamentally opposed to the theories underlying evolution, motivated by a religious desire to inject alternative theories into schools and to discredit the teachings of evolution.[175] Those who wish to keep intelligent design out of schools, on the other hand, are depicted as atheistic devotees of Darwin, forcing students to believe that humans descended from lower animal forms with no room left for criticisms from Christian fundamentalists or anyone else.[176] Indeed, the *Kitzmiller* court bluntly concluded that intelligent design was not science, and that it moreover could not "uncouple itself from its creationist, and thus religious, antecedents."[177]

However, a reasonable middle ground does exist. A nationwide movement is underway promoting the accommodation of religion and evolution. In early 2005, several hundred churches formed a consortium to preach against the recent efforts that have been made to discredit evolutionary theory. The Clergy Letter Project circulated a letter that attempted to accommodate religious beliefs and evolutionary theory.[178] It reads in part: "To reject [evolution] is to deliberately embrace scientific ignorance and transmit such ignorance to our children. We believe that among God's good gifts are human minds capable of critical thought and that the failure to fully employ this gift is a rejection of the will of our Creator."[179] The Presiding Bishop-elect of the Episcopal Church of the U.S.A. has even commented, "[E]volution ought to be taught in the schools as the best witness of what modern science has taught us. To try to read the

174. *See* Brauer et al., *supra* note 25, at 73–74.

175. *See supra* Part II.B.

176. Of course, evolution offers an explanation for events that even its proponents, led today by British biologist Richard Dawkins, concede is "very improbable." DAWKINS, *supra* note 36, at 1. However, these promoters of evolution posit that evolution explains how those very improbable events occurred. Dawkins notably wrote that Darwin "made it possible to be an intellectually fulfilled atheist." *Id.* at 6. Despite these beliefs, Dawkins notes on the first page of his seminal work that "[b]iology is the study of complicated things that give the appearance of having been designed for a purpose." *Id.* at 1. The difference between evolution and intelligent design, then, seems to hinge not on the "complicated" science, but on whether such a purpose does exist.

177. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005).

178. Neela Banerjee & Anne Berryman, *At Churches Nationwide, Good Words for Evolution*, N.Y. TIMES, Feb. 13, 2006, at A16.

179. *Id.*

Bible literalistically about such issues disinvites us from using the best of recent scholarship."[180] Competing perspectives are clearly on trial in intelligent design cases. Although accommodation of the two theories is possible, simply removing the unnecessary taint of religion from the intelligent design equation altogether does not necessarily reveal an educationally beneficial solution. That determination, however, is one for courts to make in scrutinizing local school board decisions under a freedom of expression, curriculum-based analysis, rather than a premature and ill-fitting *Lemon* test and Establishment Clause analysis.

V. THE CASE FOR A NEW ANALYSIS

Initially, a strong argument exists that the inclusion of intelligent design along with evolution in high school science curricula should pass the *Lemon* test. Recent court decisions unequivocally assume that, even if the first-prong "secular purpose" test is met, the injection of statements acknowledging the existence of alternative theories of the origins of the human species fail to have a secular effect because of the inherently religious nature of such a statement.[181] Although highly fact-specific, it is possible that a textbook's disclaimer describing evolution as a theory and acknowledging alternative world views that contravene or conflict with evolution may indeed have the intended secular effect of enriching students' education by fully exposing them to the merits and drawbacks of evolutionary theory. Evolutionary theory is not without gaps, and acknowledging these gaps may expand and clarify a student's understanding of the issues involved. This is especially true given today's academic environment of debate over what constitutes science, how evolution may fully be explained, and whether intelligent design is science.[182]

Even in the few challenges to intelligent design policies that have reached courts, the intelligent design policies at issue do not go so far as to actually explain precisely what intelligent design *is*; rather, students are alerted to gaps in evolutionary theory and are free to research differing viewpoints if they so desire.[183] Including intelligent design in high school curricula could further a secular purpose in the

180. *10 Questions for Katharine Jefferts Schori*, TIME, July 17, 2006, at 6; *see also* Bowman, *supra* note 82, at 429–30 (citing several official statements issued by the Pope and various churches accepting evolution as compatible with their religious beliefs).

181. *See Kitzmiller*, 400 F. Supp. 2d at 762–63; Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286, 1307 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

182. *See* Brauer et al., *supra* note 25, at 75–101.

183. *See Kitzmiller*, 400 F. Supp. 2d at 708; *Selman*, 390 F. Supp. 2d at 1292.

science classroom by its comparison with evolution, contrasting what is "science" with what is not if the teacher subjugates the theory to evolution. At the very least, teaching intelligent design in nonscience classrooms may have academic value as a cultural inquiry. For example, a teacher in a civics classroom could introduce the concept to spark a policy debate.

Despite the possible success of future intelligent design claims under the *Lemon* test, it is not the most accurate way of guaranteeing the rights of the parties involved. In any event, the changes ushered in with two new Supreme Court Justices may render the test an artifact in terms of First Amendment jurisprudence, regardless of the context.[184] Even when analyzed under the cloud of religion, intelligent design may be permissible as a legitimate secular enhancement to science education. Regardless of whether it is in fact permissible, the issue falls most squarely in the realm of a curriculum-related issue, and should be analyzed accordingly.

Presenting students with alternative theories and alternative worldviews is commonplace in public education; in fact, it is a key component of many core curriculum classes. World history, for example, examines various world religions in the course of its description of historical global cultures. Civics classes provide students with an overview of alternative and often controversial forms of government. Foreign language courses are often intertwined with particular religions. Few would suggest that by allowing students to encounter Buddhism, Greek mythology, the Salem witchcraft trials, or the Socialist Party in the course of their core education, the government is impermissibly endorsing these practices.

In fact, parents have often brought challenges to the inclusion of such subjects in public school curricula, objecting on grounds that are often—but not always—religiously based.[185] Nonetheless, even in such religiously based curriculum challenges, courts have not applied *Lemon*, but rather have used a more appropriate framework anchored in freedom of speech and expression principles and the relative burdens on the individual interests resulting from certain curriculum choices.[186] These challenges in fact raise issues identical to the intelligent design debate, and the current trend toward framing the issue in First Amendment religious terms is misguided.

184. *See supra* Part II.A.
185. *See supra* Part III.A.
186. *See supra* Part III.B.

Framing the intelligent design debate in terms of academic freedom, rather than religion, may craft a new useful analysis. The end result under this new analysis is uncertain. Public opinion is sharply divided on the issue, so the use of this different analysis may not provide answers to the debate. Instead, it will likely do the most appropriate thing: it will place the debate squarely in the hands of those who are most suitably positioned to gauge the needs and circumstances of its community, the local school boards. According to *Newsweek*, "80 percent of the population believe God created the earth,"[187] but the fact that the public believes strongly in an alternate theory of the origin of the species may or may not be enough to justify intelligent design's inclusion in the public school curriculum. Even if intelligent design is inappropriate as a part of instruction in public school science classrooms, a different analysis than *Lemon* is the appropriate vehicle for reaching that determination.

The *Kitzmiller* and *Selman* decisions inappropriately leapt to the Establishment Clause and the *Lemon* test, based superficially on precedent and the motives underlying the school policies at issue. Neither of these justifications provides the link needed to bridge the gap between the proposed critique of a scientific theory and the endorsement of religion in public schools. Courts examining intelligent design have relied on the well-established line of precedent relating to the injection of religious beliefs in public schools. However, these cases all involved actions that were affirmatively religious; they analyzed policies that were directly associated with religion, such as school prayers and the display of the Ten Commandments on school grounds.[188] At least in the two most recent intelligent design cases, the policies at issue are facially neutral: they do not endorse or even explain the concept of "intelligent design," but rather inform the reader that the theory of evolution is not without shortcomings and point out that other theories exist.[189] This action does not endorse one religious view over another, but instead allows the reader to choose to believe or not believe the one

187. William Lee Adams, *Other Schools of Thought: The Teaching of Evolution Continues to Polarize Communities*, NEWSWEEK, Nov. 28, 2005, at 57.

188. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (declaring the delivery of prayers by students at high school football games unconstitutional); Stone v. Graham, 449 U.S. 39, 39 (1980) (per curiam) (holding a state statute requiring the display of the Ten Commandments on public school classroom walls unconstitutional); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding unconstitutional daily prayers in public schools).

189. *See supra* notes 40–46 (excerpting the Dover and Cobb County school districts' proposed statements).

particular view presented: evolution.[190] Most of the other authority cited by the courts examining intelligent design involved conduct which affirmatively implicated religion.[191]

Lastly, courts analyzing intelligent design have, inadvertently or not, placed great weight on the motivations driving critics of evolution.[192] The leap is carelessly made between a facially secular curriculum choice and religious advocacy simply because the proponents of the curriculum choice happen to believe in the policy based on their religious beliefs. Can one imagine the abortion debate being analyzed by courts in terms of religious constitutional issues simply because many opponents of abortion base their opposition on religious beliefs? In *Mozert v. Hawkins County Board of Education*,[193] the Sixth Circuit even found that a certain reader series used in public schools, criticized for promoting secular humanism, did not unconstitutionally burden students' freedom of exercising their religious beliefs.[194] The court noted that "[w]hat 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."[195] Likewise, the intelligent design disclaimers in high school textbooks may arguably have the same effect and the same absence of compulsion to affirm or deny any religious practice. Instead, they present two alternate theories of the origin of the species.

In *Kitzmiller*, on the other hand, the court concluded that an objective observer (whether it be a child or adult) would consider intelligent design to be of a religious nature based on the writings of several experts at trial who testified that "[intelligent design] is not a new scientific argument, but is rather an old religious argument for the existence of God,"[196] and that teaching about gaps in Darwin's theory is a religious strategy with its roots in creationism.[197] The court embarked on a lengthy explanation of the support for this argument,

190. This is reminiscent of the "balanced treatment" approach, which may not be totally defunct if intelligent design is articulated as an alternative theory without a specific link to a specific religion. *See supra* Part I.A.

191. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 590–93 (1987); Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

192. *See supra* Part II.B.

193. 827 F.2d 1058 (6th Cir. 1987).

194. *Id.* at 1062, 1070.

195. *Id.* at 1069.

196. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 718 (M.D. Pa. 2005).

197. *Id.* at 711–12.

including earlier decisions involving creationism and other religiously motivated responses to evolutionary theory.[198]

The final step in the leap characterizing intelligent design as religious is that "the existence of a supernatural designer is a hallmark of [intelligent design]."[199] This reasoning proceeds as follows: intelligent design suggests that the world was designed by laws other than those of nature, and that the designer being a natural entity is not plausible.[200] Therefore, in order for intelligent design to pass as "science," the basis of scientific thought would have to be broadened to include supernatural forces.[201] This distinction, however, 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.

The *Mozert* court stated that "[w]hen asked to 'interpose,' courts must examine the record very carefully to make certain that a constitutional violation has occurred before they order changes in an educational program adopted by duly chosen local authorities."[202] Given the broad discretion and wide power given to local authorities over curriculum matters, and the varying degrees to which evolution is taught across the country, courts' charge to analyze the inclusion of the theory in public school curricula as a constitutional issue seems grimly premature. Following the Sixth Circuit's admonition, it appears that the scenarios presented by *Kitzmiller* and *Selman* do not even approach a constitutional violation, at least not in the Establishment Clause sense, and should be reexamined in light of what the debate truly concerns: curriculum control. If any constitutional provision is implicated, it is freedom of speech and expression, and precedent indicates that deference will be given to local school board decisions under this analysis.[203]

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198. *Id.* at 716–23.

199. *Id.* at 720. Lehigh University Professor Michael Behe, testifying at the trial, claimed that "the *plausibility of the argument for ID depends upon the extent to which one believes in the existence of God.*" *Id.* (emphasis in original); *see also* Laurie Goodstein, *Witness Defends Broad Definition of Science*, N.Y. TIMES, Oct. 19, 2005, at A15.

200. *See supra* Part I.C.

201. *Kitzmiller*, 400 F. Supp. 2d at 720–21.

202. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987).

203. Of course, leaving decisions about the teaching of evolution to local control may not alleviate the controversy significantly, or even at all. The two cases that have been litigated thus far have involved curriculum policies teaching intelligent design alongside evolution. However, adopting the framework advocated in this Comment inevitably leads to the possibility that a school board could decide not to teach evolution at all, relying

CONCLUSION

These questions have not yet reached the Supreme Court, but when they do, the Court should carefully examine the fundamental nature of the debate to ensure that the proper analysis is chosen. The few times that the debate, in its modern form, has reached a court, the body examining the issue has unquestioningly applied the *Lemon* test, assuming its propriety in light of the historical context surrounding the evolution debate.[204] However, the theory of intelligent design contains some important differences that may separate it from the traditional "creation-science" designation in a courtroom. Intelligent design's unique position, and the limited circumstances under which it has been litigated, makes it entirely appropriate for future courts to analyze intelligent design challenges under freedom of speech and curriculum-related regimes rather than the traditional religious purpose, religious effect *Lemon* mantra. The newly comprised Supreme Court must resist the temptation to analyze this issue under a religion clause analysis, and use caution in infringing on teacher and school district discretion.

Instead, courts might reach a conclusion more amenable to the interests of both students and school administrators by adopting the logic of the more fully developed curriculum-based areas of law. This reasoning is much more useful in resolving the interests implicated by the intelligent design debate and operates on the principle of deference to local school board discretion. At its root, the issue of including the intelligent design theory in public school classrooms is in fact one of curriculum choice and academic freedom, not religious burden.

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solely on intelligent design as its means of indoctrinating students about the origin of the species. Critics argue that intelligent design's aim of ensuring that evolution is not taught as fact is a reaction to the same group's inability to have evolutionary instruction barred altogether by the judiciary. *See* McCarthy, *supra* note 6, at 456. If this is correct, then the likelihood of school policies endorsing intelligent design to the exclusion of evolutionary teaching may be significant. However, if precedent is to be followed with respect to curricular decisions, such a result may amount to a reflection of changing societal mores and their influences on the next generation. While the implications of such a trend are outside the scope of this Comment, they are worth noting.

204. *See Kitzmiller*, 400 F. Supp. 2d at 712; Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286, 1298 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006); *see also* discussion *supra* Part I.B (summarizing the courts' decisions in both *Selman* and *Kitzmiller*).