

LIVING IN THE MATERIAL WORLD: WHY INTELLIGENT DESIGN IN PUBLIC SCHOOLS IS NO THREAT TO THE ESTABLISHMENT CLAUSE

INTRODUCTION

The topic of biological origins is rife with conflict largely because proponents of differing theories cannot understand how their opponents' side can be getting it so wrong. Adherents to different theories often mistake their own presuppositions for conclusions based on evidence, with both sides frequently misunderstanding the foundational principles to which the other side adheres. Consequently, the conversations on the topic often consist of people talking directly past each other and wondering how their opponents can completely miss the point. The intellectual and emotional stakes run high in such debates, especially when they impact children in public schools through statutes that require or prohibit the teaching of different biological theories of origin such as Darwinism or Intelligent Design ("I.D."). The Supreme Court of the United States noted that it is "particularly vigilant" regarding alleged Establishment Clause violations in elementary and secondary schools because "[s]tudents in such institutions are impressionable and their attendance is involuntary."¹ This enhanced vigilance, however, does not require the barring of I.D. from the classroom.

The teaching of alternative origins in the classroom has been the subject of several Supreme Court decisions. In *Epperson v. Arkansas*, the Supreme Court struck down an Arkansas statute that forbade public schools from teaching evolution.² The Court determined the evolution prohibition existed solely because the teaching conflicted "with a particular religious doctrine"³ and this violated the First Amendment, which "mandates governmental neutrality between religion and religion, and between religion and nonreligion."⁴ In *Edwards v. Aguillard*, the Court struck down a Louisiana statute that demanded balanced treatment between creation-science⁵ and evolution.⁶ Here, the Court applied the three-prong *Lemon* test.⁷ The *Lemon* test requires that

¹ *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987).

² 393 U.S. 97, 98, 101, 109 (1968).

³ *Id.* at 103.

⁴ *Id.* at 103–04.

⁵ Creation-science is a biblically based scientific model with tenets that "parallel the Genesis story of creation." *Edwards*, 482 U.S. at 603 (Powell, J., concurring).

⁶ *Id.* at 581–82 (majority opinion).

⁷ *Id.* at 582–83.

“[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;”⁸ and, third, “the statute must not foster ‘an excessive government entanglement with religion.’”⁹ Using this test, the Court held that there was no secular purpose identified for the act and, in fact, “[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind.”¹⁰ The Court has, therefore, spoken clearly on creation-science. The theory’s ties to Christianity render its teaching a violation of the Establishment Clause.¹¹

A more recent alternative to Darwinism is I.D.¹² While creation-science has as its foundation a religious text, I.D. has as its foundation traditional scientific observation.¹³ I.D. posits that life developed as a result of an intentional selection process, requiring a selective guidance for which traditional Darwinism cannot account.¹⁴ I.D., generally defined, is “a scientific theory which argues that [the] best explanation for some natural phenomena is intelligence, especially when the phenomenon has certain informational properties which in our observation-based experience are caused by intelligence.”¹⁵ In its methodology, I.D. “studies present-day causes and then applies them to explain the historical record to *infer* the best explanation for the origin of the natural phenomenon being studied.”¹⁶

The Supreme Court has not ruled on the constitutionality of teaching I.D. in the classroom; therefore, it is open to speculation whether such a case in front of the Court would be treated in a similar

⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Board of Education v. Allen*, 392 U.S. 236, 243 (1986)).

⁹ *Id.* at 613 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

¹⁰ *Edwards*, 482 U.S. at 585, 591.

¹¹ *See id.* at 596–97.

¹² *See* Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 461, 461–62 (2003).

¹³ *See* David K. DeWolf et al., *Intelligent Design Will Survive* *Kitzmiller v. Dover*, 68 MONT. L. REV. 7, 27 (2007).

¹⁴ *See, e.g.*, Beckwith, *supra* note 12, at 462 (“The main thrust of this new movement, known as Intelligent Design (ID), is that intelligent agency, as an aspect of scientific theory-making, has more explanatory power in accounting for the specified, and sometimes irreducible, complexity of some physical systems, including biological entities, and/or the existence of the universe as a whole, than the blind forces of unguided and everlasting matter”) (footnote omitted).

¹⁵ Casey Luskin, *Intelligent Design*, CASEY LUSKIN.COM, <http://www.caseyluskin.com/id.htm> (last visited Mar. 13, 2013).

¹⁶ *Id.*

fashion to creation-science. The most thorough treatment of teaching I.D. in the classroom occurred in the district court case *Kitzmiller v. Dover Area School District*.¹⁷ In *Kitzmiller*, the court held that requiring high school biology teachers to portray I.D. as an alternative to evolution was a violation of the Establishment Clause.¹⁸ The court applied the *Lemon* test and found that the school board's purpose was to promote religion¹⁹ and that the requirement had the effect of endorsing religion.²⁰

The *Kitzmiller* court also analyzed the requirement under the endorsement test, an alternative analysis to the *Lemon* test for violations of the Establishment Clause.²¹ Justice O'Connor had first proposed the endorsement test in *Lynch v. Donnelly*,²² and it was later applied by the majority in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*.²³ Under this test, a court analyzes what is meant to be communicated by the proponent and what is understood by the recipient.²⁴ The question is whether the communication "in fact conveys a message of endorsement or disapproval" regarding religion,²⁵ with the "reasonable, objective observer being the hypothetical construct to consider this issue."²⁶ The *Kitzmiller* court found that teaching I.D. had

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

¹⁸ *Id.* at 708–09, 765. The Dover Area School District passed a resolution in 2004 that stated the following: "Students will be made aware of gaps/problem in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught." *Id.* at 708. The board subsequently stated that it would require teachers to read a statement to students that encouraged students to keep an "open mind" regarding the theories, and that Intelligent Design was an alternative to Darwinism, a theory with "[g]aps . . . for which there is no evidence." *Id.* (internal quotation marks omitted).

¹⁹ *Id.* at 763.

²⁰ *Id.* at 764. The plaintiffs did not claim the third prong of the *Lemon* test, excessive entanglement between government and religion. *Id.* at 746 n.19. This Note only analyzes the purpose and effect prongs, as many of the considerations between the effect and the excessive entanglement prongs are similar, and many courts combine "the last two prongs 'into a single effect inquiry.'" Todd R. Olin, *Fruit of the Poison Tree: A First Amendment Analysis of the History and Character of Intelligent Design Education*, 90 MINN. L. REV. 1107, 1110 (2006) (quoting *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1299 (N.D. Ga. 2005)).

²¹ *Kitzmiller*, 400 F. Supp. 2d at 714 n.4, 714–46.

²² See 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring); see also *Kitzmiller*, 400 F. Supp. 2d at 714.

²³ 492 U.S. 573, 592–601 (1989).

²⁴ See, e.g., *Lynch*, 465 U.S. at 690.

²⁵ *Id.*

²⁶ *Kitzmiller*, 400 F. Supp. 2d at 715. One commentator notes that the various tests used by the Supreme Court (such as the *Lemon* test and the endorsement test) "have failed to provide any consistent basis for evaluating establishment clause cases." PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURT'S TORTUOUS TREATMENT OF RELIGION* 55 (2006).

violated the endorsement test from the standpoint of both an adult community member and a student observer.²⁷

This Note challenges the *Kitzmiller* holding and disputes the general proposition that I.D.'s claim to science is nothing more than a sham concealing a religious purpose. Also, this Note shows that I.D. is a legitimate scientific theory, and a rejection of the theory on religious grounds is unwarranted. Furthermore, the required teaching of any scientific theory (such as I.D.) should be impervious to an Establishment Clause analysis or should at least be given much greater deference than current Establishment Clause tests provide. For this reason, any required teaching of I.D. in public schools should not be held to violate the Establishment Clause. Part I of this Note argues that the courts' definition of science is unnecessarily restrictive and that a more logical definition of science includes I.D. Part II argues that I.D. is not inherently religious, and that, as an objective theory, it should not be hindered by any potential religious implications that flow from it. Part III discusses I.D. under *Lemon*, arguing that the required teaching of I.D. should not be susceptible to invalidation under the purpose and effect prongs. Part IV discusses I.D. under an endorsement test analysis, likewise suggesting that the required teaching of I.D. should not be invalidated under the endorsement framework.

I. INTELLIGENT DESIGN AND SCIENCE

The definition of science is by no means agreed upon.²⁸ In nearly all scientific definitions, the importance of experimentation and observation is stressed, with legitimate conclusions limited to those that can be inferred from observable data.²⁹ The *Kitzmiller* court found I.D. failed to meet this standard, asserting that I.D. "requires supernatural

This Note mirrors the court's analysis in *Kitzmiller*, which applied the *Lemon* and endorsement tests. See *supra* text accompanying notes 18–21.

²⁷ *Kitzmiller*, 400 F. Supp. 2d at 734.

²⁸ See, e.g., Jana R. McCreary, *This Is the Trap the Courts Built: Dealing with the Entanglement of Religion and the Origin of Life in American Public Schools*, 37 SW. U. L. REV. 1, 5–6 (2008).

²⁹ Quoting from the National Academy of Sciences, the court in *Kitzmiller* used the following definition:

Science is a particular way of knowing about the world. In science, explanations are restricted to those that can be inferred from the confirmable data—the results obtained through observations and experiments that can be substantiated by other scientists. Anything that can be observed or measured is amenable to scientific investigation. Explanations that cannot be based upon empirical evidence are not part of science.

400 F. Supp. 2d at 735–36 (internal quotation marks omitted).

creation.”³⁰ Similarly, in *Edwards v. Aguillard*, the Supreme Court declared creationism to be religious because it requires the supernatural.³¹

I.D. does not, however, require supernatural causation: “Design theory does not try to address questions about whether the designer is natural or supernatural because such questions lie outside of the empirical domain of science.”³² Rather than addressing the issue of supernatural versus natural causation, I.D. claims that design is detectable because there are “tell-tale features of living systems and the universe that are best explained by an intelligent cause.”³³ I.D.’s claim to be able to detect design is not a principle that is foreign to other areas of science. For example, the Search for Extraterrestrial Intelligence Project (“SETI”) scans for radio signals among the stars that may indicate non-human intelligent life based on the principle that certain patterns in the material universe can only arise from an intelligent source.³⁴ While something non-material may not be immediately observable, it can leave “fingerprints” that imply its existence.³⁵

³⁰ *Id.* at 721, 735.

³¹ 482 U.S. 578, 591–92 (1987).

³² DeWolf et al., *supra* note 13.

³³ *Id.* at 25 (quoting Stephen C. Meyer, *Not by Chance: From Bacterial Propulsion Systems to Human DNA, Evidence of Intelligent Design Is Everywhere*, NAT’L POST, Dec. 1, 2005, at A22).

³⁴ *Id.* at 26 (“Implicit in [SETI astronomers’] research is the assumption that signals produced by intelligent agents differ from radio emissions resulting from natural phenomena.”).

³⁵ The example of symbolic communication may be useful to illustrate one of these “fingerprints.” Symbolic forms of communication, which use arbitrary signals to indicate real world information, have only been observed to arise from the choices of intelligent actors. See WERNER GITT, *IN THE BEGINNING WAS INFORMATION: A SCIENTIST EXPLAINS THE INCREDIBLE DESIGN IN NATURE* 61, 67, 96 (2006); see also PERCIVAL DAVIS & DEAN H. KENYON, *OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS* 7 (Charles B. Thaxton ed., 2d ed. 1993). Imagine landing on the surface of a previously unexplored planet and discovering a tablet of hieroglyphs or any sort of symbolic notation such as sheet music or mathematical equations. The idea that these symbols did not come from an intelligence would not be taken seriously because we know that symbolic, arbitrary notation (such as the alphabet used to write this Note) does not occur without preexisting intelligences to assign meaning to the symbols. DAVIS & KENYON, *supra*; GITT, *supra*, at 61, 67. “Chair” means to the reader what it does to the writer because our society has agreed that the arbitrary symbols of “C,” “H,” “A,” “I,” and “R” correspond to the real world concept of the object on which we sit. See GITT, *supra*, at 60–61, 67. The letters in “chair” theoretically could be used to indicate anything, such as a bed or a table. See *id.* at 60–61. In that respect, the symbols are arbitrary. See *id.* We only know what real world concept they signify because of previous linguistic agreement. *Id.* at 67, 71. DNA utilizes a similar arbitrary alphabet, with the “words” being composed of sequences of chemical letters. DAVIS & KENYON, *supra*, at 57; see also STEPHEN C. MEYER, *SIGNATURE IN THE CELL: DNA*

Modern science arbitrarily subscribes to the tenet that observations cannot infer “extra-material”³⁶ causes. This tenet incorporates the unjustified axiomatic assumption that there is nothing outside of the material universe, at least nothing that materially interacts with it.³⁷ A more expansive view of science accepts any rational conclusions based on material evidence that reflect what is true.³⁸ One commentator criticizes I.D. by writing that “intelligent design is more than an alternative theory of origins; it is an attempt to reformulate science in a way that allows the use of religion to explain patterns found in nature.”³⁹ Setting aside the definition of “religion” for now, this statement presumes that religion (as that author defines it) is not the explanation for the patterns in nature. How does the author know this? How does he know that the limits he has placed on science are the correct ones for ascertaining truth? He, of course, does not, as a commitment to materialism is an a

AND THE EVIDENCE FOR INTELLIGENT DESIGN 248–49 (2009). This is much like “1” and “0” in the computer programming language of binary code. See GITT, *supra*, at 61. I.D. theorists posit that such an arbitrary symbolic code in DNA is necessarily the product of conscious choice. See, e.g., GITT, *supra*, at 96; MEYER, *supra*, at 246–49, 332–34.

³⁶ The term “extra-material” is used here in lieu of the word “supernatural.” This is not meant as a way to “split hairs” and avoid the association of the supernatural with I.D. It is merely an attempt to avoid the religious implications that accompany the term “supernatural.” “Supernatural” is a term laden with predetermined constructs of meaning that can bias an objective discourse.

³⁷ For example, renowned evolutionary biologist Richard Lewontin has stated, We take the side of science *in spite* of the patent absurdity of some of its constructs, *in spite* of its failure to fulfill many of its extravagant promises of health and life, *in spite* of the tolerance of the scientific community for unsubstantiated just-so stories, because we have a prior commitment, a commitment to materialism. It is not that the methods and institutions of science somehow compel us to accept a material explanation of the phenomenal world, but, on the contrary, that we are forced by our *a priori* adherence to material causes to create an apparatus of investigation and a set of concepts that produce material explanations, no matter how counter-intuitive, no matter how mystifying to the uninitiated.

Richard Lewontin, *Billions and Billions of Demons*, 44 N.Y. REV. BOOKS 28, 31 (1997) (book review). This quote is not used to imply that Lewontin is a proponent of I.D. or that he thinks that the modern scientific commitment to materialism is misguided. It is used only to help illustrate that materialism is the arbitrary starting point for modern science and is not the only rational option.

³⁸ Michael Behe, an I.D. proponent, writes in his response to the *Kitzmiller* decision that “science’ is an unrestricted search for the truth about nature based on reasoning from physical evidence.” Michael J. Behe, *Whether Intelligent Design Is Science: A Response to the Opinion of the Court in Kitzmiller vs Dover Area School District*, DISCOVERY.ORG (2006), <http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=697>.

³⁹ David R. Bauer, *Resolving the Controversy over “Teaching the Controversy”: The Constitutionality of Teaching Intelligent Design in Public Schools*, 75 FORDHAM L. REV. 1019, 1057 (2006).

priori requirement for science in its modern conception.⁴⁰ Anything extra-material that might be involved in the origin of life is ruled out because of the predetermined, arbitrary limitation of materialism placed on modern science, not because of any objective reason.

The nature of the theoretical extra-material force is not a part of I.D. theory.⁴¹ Answering this ultimate question is outside the purpose of the I.D. movement,⁴² but to disregard the possibility of such specified intent in life is to be blatantly illogical. The classic example of the watch is illustrative.⁴³ Consider the following hypothetical scenario: Walking into a room, an observer finds pieces of a watch. Leaving the room, the observer returns later to find the watch assembled into a working timepiece. If the observer presupposes that any explanation for the assemblage of the watch has to come from the room in its current state, and the room has no intelligent actors in it, then the presupposition that ties the origin of the watch to the current state of the room necessitates the conclusion that there is a materialistic, non-intelligent explanation for the construction of the watch. This presupposition thus leads to a

⁴⁰ The National Council for Science Education has espoused the requirement that science deny the supernatural, stating, "Science cannot be neutral on this issue. . . . The assumption that 'the only explanations that count are those that rely on nature' is indeed an important part of science; in fact, this is a foundational axiom for any rational thinking. It needs to be said clearly: All educated people understand there are no forces outside of nature." Casey Luskin, *Zeal for Darwin's House Consumes Them: How Supporters of Evolution Encourage Violations of the Establishment Clause*, 3 LIBERTY U. L. REV. 403, 476 (2009) (quoting Steven Newton, Preparatory Materials for Speakers at the 21 January 2009 Texas SBOE Meeting, 32, 44, available at <http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=4411> (internal quotation marks omitted)).

⁴¹ Behe, *supra* note 38. ("To reach to a conclusion of God or the supernatural requires philosophical and other arguments beyond science. . . . I have repeatedly affirmed that I think the designer is God, and repeatedly pointed out that that personal affirmation goes beyond the scientific evidence, and is not part of my scientific program.").

⁴² DeWolf et al., *supra* note 13.

⁴³ The watchmaker analogy, which is meant to illustrate the existence of God, was first used by William Paley in his book, *Natural Theology*. See WILLIAM PALEY, NATURAL THEOLOGY 7–8, 35 (Matthew D. Eddy & David Knight eds., Oxford Univ. Press 2006) (1802). The simplest explanation of the argument is that watches are complicated and so require a watchmaker to assemble them, and life is analogously complicated and thus requires a deity to create it. *Id.* A similar argument by the thirteenth-century monk, Thomas Aquinas, was discussed in *Kitzmiller*, in which an expert witness explained that Aquinas's argument was: "Wherever complex design exists, there must have been a designer; nature is complex; therefore nature must have had an intelligent designer." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 718 (M.D. Pa. 2005). The watch argument has admittedly become a bit of a cliché and is also not completely applicable to the life context because watches do not reproduce and do not have DNA, which are necessary components for evolution, according to Darwinism. However, the watch example is useful as an illustration to expose unjustified scientific assumptions and is not used as a scientific argument.

conclusion that is clearly not the case (or is so unlikely that to espouse such a conclusion would be irrational in the face of more likely alternatives). In this scenario, it is patently absurd that natural processes within the confines of the room somehow constructed the watch. This *reductio ad absurdum* demonstrates the point that, while an intelligent actor may not be currently present (i.e. not scientifically observable), there may be inescapable conclusions in the observable world that point to such an actor.⁴⁴ I.D. does not attempt to qualify this alleged “assembler.”⁴⁵ It merely points out the improbability that such assemblage can take place without a conscious choice.⁴⁶

Materialistic explanation is the starting point for all Darwinian science,⁴⁷ and this materialistic presupposition is a starting point that serves most of the scientific disciplines very well.⁴⁸ Eyeglasses, satellites, and internal combustion engines—all have been made as a result of observational hypothesizing and testing in a world with predictable methods of operation. But this strategy does not apply in the same way to the origins of the biological world. The emergence of life from non-life, the emergence of new biological structures, and the corresponding genetic design necessary to perpetuate these structures are not observable⁴⁹ as such occurrences take vast amounts of time or have already occurred in the unobservable past. Some commentators draw the distinction here between “operation science” and “origin science.”⁵⁰ “Operation science is an empirical approach to the world that focuses on repeatable, regularly recurring events or patterns in nature.”⁵¹ “[O]rigin science focuses on past singularities that are not repeatable (e.g., the

⁴⁴ DeWolf et al., *supra* note 13, at 25.

⁴⁵ DAVIS & KENYON, *supra* note 35.

⁴⁶ Casey Luskin, *Finding Intelligent Design in Nature*, in INTELLIGENT DESIGN 101: LEADING EXPERTS EXPLAIN THE KEY ISSUES 67, 71 (2008) (“The principal characteristic of intelligent agency is directed contingency, or what we call choice.’ By observing the sorts of choices that intelligent agents commonly make when designing systems, we can make a positive case for intelligent design, using predictable, reliable indicators of design.”) (quoting WILLIAM A. DEMBSKI, THE DESIGN INFERENCE: ELIMINATING CHANCE THROUGH SMALL PROBABILITIES 62 (Brian Skyrms et al. eds., 1998) (emphasis omitted)).

⁴⁷ See Lewontin, *supra* note 37.

⁴⁸ Eugenie C. Scott, “Science and Religion”, “Christian Scholarship”, and “Theistic Science”: *Some Comparisons*, 18 REP. NAT’L CENTER FOR SCI. EDUC., Mar.–Apr. 1998, at 30, 31.

⁴⁹ Stephen C. Meyer, *The Scientific Status of Intelligent Design: The Methodological Equivalence of Naturalistic and Non-naturalistic Origins Theories*, in 9 THE PROCEEDINGS OF THE WETHERSFIELD INSTITUTE: SCIENCE AND EVIDENCE FOR DESIGN IN THE UNIVERSE 151, 170–71 (2000).

⁵⁰ J.P. MORELAND, CHRISTIANITY AND THE NATURE OF SCIENCE: A PHILOSOPHICAL INVESTIGATION 225 (1989).

⁵¹ *Id.*

origins of the universe, life, various life forms, and mankind).⁵² Materialism is an assumption that makes sense with the former type of science and not the latter, according to these commentators.⁵³

Materialistic presuppositions are less applicable to origin science (such as I.D. and Darwinism) because origin science deals with situations that cannot be repeated under observation.⁵⁴ The materialistic origin of life is presupposed in Darwinism in the same way that it is presupposed in all of the observable sciences (chemistry, physics, etc.).⁵⁵ But the fact that the existing material world currently *operates* under naturalistically explainable processes says nothing about the *origin* of the material world or the variety of biological structures within it. The internal combustion engine, for example, operates under observable, testable, and repeatable processes. But it says nothing of the origin of the device. The complexity of the engine would defy naturalistic explanation even if we did not know that the hands of men made it.⁵⁶ With the origin and development of life, it is relevant to ask how many explanations under Darwinian theory are based on observation and rational inference, and how many are based on “just-so” stories⁵⁷ created within the self-imposed confines of materialism.⁵⁸ Scientific theories that allow for a potential conscious design to the universe “better satisf[y] the epistemic value of being able to account for a wider variety of actual or potential phenomena.”⁵⁹ I.D. not only qualifies as science, but its lack of an arbitrary materialist assumption puts it in a better position than

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Scott, *supra* note 48.

⁵⁶ It is not my intention to “short change” any aspect of Darwinian theory through mechanistic analogies. Eyeglasses and satellites cannot do something that biological organisms can, which is reproduce. The genetic mutations in subsequent generations provide the raw material for evolution under Darwinism, and mechanistic analogies do not take this reproductive process into account. Such analogies are used only to explain the fundamental differences in the theories.

⁵⁷ See Lewontin, *supra* note 37.

⁵⁸ The very fact that there is a debate, while not conclusive by any means, is evidence that there is a legitimate conflict regarding biological origins. There is virtually no dispute over observable material processes, such as gravity or the hydrologic cycle because there is really no rational way to dispute that they act under natural processes. The biological past, however, is open to conjecture as it is only observable by inference. If naturalistic Darwinism is so obviously proven that it is among the likes of gravity and the hydrologic cycle, why is it even possible to have a logical debate on the subject? Of course, the converse is also true that, because biological origins are not directly observable, they are subject to religious bias and wishful interpretations. But this would apply to both sides of the argument.

⁵⁹ MORELAND, *supra* note 50, at 223.

traditional Darwinism to accurately describe the truth of life's origins and developments.

II. I.D. AND RELIGION

A. I.D. Is Not Inherently Religious

The *Kitzmiller* court held that I.D. was a religious teaching and, therefore, not a scientific one.⁶⁰ The court's definition, however, mischaracterized I.D. by mistaking the logical inferences of the theory for religious dogma. I.D. should not be classified as religious simply because it argues for the possibility of an intelligent creative agent. I.D. does not attempt to institute the comprehensive system of morality, worship, and belief that should be the criteria for a court's religious analysis.⁶¹

The Supreme Court has applied an evolving set of standards to what constitutes a religion. Beginning in 1890, the Supreme Court gave a traditionally theistic definition of religion by stating, "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."⁶² This more traditional theistic viewpoint eroded as society's conception of religion changed, as evidenced by the Court's decision in *Torcaso v. Watkins*, which stated that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."⁶³ This language reflects a broad interpretation of what can constitute a religion, but it is not without limits. The Court held in *Wisconsin v. Yoder* that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."⁶⁴ As the Court moved away from the traditional theistic approach to defining religion (with a distinct God-like creator and the corresponding requirements that accompany belief in this deity), the standard for what constituted a religion was not so subjective as to qualify any set of personal standards as "religion" as defined under the Constitution. The Supreme Court further developed its approach in *United States v. Seeger* with the "parallel positions" test, which

⁶⁰ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 720–21 (M.D. Pa. 2005). In doing so, the court followed *Edwards*, which recognized the belief in supernatural creation as being inherently religious. See *Edwards v. Aguillard*, 482 U.S. 578, 591 (1987).

⁶¹ See *Malnak v. Yogi*, 592 F.2d 197, 207–09 (3d Cir. 1979) (Adams, J., concurring).

⁶² *Davis v. Beason*, 133 U.S. 333, 342 (1890).

⁶³ 367 U.S. 488, 495 n.11 (1961).

⁶⁴ 406 U.S. 205, 215–16 (1972).

determines “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”⁶⁵ With these evolving definitions, it is difficult to apply exact standards to differentiate between what is secular and what is religious. One commentator said, “[H]istorically, courts have been reluctant to adopt a universal definition of religion to avoid the obvious danger that an arbitrary demarcation as to what constitutes religion could lead to unfair decisions and judicial bias.”⁶⁶

Federal circuit courts have applied their own definitions of religion, utilizing the principles outlined by the Supreme Court.⁶⁷ In *Malnak v. Yogi*, Judge Arlin Adams, in his concurrence, isolated principles used in the Supreme Court’s parallel positions test and created a test for religion that looked at the existence of three indicia: whether the nature of the ideas involved addresses fundamental or “ultimate concerns”; whether the ideas reflect comprehensiveness; and whether there are formal or external signs analogized to religion.⁶⁸ Judge Adams determined that the three indicia “are basic to our traditional religions and . . . are themselves related to the values that undergird the first amendment.”⁶⁹ Judge Adams’s definition has been used by other federal courts and is arguably the most influential definition of religion used by federal courts.⁷⁰ It is thus a logical test to apply to I.D. The application of the *Malnak* test serves to illustrate the difference between the religious ideas (or lack thereof) inherent in I.D. and religious implications that are outside of the theory.

The *Malnak* concurrence suggested that the Big Bang theory “may be said to answer an ‘ultimate’ question” because it is an “astronomical interpretation of the creation of the universe.”⁷¹ By analogy, I.D. can answer a similar question by positing that life was designed. The concurrence next stated that the Big Bang theory is not a religious idea because it lacks the second indicia of comprehensiveness by lacking a

⁶⁵ 380 U.S. 163, 165–66 (1965).

⁶⁶ Bauer, *supra* note 39, at 1025.

⁶⁷ See, e.g., *United States v. Meyers*, 95 F.3d 1475, 1482–84 (10th Cir. 1996); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 688 n.5 (7th Cir. 1994); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983); *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969).

⁶⁸ 592 F.2d 197, 207–09 (3d Cir. 1979) (Adams, J., concurring).

⁶⁹ *Id.* at 207–08.

⁷⁰ Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 133–34 (2002); see also *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996) (utilizing the *Malnak* factors as a synthesis of the parallel positions test).

⁷¹ *Malnak*, 592 F.2d. at 209.

broad enough scope to render it a “comprehensive belief system.”⁷² Similar to the Big Bang theory, I.D. is not comprehensive because it is only concerned with the rational conclusion of design that follows from observable data.⁷³ There is no attempt to define or limit this designer, nor is there an attempt to create a comprehensive system of belief due to the existence of this designer. The designer may be disinterested, the designer may no longer exist, or the designer may be outside of current theorizations because humans have not observed a parallel concept in our universe from which to extrapolate a working concept of it.⁷⁴ I.D. is not a moral or social alternative to Darwinian theory, but an evidentiary one.⁷⁵ Both theories attempt to accurately categorize the engine of creation for biological organisms and structures and account for why they appear designed.⁷⁶ Neither theory attempts to link these to a fundamental human concern, such as the purpose of existence or the definition of morality.⁷⁷

The third *Malnak* prong, that there are formal and external signs, is not relevant to I.D., as no sort of behavior or ritual is associated with the theory.⁷⁸

B. Any Religious Implications of I.D. Should Not Be Relevant to an Establishment Clause Analysis As They Are Not Intrinsic to the Theory

It must be admitted that I.D. may have religious, moral, and philosophical implications that extend beyond the intended scope of the theory and would qualify as both “comprehensive” and addressing “fundamental questions” (to use *Malnak*’s terminology).⁷⁹ The term “intelligent” implies a mind, and the necessary ability to design

⁷² *Id.*

⁷³ Behe writes, “If I think it is implausible that the cause of the Big Bang was natural, as I do, that does not make the Big Bang Theory a religious one, because the theory is based on physical, observable data and logical inferences. The same is true for ID.” Behe, *supra* note 38.

⁷⁴ *See id.* at 10.

⁷⁵ *See id.* at 3.

⁷⁶ DAVID K. DEWOLF ET AL., INTELLIGENT DESIGN IN PUBLIC SCHOOL SCIENCE CURRICULA: A LEGAL GUIDEBOOK 17 (1999), available at <http://www.arn.org/docs/dewolf/guidebook.htm> (“[D]esign theory seeks to answer a question raised by Darwin as well as contemporary biologists: How did biological organisms acquire their appearance of design? Design theory, unlike neo-Darwinism, attributes this appearance to a designing intelligence . . .”).

⁷⁷ *Id.*

⁷⁸ *Id.* (“Design theorists have formed organizations and institutes, but these resemble other academic or professional associations rather than churches or religious institutions.”).

⁷⁹ *Id.* at 18 (paraphrasing *Malnak v. Yogi*, 592 F.2d 197, 208–09 (3d Cir. 1979) (Adams, J., concurring)).

biological life implies an extreme degree of power and skill. With these attributes in mind, this imagined designer starts to sound like a supernatural deity. But implications of I.D., just like the implications of evolutionary theory or any valid scientific theory for that matter, are not the theory's "fault."⁸⁰ As stated previously, much of the basis for placing I.D. in the realm of religion comes not from the empirical claims of I.D., but from the possible interpretation of these claims as evidence that God exists.⁸¹ This interpretation is then used as a categorical denial of I.D. as science.⁸² But the knee-jerk reaction to the possibility of a designer automatically equaling an unscientific proposition is based on the unjustified assumption that it is categorically impossible for rational science to point to a creator. As previously discussed, the categorical denial of the possibility of a designer is a needlessly restrictive qualification to place on science. In the minds of many evolutionary proponents, the concept of a designed universe automatically equates with everything that accompanies religion; therefore, discussing the universe as a design is automatically religious and not possibly "true" in the evidentiary sense.⁸³ The courts seem to support this proposition, treating the presence of a supernatural creator as a *per se* reason to classify a school of thought as inherently religious.⁸⁴

⁸⁰ Behe, *supra* note 38. ("The [Kitzmiller] [c]ourt's opinion ignores . . . the distinction between an implication of a theory and the theory itself. As I testified, when it was first proposed the Big Bang theory struck many scientists as pointing to a supernatural cause. Yet it clearly is a scientific theory, because it is based entirely on physical data and logical inferences. The same is true of intelligent design.").

⁸¹ DEWOLF ET AL., *supra* note 76, ("[I.D.] requires neither a belief in divine revelation nor a code of conduct; nor does it purport to uncover the underlying meaning of the universe or to confer inviolable knowledge on its adherents. It is simply a theory about the source of the appearance of design in living organisms. It is a clear example of an 'isolated teaching,' one that has no necessary connections to any spiritual dogma or church institution.").

⁸² *Id.* at 9.

⁸³ *See, e.g.*, *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 721 (M.D. Pa. 2005). For example, the court in *Kitzmiller* notes that "not one defense expert was able to explain how the supernatural action suggested by ID could be anything other than an inherently religious proposition." *Id.* This is, of course, using the definition of religion that equates anything extra-material with religion, regardless of the comprehensive nature of the belief. If I.D. is a religious proposition, it is one without any indicia of religion as it has been known throughout human history—a religion in which you are not required to do, worship, or believe anything.

⁸⁴ *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 592 (1987) (noting that teaching supernatural creation is religious); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1266 (E.D. Ark. 1982) ("The argument . . . that teaching the existence of God is not religious unless the teaching seeks a commitment, is contrary to common understanding and contradicts settled case law.").

Jay D. Wexler says that I.D. “is concerned with addressing such fundamental questions as the origins and meaning of life and our role in the universe.”⁸⁵ The use of the word “concerned” here is only accurate if it is meant to say that I.D. does not directly address these issues but rather indirectly touches upon them. Wexler, however, makes the claim that these are central concerns to the theory. What is the “meaning of life” according to I.D.? What is our “role in the universe” according to I.D.? There are no answers to these questions because I.D. is silent on these issues. Arguments, such as Wexler’s, reflect the assumption that the mere idea of an intelligent creation is on the same level as a moral duty or a defined reason for existence.⁸⁶ In his assumption, he arbitrarily decrees that any discussion of what is outside the material world is automatically religious.

I.D., however, discusses an extra-material entity as creative force only.⁸⁷ Without worship, purpose, or moral demands, this proposition remains in the scientific realm of “true or not true,” and it remains out of the religious realm that First Amendment jurisprudence seeks to avoid endorsing. Recognizing the likelihood that the watch has been purposefully assembled is much different than deciding that the watchmaker should be worshipped because he has given us the gift of a watch (or for some other reason). Worship is a personal, ephemeral decision that will change from person to person. What does not change from person to person are the dimensions of the watch hands and the complexity of the internal gears. Similarly, the claim of design in the universe should not be confused with any religious paradigms that are grafted onto it.

Furthermore, the case can be made that even the concept of a “God” is not an inherently religious one. In his dissent in *Edwards*, Justice Scalia pointed out that the Aristotelian concept of a “prime mover” or original cause to the universe was not a religious concept.⁸⁸ J.P. Moreland writes that when “God” is used as a religious term, “it is involved in moral and spiritual exhortation, and it is surrounded by

⁸⁵ Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 461 (1997).

⁸⁶ Compare *id.* at 462, with Jay W. Richards, *Why Are We Here?: Accident or Purpose?*, in INTELLIGENT DESIGN 101: LEADING EXPERTS EXPLAIN THE KEY ISSUES 131, 133 (H. Wayne House ed., 2008) (urging readers to look at evidence apart from assumptions).

⁸⁷ See Eddie N. Colanter, *Philosophical Implications of Neo-Darwinism and Intelligent Design*, in INTELLIGENT DESIGN 101: LEADING EXPERTS EXPLAIN THE KEY ISSUES 153, 164 (H. Wayne House ed., 2008); see also Behe, *supra* note 38.

⁸⁸ *Edwards*, 482 U.S. at 629–30 (Scalia, J., dissenting).

ritual and other forms of religious devotion.”⁸⁹ Moreland goes on to describe how the term “God” can also be used as “a mere philosophical concept or theoretical term denoting an explanatory theoretical entity needed in some sort of explanation.”⁹⁰ The point here is not that the term “God” should be used in connection with I.D., but rather that there are different aspects to what we would typically refer to as “deity” that must be parsed out if one is to treat the subject accurately. If I.D. touches on deity, it is only on the aspects that are suggested by materialistic observations. The terms “designer,” “creator,” or even “God” in such a context are more like theoretical placeholders, or labels, to be put onto the decision-making force that is suggested by I.D. proponents. All of the other aspects that are traditionally associated with deity, such as worship and moral requirements, are not present within I.D.’s conceptualization of the designer.

For the third *Malnak* prong, it is difficult to see how either theory incorporates formal and external signs of adherence to a religion, unless the espousal of both theories is somehow considered to be a formal sign of adherence to its religious tenets. But again, neither theory requires the hearer to do anything.

III. I.D. AND THE *LEMON* TEST

A. *The Lemon Test’s Purpose Prong Is Needlessly Subjective*

The *Kitzmiller* court held that the school district in question violated the first prong of the *Lemon* test by having a religious purpose in enacting the statute, which required I.D. to be taught in the classroom.⁹¹ This type of application reflects the misguided principle that

⁸⁹ MORELAND, *supra* note 50, at 221.

⁹⁰ *Id.*

⁹¹ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 763 (M.D. Pa. 2005). The court cites a long litany of evidence meant to catalogue the religious motivations of the Dover School Board. *Id.* at 746–53. Without commenting on the school board’s religious motivation, this Note deals with the topic more generally by arguing that the objective content of the I.D. policy and its application are much more relevant to an Establishment Clause inquiry whether the board members had a “religious” motive or not.

In a law review article, John Calvert argues that the school board’s written I.D. policy is in fact evidence of a secular purpose, writing that the policy “seeks to add information to a curriculum that artificially restricts or excludes it” and that “[i]ts effect is to add information relevant to the adequacy of an existing natural/material cause only orthodoxy.” John H. Calvert, *Kitzmiller’s Error: Defining “Religion” Exclusively Rather than Inclusively*, 3 LIBERTY U. L. REV. 213, 323 (2009). Thus, Calvert argues that the purpose of the school board is secular because it seeks to broaden the informational landscape available to students in an effort to counteract the religious orthodoxy of materialism.

It should also be noted that the Supreme Court has used language supporting at least the potential of a legitimate secular purpose of teaching alternative theories on

religious motivations are somehow incompatible with good government.⁹² It is similar to the rejection of I.D. based on secondary correlations to religion rather than the objective tenets of the theory. With I.D., as with the first *Lemon* prong, subjective factors that should be outside of the realm of rational analysis are mistakenly incorporated into the court's substantive assessments.⁹³

The superfluous assessment of subjective intent in the *Lemon* test is addressed in Justice Scalia's dissent in *Edwards v. Aguillard*, in which he writes, "Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims."⁹⁴ Justice Scalia points out the difficulty and absurdity of trying to ascertain the subjective views of every legislator.⁹⁵ Scalia also analyzes past applications of the *Lemon* test, saying that all that is needed to satisfy the first *Lemon* prong is any secular purpose, even one alongside a religious one.⁹⁶ Overall, Scalia would abandon the purpose prong entirely.⁹⁷

It would certainly be easier for I.D. to pass the first *Lemon* prong with the lessened purpose standard advocated by Scalia. Stephen Marshall argues that a legitimate secular purpose can be found in teaching I.D. by fostering "scientific literacy by teaching all of the

biological origins. See *Edwards*, 482 U.S. at 594 ("[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."). This was in the context of a statute requiring the teaching of biblical creationism, however, and the Supreme Court found the Louisiana legislature in the case to be acting with a religious purpose. *Id.* at 592.

⁹² *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) ("[R]eason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." (quoting George Washington, Farewell Address (1796), in 35 THE WRITINGS OF GEORGE WASHINGTON 229 (John C. Fitzpatrick ed., 1940))).

⁹³ See *Kitzmiller*, 400 F. Supp. 2d at 745, 747.

⁹⁴ 482 U.S. 578, 615 (1987) (Scalia, J., dissenting); see also Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV 639, 647-48 ("I do not see how we can embrace the principle of secular rationale. Unless we regret the religiously-motivated activism of Sam Adams, Isaac Backus, William Lloyd Garrison, Harriet Beecher Stowe, Sojourner Truth, William Jennings Bryan, Dorothea Dix, and Martin Luther King, Jr., how can we say that presenting religious arguments in political debate is an act of bad citizenship?").

⁹⁵ *Edwards*, 482 U.S. at 637.

⁹⁶ *Id.* at 614; see also FRANCIS J. BECKWITH, LAW, DARWINISM, & PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN 172 n.69 (2003) (noting that the statute in *Edwards* was invalidated because there was no secular purpose, not because there was a religious one).

⁹⁷ See *Edwards*, 482 U.S. at 636.

evidence and explanatory theories.”⁹⁸ This echoes reasoning in *Edwards* in which the Court stated that teaching different scientific theories about origins “might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.”⁹⁹

On a general level, it is unclear why a statute’s enactment cannot be religiously motivated even if neither the terms nor the implementation of the statute constitute an “establishment” in the court’s assessment. By the reasoning of the *Lemon* test, if a statute is enacted to keep a rural area free from development for the purpose of environmental protection, it is legitimate. But if the same statute is enacted to keep the area undeveloped so citizens can learn how beautiful God made the world, the statute likely fails the test. In both hypotheticals, assuming that there are no overt signs that the legislature is attempting to indoctrinate citizens one way or the other, it makes little sense that the legislator’s subjective thoughts should invalidate a government act that is legitimate on its face. If the government forces citizens to read a prayer to God before they enter a park or some other action is forced, then it would be a violation of the Establishment Clause because the government action would clearly link the statute’s implementation with the endorsement of religion. But the first *Lemon* prong could conceivably rule out statutes that have nothing to do with religion in their form or implementation. According to the terms of the First Amendment as applied under *Lemon*, the government has somehow established religion even if the only religious connection of the statute is the potential threat of religiously minded legislators seeing a religious purpose in an objectively secular application.¹⁰⁰

Professor Michael McConnell finds the exclusion of religious motivations contrary to the spirit of the First Amendment, noting that “no one can claim that the principle of secular rationale is logically entailed by American democracy, or by First Amendment principles. America has enjoyed a pretty good democracy for over 200 years without any limitations on religious participation in politics.”¹⁰¹ The secular purpose prong reflects a disturbing trend of an argument being discounted because it is “religious” almost as if this term is a synonym

⁹⁸ Stephen L. Marshall, Note, *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).

⁹⁹ *Edwards*, 482 U.S. at 594.

¹⁰⁰ This does not necessarily mean that religious motives should not play a role in an Establishment inquiry. They may have some probative value in the determination of a statute’s effect on the populace. In other words, blatantly religious motives might make it easier to find an advancement or inhibition of religion under the effect prong but should not be taken as a threshold inquiry in their own right.

¹⁰¹ McConnell, *supra* note 94, at 647.

for “wrong.” This association is very similar to the scientific arguments for I.D. being rejected on the basis that it has religious implications. Saying that “an argument is religious” is, to many ears, the equivalent of saying that “an argument is illogical” or that “an argument does not reflect the facts.”¹⁰² Whereas I.D. arguments are treated unfavorably for the potential religious conclusions that may occur as a result of learning the theory, religious arguments are treated unfavorably because of their religious origin.¹⁰³ Some are discounted because of their potential end result, the others because of their starting point, but they amount to the same principles of ignoring objective data and instead relying on an unfounded anti-religious assumption that religion and practical truth are fundamentally incompatible. Saying that an argument is “religious” and, therefore, flawed in some way, is an easy way of bypassing the merits of the argument; if it is said loud enough and long enough it will start to sound like “that argument is wrong” without anyone stopping to realize that the merits of the argument have not been discussed.¹⁰⁴

Regarding the sciences, it would be constitutionally unacceptable for a school board to require the teaching of religious indoctrination that was masquerading as science.¹⁰⁵ It should be acceptable, however, for religious people to require the teaching of a scientific theory even when the theory harmonizes with their religious beliefs.¹⁰⁶ Acceptable, of course, so long as the required science curriculum is legitimate. In either scenario, the deciding factor should be the legitimacy of the science, not

¹⁰² The type of objection that discounts an argument solely because of its religious basis is an example of the “genetic fallacy.” The genetic fallacy is “the mistake of confusing the origin of a claim with its evidential warrant and undermining the claim by calling attention to its origin.” MORELAND, *supra* note 50, at 229.

¹⁰³ See Phillip Johnson, *Bringing Balance to a Fiery Debate*, in INTELLIGENT DESIGN 101: LEADING EXPERTS EXPLAIN THE KEY ISSUES 21, 39 (H. Wayne House ed., 2008) (“[Darwinian] strategy is to link anything that questions evolution back to religious fundamentalism to discredit it.”).

¹⁰⁴ Favoring secular reasons over religious reasons “rests on a flawed dichotomy between reason and religion. Secular political arguments are not based on ‘reason’ (though they may employ reason, just as religious arguments may employ reason); they are based on ideological positions, or points of view.” McConnell, *supra* note 94 at 653. Similarly, I.D. and Darwinism both rest on axioms, or “ideological positions.” Darwinism rests on the axiom of materialism, while I.D. rests on the axiom that a designer of biological life is logically possible. Darwinism should not gain an advantage merely because its axiom is more harmonious with a secular rationale.

¹⁰⁵ See *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

¹⁰⁶ *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring) (“A decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught ‘happens to coincide or harmonize with the tenets of some or all religions.’” (quoting *Harris v. McRae*, 448 U.S. 297, 319 (1980))).

the subjective intent of the government actor. It is difficult to see the harm that could come from religious motivation if it is cabined by relevant scientific inquiry.

B. As a Scientific Theory, the Teaching of I.D. Should Not Be Susceptible to a Challenge Under the Effect Prong of the Lemon Test.

The second *Lemon* prong states that a government action may neither advance nor inhibit religion as its primary effect.¹⁰⁷ As previously explained, I.D. does not qualify as the status of a religion.¹⁰⁸ However, this does not mean that a statute allowing or requiring the teaching of I.D. automatically passes the religious effect prong, as a statute involving the teaching of I.D. could still conceivably have the function of endorsing religion even though I.D. is not religious in and of itself.

The scientific aspects of I.D. make an effect prong assessment more complex. For statutes involving prayer in schools or the religious iconography of a public landmark, there is no real “objective” truth to be analyzed, at least in the sense of the truth of the material world. These statutes involve human decisions and human constructs *applied* to the material world, but they ultimately have their origin in human decision. If a teacher decides to pray in class, or if a school board puts up a cross in a cafeteria, there is always the question of whether it is appropriate for the action to be taken. I.D. and the rest of the scientific field simply tries to see the world *as it is* without shaping it according to an internal belief (or as much as objectively possible in the realm of human affairs).¹⁰⁹ For this reason, the effect of any such theory under the effect prong should be granted much more leeway for its religious implications, or the second prong should be discarded altogether in the case of statutes involving the teaching of science. To hold science to the same standards under the effect prong is to hold that, *even if true*, the teaching of such a theory would not be allowed. This cannot logically hold as a rationale of the court; surely the freedom from established religion does not go so far as to discard scientific truth. If gravity offended people’s notions of religious propriety, it would be madness to inhibit its teaching for fear of

¹⁰⁷ *Lemon*, 403 U.S. at 612.

¹⁰⁸ See *supra* Part II. The *Kitzmiller* court, of course, held the opposite, stating essentially that because I.D. is not science, the effect of the policy must have the effect of advancing religion. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005). (“[S]ince ID is not science, the conclusion is inescapable that the only real effect of the ID Policy is the advancement of religion.”).

¹⁰⁹ See J.P. Moreland, *Intelligent Design and the Nature of Science*, in *INTELLIGENT DESIGN 101: LEADING EXPERTS EXPLAIN THE KEY ISSUES* 41, 45 (H. Wayne House ed., 2008) (“ID theory does not attempt to identify the designer nor does it make explicit reference to God.”); Luskin, *supra* note 46, at 110.

establishing or hindering religion because gravity is an objective truth that exists whether it is taught or not. It is much more logical to speak of “establishing” religion in terms of human choice and preference. Science does not advocate action or belief; it simply describes what is,¹¹⁰ and for this reason it should be free from Establishment Clause concerns.

The presumable constitutionality of the teaching of evolution¹¹¹ shows that courts agree with the principle that science is impervious to Establishment Clause violations. Much of *Lemon*'s jurisprudence goes to determine whether a government action has established religion, but the test is also geared towards those actions that hinder or inhibit religion.¹¹² Evolution, despite having many of the same religious implications of I.D.,¹¹³ gets a “pass” on its potential violation of the effect prong, even though it arguably has the effect of hindering religion. Evolution clearly is a hindrance on certain monotheistic religions such as Christianity.¹¹⁴ While many Christians attempt to form a synthesis between evolution and biblical teachings, no such synthesis is consistently possible, at least without a radical reformulation of biblical truth.¹¹⁵ Even a Christian that sees the entire Old Testament as allegorical must still deal with one of the basic, if not the most basic, teachings of the Bible: that man is responsible for sin and consequently death,¹¹⁶ which necessitates the need for a savior. Under evolutionary teaching, organisms lived and died millennia before man even appeared on the scene.¹¹⁷ The Bible thus makes no sense, literally or allegorically, if man is not the originator of death and generations of animals lived and died before evolution brought him into existence. On a more general level, evolution provides an explanation for the origin of life (and the universe, if we are to take into

¹¹⁰ Moreland, *supra* note 109, at 49.

¹¹¹ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (holding that a state statute prohibiting the teaching of evolution because of conflicts with the Bible is against the Constitution); *Malnak v. Yogi*, 592 F.2d 197, 209 n.41 (3d Cir. 1979) (“[Evolution] is offensive to some religious groups, but it is not in itself religious.”).

¹¹² *Edwards v. Aguillard*, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting).

¹¹³ Colanter, *supra* note 87, at 157 (explaining that evolution has implications undermining morality).

¹¹⁴ Evidence that practitioners of Christianity saw evolution as antithetical to their beliefs can be seen with the proliferation of anti-evolution laws in the first half of the twentieth century. See McCreary, *supra* note 28, at 37–38.

¹¹⁵ The author of this Note does not intend to criticize Christians who synthesize their beliefs with evolution, but rather to show that there is at least one valid interpretation of the biblical text that renders evolution as antithetical to Christianity.

¹¹⁶ *Genesis* 3:7, 3:19.

¹¹⁷ CHARLES DARWIN, *THE ORIGIN OF SPECIES* 297 (Gramercy Books 1979) (1859).

account cosmic and chemical evolution) that does not include a creator.¹¹⁸ There are few conclusions that are as antithetical to a monotheistic religion such as Christianity, in which the created universe is one of the primary ways that man can know who God is.¹¹⁹

The Constitution has been found to “forbid[] . . . the prohibition of theory which is deemed antagonistic to a particular dogma.”¹²⁰ At the same time, the State should not favor “one religious or anti-religious view over another.”¹²¹ The Supreme Court cites the general principle of neutrality that the government should hold between religion and irreligion.¹²² So, the mere fact that evolution may be “antagonistic” to beliefs in Christianity is no reason to forbid its teaching. But evolution is more than antagonistic to Christianity because it actively provides an alternative metaphysical perspective.¹²³ If the designer in I.D. is automatically supernatural and therefore considered to be religious, then the advocacy by the state of a theory that posits no designer is more than antagonism to religions with a creative deity—it is a metaphysical replacement of them, answering all of the same “religious” questions

¹¹⁸ Strangely, and perhaps for this reason, many evolutionary proponents deny that evolution is a theory of origins. According to the National Center for Science Education, “it is not a ‘theory of origins’ about how life began.” *Evolution Education*, NAT’L CTR. FOR SCI. EDUC., <http://ncse.com/evolution> (last visited Mar. 14, 2013). But this statement is patently absurd because there is an entire field of science dedicated to determining how life could arise from non-life through material processes. This particular subset of biology (or more accurately biochemistry) is called abiogenesis. The subject is addressed in many, if not most, biology textbooks. See, e.g., ELI C. MINKOFF, *EVOLUTIONARY BIOLOGY* 404 (1983) (discussing the origin and early evolution of life on Earth).

¹¹⁹ *Romans* 1:20.

¹²⁰ *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (quoting *Epperson v. Arkansas*, 393 U.S. 103, 106–07 (1968)).

¹²¹ *Epperson*, 393 U.S. at 113 (Black, J., concurring).

¹²² See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

¹²³ BECKWITH, *supra* note 96, at 165 (“[I]f a scientific research program is ‘religious’ because it supports and is consistent with a belief in a higher intelligence or deity, it would follow that a research program is ‘irreligious’ because it supports and is consistent with the nonexistence of such a being.”). Many evolutionists claim that their theory is compatible with belief in a God, designer, or creator. See, e.g., Peter M.J. Hess, *How Do I Read the Bible? Let Me Count the Ways*, NAT’L CTR. FOR SCI. EDUC. (July 26, 2009), <http://ncse.com/religion/how-do-i-read-bible-let-me-count-ways>. However, “to say that belief in God’s existence is not inconsistent with naturalistic evolution is to imply that God is not really an object of knowledge. For if it were, the existence of a God (and/or any other nonmaterial reality, e.g. mind, moral properties, numbers) . . . would be allowed to count against methodological naturalism.” BECKWITH, *supra* note 96, at 152. So ultimately God is allowed to “exist,” but there cannot be a rational or material basis for such existence, and God can serve no material role in the universe’s operations. Put more colloquially: God is fine, as long as he doesn’t do anything. This rational sounds like a fundamentally opposite viewpoint to that of most monotheistic religions and rises above the level of mere antagonism.

that I.D. does. This presupposition should render evolution in violation of the effect-prong of the *Lemon* test.

Why, then, is the teaching of evolution constitutional if it serves to contradict such basic teachings of the Bible (and other monotheistic religions)? One possibility is that evolution is allowed to hinder religion because the court “knows” it to be true, or at least the court cannot question it because it has attained the mantle of “science,” which trumps any religious concern. This may be why the court in *Kitzmiller*, after concluding that the school board’s mandating the teaching of I.D. was religiously motivated, did not stop its analysis.¹²⁴ The court went on to demonstrate that I.D. is not science, even though that determination is not necessary to its holding.¹²⁵ To let the decision stand merely on a violation of the purpose prong, however, would allow the implication that I.D. was valid science, prohibited for its religious connotations. The court had to demonstrate that I.D. was not science,¹²⁶ as it would have been unacceptable for it to seem like a legitimate science was kept out of the classroom, whether it had religious implications or not. “Real” science, in other words, cannot violate the Establishment Clause because it reflects the truth (whether this principle is articulated by the court or not). This is why I.D. had to be shown to be the opposite of science, a religion, at least in the court’s view.

And rightly so. Far different from the human choices of praying or putting up a monument, science tells us about the real world in which we live,¹²⁷ and if something that it tells us has religious implications, it should not be hindered from telling the truth because of those religious implications. This is a necessary principle. Should we still believe that the sun revolves around the earth because such a proposition hindered the religious understandings of the time? Surely not. The scientist who is willing to stand up to the religious bigotry of his day and confront it with the truth should be lauded. The problem is that because of inaccurate conceptions of science and religion, a court, such as *Kitzmiller*, can deny the teaching of I.D. because of its religious implications while allowing evolution to be taught, even though it has comparably significant religious implications. Such a holding, if mirrored in other circuits or eventually by the Supreme Court, would reflect a general judicial

¹²⁴ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005).

¹²⁵ *Id.* at 764; DeWolf et al., *supra* note 13, at 16 (“[J]udicial findings and inquiries on the scientific status of the theory in question and the effect of teaching it are neither necessary nor appropriate if a court finds that the acting government agents had predominantly religious motivations.”).

¹²⁶ *See Kitzmiller*, 400 F. Supp. 2d at 716, 737–38.

¹²⁷ MORELAND, *supra* note 50 (explaining science as focused on “patterns in nature” and “life”).

favoritism towards naturalism, as opposed to an allowance for the teaching of alternate theories of origins that the neutrality principle would seem to require.¹²⁸ As a legitimate science, I.D. should be afforded the same sort of Establishment Clause immunity, or neither theory should be taught.

IV. I.D. AND THE ENDORSEMENT TEST

In its endorsement analysis, the *Kitzmiller* court used a reasonable observer who is familiar with “the policy’s language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose.”¹²⁹ The court traced the history of the I.D. movement, linking it historically with creation-science¹³⁰ and Christianity, ultimately concluding that “I.D. aspires to change the ground rules of science to make room for religion, specifically, beliefs consonant with a particular version of Christianity.”¹³¹ Here, we see the same anti-religious bias at play that allowed I.D. to be attacked for allowing a “supernatural” conclusion: Even though it is not part of the theory, I.D. cannot be taught because of a connotation with religion. Even if such a connotation were true, the real test of science should be whether the science stands or falls. The reasonable observer should not be allowed to perpetuate ignorance because he associates religion with a legitimate scientific theory.¹³²

Associating I.D. with Christianity, as *Kitzmiller* does,¹³³ reflects an inherent prejudice that religious people cannot espouse theories that are objectively true.¹³⁴ For example, the court relied on expert testimony that I.D.’s argument for design is actually an old religious argument that dates back to the thirteenth-century monk, Thomas Aquinas.¹³⁵ The court also relied on testimony that many of the proponents of I.D. believe the designer to be God.¹³⁶ In relying on this type of inference, once again

¹²⁸ *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (“[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.”).

¹²⁹ *Kitzmiller*, 400 F. Supp. 2d at 715.

¹³⁰ *Id.* at 716–21.

¹³¹ *Id.* at 720. The court also concluded that requiring the teaching of I.D. failed the endorsement test because it requires a supernatural creator. *Id.* at 721. See *supra* Part II for an analysis of the supernatural and I.D.

¹³² This reasonable observer would also invalidate the teaching of chemistry and astronomy because “they have their historical origin in the religiously oriented practices of astrology and alchemy.” BECKWITH, *supra* note 96, at 154.

¹³³ *Kitzmiller*, 400 F. Supp. 2d at 720.

¹³⁴ See discussion *supra* Part III.A.

¹³⁵ *Kitzmiller*, 400 F. Supp. 2d at 718.

¹³⁶ See discussion *supra* Part II.B.

subjective factors influence what should be an objective inquiry. Whatever personal assessments Aquinas made as to the actual nature of the designer, the only relevant inquiry is whether his arguments for design are valid.¹³⁷ The historical aspect of the endorsement test is only meant to gauge the reaction of an objective observer (as opposed to measuring the actual merits of the theory),¹³⁸ but in the realm of science, where propositions stand or fall on their own merit, subjective assessments such as this are superfluous. By the *Kitzmiller* court's rationale, we would rather have a society denied scientific truth than forced to encounter what an observer considers to be a religious viewpoint.

Even if the potential correlation between I.D. proponents and Christianity is a real one, this should not affect the theory's validity any more than a potential connection between evolution and atheism.¹³⁹ It is true that certain scientific viewpoints correspond to certain personal philosophies. But the statements "You believe that because you are Christian" and "You believe that because you are atheist" have very little probative worth from an argumentative standpoint. They are not provable propositions, and, even if true, they say nothing as to the validity of the propositions at hand.¹⁴⁰ If you believe something because you are an atheist, or because you are a Christian, your reason for believing says nothing about whether you are right or wrong. The only way to determine who is right is through an objective evidentiary evaluation.¹⁴¹ It is a fallacy to think that subjective starting points

¹³⁷ Casey Luskin, *Any Larger Philosophical Implications of Intelligent Design, or Any Religious Motives, Beliefs, and Affiliations of ID Proponents, Do Not Disqualify ID from Having Scientific Merit*, DISCOVERY INST. (Sept. 8, 2008), <http://www.discovery.org/a/7081> ("[I]n science, the motives or personal religious beliefs of scientists don't matter; only the evidence matters. For example, the great scientists Johannes Kepler and Isaac Newton were inspired to their scientific work by their religious convictions that God would create an orderly, rational universe with comprehensible physical laws that governed the motion of the planets. They turned out to be right—not because of their religious beliefs—but because the scientific evidence validated their hypotheses. (At least, Newton was thought to be right until Einstein came along.) Their personal religious beliefs, motives, or affiliations did nothing to change the fact that their scientific theories had inestimable scientific merit that helped form the foundation for modern science.").

¹³⁸ *Kitzmiller*, 400 F. Supp. 2d at 714–15.

¹³⁹ See Luskin, *supra* note 40, at 471, 473, 476 (demonstrating the linkage between evolutionary proponents and atheism).

¹⁴⁰ See MORELAND, *supra* note 50, at 229 (discussing the genetic fallacy).

¹⁴¹ See H. Wayne House, *Preface* to INTELLIGENT DESIGN 101: LEADING EXPERTS EXPLAIN THE KEY ISSUES 17, 17 (H. Wayne House ed., 2008) ("Contrary to popular belief, this struggle is not simply between science and religion, or even between science and philosophy. It is about competing scientific explanations of the data.").

necessarily lead to incorrect (or “religious”) conclusions. All areas of human inquiry have axioms and starting points.

CONCLUSION

Science makes claims to objective truth in our society, and any form of legitimate science should not be stifled due to judicial or societal fears of establishing religion. A true scientific theory could never establish “religion,” as science attempts to describe the intrinsic nature of things. Religion, on the other hand, deals with subjective beliefs, such as moral imperatives and requirements to worship. There may be philosophical consequences to any scientific theory, especially when it comes to biological origins, but such consequences are not intrinsically part of the science, and, as such, these consequences should not factor into an establishment analysis. Indeed, the religious and philosophical consequences that arise out of the theory of evolution are allowed to survive an establishment inquiry because of the perceived scientific legitimacy of the theory. I.D. should be afforded the same immunity; otherwise, the judicial conceptions of science and religion have the danger of barring legitimate science from classrooms and turning the process of education into one of indoctrination.

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