FREEDOM TO ERR:
THE IDEA OF NATURAL SELECTION
IN POLITICS, SCHOOLS, AND COURTS

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The biologists are surely correct who proclaim that "there is no serious scientific
doubt that evolution occurred or that natural selection is a major mechanism in its
occurrence." But worthy of their salute is the wisdom of President Jefferson that "error
of opinion may be tolerated, where reason is left free to combat it." Jefferson's wisdom
was uttered in response to the deep division between Anglophiles and Francophiles
that seriously threatened the stability of the Republic he governed. It now serves to
call into question the quoted biologists' next sentence stating that "it is scientifically
inappropriate and pedagogically irresponsible for creationist pseudoscience, including
but not limited to 'intelligent design,' to be introduced into the science curricula of
our nation's public schools."

Especially questionable is the wisdom of elite federal courts acting on the advice
of such eminent biologists to invoke the Constitution of the United States to suppress
minor scientific heresies uttered in the education of adolescents by their parents or

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tation of numerous teachers, parents, and children in their quarrels with local school boards.
It is also pertinent that in 2000–2006, I served as a member of the National Academy of
Science Panel on Law, Science and Technology. This essay grows out of a discussion con-
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1 See Project Steve: Humorous Test of Scientists' Attitudes Towards Intelligent Design,
2 NOBLE E. CUNNINGHAM, JR., THE INAUGURAL ADDRESSES OF PRESIDENT THOMAS
JEFFERSON, 1801 and 1805, at 5 (quoting the text of Jefferson's address of March 4, 1801).
Jefferson was drawing on the earlier wisdom of John Milton: "Let [Truth] and Falsehood
grapple; who ever knew Truth put to the worse, in a free and open encounter." JOHN MILTON,
AREOPAGITICA (London, 1644), reprinted in SELECTED ESSAYS OF EDUCATION, AREOPAGITICA,
THE COMMONWEALTH 130 (Laura E. Lockwood ed., 1911).
3 Carol Armbruster, From Jefferson to Today: Longstanding Collection Policy Built
9515/french.html.
4 Project Steve, supra note 1.
The tendency of leading scientists to depart from Jeffersonian tolerance of errors that reason might in time correct is a cause of needless conflicts between science and religious faith, and between the professional elite and citizens of lesser status, over the conduct of public education. The difficult task of managing such conflicts is one well left, insofar as possible, to parents, teachers, and the local school boards who represent them and, if necessary, to state boards of education, state law and state courts. The federal judiciary should strive to avoid engagement in disputes of such a profoundly intimate nature.

Perhaps intolerance of error is a trait nurtured in the professional training of scientists for it seems widespread. Biologist Sahotra Sarkar, for example, questions: "[S]hould the teaching of evolution be diluted in our biology classes?" And he answers with certainty: "Obviously not, if we want our science standards to be high." But high standards in science are not the only consideration to be taken into account in conducting public education of adolescents. Parents who desire to make marginal sacrifices in the quality of the biology instruction received by their adolescent children also have fundamental rights that deserve a reasonable measure of respect. And religious parents are not wrong to detect an anti-religious agenda in the utterances of some scientists and others who insist on the absolute value of science. The principle of natural selection does have deep implications other than its explanation of the evolution of species. It can threaten not only religious beliefs that parents are entitled to share with their offspring, but also other social and political values important to communities and to democratic government. For these reasons, state and local politicians are not wrong, or necessarily driven by improper religious impulses, when they express scientifically incorrect thoughts by seeking to add a grain of skepticism to the teaching of natural selection to adolescents required to attend public schools.

I. THE COMMON SCHOOL IDEA

At the center of the current struggle between science and faith is the common school, an institutional idea to be briefly recalled here because its assimilating role

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6 For a broader perspective on that divide, see LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR (Paul D. Carrington & Trina Jones eds., 2006).
7 SAHOTRA SARKAR, DOUBTING DARWIN? CREATIONIST DESIGNS ON EVOLUTION 165 (2007).
8 Id.
10 See, e.g., CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007).
is not always kept clearly in mind by the elite. Compulsory school attendance laws enacted in the seventeenth and eighteenth centuries aimed to require religious instruction leading to correct moral behavior. But in the early decades of the nineteenth century, as common schools spread across the United States, diversity of beliefs and disbeliefs was a salient feature of the culture and was inevitably reflected in the governance of schools. Hostile feelings on a scale comparable to those exchanged today between scientists and those of strong faith often divided Protestant sects, never mind the sentiments they shared about faithless Quakers and their like.

The aim of their common schools, as stated by the eminent educator of that time, Horace Mann, was to provide an education "which every citizen of the State must receive as a necessary preparation for citizenship." The development of moral character and a measure of patriotism were primary aims. That required at least a measure of reconciliation among those of diverse faiths and a fracturing, if possible, of class lines, much as the egalitarian rhetoric of the Revolution had promised. Literacy and an academic work ethic would be bestowed on children held in low esteem on account of their illiterate parentage, and many could prosper. And moral education not dependent on religious training would encourage virtuous conduct respectful of the rights and status of fellow citizens.


13 When Methodists complained that every member of the Indiana University faculty was a Presbyterian, they were informed that there was not a Methodist in America qualified to sit in a professor’s chair. James Albert Woodburn, History of Indiana University, 1820–1902, at 115 (1940).

14 In the seventeenth century, it was a capital offense to be a Quaker in Massachusetts Bay. See Jonathan M. Chu, Neighbors, Friends, or Madmen: The Puritan Adjustment to Quakerism in Seventeenth-Century Massachusetts Bay (1985); Thomas D. Hamm, The Quakers in America (2003).

15 Marvin Lazonier, Origins of the Urban School: Public Education in Massachusetts, 1870–1915, at 2 (1971) (quoting Horace Mann, the eminent first Secretary of the Massachusetts Board of Education).

16 David Tyack, Seeking Common Ground: Public Schools in a Diverse Society 11 (2003) (hereinafter Tyack, Seeking Common Ground) ("They wanted a religious, but nonsectarian, foundation for morality and sought to strengthen the character of individuals rather than appealing to the primordial claims of kinship and ethnicity. They tried to train the young to be politically non-partisan . . . ").

17 On the diversity of aims, see Michael B. Katz, The Irony of Early School Reform: Educational Innovation in Mid-Nineteenth Century Massachusetts (1968).

18 Id.

19 The best articulation of this aim was left to the French scholar, Emile Durkheim in a
practice of civic virtue, it was widely observed, is "useful, not only in the interests of society, . . . but for the welfare of the individual himself." 20

The radical nineteenth-century American "barnburners" 21 who favored social equality prevailed in their demand that "free schools" be locally governed and thus subject to a measure of indirect parental control. 22 Mistrust of distant government abides in contemporary America: voters still favor local control. 23 The vision was and is that dutiful parents with better trained and more accomplished children should share their children's preparation with that of their less accomplished neighbors, to the benefit of all, including even those members of the community having no children. 24

The teacher was, among other things, a broker in this communitarian transaction. He or she was likely to leave the nurturing of diverse faiths, even those faiths promising posthumously to reward good conduct in school, to the churches and Sunday schools. Mann cautioned teachers to avoid controversy and teach only those principles that are universally approved. 25 But the teacher was nevertheless responsible for the development of discipline fitting students for their role in society, a task not so very different from religious instruction. That expectation fit well with the diverse state laws explicitly directing that church and state be separate, 26 but did not prevent series of lectures delivered at the Sorbonne in 1902–03. See MORAL EDUCATION: A STUDY IN THE THEORY AND APPLICATION OF THE SOCIOLOGY OF EDUCATION (Everett K. Wilson ed., Everett K. Wilson & Herman Schnurer trans., 1961). ("Elle crée dans l’homme un être nouveau.") (Education creates a new being.)).

20 Id. at 48; see also JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (Marjorie Gabain trans., 1965); PATRICIA WHITE, CIVIC VIRTUES AND PUBLIC SCHOOLING: EDUCATING CITIZENS FOR A DEMOCRATIC SOCIETY (1996).

21 For a brief account of the Barnburner ideology, see PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION 15–23 (1999). "Barnburners" was the name assigned to the political movement inspired by President Jackson's message explaining his veto of the renewal of the charter of the Bank of the United States. Id. at 19. They were also known as the Equal Rights Party although they were not organized as a political party. Id. at 18. Their doctrine of equal rights required four freedoms: "free labor, free schools, free trade, and free speech." Id.


25 Id. at 21. When encountering controversial material, "he is either to read it without comment or remark; or, at most, he is only to say that the passage is the subject of disputation. . . ." Id. (quoting Mann).

26 Perhaps the most strenuous statement of the separation appears in Section 16 of the Virginia Constitution of 1776 drafted by Jefferson; it proclaims:

That religion, or the duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free
teachers from thinking of themselves as "God’s gardener[s]" or making use of generally accepted biblical dogma.

It was not until the twentieth century that states came to require attendance at high school. Early high schools had been few and small, in part because enrollment was not required of adolescents who were old enough to work. An alignment of labor leaders and advocates for improvement in the human condition created a demand for more years of school attendance, and public high schools began to spread. It was in that era that schools acquired a technocratic aspect featuring professionally trained teachers overseen by professional superintendents responsible for “rational system[s] of instruction.” And state agencies emerged with diverse authorities to oversee the superintendents and local boards. “Teacher knows best” seems to have been a principle accepted by many parents who hoped and expected that professional teachers would prepare their children for a future requiring not only sound morals but some form of technical competence in which scientific discipline might be an element. The idea of communitarian responsibility and control faded, but it did not disappear. It was expressed by Judge Alex Kozinski in 2006, thus:

[T]ime spent in school... has a significant impact on [a] student’s development. The school environment forces students both to compete and cooperate... Schoolmates often become friends, rivals and romantic partners... Schools... don’t simply

exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

VA. CONST. of 1776, § 16. It was, however, not until 1841 that Connecticut became the last state to repeal such a constitutional restraint on its government. Section 3 of that constitution now provides that:

The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.

CONN. CONST. art. 1, § 3.

27 KATZ, supra note 17, at 157.
28 Id. at 156.
32 TYACK, THE ONE BEST SYSTEM, supra note 22, at 76 (quoting William H. Maxwell, the Brooklyn Superintendent, defining his role).
prepare students for further education... good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college. 34

As the professionalism of teachers grew, they did not abandon their connections to the parents of their students or their communities. 35 And still as John Dewey, the leading theorist of his profession, acknowledged the conduct of public instruction remained an art, not a technology. 36 As recently as 1948, the Supreme Court was able to declare that “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.” 37 Indeed, other wise observers have emphasized the importance of the public school as an emblem of our shared destiny. Hannah Arendt could affirm that “education plays a different role and politically incomparably more important role in America than in other countries.” 38

If believers and disbelievers were to share a common destiny, it was not in the public interest to concentrate attention on the principle of natural selection and its implications. Perhaps this was a consideration in the mind of those who wrote or selected the books that the schools and professional teachers used to teach botany and zoology in the progressive era of the early twentieth century. Those books generally presented the idea of natural selection as an explanation for the differences among species, but did not elaborate the idea. 39

Alas, while public high schools became universal in America in the early decades of the twentieth century, they proved over time to be “an imperfect panacea.” 40 As natural scientists were confirming the reality of natural selection, social scientists were revealing disappointing facts regarding the learning processes of children. The available data tend to confirm the importance for most school children of parental support and peer-group pressure. 41 Classroom teaching is still, in the twenty-first century, as Dewey affirmed, an art; teachers matter, but it is not entirely clear how.

35 Nicholas Murray Butler, the president of Columbia University, explained that he would "as soon think of talking about the democratization of the treatment of appendicitis" as to speak of "the democratization of schools." TYACK, THE ONE BEST SYSTEM, supra note 22, at 77.
36 15 THE MIDDLE WORKS OF JOHN DEWEY 1899–1924, at 186 (Jo Ann Boydston ed., 1983) ("[I]f education is going to live up to its profession, it must be seen as a work of art which requires the same qualities of personal enthusiasm and imagination as are required by the musician, painter or artist."). For reflections on Dewey, see DOUGLAS J. SIMPSON ET AL., JOHN DEWEY AND THE ART OF TEACHING: TOWARD REFLECTIVE AND IMAGINATIVE PRACTICE (2005).
39 LARSON, supra note 5, at 15–24.
41 See Richard D. Kahlenberg, Learning from James Coleman, PUBLIC INTEREST, Summer 2001, at 55–58.
Standardized testing to judge the teacher’s work is a crude tool that may even impede the efforts of some teachers and schools to engage their students in sharing diverse interests (e.g., art and music) in ways that reward them for their attentive study and knowledge and reinforce appropriate moral standards.

Many twentieth-century parents anticipated what such data revealed. Prosperous parents often made decisions seeming to secure for their children neighborhood peer groups suited to reinforce their parental efforts to get their children to learn. The suburban independent school district was an obvious device for selling countless real estate developments to parents willing to pay to assure their children of contact with neighbor children of other prosperous, caring families and to diminish their exposure to less worthy peers growing up in urban areas. And better students and parents surely tended to attract better professional teachers, especially if they were more highly compensated by the more elite school districts. As a result, public schools were complicit in divisions of class and became targets of vigorous criticism by observers on the political left.

Elite private academies and boarding schools marketed the same sort of benefits as the suburban school districts, mostly to those parents able to pay. And Catholics maintained a separate school system wherever they could, not only to flee prejudice and reinforce the faiths of Catholic children, but to secure the support of a congenial peer group that would assist teachers of faith in inducing one another to learn. This practice of those of Catholic faith was not everywhere approved.

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46 In some communities, this was severe. In 1844, in Philadelphia, there was a riot to protest the request of the Catholic bishop that his parishioners be allowed to use the Catholic version of the Bible. BESSIE LOUISE PIERCE, CIVIC ATTITUDES IN AMERICAN SCHOOL TEXTBOOKS 85 (1930).

Oregon was not the only state to require public school attendance as a means of securing assimilation of diverse cultures and religions, but its law was held unconstitutional in 1925.48

Notwithstanding the continuing pressures of subcultural differences, there have been some stunning successes of urban public schools in imparting literacy, basic intellectual skills, and a sense of engagement in their larger community to millions of immigrant children. The public schools of New York City49 and Honolulu50 may, for examples, merit special recognition in this regard, although they were more successful in educating children of some immigrant cultures than others. And nowhere in America was there an absence of secondary school students who emerged from the experience thoroughly trained in failure.51

The need for socialization to civic virtue is in no way diminished by the recent growth of both legal and illegal immigration. Differences of language and religion are greater than ever, and assimilation in greater need. But in recent decades, the public schools have been afflicted with additional impediments to achieving their goals. Working mothers or single parents attend fewer PTA meetings and spend less time with children than did their homemaker forebears. Yet it remains true that "the school is a weak institution compared with the home."52 And while this change in families results in greater dependence on the talents and energies of teachers, there may be more market competition for those traits, making it more difficult to attract into their profession in sufficient numbers those with the relevant intellectual and social skills, whatever those might precisely be.53 And there is the reality that twenty-first-century American children spend more time watching television or playing computer games than they spend in school.54 Partly in response to these impediments, class sizes have been reduced dramatically to enhance the influence of teachers on their students, while state and federal governments have presumed to exercise more controls, often in the form of standardized tests intended to hold teachers accountable for their results.55

52 DANIEL PATRICK MOYNIHAN, FAMILY AND NATION 92 (1986).
55 For an account of the development of standardized testing and its introduction in secondary schools, see ORVILLE G. BRIM, JR. ET AL., THE USE OF STANDARDIZED ABILITY TESTS IN AMERICAN SECONDARY SCHOOLS AND THEIR IMPACT ON STUDENTS, TEACHERS, AND ADMINISTRATORS (1964). For an expression of misgivings about this development, see LINDA
In 1990, charter schools were devised to empower some public school parents in the selection of the specialized common school best suited to serve their children. Choice has not proved to be a magic cure. And privatization of the purposes of education threatens the ability of schools to achieve the public aim of linking children to their community.

Also in the 1990s, there was a movement to establish more rigorous national academic standards to be implemented by state governments. This initiative drew heavily on standardized testing of the sort devised to choose military personnel in World War I. While many state boards became more aggressive in imposing standards, the movement in Washington floundered when those responsible for the American history standards suffocated their subject in political correctness. Despite these reforms, measurable academic skills of students have not notably improved and are low by international standards.

It is both a cause and effect of the decline in the success of public schools that parents in increasing numbers seek alternatives. Local private schools flourish in many communities. Vouchers subventing private schools are advocated as a total displacement of the common school. And perhaps a million children are homeschooled. An important source of this widespread parental mistrust is the hostility


Charter schools began to appear about 1990. They are publicly funded institutions subject to less regulation by the state or local boards, but selected by parents. They are not religious and their students are not selected. See Jeanne Allen & Anna Varghese Marcucio, The Center for Education Reform, Charter School Laws Across the States: Ranking and Scorecard (8th ed. 2004); Tyack, Seeking Common Ground, supra note 16, at 158–80. For a recent assessment, see James Forman, Jr., Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling, 2007 U. Ill. L. Rev. 839.

Larson, supra note 5, at 196–201.


of "the Christian right"\textsuperscript{61} to teaching that is seen to weaken the religious faith of students and thus weaken moral constraints that parents may wish to impose on their children's conduct.\textsuperscript{62} It is this social context that those responsible for public education must confront when addressing the political problem of conflicting heresies.

To share that responsibility, there remain the state and local school boards established by every state government in the nineteenth century to marshal community support for their schools by affording them a measure of participation in governance and assuring a measure of accountability of the schools to the public they serve,\textsuperscript{63} a group that includes all citizens, not just parents.\textsuperscript{64} Local board members are in many, perhaps most, places elected to serve their modest political role without compensation. Traditionally in most states, local boards exercised a power to tax local property to fund their program,\textsuperscript{65} a power generally limited by the requirement that local taxes be approved by the local voters.\textsuperscript{66} Local millage elections were occasions for recruiting the support of parents and fellow citizens as taxpayers.\textsuperscript{67} State legislatures also came to provide additional funds and special programs for orphans or the disabled;\textsuperscript{68} the state boards were established to provide a measure of accountability for local boards.\textsuperscript{69} But local school politics remain everywhere a device for enlisting support for the teaching mission of the publicly financed schools.

If parents are concerned that the teaching of science will weaken their relationship with, and influence over, their children, state and local school politicians are not wrong to address their concerns. Especially so if the realistic alternative for board members is to witness the withdrawal from their public institutions of more able students from supportive families, and withdrawal of their support for public finance of schools. It is no service to science to cause many able and well-supported students


\textsuperscript{62} See id. at 1–30.


\textsuperscript{64} See David Mathews, Is There a Public for Public Schools? (1997).

\textsuperscript{65} It was this feature that resulted in widespread unrest over the uneven distribution of funds that has been a cause of contention in recent decades. The Supreme Court declined to invoke the Equal Protection Clause to address that problem. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972).

\textsuperscript{66} Paul D. Carrington, Financing the American Dream: Equality and School Taxes, 73 Colum. L. Rev. 1227, 1245–46 (1973).

\textsuperscript{67} For a qualified defense of local taxation, see id. at 1227, 1239–46.

\textsuperscript{68} For an account, see James M. Kaufmann, Special Education: What It Is and Why We Need It (2004).

to leave the common schools and their classmates behind at ill-supported and beleaguered centers of a dropped-out culture.

II. THE FEDERAL PRESENCE IN PUBLIC SCHOOLS

Until recent times, the federal presence in public education was slight. In 1923, the Supreme Court first began to read the Federal Constitution as conferring individual rights on citizens against their state governments. But not until 1947 did the Court first detect that the Fourteenth Amendment ratified in 1868 extended the First Amendment's prohibition on the establishment of religion by Congress to apply to local public schools. The Court has for the subsequent six decades sought to deter conduct of school boards that can be identified and prohibited as efforts to propagate a religious faith. Thus, it has held that teachers may not preach or pray in class, for such activities are said to serve only evangelical aims to elevate faith, even if the moment of prayer is a moment of silence. In assigning this task of detecting religious or anti-religious motives to federal courts, it is well to recall, the Court

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71 In Meyer v. Nebraska, the Court held that the state may not prohibit the teaching of a foreign language in private elementary schools. Id. at 403 (1923). The statute in question was aimed at suppressing the German language still spoken by immigrants whose loyalty was questioned during World War I. Id. at 397-98. The Court found a right of parents to control the education of their children. Id. at 400. Reference was also made to the First Amendment that had not yet been incorporated into the Fourteenth Amendment. Id. That happened in Gitlow v. New York, 268 U.S. 652, 666, 670 (1925).
74 Engel v. Vitale, 370 U.S. 421 (1962); see GREENAWALT, supra note 11, at 79–87; Bowman, supra note 73. A recent example of the difficulty of discerning the educational motive is provided by Skoros v. New York City, 437 F.3d 1 (2d Cir. 2006) (school may forbid Catholic students from displaying at school a crèche depicting the birth of Christ alongside other symbols of Christmas and symbols of Judaism and Islam). For thoughts on what a science teacher might reasonably do to accommodate faith-based doubt, see GREENAWALT, supra note 11, at 114–15.
was duplicating a task previously assigned to state courts by their state constitutions. No American state permits itself to establish a religion. 76

In 1968, the Court held that the Arkansas state law forbidding the teaching of evolution was an establishment of religion and hence invalid under federal law. 77 This decision was rendered notwithstanding the fact that Arkansas had made no effort to enforce its hortatory law. 78 The Court explained that “[t]he State’s undisputed right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.” 79 And in 1987, the Court detected that the Louisiana law requiring equal time for creation science and evolution science was also an impermissible effort to establish a religion. 80

The Court has also proclaimed other rights that students and parents may exercise at school. Students have a right to wear armbands protesting an ongoing war. 81 And they have a right to refuse to salute the flag even if they do so for religious reasons. 82 Parents have a right to disobey compulsory attendance laws for religious reasons. 83 Presumably parents are also entitled for religious reasons to restrain their children from enrolling in science classes. And it would seem that parents are free to place regalia on their children when attending biology class that would serve to symbolize their skepticism about the reach of natural selection. 84

School boards and their members presumably also have First Amendment rights. They are not themselves teachers of children and cannot in the first person effectively propagate a religious faith. As David Tyack has explained, their “key job . . . is to

76 See, e.g., supra note 26.
78 On that account, federal jurisdiction might have been withheld for lack of a case or controversy within the meaning of Article III. U.S. CONST. art. III.
79 Epperson, 393 U.S. at 107.
83 Wisconsin v. Yoder, 406 U.S. 205, 234 (1972). The parents involved in that case were Amish who wanted their children to remain in the community as farmers and housewives who share their lives and skills with their neighbors of the same faith. Id. at 211. Science instruction was but one of the features of the public school that they sought to avoid. Id. at 210–11.
84 Cf. Tinker, 393 U.S. at 505–06 (recognizing students’ First Amendment right to wear armbands in peaceful protest of the United States’ involvement in the Vietnam War).
help communities achieve a sense of common ground in the education of children.\textsuperscript{85} As politicians they have almost no direct contact with children. And like judges they have virtually no direct influence on the thoughts or beliefs of others. As individuals, they surely have the same freedom of religious expression as other politicians. Just as presidential candidates publicly profess a faith of some kind, so must many citizens standing for election to a local school board. It may be bad politics, but it is not a violation of the Fourteenth Amendment to pray at a local school board meeting.\textsuperscript{86} And the utterances of state or local boards are, like other laws, often results of compromises that serve multiple purposes including moral ones that in the minds of voting members may have some religious connections. That a board member admits to having a religious faith that he or she considers in fashioning school policy does not alone make a board’s action an effort to establish a religion.\textsuperscript{87} In finding that state “balanced treatment laws” violate the First Amendment, the Court did not notice that those laws left the teacher free to manifest disdain for the one or the other.\textsuperscript{88} And a recent decision of the Court on the constitutional rights of judicial candidates to make campaign promises regarding legal issues pending before their courts\textsuperscript{89} might reasonably be taken to suggest similar rights for those seeking or exercising office as elected members of state or local school boards, and who presume to be voices for their communities even if what they say is scientifically incorrect.

\textsuperscript{85} Tyack, Seeking Common Ground, supra note 16, at 157.
\textsuperscript{86} See Marsh v. Chambers, 463 U.S. 783, 786–92 (1983). In 1971–73, the author, in protest, refused to participate in such a ceremony but did not commence legal action against his religious colleagues.
\textsuperscript{87} Justice Scalia correctly observed that:

Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. Notwithstanding the majority’s implication to the contrary, we do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths. To do so would deprive religious men and women of their right to participate in the political process. Today’s religious activism may give us the [Louisiana] Balanced Treatment Act, but yesterday’s resulted in the abolition of slavery, and tomorrow’s may bring relief for famine victims.

\textsuperscript{88} The eminent philosopher of science, Larry Laudan, assessed the findings on which such conclusions were “achieved only at the expense of perpetuating and canonizing a false stereotype of what science is and how it works. If it goes unchallenged by the scientific community, it will raise grave doubts about that community’s intellectual integrity.” Larry Laudan, Beyond Positivism and Relativism: Theory, Method, and Evidence 227 (1996).
\textsuperscript{89} Republican Party v. White, 536 U.S. 765 (2002).
A common difficulty is the selection of science textbooks. This is usually a matter for teachers and local school administrators. Texts may be challenged as heretical either by scientists on one side or by ministers of faith on the other. The consequences of such choices cannot wisely be ignored by those responsible for the conduct of public schools and the winning of parental and public support for those institutions. But the Court has invoked the Fourteenth Amendment to limit the freedom of state and local institutions to choose the wrong books if their choices can be seen to have a religious-missionary motive,\(^9\) while leaving aside the possibility that some intellectuals advocating intense training on natural selection might be at least partly motivated by an ambition to suppress the fundamentalist Protestant faith as anti-scientific.

As previously noted, to the extent that the First Amendment applies to the conduct of public schools, it is in large measure redundant to the state constitutions that also guarantee freedom of religion.\(^9\) When the deeds and utterances of school politicians engaged in the task of resolving conflicting heresies must be questioned for possibly crossing the subtle line between legitimate public expression and the illicit establishment of religion, there are benefits to resolving disputes in state courts in accordance with state law. State court decisions are more likely to reflect the political realities of local circumstances and perhaps to gain the acceptance of local citizens.\(^9\) And state law is, unlike the Federal Constitution, plausibly subject to possible revision when a court gets it wrong.\(^9\) When the Louisiana Balanced Treatment Act was challenged in federal court, the United States Court of Appeals for the Fifth Circuit prudently certified to the Supreme Court of Louisiana the question whether the statute at issue violated the Louisiana Constitution.\(^9\) That court held that it did not.\(^9\) Only then was the issue posed by the Federal Constitution considered.\(^9\) That was a prudent move; more moves like it should be made.

Even taking account of these earlier applications of the First Amendment, the federal government had played only a very minor role in governing public education until 1954 when the Court decided Brown v. Board of Education.\(^97\) That decision applied the clear text of the Equal Protection Clause of the Fourteenth Amendment that Justices had not previously had the courage to enforce.\(^98\) Brown was an explicit

\(^91\) See supra note 26.
\(^92\) See supra note 23 and accompanying text.
\(^93\) See, e.g., Aguillard v. Treen, 440 So. 2d 704 (La. 1983).
\(^94\) Id. at 705.
\(^95\) Id. at 704.
\(^97\) 347 U.S. 483 (1954).
\(^98\) A full account of the stress is Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality (1976). But in 1954, the Court could not have withheld relief. It did not even then order desegregation,
endorsement of the communitarian premise of public education in its requirement that no child be excluded from the local school on racial grounds. But the enforcement of the principle in a thousand local school districts unsurprisingly proved to be beyond the power of the federal judges and their marshals. A division of paratroopers got the job done in Little Rock, but that school then closed for a time. The active engagement of the Department of Justice in enforcing the Civil Rights Act of 1964 and the religiously rooted moral teaching of the Southern Christian Leadership Conference led by Martin Luther King, Jr., were both indispensable to the result of school desegregation achieved by 1974. And despite much judicial rhetoric and many reforms, class and racial differences in school populations continue to blight countless schools and districts.

In 1959, in response to the Soviet missile program, Congress funded the Biological Science Curriculum Study that resulted in the publication of new textbooks for high school biology. All emphasized the importance of evolution and natural selection. It was the insistence of a teacher at Little Rock Central High on the use of one of those books that led her to seek and secure the declaratory judgment that the unenforced Arkansas law forbidding the teaching of evolution was an unconstitutional threat to her freedom of expression.

In 1965, the federal treasury began to provide federal funds to local schools burdened with local children of impoverished parents. But the sad lesson learned

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100 See Elizabeth Jacoway, Turn Away Thy Son: Little Rock, the Crisis That Shocked the Nation (2007).


102 See Taylor Branch, Pillar of Fire: America in the King Years 1963–65 (1999); David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference (1986).


104 See Larson, supra note 5, at 95–98.

105 Epperson v. Arkansas, 393 U.S. 97, 100 (1968).

106 The major step was the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified at 20 U.S.C. §§ 6301–6304 (2000)). See generally Hugh Graham, The Uncertain Triumph: Federal Education Policy in the Kennedy and Johnson Years (1984). There was the antecedent practice initiated during World War II of subsidizing schools near military bases to take account of the fact that no local property tax was being paid. Id.
was that spending federal money did not help much. Reduction in class size helped somewhat, but even in small classes families and peers generally have more influence on the development of adolescents than their teachers. The earlier federal funding program was replaced in 2001 by the No Child Left Behind scheme that links federal funding to standardized testing and rewards teachers whose students achieve higher scores. But, alas, there is serious doubt that the teachers so rewarded will be able significantly to alter the overall performance of their public schools' students. And the moral education they provide may even be impaired by this utopian federal scheme.

As noted, there was an anti-communitarian initiative in Washington in the 1990s to encourage the general elevation of academic standards. Most recently, in 2007, the Supreme Court forsook the communitarian premise when it invoked the Equal Protection Clause to deny community schools in Seattle and Louisville the right to pursue admission policies designed to bridge racial divides in their communities and teach their children to live with and respect those of a different pigmentation. But that decision surely does not withhold the rights of local citizens to engage in school politics designed to bridge the divide between religious and agnostic citizens.

III. CONFLICTING HERESIES

At whatever level of government the matter is considered, science and religion have not gotten along very well. The 1859 work of Charles Darwin has been a subject of dispute among parents, clergymen, and teachers for the last century and a half, but he was far from the first scientist to challenge the history of man recorded in the Book of Genesis. The study of astronomy, geology and paleontology had

107 GRAHAM, supra note 106, at 121–23.
109 See ABERNATHY, supra note 43; RYAN, supra note 43.
111 See LARSON, supra note 5, at 196–201.
113 CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (D. Appelton & Co. 1875) (1859).
114 In 1650, James Ussher, the Anglican archbishop of Ireland, was provoked by the skeptics of Genesis to publish the Annales veteris testamenti, a prima mundi origine deducti ("Annals of the Old Testament, deduced from the first origins of the world") and its continuation,
previously made it clear to anyone who cared to know that the Biblical account was at best poetry, not reality. Even the idea that species had evolved was already a familiar notion. Darwin's *On the Origin of Species* was but an item in an ongoing debate over the relationship between humans and apes. His important contribution to that debate was the idea of natural selection, i.e., that species can and do over generations of reproduction adapt to their situations. But even his account of natural selection as the means of evolution barely preceded that of similar work by another British naturalist then working in Indonesia.

Darwin had postponed his publication because he was anxious about the reaction to his theory. Although he drew on the gloomy economist Thomas Malthus for the hypothesis to which he applied the data available to him, he did not advance the political use of the idea of natural selection to justify market economics and its reward of brutal greed as the inevitable outcome of nature. That use of his idea as "social Darwinism," was originally drawn also from the work of Herbert Spencer and was popularized in America in the late nineteenth century to celebrate the prosperities of the Gilded Age with Spencer's phrase, "the survival of the fittest." Never mind the condition of workers, farmers, and others who had been less well selected, social Darwinists taught; their fates had been sealed by nature and could not be helped. And the great American botanist Louis Agassiz was not alone in invoking the idea as an explanation of racial inferiority and an excuse for racial segregation.

Thus, Darwin's cousin, Sir Francis Galton, after contemplating the genes of geniuses, was inspired to lead a movement of eugenics that planned to improve the human condition by sterilizing those with disadvantageous genes. His proposal won

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*Annalium pars posterior*, published in 1654. In the latter work, he calculated the date of the Creation to have been nightfall preceding Sunday, 23 October, 4004 BC. Peter J. Bowler, *Monkey Trials and Gorilla Sermons* 39 (2007).

115 Id.

116 It had provided the theme of Robert Chambers, *Vestiges of the Natural History of Creation* (Leicester Univ. Press 1969) (1844). That work was originally published anonymously, but was widely circulated. Ben Waggoner, *Robert Chambers* (1802–1871), http://www.ucmp.berkeley.edu/history/chambers.html (last visited Sept. 15, 2008).

117 Bowler, supra note 114, at 94–95.

118 See Michael Ruse, *Darwinism and Its Discontents* 5–17 (2006); see also id. at 284–85 (Darwin's letter to Asa Gray, May 22, 1860).


122 See Larson, supra note 5, at 11–12.


the approval of many elite Americans including Woodrow Wilson, Alexander Graham
Bell, John D. Rockefeller and Andrew Carnegie, leading many American states in the
early years of the twentieth century to enact laws calling for the compulsory steriliza-
tion of individuals deemed to have flawed genes. The Supreme Court of Indiana
held its state’s law invalid under the state constitution. But the Supreme Court of
the United States found sufficient scientific justification for such laws that it held the
Virginia law to be no violation of the Federal Constitution.

In short, diverse brutalities have been defended as inevitable consequences of
natural selection. Such ideas tended to fall into disfavor when they became closely
associated with German Nazism and the Holocaust. But some elite scientists continue
to favor more limited use of genetic data to mandate abortions of defective fetuses.
And the idea of natural selection as an ultimate truth abides in the minds of many
Americans who choose to attribute their elite status to their natural superiority.

And although Darwin’s own faith was weakening by 1859, he never shared the
atheism sometimes rooted in the idea of natural selection and so vigorously advanced
in recent times by Richard Dawkins and others reluctant to acknowledge that at the
end of any scientific inquiry will always remain another mystery to be explained,
possibly as the work of a Creator. Who or what caused the Big Bang?

Evolution and natural selection did not disturb the religious convictions of those
who regarded their religious texts less as a realistic account of the history or future
of life on Earth, and more as poetry shared by co-religionists as comforting art and
as moral instruction. Much of humanity was found in the latter category, perhaps
in part because many of the world’s religious texts other than those of Christianity,
Judaism and Islam lack any specific explanations of the origins of life that could con-
flict with the idea of evolution. And the idea of natural selection was easily assimilated
by many Christian leaders. Decades before Darwin, many citizens of Protestant

For full accounts of the movement, see MARK H. HALLER, EUGENICS: HEREDITARIAN
ATTITUDES IN AMERICAN THOUGHT (1963); DANIEL J. KEVLES, IN THE NAME OF EUGENICS:

Williams v. Smith, 131 N.E. 2 (Ind. 1921).

See STEFAN KUHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN
NATIONAL SOCIALISM (1994). Indeed, many and perhaps most of the horrors of the twentieth
century can be explained as expressions of racist ideas associated with natural selection. See
generally NIALL FERGUSON, THE WAR OF THE WORLD: TWENTIETH CENTURY-CONFLICT AND

E.g., Mark Henderson, Let’s Cure Stupidity, Says DNA Pioneer, TIMES (London),

See sources cited supra note 9.

Indeed, Dawkins to the contrary notwithstanding, it now appears that there may have
been no Big Bang. Lawrence M. Krauss & Robert J. Scherrer, The End of Cosmology?,

Required reading for many adolescents was WILLIAM PALEY, NATURAL THEOLOGY
(Boston, Gould & Lincoln 1802). This work depicted the complexities of the forms of life
religious faiths contemplated and accepted the evolution of life over millennia and
sought comfort in the idea that at least some forms of life were too complex not to
have been designed by a benign Creator. And numerous works of those professing
Christian faith reconciled Darwin’s teaching with that of Christ. Those of Jewish
faith and most of those of Islamic faiths also seem to have worked out the problem.
The Catholic Church accommodated evolution in all its forms by the simple device
of declaring the invisible human soul to be excluded from its operation. This was
less painful because that church hierarchy was empowered to alter the shared faith
to accord to its understanding. 137

But for many Protestants who have been assured since the time of Martin Luther
of their competence to read their sacred text for themselves, it was and is seriously
disturbing to be informed that their literal reading of the holy text on which the moral
instruction of their children is rooted is factually incorrect. And it is also seriously
discomforting to many who do ungratifying work for a living to be informed that their
labor is their destiny and will be that of children who are afflicted with their unfortu-
nate genes. In a social order proclaiming its commitment to equal rights and equal
opportunities to all, the idea of natural selection, if taken to its extremes, is heretical.
Pollsters tell us that half the population of the United States rejects it. 139

It was for that reason that the Great Commoner, William Jennings Bryan, came
openly in 1920 to reject the idea. By that time, most adolescents were attending
and concluded that they could not have been the result of chance, and must therefore be the
product of design. Id.

133 Id.
134 For examples, see RUSE, supra note 118, at 275–90, and FRANCISCO J. AYALA,
135 In recent years, some Islamic fundamentalists have begun to join in the resistance to
atheistic science. BOWLER, supra note 114, at 204.
136 Id. at 177–79.
137 Id. at 178.
138 Poll data, if it can be credited, shows overwhelming support for the creationist premise.
For a review of the data, see Poll: Half of Americans Reject Evolution, BAPTIST PRESS,
support for creationism in Turkey and Pakistan. Debora MacKenzie, A Battle for Science’s
Soul, NEW SCIENTIST, July 9, 2005, at 8. Also, Professor Leakey’s plan for a museum to
display the skeleton of “Turkan Boy” that may be 200,000 years old is encountering resis-
tance in Kenya, while both Pope Benedict XVI and the Moscow Patriarchate are expressing
skepticism about the science of evolution. In the Beginning: Evolution and Religion,
THE ECONOMIST, Apr. 21, 2007, at 23.
.bpnews.net/bpnews.asp?ID=25301.
140 He had earlier concluded that natural selection “does not solve the mystery of life or
explain human progress.” WILLIAM JENNINGS BRYAN, The Prince of Peace, in SPEECHES OF
WILLIAM JENNINGS BRYAN 261, 269 (1909).
public high school and were reading science texts. Bryan had come to see belief in natural selection and social Darwinism not only as a demoralization of those who have to work for a living and a proposed justification for severe class distinctions, but also as a false justification for eugenic brutality, imperialism and global warfare. Politicians sharing his opinions had by 1920 enacted laws in at least six states with large populations of ardent Protestant believers that absolutely prohibited the teaching of evolution in their public schools.

The issue was dramatically presented in the celebrated Scopes “monkey trial” held in Dayton, Tennessee, in 1925. The case had been prosecuted in response to the initiative of the then-new American Civil Liberties Union that sought to challenge the constitutionality of Tennessee’s law prohibiting the use in public schools of science books advancing the idea of evolution. Its leadership persuaded Scopes, a local athletic coach who sometimes tutored students in biology to proclaim over lunch at the community drug store his right to use a book advancing Darwin’s truth. He was duly prosecuted at the urging of local business leaders who saw that a dispute on that big issue might be a way of putting little Dayton on the map. Bryan agreed to come to Dayton to assist the prosecution. The celebrated Clarence Darrow was recruited to represent the defendant and contend that the law in question violated the Tennessee and Federal Constitutions. The trial was broadcast on national radio, at the time a novelty attracting many listeners. Bryan improvidently agreed to serve not only as assistant prosecutor but also as a witness who would explain the origins of life to the jury. His inability under cross-examination by Darrow to make rational sense of the religious faith he advanced as a justification for the law was personally humiliating to him. The experience may have been a contributing cause of Bryan’s death a few days after the trial concluded. While Scopes was nevertheless convicted by the jury, his conviction

141 See supra note 12 and accompanying text.
143 See Epperson v. Arkansas, 393 U.S. 97, 101 n.8 (1968) (citing American Civil Liberties Union, The Gag on Teaching 8 (2d ed. 1937)).
145 This was the same law as that enacted in Arkansas and held invalid in Epperson v. Arkansas. Its proponents explained that “We do not ask that Christianity be taught in the schools, but we do ask that nothing contrary to that belief be taught.” Larson, supra note 5, at 56. The legislature had rejected a bill proposing to fire evolutionist teachers. Id. The Governor who signed the law prohibiting evolutionary teaching assumed that no one could ever be prosecuted under it. Id. at 57.
146 Id. at 199–200.
was later reversed by the Supreme Court of Tennessee on a technicality, but not
without dicta proclaiming the constitutional power of the state to punish the teach-
ing of irreverence by those in its employment. Scopes’s case would three decades
later become the subject of the Broadway play Inherit the Wind, and then in 1965
of a popular movie; both treated Bryan with disdain. These events seem, at least
for a time, to have diminished the interest of local school boards and prosecutors in
enforcing the states’ laws forbidding teachers from explaining evolution to children
or using textbooks that presumed to do so. And in 1968, the Supreme Court at last
resolved the specific issue presented in Scopes as a matter of federal constitutional
law, declaring that the public school biology teacher in Arkansas has a First Amend-
ment right to use a text informing her students of the teaching of Charles Darwin,
and of the evidence tending to confirm the principle of evolution.

But the conflict between the science of life and fundamentalist faith intensified
by stages as ongoing scientific investigations tended to confirm the process of natural
selection and secure the absolute confidence of scientists. Reinforcement of Darwin’s
hypothesis came steadily from the fossil record, the details of morphology, biogeog-
raphy, genetics, and molecular analysis. As a result, there are few if any respected
scientists who question the validity of Darwin’s point that species can and do adapt
from one generation to the next to meet the situations of their time and place.

But fundamentalist Protestants continue to revile natural selection as an evil
theory calling into question the existence of their omnipotent and benign God who
might punish their sins and reward their deserving conduct. In the minds of some
persons of faith, the story of how God made Man in His image is still not merely an
artistic answer to life’s mystery, but is linked to the expectation of Armageddon, the
day of divine judgment on their behavior, and thus a vision affording citizens and their
children an inducement to restrain from misconduct. There is indeed some evidence

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148 For a critical comparison of the trial and the play, see Carol Iannone, The Truth About
Inherit the Wind, FIRST THINGS, Feb. 1997, at 28. It has been revived and was playing in New
.com (last visited July 28, 2008).
149 LEINWAND, supra note 142, at 167–71; Kevin P. Lee, Inherit the Myth: How William
Jennings Bryan’s Struggle with Social Darwinism and Legal Formalism Demythologize the
150 “The State’s undoubted right to prescribe the curriculum for its public schools does not
carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific
theory or doctrine where that prohibition is based upon reasons that violate the First
Amendment.” Epperson v. Arkansas, 393 U.S. 97, 107 (1968). The Court first held that the
First Amendment limits the powers of state and local governments in Everson v. Board of
151 For a brief account, see SARKAR, supra note 7, at 6–10.
152 This is a vision widely shared among American Christians given to literal reading of
the Old Testament account, leading many of them to be more ardent supporters of the Republic
that such faith can serve to deter anti-social conduct; while our public prisons have generally despaired of preventing recidivism, religious instruction does achieve some measurable results. \textsuperscript{153} To minds committed to such faith and its reforming effects, the idea of natural selection not only threatened to liberate adolescents from family relationships, but to free them to do evil, including such misdeeds as drug use, alcohol abuse, homosexuality, sexual promiscuity, and dropping out of school.

There also remained an element of reverse class prejudice: persons who have not participated in higher education or elite professional training, who perhaps rightly feel threatened by the globalization of the economy, who may share a measure of resentment against those more highly educated professionals who are more highly compensated for their less onerous services, and who have less to fear and even perhaps much to gain from globalization. This is not to say that academic arrogance with respect to these matters is a new phenomenon. John Dewey observed in 1924:

There is a considerable class of influential persons, enlightened and liberal in technical, scientific and religious matters, who are only too ready to make use of appeal to authority, prejudice, emotion and ignorance to serve their purposes in political and economic affairs. Having done whatever they can do to debauch the habit of the public mind in these respects, they then sit back in amazed sorrow when this same habit of mind displays itself violently with regard, say, to the use of established methods of historic and literary interpretations of the scriptures or with regard to the animal origin of man.\textsuperscript{154}


Christopher Lasch described our contemporary culture as a revolt of the elite against the moral values of those who vote, pay taxes, bear and raise children, and provide the arms for defense.\(^{155}\) Such a revolt cannot be prudent.\(^{156}\)

Evidence suggests that such conflicts of academic class are most likely to arise in communities that are undergoing demographic change. A rural community being transformed into a suburb inhabited by the professional elite may be especially likely to find its schools a battleground between believers and disbelievers who revere hard science and are untroubled by the idea of natural selection.\(^{157}\) Thomas Frank explains the view of conservative working-class Kansans:

\[T\]his science establishment may be the most turf-conscious, credential-flaunting, undiplomatic bunch of pedagogues in all of academia. Provoke them, and they inevitably pull rank on you. Get them to do their high-hat, critic-squashing routine against some nice unassuming Kansans... and you've set up a war pitting humble, God-fearing, blue-collar folk against an arrogant intellectual elite...\(^{158}\)

The scornful utterances of the noted Richard Dawkins might serve as an example of such "high-hat critic-squashing,"\(^{159}\) or as a form of extremism well calculated to

\(^{155}\) CHRISTOPHER LASCH, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY (1995). Michael Sandel explains that the American tradition of sharing power has been displaced in the last half century by a vision of "freedom" enlarging individual autonomy and governmental neutrality at the expense of the bonds uniting us in a common venture. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996).

\(^{156}\) A useful word of caution regarding the cultural divergence has been expressed by Princeton president Harold Shapiro:

[S]cientists and nonscientists alike are part of a common moral community, bound to one another by a shared vision of the kind of society we would like to become, by various mechanisms of priority setting and accountability, and by the nature of the obligations we have to the interests of others... [I]n a scientific age such as our own, serious conversations and social negotiations between scientists and nonscientists on matters of mutual concern are both extremely important and ethically significant.


\(^{158}\) THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA 208 (2004). Robert Bork has also emphasized the arrogance of what he denotes as the New Class who, he contends, seek to rule the world by judicial decree. ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 52-84 (2003).

\(^{159}\) E.g., RICHARD DAWKINS, THE GOD DELUSION (2006).
evoke the rage of those to whom it is addressed.  

The point of class difference is also made by Edward Larson who describes the Pyramid of Disbelief; evidence confirms that persons higher in academic status are very likely to reject the idea of a God who might respond to prayer, while those of lesser status may maintain a measure of faith.  

For whatever reasons, many faithful Protestants cling to literal readings of the holy text and reject virtually all that science teaches about the origins of life. Thus, many cling to the theory that the earth is not more than 8,000 years old and its geology can be largely explained by The Flood. They have enlisted the support of scholars well-trained in science who teach creation science at diverse colleges governed by those of fundamentalist faiths.  

Museums recording Genesis have appeared. Thus, in May 2007, the Creation Museum in Petersburg, Kentucky, opened to depict the history of Man. Adam and Eve are there; the latter, we are told, resembles the Brazilian supermodel, Gisele Bündchen. The museum is well-attended despite a hefty twenty-dollar admission fee. It is selling an idea no less heretical to science than is the idea of natural selection heretical to the fundamentalist Protestants who patronize such museums. The display disregards the geology and biogeography that refute it.  

Those of this “young-earth” faith who are offended by the science that questions their readings of biblical texts have been growing in number in recent decades. One marker of this development is the popularity of the work of Tim LaHaye, now said to be the most widely read American novelist, whose works may be seen to encourage readers to prepare for Armageddon by contrasting the rapture to be experienced

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160 Amy Gutmann, The Lure & Dangers of Extremist Rhetoric, DAEDALUS, Fall 2007, at 70-78.
162 E.g., JOHN C. WHITCOMB & HENRY M. MORRIS, THE GENESIS FLOOD: THE BIBLICAL RECORD AND ITS SCIENTIFIC IMPLICATIONS (1961). This “young earth” form of creationism has the support of diverse groups of Baptists, Lutherans, and Calvinists. BOWLER, supra note 114, at 207-11.
165 See BOWLER, supra note 114, at 214-15.
by believers with the horrors to be experienced by the disbelievers who will “be left behind” to be punished by God. \(^{168}\) LaHaye and his followers tend to dismiss the science of life as a distraction from sound morals as well as correct beliefs.

The conflict between science and fundamentalist faith has also been magnified in recent times by the advent of state regulation of the science curriculum and standardized testing used to evaluate schools and teachers. \(^{169}\) Such standards and testing, first encouraged by the federal government in the 1990s are now strongly favored by the previously mentioned federal law stressing that “no child should be left behind” with low test scores. \(^{170}\) At least in some states, the failure of high school graduates to comprehend evolution may be taken as a sign of professional incompetence of their science teachers or even of a need to reduce public funding for their low-scoring school. Should “no child be left behind” in his or her understanding of the origins of life, as may be required by the federal law bearing the same name as some of Tim LaHaye’s work? The question was discussed but not resolved by Senators debating the federal enactment. \(^{171}\)

An earnest effort to resolve the conflict was the advancement of the doctrine of intelligent design, \(^{172}\) alternatively presented as the theory of abrupt appearance. \(^{173}\) That doctrine adapts the nineteenth-century idea that complex creatures must in their forms embody the ideas of God, at least when one focuses attention on the “irreducible complexities” of cell biology, \(^{174}\) if they appear suddenly among the evolving forms of life. The idea is generally comforting to those who believe in a ubiquitous and omnipotent God, but who are willing and even eager to adapt their faith to scientific realities if only those realities can be made to accommodate a useful belief in God that cares about their conduct and that of their children. That seems to include many Protestants.

But intelligent design is not nearly satisfactory to the young-earth creationists who seek confirmation of the imminent Second Coming of Christ. Nor does it gain any

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\(^{168}\) His seminal work is TIM LAHAYE & JERRY B. JENKINS, THE RAPTURE: IN THE TWINKLING OF AN EYE, COUNTDOWN TO THE EARTH’S LAST DAYS (2006), in which the faithful are magically whisked away to Heaven while the earth becomes hell for the unfaithful. It commenced a series of “left behind” works depicting the unhappy reward of disbelief. For assessments, see AMY JOHNSON FRYKHOLM, RAPTURE CULTURE: LEFT BEHIND IN EVANGELICAL AMERICA (2004); GLENN W. SHUCK, MARKS OF THE BEAST: THE LEFT BEHIND NOVELS AND THE STRUGGLE FOR EVANGELICAL IDENTITY (2005).

\(^{169}\) LARSON, supra note 5, at 196–201.

\(^{170}\) See supra note 42 and accompanying text.

\(^{171}\) Bowman, supra note 73, at 476–81.


\(^{173}\) WENDELL R. BIRD, THE ORIGIN OF SPECIES REVISITED: THE THEORIES OF EVOLUTION AND OF ABRUPT APPEARANCE (1989). This is a remarkably comprehensive work concluding that Darwinism is intellectually dead. Id.

acceptance from scientists who demand evidence. The idea relies on the fact that available data does not exclude the possibility that some steps in the evolutionary process were abrupt and therefore not the result of natural selection but of divine intervention. It offers no hypothesis to be examined by active inquiry. Some adherents to the doctrine of intelligent design are trained scientists holding academic appointments, but all but a few of these scientists are found at fundamentalist Christian colleges. Their teaching is regarded as heretical by most scientists of academic repute. Michael Behe, one scientist who advances intelligent design, responded in 2007 to the skepticism of scientists with yet another argument for intelligent design based on his study of sickle cells and the malaria parasites. But the skepticism abides.

President Ronald Reagan was elected on a campaign promise to appoint federal judges who would not “expel God from the classroom.” President George W. Bush and some candidates for the Presidency in 2008 have joined in supporting the contention that the theory of intelligent design should be taught to public high school students along with the theory of natural selection. Despite its political base, many scientists and other persons of professional status are irate at the suggestion that a public institution might advance even the more moderate heresy of intelligent design to accommodate mere religious beliefs of parents.

The Supreme Court has never had occasion to consider the alternative right to academic freedom of a public school science teacher who, contrary to school-board policy or state law, seeks to discount Darwin and advance an alternative biblical vision of the origins of life, or who insists on questioning the theory of evolution, much less the biology teacher who expresses doubt and acknowledges that empiricism has not answered every possible doubt. In 2005, it was reported that perhaps as many as one American science teacher in four gives “moderate emphasis” to the creationist belief that God created the universe, and perhaps as few as a third “emphasize

175 Id.
176 Michael Behe, for example, is a professor of biology at Lehigh University; Dean Kenyon is a professor at San Francisco State University.
179 Larson, supra note 5, at 173–75.
183 Evolutionists are not unknown to take great offense at utterances expressing doubts about aspects of the theory, such as sexual selection. See Joan Roughgarden, Challenging Darwin’s Theory of Sexual Selection, Daedalus, Spring 2007, at 23.
evolution. This reality confirms that classroom teachers are more sensitive to the moral and intellectual state of students and their parents than are the elite who have persuasively demonstrated that intelligent design is not science. Their practice accepts the direction of Thomas Mann that controversy about such matters is wisely avoided by teachers who serve parents and children.

Although commonplace, the problem with such deferential teaching is real. It has been well stated by University of Pennsylvania president Amy Gutmann:

The religions that reject evolution as a valid scientific theory also reject the secular standards of reasoning that make evolution clearly superior as a theory to creationism. Only by putting religious faith above reason can someone believe that the entire fossil record . . . was created at the time of the Great Flood . . . . The distinctly democratic problem with teaching creationism stems from the fact that it is believable only on the basis of sectarian faith.

Of course, the biology class in a public school cannot be a sermon or a religious ritual without violating the constitution of perhaps every state as well as the Federal Constitution as interpreted by the Supreme Court. But “secular standards of reasoning” are not constitutionally de rigueur in public schools. As the Court long ago proclaimed, our “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” Surely much has been taught in public schools (and private ones as well) over the last two centuries, in classes on literature, history, and social science, that did not meet the secular standards of its time. Or even come close. It cannot be unconstitutional to be imperfect in imparting standards of reasoning. Non-rational citizens also have rights under the First Amendment and analogous provisions of state constitutions.

The University of California has adopted an admissions policy that takes the position of Gutmann as stated above to the point of aggressive intolerance of error.


185 An account of the experience of one wise science teacher is Amy Harmon, A Teacher on the Front Line as Faith and Science Clash, N.Y. TIMES, Aug. 24, 2008, at A1.


189 Excessive intolerance may also be reflected in publishing and personnel decisions of universities. For example, Wendell Bird describes the inability of physicist Robert V. Gentry

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The University has undertaken to regulate the teaching of science in private schools in its state. These schools have been established to serve parents many of whom may have moved their children out of public high schools to avoid the (to them) heretical preoccupation of biology texts and teachers with natural selection. The University policy denies credit for admissions purposes for courses in which students are assigned to read books that the University admissions office disapproves as anti-scientific. The policy is applied even to humanities courses using forbidden texts. The Association of Christian Schools International has brought the matter to the attention of a federal court. But why is this not a matter better left, at least in the first instance, to the courts and constitution of the state of California? The issues presented require consideration of local circumstances and political motives resulting from those circumstances. The judiciary of California is generally better qualified to examine those circumstances and motives than are those exercising federal jurisdiction. And if the state court gets it wrong, those who are disappointed are not without recourse, including even the possibility of amending the state constitution.

In 2008, it appears that the University of California case will go to trial in federal court. To be sure, this is no book burning, but it does manifest a major source of the growing problem. Is there no room in a great university for students, however intelligent and resourceful they may be, if they bring to the academic table some flawed ideas about the origins of Man? Is even standardized testing really an insufficient measure of the quality of those private academies and their graduates? Could the admissions office not devise some other less intrusive means of assuring itself that freshmen entering the university are not committed to an erroneous view of the origins of life? O, Jefferson!

Or contrast the even greater rigidity and intolerance of the Texas Education Agency that in 2007 fired its director of science for forwarding to science teachers an e-mail to publish works on scholarly journals unless he deleted a concession that he could not reconcile his data with current cosmological theories. BIRD, supra note 173, at 404–05.


The pertinent provisions of the California Constitution are found in Article I:

Sec. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. . . . Sec. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed.

CAL. CONST. art. I, §§ 2, 4.

The complaint alleges:

[V]iewpoint discrimination and content discrimination by defendants toward Christian school instruction and texts, which violates the constitutional rights of Christian schools and students to freedom of speech, freedom from viewpoint discrimination, freedom of religion and association, freedom from arbitrary governmental discretion, equal protection of the laws, and freedom from hostility toward religion.

message containing a recent lecture given locally on evolution and creationism.\textsuperscript{195} It was explained that the agency required absolute neutrality on the dispute between evolutionists and creationists, and it was therefore intolerable to have a science director who would side against creationism or intelligent design.\textsuperscript{196} But she had not endorsed the lecture she circulated and had been accustomed to circulating all manner of material of current interest to science teachers.\textsuperscript{197} The elected Texas Board of Education is considering possible revisions of its standards for high school biology courses that presently require students to know the theory of evolution and be able to “illustrate the results of natural selection in speciation, diversity, phylogeny, adaptation, behavior and extinction.”\textsuperscript{198} The chair presiding over that reconsideration is a citizen who teaches Sunday school at the Grace Baptist Church and lectures on intelligent design.\textsuperscript{199}

Pointing in the same direction of creationist sympathies is the tentative decision of the Texas Higher Education Coordinating Board to allow the Institute for Creation Research to offer an online master’s degree in science education.\textsuperscript{200} The New York Times was not wrong to question the dismissal of the director, but it may have overborne its point in editorializing about the possible need to “save Texas from a retreat into the darker ages.”\textsuperscript{201} The parents of Texas school children do have rights deserving the respect even of the elite editors. If Texas high school biology teachers were to suggest that their knowledge of the origins of life is incomplete and were to speak of evolution as a “theory” not a “fact,” and might thereby blunt the conflict between science and faith, would that be a retreat into the darker ages, and be a matter of appropriate concern to the editors of the N.Y. Times?

An acknowledgement of the modest theory of intelligent design in a public high school biology class or the refusal to make any such acknowledgement on the ground that intelligent design is “snake oil” presents an issue best resolved by state and local governments. If and when a local school board is allowed by state law to require the teaching of Genesis as a chapter of the high school biology course, it would then perhaps be time for a federal court properly to consider the application of the Fourteenth Amendment. Meanwhile, we may consider three recent federal cases as examples of matters better left to state courts and state constitutions.

IV. PUBLIC SCHOOL POLITICS IN FEDERAL COURT

A problem with the Court’s jurisprudence on the subject of science teaching is its preoccupation with the legislative purposes of politicians. Those purposes, like

\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.}
many of our purposes, are often at best opaque. The Court has directed federal
courts to be "particularly vigilant in monitoring compliance with the Establishment
Clause in elementary and secondary schools" politics because "particular concerns"
arise in that context. Federal courts, including the Supreme Court itself, might
better be particularly vigilant in remembering that parents, teachers, and school chil-
dren also have rights. After all, the text of the Federal Constitution does not speak
to the issue and the law they make is virtually invulnerable to amendment, leaving
the polity with an enduring source of instability. For those reasons, they might also
do well to recall the oft-repeated advice of Justice Brandeis emphasizing the
wisdom of allowing states to experiment by finding their own ways and making or
fixing their own mistakes.

Public schools do, indeed, present "particular concerns" because they are so
heavily dependent on the acceptance and approval of the parents and local commu-
nities they serve. And, as noted, it is the business of the politicians on school boards
to marshal the needed support. The federal judiciary is an impediment to the conduct
of public education when it presumes to constrain political utterances having scant
impact on the learning of school children merely because they suspect possible reli-
gious motivation. To be sure, legislative bodies should not be allowed to immunize
their enactments from constitutional scrutiny merely by proclaiming an appropriate
purpose for laws obviously having inappropriate consequences. But the mere utter-
ances of school boards or their members expressing respect for the religious faiths
of their constituents should have no more constitutional consequence than similar
invocations of the divinity by presidents and congressmen.

Notwithstanding the Court’s cautionary dicta, many state and local boards have
addressed the political issue posed by the teaching of evolution to secondary school
students. And at least three local school districts have found themselves in federal
court as a result of their efforts to deal with the issue. All three are in formerly
rural areas undergoing suburbanization, a circumstance tending to confirm the obser-
vation that there is an element of class conflict in the controversy.

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202 I am by no means the first to notice. See, e.g., Bowman, supra note 73; Jesse H.
Choper, The Endorsement Test: Its Status and Desirability, 18 J.L. & POL. 499 (2002); Kent
Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses,
1995 SUP. CT. REV. 323 (1995); Steven D. Smith, Symbols, Perceptions, and Doctrinal
Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266
(1987). As these authors observe, Justice O'Connor may have been especially faithful to the
test requiring something vaguely resembling psychoanalysis of the officials accused of illicit
establishment.

203 Van Orden v. Perry, 545 U.S. 677, 691 (2005) (plurality opinion) (quoting Edwards
v. Aguillard, 482 U.S. 578, 583–85 (1987)).


205 See Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999), cert. denied,

206 See cases cited supra note 205.
A. Tangipahoa Parish, Louisiana

In 1994, the school board of this parish rejected proposals by a creationist member seeking to compel the teaching of intelligent design. But it then resolved by a 5–4 vote that:

Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation, the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

Is it possible that students in a high school biology class could have their religious faith or lack thereof influenced by such an utterance coming from such a source? How many teenagers would not recognize this as an inconsequential ceremonial utterance expressing respect for the right of parents to err?

The Board also passed four other resolutions, providing that:

(1) no religious belief or non-belief should be promoted or disparaged by the school system; (2) religious materials may be included in secular education (e.g., literature, art, humanities, etc.); (3) artistic expressions (e.g., music, art, etc.) could have religious themes if they were presented objectively; and (4) students could distribute religiously oriented materials as long as students followed the school’s rules pertaining to content-neutral time, place, and manner restrictions.

Parents offended by the Board’s symbolic resolution apologizing for the teaching of science brought suit in the Federal Court for the Eastern District of Louisiana.
invoking both state\textsuperscript{210} and Federal Constitutions as prohibitions on such an expression by the board.\textsuperscript{211} The district court found that the purpose of the Board's resolution was to relieve parents of concern that the teaching of evolution was contradicting the message being taught to their children at Sunday school.\textsuperscript{212} It was therefore found to violate both constitutions and its reading was enjoined.\textsuperscript{213}

The court of appeals affirmed.\textsuperscript{214} It acknowledged that the First Amendment jurisprudence was confused.\textsuperscript{215} And it conceded that the dual objectives of disclaiming orthodoxy of belief and reducing student/parent offense are permissible secular objectives that the School Board could rightly address. But it found that:

\begin{quote}
[T]he term “disclaimer,” as used by the School Board to describe the passage to be read to students before lessons on evolution, is not wholly accurate. Beyond merely “disclaiming” endorsement of evolution, the two paragraph passage urges students to take action—to “exercise critical thinking and gather all information possible and closely examine each alternative” to evolution. The disclaimer, taken as a whole, encourages students to read and meditate upon religion in general and the “Biblical version of Creation" in particular.\textsuperscript{216}
\end{quote}

The court of appeals discounted the board's contention that it sought to promote critical thinking about basic questions, noting the lack of evidence that such a consideration had been advanced at its meetings.\textsuperscript{217} The implication is that if the board members had summoned parents of faith to a board meeting and recorded their statements favoring the keeping of open minds, then perhaps the court could credit the motives of the secular board members.

\textbf{B. Cobb County, Georgia}

In 1995, this local school board detected that “some scientific accounts of the origin of human species as taught in public schools are inconsistent with the family teachings of a significant number of Cobb County citizens.”\textsuperscript{218} Accordingly, it provided that “the instructional program and curriculum of the school system shall be planned and organized with respect for these family teachings.”\textsuperscript{219} At the Board’s

\textsuperscript{210}``No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.’’ \textit{La. Const.} art. I, § 8.
\textsuperscript{211} \textit{Freiler}, 185 F.3d at 342.
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at 342.
\textsuperscript{214} \textit{Id.} at 349.
\textsuperscript{215} \textit{Id.} at 343.
\textsuperscript{216} \textit{Id.} at 349.
\textsuperscript{217} \textit{Id.} at 342.
\textsuperscript{219} \textit{Id.}
direction, the school district provided students with science books from which material on evolution had been torn out, notwithstanding that standards approved by the Georgia state board required the teaching of evolution.\textsuperscript{220} No litigation resulted from this disfigurement.

In 2002, it was time to order new science books. The Board approved purchase of a new thousand-page book containing over a hundred pages on evolution, the book recommended by the chair of its high school science department.\textsuperscript{221} The book was, however, placed on display inviting parental comment. At a public meeting, some parents asked that intelligent design also be taught in science class. The Board's counsel advised that this would violate the applicable state\textsuperscript{222} and Federal Constitutions. The Board then asked counsel to develop some language that would address parental concerns without violating the law. His proposed solution was adopted; it was to attach a sticker inside the front cover of the new biology books. The sticker states in full:

\begin{quote}
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.\textsuperscript{223}
\end{quote}

\textit{Approved by}
\begin{quote}
Cobb County Board of Education
\end{quote}
\textit{Thursday, March 28, 2002}

Parents brought suit in federal court\textsuperscript{224} invoking both state and Federal Constitutions as prohibitions on stickers establishing a religion. Contrary parents sought to intervene to invoke their right to freely exercise their religion by securing the respect for their faiths acknowledged by the sticker and certified by the Board. Their intervention was denied.\textsuperscript{225} So was the defendant's motion for summary judgment.\textsuperscript{226} The trial court considered the Board's purpose in adopting the sticker, finding that:

\begin{quote}
Among the reasons that Board members voted to place the Sticker in textbooks were parent concerns regarding the content of the new textbook and the strengthening of evolution instruction, parent concerns regarding the imbalanced presentation of theories of origin, teacher concerns regarding the teaching of theories of origin, their own concerns that the science textbooks did not
\end{quote}

\textsuperscript{220} \textit{Id.} at 1290.
\textsuperscript{221} \textit{Id.} at 1291.
\textsuperscript{222} "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." \textit{GA. CONST.} art. I, § II, para. VII.
\textsuperscript{223} \textit{Selman}, 390 F. Supp. 2d at 1292.
\textsuperscript{224} \textit{Id.} at 1286.
\textsuperscript{225} \textit{Selman v. Cobb County Sch. Dist.}, 449 F.3d 1320, 1324–25 (11th Cir. 2006).
\textsuperscript{226} \textit{Id.} at 1325.
address scientific controversy regarding evolution, their own desire to assure parents that the enhanced evolution instruction would not be unduly offensive to their philosophical or religious beliefs, and their own desire to promote critical thinking. . . . While the Sticker, on its face, is neutral towards religion and contains no religious content, the statement is not clearly neutral towards evolution. 227

The district court concluded that there was an issue of fact to be tried; that issue was the intended effect of the Board’s action. Was the Board encouraging children in its school to believe, or did some members hope that they might disbelieve? Or were they just trying to keep the kids in school? At a trial of that issue, the plaintiffs offered the testimony of scientists who would affirm that evolution is a fact, not a mere theory. Their testimony was excluded. 228 The author of the new textbook was called by the plaintiffs, but testified that he taught evolution as a theory, not as a fact. After a four-day trial, the court concluded that notwithstanding the appropriateness of the Board’s motives, “in light of the sequence of events that led to the Sticker’s adoption, the Sticker communicates to those who endorse evolution that they are political outsiders, while the Sticker communicates to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders.” 229 It “misleads students regarding the significance and value of evolution in the scientific community for the benefit of the religious alternatives.” 230 And in that way “the Sticker sends an impermissible message of endorsement.” 231 And it was an expenditure of public funds to favor a religious view in contravention of the Georgia Constitution. 232 Accordingly the court granted an injunction compelling removal of the stickers. 233

But can anyone suppose that teenagers were influenced in their faiths or disbeliefs by what the sticker said? Maybe a few spent a few minutes thinking about it, but surely no faiths were established or impaired by a mere sticker. The only purpose the sticker might achieve was to assure young-earth creationist parents that the schools and their teachers were not being sent on the errand of disturbing family beliefs. Even a sticker assuring students that the Board members believe that God made Man could have no significant consequence.

The court of appeals reversed, but remanded for further hearing of the evidence regarding the “sequence of events that led to the Sticker’s adoption” because the record on appeal did not supply the relevant evidence. 234 In particular, it was argued on appeal that the Board had acted in response to a petition signed by 2300 voters,
but no such petition was in the record. If indeed the Cobb County Board received a petition signed by thousands of parents, is that evidence of an improper motive on its part? If thousands want intelligent design to be taught in biology class, that fact supplies thousands of reasons for the board to send some signal of respect to those parents. Perhaps the Board cannot yield to such a petition, but neither can it wisely treat the petitioners with disrespect. The sticker contained no expression of faith and had not the slightest chance of making a believer out of any student who read it. Such compromises are the essence of good democratic politics. It may well be that numerous members of the Cobb County Board are persons of literal-minded “young earth” faith, but the fact that such a board is responding to political pressures with a polite gesture in that direction does not make its action a law “establishing a religion.” The matter was settled out of court in 2006.

C. Dover, Pennsylvania

In October 2004, the Dover School Board specifically advanced the theory of intelligent design in the manner of the Kansas Board. Specifically, it resolved that, “[s]tudents will be made aware of gaps/problems in Darwin’s theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.” The Board then directed teachers in the ninth grade biology class to inform their students that:

The Pennsylvania Academic Standards require students to learn about Darwin’s Theory of Evolution and eventually to take a standardized test of which evolution is a part.
Because Darwin’s Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.
Intelligent Design is an explanation of the origin of life that differs from Darwin’s view. The reference book, Of Pandas and

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235 Id. at 1320.
238 Kitzmiller, 400 F. Supp. 2d at 708.
People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

The Dover biology teachers invoked their First Amendment rights to academic freedom and refused to read this statement to their students, so the Board directed the Assistant Superintendent to do so. Some members of the Board also undertook at their own expense to circulate copies of Of Pandas and People to students.

The Board members uttering this expression of skepticism were defeated when they sought re-election in 2005. That outcome, along with elections in Kansas, Ohio, and elsewhere, could be taken as evidence that the issue is well-suited to resolution by a democratic process that is more likely to gain the acceptance of those who disagree with the result than is a judicial decree.

Meanwhile, however, numerous parents and teachers protested to the federal court that this action by the Dover Board “established a religion” in violation of the First Amendment. Glancing reference was also made to the Pennsylvania Constitution.

At a long and warmly contested trial, scientists were called to support the school board’s action and defend intelligent design as a science. Their experience somewhat resembled that of William Jennings Bryan in Dayton, Tennessee: they were unable to persuade the court that their work met minimal scientific standards. Contrary witnesses summoned by the plaintiffs to challenge the school board’s actions discounted the theory of intelligent design as a new label for fundamentalist faith, and mere “junk science” unfit for presentation as anything other than religion that public schools are forbidden to advance. The federal court was persuaded by the plaintiffs’ witnesses that the school board was propagating a religion, not a science, and was therefore violating the Federal Constitution. It was not impressed by the concerns of some parents that the Dover Schools’ biology teachers were propagating a “junk religion” putting at risk their children’s salvation at Armageddon and thereby diminishing their incentive to behave properly.

No appeal was taken from the district court’s judgment. The political response of the voters was surely the primary reason for that decision by the school board, but
it may also be a factor that the court taxed a very substantial counsel fee against the school board, presenting even members of a religious faith with a question as to how much public school money should be expended in such an effort. 247

D. Are These Three Disputes Best Resolved in Federal Court?

As noted, the opinions of the Supreme Court instruct the federal courts to strive to detect the underlying purpose of each local school board’s program. 248 Were these local boards aiming to propagate a religious faith or were they merely striving not to suppress one and to gain the trust of their fellow citizens committed to an anti-evolution faith? How does a federal judge determine the answer to that question? The answer may very well be unclear even in the minds of the school board members who made the decisions under challenge. The psychoanalysis of local school boards by federal judges to determine their underlying motives in expressing their views is not a fruitful inquiry. If there are legitimate non-sectarian aims served by school policy and if no significant service to any sectarian cause results, the federal judiciary should disengage.

This is not to defend the educational politics of any of these three school boards. The voters of the Dover school district should be commended for denying re-election to board members who exceeded their proper roles in suggesting directly to children that intelligent design is serious science and urging them to read the anti-science peddled in Of Pandas and People. On the other hand, placing Of Pandas and People in a school library would seem constitutionally unobjectionable and even sound educational policy, 249 even if the admissions office of the University of California might possibly disapprove.

Reasonable voters might vote to re-elect the local boards in Cobb County or Tangipahoa Parish. Neither of those boards explicitly advanced any religious notion. Even one who would prefer school board members who maintained complete silence in regard to the science curriculum, leaving consideration of the problem of family relations to the science teacher, might nevertheless want to keep as many children as possible in the community’s school, and might support school board members who can win votes for taxes to pay for schools. To those ends, if necessary, a wise voter might tolerate stickers in science books or other brief utterances by a local board expressing respect for the faiths of parents. Indeed, would it really matter if some books in a school library contained stickers revealing that the locally elected school board believes, or disbelieves, every word in the book at hand?

Leaving further consideration of such gestures to the local voters offers the advantage of flexibility in dealing with the task of unifying the institutions of a community. When outvoted in an honest election, most citizens will abide by the outcome, if not

247 Id. at 766.
248 See supra notes 203-04 and accompanying text.
249 Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982). The Court there failed to rule on the claim of students to have in their school library books that parents and school board members wanted removed because of their alleged moral failings. Id.
cheerfully, then at least with lessened resentment. And they remain free to contest the next election. Indeed, “debating our differences may be the only thing that holds us together.”

As previously affirmed, the statements made by the school politicians on these school boards could have no possible significant effect one way or the other on the religious beliefs of students or on their understanding of science. Parents and students who have no problem with evolution should have no problem with encouragement to keep an open mind, for that is an essence of the academic enterprise at all levels. Whatever one may think about teaching science without concession to sectarian anxieties, all must ultimately acknowledge, as did John Dewey, that teaching is not itself a science, but an art. Insistence on intellectual rigor is a feature of the best of that art, but so is sensitivity to the intellectual state of the students being addressed. Seldom effectively taught is material that students resist learning. As an eminent scientist has recently affirmed: “[t]elling people... that their deepest beliefs are simply silly—even if they are—and that they should therefore listen to us to learn the truth ultimately defeats subsequent pedagogy.” And all public classrooms are not the same; teaching science in a public school in Ann Arbor, Lawrence, or Chapel Hill is not the same task as teaching science in Grass Lake. No federal court need or should take responsibility for insisting on science teaching that is pure in spirit and unclouded by the social and political realities with which conscientious school boards and their teachers must deal.

Even the Dover Board’s unwelcome statement was too inconsequential to merit the attention of a federal court enforcing our national Constitution. Mistakes of that modest size and consequence can and should be left to democratic politics. Or if dissenting parents insist on litigation to correct so minor an offense against wholesome politics, the primary law to be applied is the state constitution, not the federal, and the preferable forum is the state court, not the federal.

As noted, Louisiana, Georgia, and Pennsylvania, like the other forty-seven states, all forbid local school boards from promoting any religious belief. It is not necessary to have a uniform national law on precisely what is meant by freedom of religion. In these matters as in others, there is wisdom in allowing a measure of difference and experimentation even in law bearing on the margins of important rights. A decision based on a state constitution leaves other courts in other states free to consider the issues afresh and in light of somewhat different constitutional texts and different social and political environments. It is also a benefit that improvident or overreaching decisions based on state constitutions are more easily corrected by constitutional

250 JONATHAN ZIMMERMAN, WHOSE AMERICA? CULTURE WARS IN THE PUBLIC SCHOOLS 228 (2002).
253 See supra nn. 169, 173.
amendments. As citizens, parents are entitled to move about the United States without putting their children at risk of having to recite prayers in school, but it is not too much to ask that they tolerate a measure of local politics in determining their schools' curricula at the level of a sticker in a science book serving to reassure other parents that children of faith are welcome.

It bears notice that the three state constitutions applicable to these three cases are not identical. The Louisiana Constitution is simply an echo of the First Amendment. The Georgia Constitution specifically forbids the use of public money for religious purposes. A judge interpreting that provision could reasonably forbid the use of public money to buy stickers. Such a judgment would leave a local board free to allow the use of private money to buy stickers. If parents objected to such stickers, they would be free to throw the rascals off the school board, or at least to express their reactions with such a threat. And if the stickers contained statements advancing or demeaning any religious faith, the state court would be on firm ground in enjoining their use, but not, it would seem, if the utterance on the stickers was of trivial practical consequence.

The Pennsylvania Constitution was written by Quakers and reflects their tradition of stern resistance to sectarian ideologies of all kinds. Indeed, Quakers were the members of the revolutionary generation who were most insistent on the separation of church and state. The pertinent provision of the first Article of the Pennsylvania Constitution they wrote is:

Section 3. Religious Freedom
All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Did the Dover School Board violate this prohibition? A state court might reasonably decide that the Board had "given a preference to a religious establishment" when it referred to intelligent design and to Of Pandas and People.

The federal court deciding the Dover School case could also have rested its decision on the Pennsylvania Constitution. This alternative would have had the advantage of expressing respect for local institutions. It would also have avoided the risk of error in expressing improvident ideas regarding what should be done in similar cases in other states in which local politicians seek to maintain local support for science teachers in their public schools. And it would rest the judgment on an explicitly

255 GA. CONST. art. I, § 2, para. VII.
257 PA. CONST. art. I, § 3.
applicable legal text that might possibly be amended if the people of Pennsylvania disagree, whereas there is no prospect that they could secure an amendment of the Federal Constitution.

It would be even more prudent for the federal court to refer the case to the state court by abstention or to certify the question of constitutionality under the state constitution as an issue best resolved by the highest state court. The Pennsylvania courts represent the people of Pennsylvania as no federal court can. They are not immune to the resentment of those seeking the respect of local school boards for their religious faiths, but the resentment of class will almost surely be less if the intrusive judges are their own Pennsylvanians and not those of a distant federal sovereign. If they deem the local board’s action to be permitted by the state constitution, those responsible for enforcing the Federal Constitution need take no offense so long as the rights of teachers are not infringed while local politicians express their views or otherwise seek to reassure those who fear the effects of science teaching on the religious faiths of their children.

Still better perhaps would be for the court, whether state or federal, to leave the narrow issue presented to the voters of Dover who knew best how to resolve it. Especially when, as in all three disputes, citizens are deeply concerned and deeply divided, it may be more constructive to point them in the direction of a deliberative political process in which both sides can participate openly and in which concessions can be reasonably expected. The point is made by the previously quoted Amy Gutmann and her co-author Dennis Thompson:

Reciprocity, publicity, and accountability ... inform the content of the deliberative perspective over time. When citizens and officials engage the dynamic of deliberative democracy, they use the principles of liberty and opportunity to bring about changes in the sources of moral disagreements—especially in the . . . nature of the diversity of reasonable moral points of view. The principles of deliberative democracy (and any agreement they create) are thus provisional. They not only are subject to revision in light of new information and better arguments, but also are a cause of such revision. Responsible citizens should thus regard many of their own moral claims as provisional.  

Young-earth creationists and Dawkinsian atheists will not settle their differences by any such deliberative process. But if they are compelled at least provisionally to resolve their differences in local school board meetings or their like, the rest of

259 See id. at 343–45.
us can be sure that their fundamental political and legal rights have been observed and that no eternal truth or scientific reality has been repudiated in a manner precluding correction in the course of the public debate that is the primary subject of the First Amendment.

In the same vein, David Tyack concluded after many decades of observation and reflection that:

there is still a good case for vesting decisions about education, as much as possible, with the people who have to live directly with the results of those decisions, in local districts and even in individual schools. Democracy is about making wise collective choices. Democracy in education and education in democracy are not quaint legacies from a distant and happier time. They have never been more essential to wise self rule than they are today.261

V. A ROLE FOR CONGRESS?

If the Congress of the United States were to share the opinion that a federal court is not the right forum for resolving issues of public school politics, it might usefully consider relieving the federal courts of jurisdiction to enforce the Supreme Court’s regrettable direction that local school boards be psychoanalyzed to detect possible sectarian aims.

A relevant example is the Norris-LaGuardia Act of 1932262 that relieved the federal courts of responsibility for assessing the legality of strikes by workers. For half a century prior to that legislation, federal judges had been issuing several strike-breaking preliminary injunctions a week, thereby presuming to govern labor relations on a broad scale.263 The legislation did not change the substantive law. It merely retired the federal judiciary to other work that it was better suited to perform. A similar act might require federal courts to transfer to a local state court any case in which a public school curriculum or textbook is challenged as an establishment of religion. The Federal Constitution as well as the state constitutions would remain applicable, but it would be left to the Supreme Court of the United States when reviewing decisions of highest state courts to determine whether the First Amendment as incorporated in the Fourteenth had been adequately enforced in lower courts.264 One might

261 Tyack, Seeking Common Ground, supra note 16 at 185.
264 A more radical solution would be to foreclose the jurisdiction of the Supreme Court as well, as was done to protect reconstruction legislation from the Court. See Ex parte McCardle, 74 U.S. (Wall.) 506 (1868). Whether the Court would or should hold still for that degree of constraint by Congress is a question. See Laurence Claus, The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III, 96 Geo. L.J. 59 (2007).
hope that the Court would be moved to establish a more viable test of constitutionality than the psychoanalysis of school board members required by its utterances to date. The benign secondary effect of such legislation would be to redirect the attention and energy of those engaged in the dispute to deliberative processes where hopes for peaceful if temporary resolution might be pursued. That would be a highly legitimate goal for a Congress that values democratic traditions and respects the rights of all its citizens.

In the alternative, Congress might be tempted to address the merits of the issue presented by the cases cited. The law made by the Court to govern the science classroom is dependent on its incorporation of the First Amendment within the Fourteenth Amendment. Section 5 of the Fourteenth Amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." 265 That text might plausibly be read to empower Congress to define the principle by which the First Amendment may or should be applied to constrain local school boards or classroom science teachers from acknowledging with respect the tension between scientific and religious heresies.

Whether an agreeable substantive principle can be fashioned is doubtful. But one might be tempted to say that whatever Congress could produce would be preferable to the Supreme Court doctrine licensing the federal judiciary as the psychoanalysts of local politicians. The best this author can provide is that locally elected school boards shall bear responsibility for assuring that the religious faiths of their students shall not be advanced, celebrated, or questioned by any academic program. The aims of such a text would be to protect the rights of local politicians, as well as classroom science teachers, to exercise freedom of speech and to assure that the inevitable disputes between science and religion are localized in order to minimize their consequences to the larger social order.

CONCLUSION

For local politicians to ignore or treat with disrespect either a religious belief held by their constituents or a scientific reality is bad public school politics. To require them to do so is bad constitutional law. Given the state of the world and of the deeply divided minds of fellow citizens on the subject of natural selection, ours should be a time for deliberation and judicial tolerance of democratic politics. Little if anything could be lost if the federal judiciary, and even Congress, were more deferential to local institutions capable of the public deliberation envisioned by the First Amendment.

265 U.S. CONST. amend. XIV, § 5.