

BREAKING EVOLUTION'S MONOPOLY ON  
ORIGINS: SELF-GOVERNANCE, PARENTAL  
RIGHTS, AND RELIGIOUS VIEWPOINTS IN THE  
PUBLIC SQUARE—A RESPONSE TO KEVIN  
TROWEL'S *DIVIDED BY DESIGN*

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INTRODUCTION

[I]t remains to be demonstrated whether it is possible, even if desirable, to . . . completely . . . isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . Even such a “science” as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. . . . One can hardly respect a system of education that would leave the student wholly

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<sup>†</sup> Juris Doctor Candidate, Ave Maria School of Law, 2009. To Julianne, who endured many lonely evenings on account of this Note, and without whose fond support it would not have been possible. And to Lincoln, Tyler, Faith, Bethany, and Michael, whose affection and love are more highly esteemed than any possible achievement or accolade. Finally, to Kevin Trowel, whose scholarship is the object, in large part, of this Note. The clarity and precision with which he articulates his position enables a sharp and robust debate to transpire, and though we have not met, I extend to him my hand in friendship and respect.

ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.<sup>1</sup>

~Justice Robert H. Jackson

In recent years, there has been a revival of the debate over the origin of the human family. The debate reaches well beyond the question of what to teach public schoolchildren, although that is perhaps its most visible aspect. On a deeper level, it raises questions about the role of parents in, and the traditionally local character of, public education. In this sense, the debate represents a microcosm of centuries-old issues at the heart of liberty, self-governance, and our federalist system. This Note addresses three major aspects of the origins debate by answering three pivotal questions: *What* should be taught? *Who* should decide what is taught? And at *what level* should that decision be made? Analyzing these questions is not merely an academic exercise, for as Aristotle aptly observed, "All who have meditated on the art of governing mankind have been convinced that the fate of empires depends on the education of youth."<sup>2</sup>

In answering these three vital questions, this Note counters the scholarship of Kevin Trowel, whose Note, *Divided by Design: Kitzmiller v. Dover Area School District, Intelligent Design, and Civic Education* ("*Divided by Design*"),<sup>3</sup> received the 2007 Scribes Law Review Award for the best student-written law review piece in the nation.<sup>4</sup> Trowel's grand motif in *Divided by Design* is that teaching intelligent design<sup>5</sup> causes social division.<sup>6</sup> Implicit in his argument is that teaching evolution does not. This Note refutes that argument. Teaching intelligent design does not cause social division any more

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1. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 235–36 (1948) (Jackson, J., concurring).

2. This saying is attributed to Aristotle. See, e.g., EZRA TAFT BENSON, AN ENEMY HATH DONE THIS 229 (1969) (quoting Aristotle).

3. Kevin Trowel, Note, *Divided by Design: Kitzmiller v. Dover Area School District, Intelligent Design, and Civic Education*, 95 GEO. L.J. 855 (2007).

4. Scribes Annual Awards, <http://www.scribes.org/awards.html> (last visited Oct. 27, 2008).

5. Intelligent design theorizes that "intelligent agency, as an aspect of scientific theory-making, has more explanatory power in accounting for the specified, and sometimes irreducible, complexity of some physical systems, including biological entities, and/or the existence of the universe as a whole, than the blind forces of unguided and everlasting matter." Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461, 462 (2003). For an excellent, succinct exposition of the science and theoretical constructs behind intelligent design, see *id.* at 470–82.

6. Trowel, *supra* note 3, at 859, 870–75, 892–94.

than teaching evolution does. The central origins question, *What is the explanation of the origin of the human family?*, is itself controversial. Evolution and intelligent design confidently propose two distinct answers to that question.<sup>7</sup> Yet the answer to that timeless question implicates deeply held religious and philosophical beliefs<sup>8</sup>—*and therein lies the true source of the controversy.*

Part I of this Note briefly paints the legal and cultural backdrop that informs and frames the modern origins debate and submits that the current framework is founded on an unjust and unjustifiable premise: that religious views should occupy virtually no place in the public realm. Part II argues the case for local control in origins curriculum decisions. And Part III insists that parents be given the opportunity to meaningfully participate in origins curriculum decisions. Finally, Part IV answers the sixty-four-million-dollar question, *What should be taught?*, by proposing that public schools be permitted (should they so desire) to include religious perspectives on the origins question as part of an academic, nonsectarian curriculum. This solution provides the child with a comprehensive education, establishes no state religion, and promotes the democratic principles of self-governance and local control. Furthermore, it retreats from the intolerance and hostility that have been exhibited toward religion over the last half century and, in a measure, “restore[s] religion to an honorable place in public life.”<sup>9</sup>

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7. Francis Beckwith argues that intelligent design and evolution provide “different answers” to the “same question”—“What is the origin of apparent design in biological organisms and/or other aspects of the natural universe? Evolution answers the question by appealing to the forces of unguided matter, [whereas intelligent design appeals] to intelligent agency.” Beckwith, *supra* note 5, at 491.

8. *E.g.*, Jay D. Wexler, *The Scopes Trope*, 93 GEO. L.J. 1693, 1716 (2005) (reviewing LARRY A. WITHAM, *WHERE DARWIN MEETS THE BIBLE: CREATIONISTS AND EVOLUTIONISTS IN AMERICA* (2002)) (“[V]iews on human origins are at the center of many religious traditions . . .”).

9. Dallin H. Oaks, *Religion in Public Life*, ENSIGN, July 1990, at 6, 7–8 (“[A] symbol and pattern of hostility to religion and indifference to religious liberty . . . have characterized many court decisions, much media publicity, and some public understandings [since the 1960s] . . .”); *cf.* Lee v. Weisman, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting) (“[M]aintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate . . .”).

## I. LEGAL AND CULTURAL BACKGROUND: REFRAMING THE DEBATE

### A. *From a Generalized Protestantism to a Generalized Secularism*

Ironically, the historical debate surrounding this subject originated with a controversy over teaching *evolution*, not intelligent design or creationism.<sup>10</sup> In fact, until relatively recent times, public schools in some areas continued to teach creationism as the only explanation of origins.<sup>11</sup> Where such was the custom, and where teaching a particular version of creationism was used to forward a “generalized Protestantism,” the practice amounted to a “semi-establishment of one religion” that was unfair to students (and parents) who did not believe the general Protestant creationist account.<sup>12</sup> Today, much to the credit of the courts, public schools are no longer constitutionally permitted to teach origins in a denominationally slanted manner.<sup>13</sup>

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10. See *Scopes v. State*, 289 S.W. 363, 363, 366–67 (Tenn. 1927) (ruling on the constitutionality of Tennessee’s law forbidding the teaching of evolution in public schools). For a definition of intelligent design, see *supra* note 5. As for creationism, the Islamic, Christian, and Jewish traditions are in broad agreement in proclaiming that a Supreme Being created the earth, all animal and plant life, and the human family. See Judith A. Villarreal, Note, *God and Darwin in the Classroom: The Creation/Evolution Controversy*, 64 CHI.-KENT L. REV. 335, 350, 351 n.133 (1988) (explaining that the Islamic “creation narrative is essentially that of Judaism and Christianity” (citing J. WILLIAMS, ISLAM 20–26 (1962))).

11. For example, Arkansas’s law forbidding public school instruction in any theory “that mankind . . . descended from a lower order of animals” was not struck down by the Supreme Court until 1968. *Epperson v. Arkansas*, 393 U.S. 97, 98–99, 109 (1968) (internal quotation marks omitted) (quoting ARK. STAT. ANN. § 80-1627 (1960 Repl. Vol.)).

12. See WILLIAMSBURG CHARTER (1988), reprinted in 8 J.L. & RELIGION 5, 13–14 (1990) [hereinafter WILLIAMSBURG CHARTER]; Anthony R. Picarello, Jr., *The Good News of InnerChange*, 7 AVE MARIA L. REV. 25, 49 (2008) (explaining that use of the term “sectarian”—with its negative connotation—“served as the legal weapon of choice for targeting Catholics for special disfavor in the mid-nineteenth century [because] denying funds to ‘sectarian’ schools allowed nativist majorities to block educational funding to Catholic schools while continuing to fund freely the ‘common’ schools, where the ‘nonsectarian’ religion of lowest-common-denominator Protestantism was taught”).

13. The Supreme Court’s jurisprudence on this narrow topic (teaching origins in public schools) is rather sparse. In fact, the reader may be surprised to learn that the Supreme Court has never directly addressed the constitutionality of teaching *creationism* in public schools. In 1968, the Court handed down *Epperson v. Arkansas*, striking down Arkansas’s anti-evolution statute. *Epperson*, 393 U.S. at 98–99, 109. Even after *Epperson*, however, teaching creationism presumably remained a constitutionally viable practice because *Epperson* merely forbade schools from excluding evolution. *Id.* But by 1987, things had changed. In that year, the Court decided *Edwards v. Aguillard*, a case that struck down Louisiana’s Balanced Treatment for Creation-Science and Evolution-Science Act, LA. REV. STAT. ANN. §§ 17:286.1–.7 (West 2001), which required public schools to give equal treatment to evolution and creation-science.

The pendulum, however, has swung far in the other direction, eroding the very fairness that led to the prohibition of the sectarian-specific creationism that once prevailed. Today, evolution enjoys a virtual monopoly on origins because public schools are strictly forbidden from teaching creationism,<sup>14</sup> "creation-science,"<sup>15</sup> and even, in some cases, intelligent design.<sup>16</sup> Needless to say, the banishment of all viable alternatives to evolution has not ended the controversy.<sup>17</sup> Indeed, many believe that the modern evolution-only paradigm is just as wrong as was the once-prevalent sectarian-specific creationism.<sup>18</sup>

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Edwards v. Aguillard, 482 U.S. 578, 580–81, 597 (1987). By holding that public school instruction in creation-science violated the Establishment Clause, the Court implicitly ended any speculation as to the constitutionality of teaching creationism.

14. The banning of creationism from public schools did not develop overnight. Gradually, beginning in the 1960s, court opinions began to require greater secularization in the classroom. Oaks, *supra* note 9, at 8–9. Then, in 1971, the Supreme Court adopted the *Lemon* test as its threshold standard in Establishment Clause cases. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The *Lemon* test has three prongs, and failure under a single prong is constitutionally fatal: (1) the legislature must have adopted the law with a secular purpose; (2) the law's primary effect must not advance or inhibit religion; and (3) the law must not result in an excessive entanglement of government with religion. *Edwards*, 482 U.S. at 582–83 (citing *Lemon*, 403 U.S. at 612–13). Perhaps sensing that teaching creationism would no longer pass constitutional muster under the newly announced *Lemon* test, three states (Tennessee, Arkansas, Louisiana) enacted laws between 1973 and 1982 that required public schools to give equal treatment to evolution and "creation-science"; all three were eventually struck down by federal courts. LA. REV. STAT. ANN. §§ 17:286.1–7 (West 2001), *invalidated by Edwards*, 482 U.S. at 580–81, 597; Balanced Treatment for Creation-Science and Evolution-Science Act, 1981 Ark. Acts 1231, *invalidated by McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1274 (E.D. Ark. 1982); Act of April 30, 1973, ch. 377, 1973 Tenn. Pub. Acts 1364, *invalidated by Daniel v. Waters*, 515 F.2d 485, 489–92 (6th Cir. 1975).

15. *Edwards*, 482 U.S. at 580–81, 597 (striking down Louisiana's Balanced Treatment Act, which required public schools to give equal treatment to evolution and creation-science). Louisiana defined creation-science as "the scientific evidences for creation and inferences from those scientific evidences." LA. REV. STAT. ANN. § 17:286.3(2) (West 2001).

16. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 734, 763–65 (M.D. Pa. 2005) (holding the teaching of intelligent design in public schools unconstitutional because, among other things, it "implicates and thus endorses religion").

17. *E.g.*, Wexler, *supra* note 8, at 1709–10 (citing contemporary examples of the debate and observing that "[m]ost of the controversy . . . has centered on the nation's public elementary and secondary schools").

18. *See WILLIAMSBURG CHARTER*, *supra* note 12, at 13–14.

In earlier times, though lasting well into the twentieth century, there was a de facto semi-establishment of one religion in the United States: a generalized Protestantism given dominant status in national institutions, especially in the public schools. This development was largely approved by Protestants, but widely opposed by non-Protestants, including Catholics and Jews.

In more recent times, and partly in reaction, constitutional jurisprudence has tended, in the view of many, to move toward the de facto semi-establishment of a *wholly secular understanding of the origin, nature and destiny of humankind* and of

Today's debate has largely shifted to the constitutionality of teaching intelligent design.<sup>19</sup> Although this Note does not weigh in directly on that question, some of what is written here may have some bearing on it. This Note proposes a solution that moves beyond the bounds of the debate as it is presently framed. Merely debating whether intelligent design is constitutional under current Establishment Clause jurisprudence is problematic because the framework of that debate assumes from the outset that public school curricula must be strictly secular, leaving little or no room for the discussion of religious views.<sup>20</sup> Such an approach is defective insofar as it demands as a prerequisite irreligious secularity.<sup>21</sup> Moreover, current Establishment Clause jurisprudence ignores the reality that teaching *evolution* implicates, and in many cases contradicts,

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the American nation. During this period, the exclusion of teaching about the role of religion in society, based partly upon a misunderstanding of First Amendment decisions, has ironically resulted in giving a dominant status to such wholly secular understandings in many national institutions. Many secularists appear as unconcerned over the consequences of this development as were Protestants unconcerned about their de facto establishment earlier.

*Id.* (emphasis added).

19. See, e.g., Stephen A. Newman, *Evolution and the Holy Ghost of Scopes: Can Science Lose the Next Round?*, 8 RUTGERS J.L. & RELIGION 1, 2–3 (2007), <http://org.law.rutgers.edu/publications/law-religion/articles/Newman.pdf> (speculating that if a case challenging intelligent design comes before the Supreme Court as currently constituted, the outcome may come down to Justice Kennedy's vote).

20. Some have suggested that "secular purpose" should be understood to mean "general public purpose," rather than "non-religious purpose," WILLIAMSBURG CHARTER, *supra* note 12, at 14, but clearly the Supreme Court has declined to adopt this view, see *Edwards*, 482 U.S. at 594. When the argument is framed in strictly secular (that is, nonreligious) terms, proponents of intelligent design or creationism are forced to argue that the motivation (or at least a motivation) behind such instruction is nonreligious, which in practice may be difficult, if not impossible, to prove. See *Edwards*, 482 U.S. at 582–94 (searching in vain for a secular purpose to public school instruction in creation-science); cf. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 901–02 (2005) (Scalia, J., dissenting) (pointing out that the *Lemon* test originally required merely that legislation be enacted with "a secular . . . purpose," but that the majority in *McCreary* had morphed that test to now require that the secular purpose "predominate" (internal quotation marks omitted)).

21. Cf. Dallin H. Oaks, *Religious Values and Public Policy*, ENSIGN, Oct. 1992, at 60, 60.

I believe that these contrasting approaches [moral relativism versus moral absolutes] underlie the whole discussion of religious values in public policy. Many differences of opinion over the role of religion in public life simply mirror a difference of opinion over whether there are moral absolutes. But this underlying difference is rarely made explicit. It is as if those who assume that all values are relative have established their assumption by law or tradition and have rendered illegitimate the fundamental belief of those who hold that some values are absolute.

*Id.*

religious views.<sup>22</sup> Ignoring this reality is unfair and logically inconsistent. For these reasons, this Note argues that a new approach to teaching origins is in order under a fresh, original interpretation of the First Amendment.<sup>23</sup>

### B. *The Origins of Social Division*

It has been said that “differences over belief are the deepest and least easily negotiated of all.”<sup>24</sup> Kevin Trowel’s major premise in *Divided by Design* is that teaching intelligent design is a divisive, society-splintering undertaking.<sup>25</sup> His unstated assumption is that teaching evolution is a neutral and uncontroversial exercise that has a unifying, cohesive effect on society. His argument fails because teaching evolution is no less divisive or controversial than teaching intelligent design. Both purport to answer the same question, *What is the explanation of the origin of the human family?*<sup>26</sup> Trowel insists that intelligent design’s answer to that question is divisive, but that somehow evolution’s answer is not.

Simply put, Trowel misapprehends the source of the controversy, which arises not from teaching intelligent design, but from addressing the origins question itself. That question and its answer have distinctly religious and philosophical components.<sup>27</sup> For starters, how one answers the origins question directly affects the formation of one’s worldview, with all that that entails. Because Trowel overlooks this dynamic of the origins debate, he cannot see that the controversy inherent in teaching origins exists independent and distinct from teaching either evolution or intelligent design.

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22. See discussion *infra* Part I.B. In *Edwards*, the Supreme Court addressed the implications of evolution upon religion with such brevity that Justice Scalia characterized the decision as a “*Scopes-in-reverse*,” and accused the majority of exhibiting an “unprecedented readiness to reach . . . a conclusion . . .” *Edwards*, 482 U.S. at 634 (Scalia, J., dissenting).

23. An exploration of the original meaning of the religion clauses is well beyond the scope of this Note. Nevertheless, this Note builds on the premise that the First Amendment was intended to protect, preserve, and encourage religion and religious practice generally.

24. WILLIAMSBURG CHARTER, *supra* note 12, at 7.

25. Trowel, *supra* note 3, at 859, 870–75, 892–94.

26. Cf. WILLIAMSBURG CHARTER, *supra* note 12, at 13 (“The intensity of the debate is commensurate with the importance of the issues debated . . .”).

27. E.g., Wexler, *supra* note 8, at 1716 (“[V]iews on human origins are at the center of many religious traditions . . .”).

In the closing argument of *Kitzmiller v. Dover Area School District*,<sup>28</sup> the lead attorney who argued against the constitutionality of intelligent design insisted that “one of the major concerns that prompted adoption of the religion clauses was that the framers and the citizens of their time intended to guard against the civil divisiveness that follows when the government weighs in on one side of a religious debate.”<sup>29</sup> He was right. Civil divisiveness *does* naturally ensue when the government chooses sides in a religious contest.<sup>30</sup> But based on that logic, does not the government provoke civil divisiveness when it excludes all religious views from a curriculum that *itself implicates religious beliefs*?<sup>31</sup> In that case, is not the government “weigh[ing] in on one side of a religious debate”—namely the side that excludes traditional religious viewpoints and promotes only ostensibly secular ones?<sup>32</sup> Even if one believes that the government acts appropriately by banning religious perspectives from origins curricula, it is fanciful to argue that by so doing the government has chosen no position or that its position is one of strict neutrality.<sup>33</sup>

Furthermore, when ostensibly secular ideas promoted by the government negate, or define as untenable, traditional religious views, they unseat the traditional religious views, thus becoming themselves religious, or at least pseudo-religious. Accordingly, it is

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28. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708–09, 763–65 (M.D. Pa. 2005) (holding that “teach[ing intelligent design] as an alternative to evolution in a public school science classroom” violated both Pennsylvania’s Constitution as well as the First Amendment’s Establishment Clause).

29. Transcript of Oral Argument at 58, *Kitzmiller*, 400 F. Supp. 2d 707 (No. 4:04-CV-02688) [hereinafter Oral Argument].

30. *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting) (“The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife.”); *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (“[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.” (citation omitted)).

31. See Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 663 (1987) (“If [public schools] may touch on ultimate questions—the meaning of the universe, the purposes of human life, the sources of ethical duty, etc.—yet teach only some of the possible answers to those questions, [they] may directly influence students’ beliefs on those matters.”).

32. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“To hold that [a state] may not [encourage religious instruction or accommodate religion] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.”).

33. See *id.*



futile to argue, as Trowel has, that a governmental ban against the discussion of traditional religious viewpoints (or even against the discussion of intelligent design, which is more akin to a discussion of the mere *possibility* of certain religious viewpoints) does not foster civil divisiveness.<sup>34</sup> Such a ban simply is not neutral. It is, in fact, divisive.

Then again, perhaps Trowel is making a more subtle point. Perhaps he is suggesting that social harmony can and ought to be maintained by requiring those who disbelieve evolution's account of origins to hold their peace by acquiescing to the status quo.<sup>35</sup> Such reasoning, if that is indeed part of what Trowel is suggesting, is reminiscent of an observation by Professor Frederick Mark Gedicks:

[S]ecularism has not *solved* the problem posed by religion in public life so much as it has *buried* it. By placing religion on the far side of the boundary marking the limit of the real world, secularism prevents public life from taking religion seriously. Secularism does not teach us to live with those who are religious; rather, it demands that we ignore them and their views. Such a "solution" can remain stable only so long as those who are ignored acquiesce in their social situation.<sup>36</sup>

Opinion polls show that those whose views on origins are "ignored" represent a significant segment of society. The great majority (66%) of Americans believe "that God created human beings pretty much in their present form at one time within the last 10,000 years,"<sup>37</sup> and most (54%) want public schools to include creationism in the curriculum, whereas only a small minority (22%) oppose the inclusion of creationism in public school curricula.<sup>38</sup> Given these results, it appears that those who jealously guard evolution's current monopoly on origins represent a relatively small percentage of the

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34. Trowel, *supra* note 3, at 859, 870–75, 891–94; cf. Frederick Mark Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113, 139 (1991) (arguing that secularism has not solved, but suppressed the conflict raised by religion in public life).

35. See Trowel, *supra* note 3, at 859, 870–75, 892–94.

36. Gedicks, *supra* note 34, at 139.

37. Gallup Poll, *Evolution, Creationism, Intelligent Design*, June 1–3, 2007, <http://www.gallup.com/poll/21814/Evolution-Creationism-Intelligent-Design.aspx> (on file with the Ave Maria Law Review). Thirty-nine percent responded that the creationist account of origins was "definitely true," and 27% responded that it was "probably true." *Id.* Only 15% responded that it was "definitely false." *Id.*

38. *Id.*

population, rendering Professor Gedicks's observation, quoted above, all the more profound.

Contemporary America is more sharply divided than it has been at any time since the Civil War, and the most salient and telling characteristic that cuts across that divide is not age or sex, race or national origin. It is religion.<sup>39</sup> The single most reliable indicator of where one stands on a host of hot-button issues is weekly church attendance at a traditional religious service.<sup>40</sup> And no less is true in the context of the evolution-creationism debate. A 2007 Gallup poll asked respondents who indicated that they did not believe in evolution a follow-up, open-ended question, allowing them to explain why.<sup>41</sup> The reasons Americans gave for disbelieving evolution were overwhelmingly religious—most of them directly or indirectly referring to the Judeo-Christian tradition.<sup>42</sup>

The poll further found that 74% of those who attend church weekly do *not* believe in evolution, while on the other hand, 71% of those who “seldom or never” attend church expressed a belief *in* evolution.<sup>43</sup> Based on this poll data, one can reasonably conclude that

39. Cf. The Pew Forum on Religion & Public Life, Religion and Politics, <http://www.pewforum.org/religion-politics/> (last visited Oct. 8, 2008) (“In recent years, religion has been woven more deeply into the fabric of partisan politics than ever before.”).

40. See Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 465 (2007). Among the issues that divide along religious lines are political party affiliation, sex education in public schools, the morality of extramarital sexual relations, abortion, homosexuality, and euthanasia. *Id.* at 465–66 (political party affiliation); *id.* at 490–91 (sex education); *id.* at 476–77 (extramarital sexual relations); Steven G. Calabresi, “*A Shining City on a Hill*”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law, 86 B.U. L. REV. 1335, 1382 (2006) (abortion and homosexuality); Barry Rosenfeld, *Assisted Suicide, Depression, and the Right to Die*, 6 PSYCHOL. PUB. POL’Y & L. 467, 471 (2000) (euthanasia).

41. Frank Newport, *Majority of Republicans Doubt Theory of Evolution*, GALLUP NEWS SERVICE, June 11, 2007, <http://www.gallup.com/poll/27847/Majority-Republicans-Doubt-Theory-Evolution.aspx> (on file with the Ave Maria Law Review).

42. *Id.* The responses and the corresponding percentages of each response are listed below:

I believe in Jesus Christ .....	19%
I believe in the almighty God, creator of Heaven and Earth.....	16%
Due to my religion and faith .....	16%
Not enough scientific evidence to prove otherwise.....	14%
I believe in what I read in the Bible .....	12%
I’m a Christian.....	9%
I don’t believe humans come from beasts/monkeys .....	3%
Other/ No reason in particular/ No opinion.....	10%

*Id.*

43. *Id.*

religion, as indicated by church attendance, plays a significant role in shaping opinions for or against evolution. Moreover, the data further confirms the inherently religious and philosophical nature of the origins question, *What is the explanation of the origin of the human family?*

### C. *A Lesson from Scopes*

A lesson taken from the genesis of legal history on this very subject discredits any speculation that intelligent design (or creationism or creation-science) is to blame for any social division that teaching origins arouses. More than eighty years ago, John Scopes, a Tennessee public school teacher, taught his students that humans descended from lower forms of animals, and for so doing, was convicted and fined \$100.<sup>44</sup> His trial attracted national attention and was the catalyst of great social division.<sup>45</sup> Deeply held beliefs were at issue, and the intensity of the debates made the case legendary.<sup>46</sup> Apparently, even the Tennessee Supreme Court was not ignorant of the social upheaval that the trial provoked, for after finding a procedural technicality on which to set aside Scopes's conviction, the court dismissed the case to conserve "the peace and dignity of the state."<sup>47</sup>

*Scopes* symbolizes one of the most heated and controversial debates in American history. Yet significantly, the controversial curriculum in *Scopes* was not creationism or intelligent design, but *evolution*.<sup>48</sup> *Scopes's* unmistakable lesson, then, is that the teaching of origins in public schools is *itself* contentious. Whether that teaching is evolution or something else makes little difference because the controversy arises from addressing the origins question—the answer to which has implications that have the power to shake the foundations of any religious belief or philosophical construct.

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44. *Scopes v. State*, 289 S.W. 363, 363 (Tenn. 1927).

45. *E.g.*, Anthony Kirwin, Note, *Toto, I've a Feeling We're . . . Still in Kansas? The Constitutionality of Intelligent Design and the 2005 Kansas Science Education Standards*, 7 MINN. J. L. SCI. & TECH. 657, 657 (2006) ("[*Scopes*] captured national attention and brought the issue to the forefront of public awareness.")

46. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 634 (1987) (Scalia, J., dissenting) (referring to the "legend of *Scopes*"); *Epperson v. Arkansas*, 393 U.S. 97, 98, 109 (1968) (referring to "the famous Tennessee 'monkey law,'" the "celebrated *Scopes* case," and the "sensational publicity" of the *Scopes* trial).

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

48. *Id.* at 363–64.

## II. THE CASE FOR LOCAL CONTROL

Six years before he was elected president, Abraham Lincoln gave a speech, discussing at length the institution of slavery and the profound problems in trying to eliminate it.<sup>49</sup> Although Lincoln “hate[d]” the *spread* of slavery, he nevertheless acknowledged, “If all earthly power were given me, I should not know what to do, as to the existing institution.”<sup>50</sup> Nearly a century later, Justice Robert H. Jackson offered a similar, Lincoln-like response when he confronted a different, but perhaps equally vexing question: *What is religion’s proper place in public education?*<sup>51</sup> The answer to this complex riddle, Justice Jackson confessed, “is more than I know,” adding that it is “a subtle inquiry,” except in the crudest cases, to ascertain the point where mere “instruction” becomes “evangelism.”<sup>52</sup> Calling the problem one of “magnitude, intricacy[,] and delicacy,”<sup>53</sup> he candidly and humbly acknowledged the profound difficulties of crafting a solution that would “satisf[y] or even [provide] justice to all faiths.”<sup>54</sup>

He nevertheless concluded that the Supreme Court was not the proper body to address the issue with sweeping finality:

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions.<sup>55</sup>

He then warned that the Court would not only fail in its quest to neatly resolve this question, but further, that its jurisprudence would prove embarrassingly erratic, “mak[ing] the legal ‘wall of separation between church and state’ as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.”<sup>56</sup> An Old Testament prophet could not have provided a more accurate description

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49. Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848–1858, at 247, 255–56 (Roy P. Basler ed., Rutgers Univ. Press 1953).

50. *Id.* at 255.

51. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

52. *Id.*

53. *Id.* at 237.

54. *Id.* at 236.

55. *Id.* at 237–38.

56. *Id.* at 238.

of the Supreme Court's "serpentine-wall-like" Establishment Clause jurisprudence that has transpired since the time of Justice Jackson's warning.<sup>57</sup>

Justice Jackson believed the key to resolving the question of religion's place in public education was to allow *local* school boards the autonomy to craft their own solutions with some degree of flexibility. He expected neighborhoods with differing "racial, religious[,] and cultural compositions" to "adopt different customs [that] emphasi[ze] . . . different values and . . . induce different experiments."<sup>58</sup> He acknowledged that even this approach was imperfect; nevertheless, he concluded, "We must leave some flexibility to meet local conditions, some chance to progress by trial and error."<sup>59</sup>

In this country, states have traditionally enjoyed exclusive control (*vis-à-vis* the federal government) over public education—subject of course to constitutional constraints—and the Supreme Court has repeatedly confirmed the wisdom and staying power of this deeply rooted tradition.<sup>60</sup> Not everyone, however, is satisfied, and a few, including Trowel, have raised their voices in favor of some form of national curriculum.<sup>61</sup>

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57. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 900 n.8 (2005) (Scalia, J., dissenting) (noting "the utter inconsistency of our Establishment Clause jurisprudence"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (noting that "our Establishment Clause jurisprudence is in hopeless disarray"); *Edwards v. Aguillard*, 482 U.S. 578, 639–40 (1987) (Scalia, J., dissenting) ("In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it 'sacrifices clarity and predictability for flexibility.'" (footnote omitted) (quoting *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980))).

58. *McCullum*, 333 U.S. at 237.

59. *Id.*

60. See *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than *local control* over the operation of schools . . ." (emphasis added)); *id.* at 744 ("Of course, no state law is above the Constitution. . . . [P]resent laws with respect to local control[] are not sacrosanct . . . if they conflict with the Fourteenth Amendment . . ."); *id.* at 741–42 ("[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of *state* and *local* authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." (emphasis added)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of *state* and *local* governments." (emphasis added)).

61. Trowel, *supra* note 3, at 881; see, e.g., Elisabeth Jaffe, Note, *A Federally Mandated National School Curriculum: Can Congress Act?*, 24 SETON HALL LEGIS. J. 207, 220–28, 247, 249–50 (1999) (advocating the need for, and the constitutionality of, a mandatory, minimum-standard, nationally established curriculum); Elizabeth Wehner, Book Annotation, 21 N.Y.U. REV. L. & SOC. CHANGE 816, 816 (1995) (noting the "surge [of] interest in the late 1980s in the idea

Unlike those who call for the *total* nationalization of public school curriculum, Trowel advocates a narrower position that would require local “civic education” standards to conform to “nationally established limits.”<sup>62</sup> By civic education, Trowel means “political virtues,” such as social cooperation, toleration, mutual respect, fairness, and civility.<sup>63</sup> Surely, no one of political consequence disputes the need for such time-tested virtues, nor the importance of instilling a sense of civic duty in the young.<sup>64</sup> The question, rather, is whether the *federal* government should be setting civic education standards (to say nothing of whether the federal government has the constitutional *power* to do so).

Trowel ostensibly argues for a middle-of-the-road approach, grounded, he claims, in principles of “federalis[m].”<sup>65</sup> Trowel describes his program as one of “local control within nationally established limits.”<sup>66</sup> But his notion of “local control” is curious, to say the least. Trowel explains, “Civic education . . . must provide students with the tools to be active, critical, political, but tolerant citizens. This will sometimes put the goals of a system of civic education in conflict with the desires of individual groups or

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of a national core curriculum” and defining “core curriculum” as “a nationally homogenous body of facts and ideas which should be at the center of American education”).

62. Trowel, *supra* note 3, at 881–82. Trowel suggests that a divisive curriculum (specifically, intelligent design) contravenes a proper, national, civic education, and further, that its “divisiveness” should be considered—using the “endorsement test” framework—as an additional “layer of analysis” in evaluating the curriculum’s constitutionality under the Establishment Clause. *Id.* at 888–94.

63. *Id.* at 882.

64. George Washington, for example, recognized that instilling a sense of civic duty is vital to the nation—although he disagreed with the notion that education, alone, could inspire it:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens. The mere Politician, equally with the pious man ought to respect and to cherish them. . . . Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

George Washington, Farewell Address (Sept. 19, 1796), in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* 72, 76 (Bruce Frohnen ed., 2002).

65. Trowel, *supra* note 3, at 881. Trowel labels as “unappealing” the proposal to centralize “all control at the national level.” *Id.* (emphasis added).

66. *Id.*

communities."<sup>67</sup> And when it does, Trowel explains, the federal interest in civic education must prevail over the democratic expression of parents, school boards, or even states.<sup>68</sup> So much for local control.

Presumably, Trowel's proposed curriculum standards for a civic education would be established and enforced by the courts or by a federal agency.<sup>69</sup> But unless democracy and self-government are to be discarded as an empty shell of a promise, public education itself must operate under a democratic system, within clear constitutional limits.<sup>70</sup> Furthermore, even if Trowel's proposed civic education standards were democratically established at the national level (which Trowel is *not* advocating), such a process would still lack the benefits of local control. Just having a say in the curriculum is not necessarily in keeping with principles of self-governance. The vote that counts most is the vote closest to home.<sup>71</sup> Accordingly, states should follow the principle of subsidiarity—that "a community of a higher order should not interfere in the internal life of a community of a lower

67. *Id.* at 882.

68. *See id.* Trowel speaks of a civic curriculum that trumps both "groups" and "communities." *Id.* Because this civic curriculum is to be guided by *nationally* established standards, I presume that it would trump not only "groups" and "communities," but also states.

69. *See id.* at 881–83. Trowel evaluates intelligent design under three proposed standards for a civic education, concluding that intelligent design fails under each one. *Id.* at 883. Evaluating curriculum proposals with multi-prong tests is not the work of legislatures or the citizenry, but of courts or agencies.

70. *Cf. Milliken v. Bradley*, 418 U.S. 717, 742 (1974) ("[L]ocal control over the educational process affords citizens an opportunity to *participate in decision making*, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" (emphasis added) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973))).

71. This poem, entitled *Diluted Liberty*, makes the point well:

Liberty's promise to rich and poor:  
 To raise one's voice, against or for,  
 And, at close of fair debate,  
 To mark a ballot, participate.  
 Votes cast nearest heat and light  
 Ensure to each a chance to fight,  
 To urge, inspire, persuade, and lure  
 Another's views perhaps to stir.  
 But votes cast out on larger seas  
 Drown in volumes of voters' pleas,  
 And give to those far from the scene  
 A ruling hand o'er many a thing.  
 So, franchise rights need not be taken  
 For liberty's promise to be forsaken.

The poem is my own.

order, depriving the latter of its functions"<sup>72</sup>—and defer curriculum decisions to local school boards.

Setting aside constitutional issues (as to federal power to set civic education standards), giving Congress, the President, or any other federal body the power to set curriculum standards for the entire nation is fraught with monstrous risks. Friedrich A. Hayek observed that “the more highly one rates the power that education can have over men’s minds, the more convinced one should be of the danger of placing this power in the hands of any single authority.”<sup>73</sup> Local control over education provides a great check on the enormous power inherent in controlling what the children *of the nation* are taught.<sup>74</sup>

Because children’s minds are young, flexible, and easily molded to thoughts and theories, there is immeasurable power associated with controlling a civic education with nationally established limits.<sup>75</sup> No one understood this better than Adolph Hitler:

A key element for Hitler’s indoctrination of the masses was to capture the youth. Control the minds of the young, and you solidify your hold on the future. The Nazis used the schools to institutionalize the Nazi ideology. Instead of the home, the school became the central source of rearing and training children. In the name of restoring tradition, the Nazi state did more than any other regime to break down parental autonomy and to make the family simply a vehicle of state policy. Thus, the ideology was not found only in the laws of the state but also in the teachings of youth. . . .

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72. Pope John Paul II, *Centesimus Annus* [Encyclical Letter on the Hundredth Anniversary of Rerum Novarum] ¶ 48 (1991).

73. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 380 (1960).

74. The Constitution itself was framed and ratified with a suspicious eye on the centralization of power, and many of its provisions reflect that fact. *N.Y. Times Co. v. United States*, 403 U.S. 713, 715–16 (1971) (Black, J., concurring). Given the caution of the colonists in establishing a federal government of limited powers, it is altogether ironic that so many today call for the expansion of federal power with seemingly no concern for its ramifications on our freedom. See, e.g., Jaffe, *supra* note 61, at 249–51 (advocating the adoption of a national curriculum). Even assuming, for the sake of argument, that Congress *could* act in the matter, say, of adopting a national curriculum, many do not appear to have given much thought to the question of whether Congress *should* act. See, e.g., *id.* at 208–52. Perhaps the Constitution and our federalist system have done such an effective job of limiting the destructive powers of government, that we have forgotten that a powerful central government is a great menace to freedom. George Washington warned: “Government is not reason, it is not eloquence—it is force! Like fire it is a dangerous servant and a fearful master . . . .” 1 JACOB M. BRAUDE, *LIFETIME SPEAKER’S ENCYCLOPEDIA* 326 (1962) (quoting George Washington).

75. See Mitchell, *supra* note 31, at 663 (“Where the government so controls the environment of impressionable children, it possesses exceptional power to influence beliefs on any matters it touches.”).



From the earliest of ages, the Nazi ideology took over as the source for all the answers.<sup>76</sup>

Hitler's indoctrination program, like Trowel's notion of civic education, had little to do with reading and arithmetic.<sup>77</sup> Rather, it focused on training children in the "Nazi ideology"—or in other words, the Nazi civic education.<sup>78</sup> Moreover, Hitler's overwhelming success in programming the German youth<sup>79</sup> was no doubt only possible in a highly centralized system. Lord Acton's maxim, "Power tends to corrupt, and absolute power corrupts absolutely,"<sup>80</sup> has been passed down to us not for its prose, but for its precision. And the *absolute* power inherent in molding the minds of virtually every American child ought to, at a minimum, cause considerable concern, even among the most staunch advocates of federal power and programs.

### III. THE PARENT'S ROLE: WHO KNOWS BEST? FATHER AND MOTHER—OR BIG BROTHER?

Trowel insists that states, school boards, *and parents* must submit to nationally established standards under his proposed federal civic education program.<sup>81</sup> Trowel explains, "Leaving educational decisions to a raw majority 'assumes, probably erroneously, that parents, whether individually or as a voting majority, will not make serious, virtue-threatening, education-stifling mistakes.'"<sup>82</sup> With striking temerity, he sides with other "theorists of civic education" in asserting that "parents do not have the right to indoctrinate their children any more than does the state or any other educational agent. Nor do parents have the right to pass on their own religious beliefs if that entails exempting their children from an education for liberal

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76. Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida?*, 48 FLA. L. REV. 813, 820 (1996) (internal quotation marks omitted) (footnotes omitted).

77. *See id.*

78. *See id.*

79. *See, e.g., id.* at 821 ("[Nazi ideology] was so pervasive that it was extraordinarily difficult to exercise any personal freedom that was not specifically approved by it").

80. Letter from Lord Acton to Bishop Mandell Creighton (1887), in 1 LOUISE CREIGHTON, LIFE AND LETTERS OF MANDELL CREIGHTON 371, 372 (1904).

81. *See Trowel, supra* note 3, at 881–82.

82. *Id.* at 881 (quoting Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 160–61 (1995)).

democratic citizenship.”<sup>83</sup> Trowel defends these immoderate theories limiting parental authority on the basis that a “child is . . . a future citizen.”<sup>84</sup>

In a section entitled “The Tyranny of the Parent,” Trowel argues that leaving curriculum decisions to the democratic process at the local level risks parental tyranny, or “excessive parental control.”<sup>85</sup> Trowel further suggests that those who call for “local control” in education often use that phrase as a pretext to cover their true intention, which is “to dictate the conduct of the Government’s internal procedures.”<sup>86</sup> In other words, the education of youth is beyond the limits of a parent’s proper concern because educational decisions are part of the “Government’s internal procedures.”<sup>87</sup>

Trowel’s argument is reminiscent of a page in history, retold by Bill Graves, former Oklahoma state representative:<sup>88</sup>

In 1953, members of East Germany’s working class rioted in East Berlin against the Communist regime in classic revolutionary style. The embarrassed Communist regime, which justified its dictatorship in the name of that same working class, reacted by distributing leaflets saying that the German people had forfeited the government’s confidence and could only win it back by working harder. This move struck even leftist playwright Bertolt Brecht as being extreme; he expressed his disgust in his now famous poem, *The Solution*:

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83. *Id.* at 882 (internal quotation marks omitted) (quoting Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557, 576 (1995)).

84. *Id.* (internal quotation marks omitted) (quoting WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 252 (1991)).

85. *Id.* at 874–75.

86. *Id.* at 875 (internal quotation marks omitted) (quoting *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987)). I was somewhat amused by the capital “G” in “Government”—like the “G” in God. Trowel pulled the quotation from a judicial opinion, and the “G” undoubtedly was not intended (by Trowel or the court) to convey a “Supreme Government,” but given the quotation’s context—describing a government that trumps parental rights, even religious rights—a capital “G” seemed appropriate.

87. *Id.*

88. William D. Graves, *Evolution, the Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 REGENT U. L. REV. 513, 513 (2001) (biographical note). The website of the Oklahoma House of Representatives shows that Graves is no longer serving as a state representative. Oklahoma House of Representatives, House Membership, <http://www.okhouse.gov/members/memberlisting.aspx> (last visited Oct. 27, 2008).

Wouldn't it  
Be simpler in that case if the Government  
Dissolved the people and  
Elected another?<sup>89</sup>

Apparently, in Trowel's estimation, parents who advocate teaching intelligent design have forfeited the confidence of their government, and accordingly, the "Government's internal procedure" (that is, the school's curriculum) for teaching "future citizens" (that is, the parents' children) is none of the parents' business.<sup>90</sup>

Of course, to implement Trowel's program would require the upheaval of a significant portion of our social structure, traditions, freedoms, and laws—including, but certainly not limited to, the First Amendment freedom to practice one's religion by raising one's children to believe in and practice one's chosen religion.<sup>91</sup> Indeed, Trowel's arguments in favor of state control at the expense of parental rights are nothing short of astounding. They fall nicely in line with plans and programs of twentieth-century tyrants to nationalize children. Lenin boasted, "Give me a child for eight years and it will be a Bolshevik forever."<sup>92</sup> And as previously noted, "the Nazi state did more than any other regime to break down parental autonomy and to make the family simply a vehicle of state policy," and under that regime, the school replaced the home as "the central source of rearing and training children."<sup>93</sup> Of course, to accomplish these grand schemes, Hitler depended on the cooperation of other political branches, and the following account reveals the invaluable support he received from the German judiciary.

The parents of an eleven-year-old girl refused to enroll their daughter in the Hitler Youth.<sup>94</sup> The girl also refused to give the

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89. Graves, *supra* note 88, at 513 (footnotes omitted).

90. This argument is constructed based on Graves's own argument, wherein he stated: "Unfortunately, today in America it seems that the federal judiciary believes the American people have forfeited the judiciary's confidence." *Id.*

91. *Cf. Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("[Parents] have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.").

92. This saying is attributed to Vladimir Lenin. *See, e.g.,* BENSON, *supra* note 2, at 229 (citing *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1966: Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 89th Cong. 316 (1965) (statement of J. Edgar Hoover, Director, Fed. Bureau of Investigation) (quoting Lenin)).

93. Mills, *supra* note 76, at 820.

94. Matthew Lippman, *The White Rose: Judges and Justice in the Third Reich*, 15 CONN. J. INT'L L. 95, 139 (2000).

German salute because it contravened her religious convictions as a Jehovah's Witness, and her parents supported this behavior.<sup>95</sup> The case went to trial, and the judge admonished the parents not to interfere with their daughter's school instruction and ordered supervision by a probation officer.<sup>96</sup> The appellate court went a step further and deprived the parents of custody.<sup>97</sup>

Later, this case was spotlighted in one of a series of letters distributed to German judges to train them in Nazi jurisprudence.<sup>98</sup> The letter explained that the trial judge had "misunderstood the principles of National Socialist education" because "[t]he socialization . . . of young people required the joint efforts of the parents, school[,] and Hitler Youth . . . ."<sup>99</sup> It emphasized that "the values of the Nazi regime must be supported and reinforced in the home" and made clear that "parents who adhere to the aspirations of the Jehovah's Witnesses are unsuited to educate their children and should be deprived of custody."<sup>100</sup>

Lest one conclude that this analogy to the little Jehovah's Witness girl is too harsh in light of Trowel's argument, consider the following question: If Trowel is correct in asserting that parents have no "right to pass on their own religious beliefs" if doing so precludes "an education for liberal democratic citizenship,"<sup>101</sup> then just how should the state respond to parents who defy the state by instilling their religious beliefs in contravention of the state's "liberal democratic citizenship" standards? If the state's education standards are to prevail, and if the parents are truly without rights in this regard, it is difficult to imagine an enforcement mechanism more effective or logical than the deprivation of custody. Merely forcing the child to attend a state school (while permitting the child to reside with her parents) risks the possibility that the parents' instruction will be more effective than the school's, which would foil the state's efforts to produce a "liberal democratic" citizen.

The notion that parents have no sustainable interest in their child's education, insofar as their interest conflicts with nationally

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 136, 139–40.

99. *Id.* at 139.

100. *Id.*

101. Trowel, *supra* note 3, at 882 (internal quotation marks omitted) (quoting Gutmann, *supra* note 83, at 576).

established standards for a civic education, violates the American tradition that insists that parents have the freedom *and the responsibility* to raise and teach their children.<sup>102</sup> Moreover, the justification for such an authoritarian program is based on the eye-opening argument that the government's civic education standards must be given priority over the student's and the parents' free exercise rights in order for the government to properly educate the child. But according to the laws and tradition of this country, the obligation to educate a child is properly placed on parents, not the state.<sup>103</sup> Parents *delegate* that responsibility to the state when they enroll their children in public school.<sup>104</sup> In America, a child is no "creature of the state," nor does the state's interest in education trump the parents' right and responsibility to raise and teach their children.<sup>105</sup>

States and public school boards have a constitutional obligation to respect and uphold parental rights. They fulfill that obligation, in part, when they ensure that parents are given the opportunity to meaningfully participate in origins curriculum decisions.

#### IV. A FRESH AND ORIGINAL APPROACH: INCLUDING RELIGIOUS VIEWPOINTS IN PUBLIC SCHOOL CURRICULUM

Two decades ago, the Williamsburg Charter Foundation proposed setting a place for religion at the public school curriculum table.<sup>106</sup> Its general structure is summarized in these six statements:

1. The school's approach to religion is *academic*, not *devotional*.
2. The school strives for student *awareness* of religions, but does not press for student acceptance of any one religion.
3. The school sponsors *study* about religion, not the *practice* of religion.
4. The school *exposes* students to a diversity of religious views,

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102. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

103. *Id.*

104. *Lee v. Weisman*, 505 U.S. 577, 643–44 (1992) (Scalia, J., dissenting) ("*Families entrust public schools with the education of their children*, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." (emphasis added) (internal quotation marks omitted) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987))).

105. *Pierce*, 268 U.S. at 535; *cf.* *Mills*, *supra* note 76, at 820 (showing that under Nazi rule, "the school [replaced the home as] the central source of rearing and training children").

106. *See* *Oaks*, *supra* note 9, at 9.

- but does not *impose* any particular religious view.
5. The school *educates* about all religions, but does not *promote* or *denigrate* any religion.
  6. The school *informs* students about various beliefs, but does not seek to *conform* students to any particular one.<sup>107</sup>

When a public school addresses origins, it should include instruction *about* religious viewpoints on the subject (assuming the local school board desires to do so). This approach does not attempt to persuade students to adopt any particular religious or irreligious view.<sup>108</sup> It includes religion without *establishing* it:

The result is neither a naked public square where all religion is excluded, nor a sacred public square with any religion established or semi-established. The result, rather, is a civil public square in which citizens of all religious faiths, or none, engage one another in the continuing democratic discourse.<sup>109</sup>

This approach enhances the student's education by allowing students and teachers "of all religious faiths, or none, [to] engage one another" in learning about and discussing the origin of humankind. An education that fails to provide students with an understanding of the evolutionary *and* creationist explanations of origins is wanting.<sup>110</sup>

107. Charles C. Haynes, *A Teacher's Guide to Study About Religion in Public Schools*, 8 J.L. & Religion 297, 299–300 (1990).

108. *Id.*

109. WILLIAMSBURG CHARTER, *supra* note 12, at 18.

110. *See* Haynes, *supra* note 107, at 297 ("Knowledge about religions is not only a characteristic of an educated person, but it is also absolutely necessary for understanding and living in a world of diversity." (quoting Position Statement and Guidelines of the National Council for the Social Studies (1998), <http://www.socialstudies.org/positions/religion>)); *id.* at 298 ("Teaching about religion is . . . necessary if public schools are to provide students with a complete education."). Furthermore, John Stewart Mill wrote:

A person who derives all his instruction from teachers or books . . . is under no compulsion to hear both sides; accordingly it is far from a frequent accomplishment, even among thinkers, to know both sides; and the weakest part of what everybody says in defence of his opinion is what he intends as a reply to antagonists. It is the fashion of the present time to disparage negative logic—that which points out weaknesses in theory or errors in practice, without establishing positive truths. Such negative criticism would indeed be poor enough as an ultimate result; but as a means to attaining any positive knowledge or conviction worthy the name, it cannot be valued too highly; and until people are again systematically trained to it, there will be few great thinkers . . . . If there are any persons who contest a received opinion, or who will do so if law or opinion will let them, let us thank them for it, open our minds to listen to them, and rejoice that there is some one to do for us what we otherwise

It is simply not possible for a student to understand the great debate over origins if she lacks an appreciation of the religious views that shape the debate.<sup>111</sup> In the words of Justice Jackson, "One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."<sup>112</sup>

What is more, students are actually *less likely* to be brainwashed by this approach than they are by an evolution-only curriculum. The forthright style of the religion-inclusive model goes a long way toward remedying one of the understated yet significant dangers inherent in a strictly secular public curriculum: the risk that students will be subtly indoctrinated by instruction that is *portrayed* as a neutral treatment of the subject matter, but that nonetheless implicates religious beliefs, indirectly characterizing them as naïve and indefensible. As wolves are most dangerous when disguised in wool, so is the risk of student indoctrination most acute when academic subjects are masked by false neutrality. Professor Mary Harter Mitchell provides this insight:

If [public schools] may touch on ultimate questions—the meaning of the universe, the purposes of human life, the sources of ethical duty, etc.—yet teach only some of the possible answers to those questions, [they] may directly influence students' beliefs on those matters. . . . On religious matters they may, in the words of Professor Charles Black, "rig the market in ideas."<sup>113</sup>

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ought, if we have any regard for either the certainty or the vitality of our convictions, to do with much greater labour for ourselves.

JOHN STEWART MILL, ON LIBERTY 43–44 (David Spitz ed., Norton Critical ed., W.W. Norton & Co. 1975) (1859).

111. See Wexler, *supra* note 8, at 1716 ("[S]tudents can hardly expect to understand the world around them without a basic understanding of religious history, traditions, and concepts. Because views on human origins are at the center of many religious traditions, students likewise must learn about those views on origins if they are to understand religion in any sophisticated and meaningful way.").

112. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

113. Mitchell, *supra* note 31, at 663 (quoting Charles L. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960, 968 (1953) (Editor's Note: Black's precise wording in the original source is "rigs the market in ideas")).

The curriculum model proposed here would present students with religious and secular views in a direct and forthright manner, reducing the likelihood of subtle indoctrination in either.<sup>114</sup>

Finally, the religion-inclusive model remedies a fundamental unfairness—imposed on those who hold traditional religious views—that arises when the state bans religious viewpoints from a curriculum that *itself implicates and contradicts foundational religious beliefs*.<sup>115</sup>

The Framers' intention [that religion be protected and respected] is indisputably ignored when public [school curricula] can appeal to the theses of Adam Smith and Karl Marx, or Charles Darwin and Sigmund Freud but not to the Western religious tradition in general and the Hebrew and Christian Scriptures in particular.<sup>116</sup>

To give implicit preference to the views of those who espouse no religion at all, over those who do, is unjust to those whose traditional religious views are excluded, but whose views are nonetheless implicated *and contradicted* by such "secular" instruction.<sup>117</sup>

#### CONCLUSION

The subject of humankind's origin, like so many of today's hot-button issues, elicits deeply held beliefs, is highly controversial, and has significant religious and philosophical implications. How then

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114. See Haynes, *supra* note 107, at 299–300.

115. Cf. Gedicks, *supra* note 34, at 139.

116. WILLIAMSBURG CHARTER, *supra* note 12, at 20. Although the actual passage in the Williamsburg Charter does not specifically address public school curriculum choices, I have taken the liberty to apply the principle it articulates to public school curricula.

117. Cf. *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952).

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.



are we to live with each other's deepest differences?<sup>118</sup> Clearly, a good starting point—and a crucial component to any solution—is that the government refrain from taking sides in religious contests.<sup>119</sup> But what exactly does that mean? In recent years, scholars and judges have debated whether the First Amendment merely prevents the government from preferring one religious creed over another (that is, mandating neutrality between sects), or whether it forbids the government from favoring religion generally (that is, mandating neutrality between religion and nonreligion).<sup>120</sup> Even conceding, for the sake of argument, that it was meant to prevent the latter, the government's duty is nonetheless to remain neutral.<sup>121</sup> It defies reason to pretend that the state conveys a position of neutrality by excluding religious views from a curriculum that *clearly implicates and in many cases contradicts* those religious views. The origins question, *What is the explanation of the origin of the human family?*, is central to virtually all religious traditions, and the government does not remain neutral by ignoring that reality. When the government excludes religious perspectives solely because they are religious, it violates its pledge of neutrality, inhibits students' education, and fosters civil divisiveness.

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118. WILLIAMSBURG CHARTER, *supra* note 12, at 10.

119. See *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting); *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971); Oral Argument, *supra* note 29, at 58.

120. For instance, in a 2005 Establishment Clause case before the Supreme Court, the majority Justices held a mini-debate with the dissenting Justices on this issue. The majority confidently asserted that "the 'First Amendment mandates governmental neutrality . . . between religion and nonreligion.'" *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). The dissenting Justices responded:

Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted *unanimously* by the Senate and with only five nays in the House of Representatives . . . , criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional. See Act of Nov. 13, 2002, §§ 1(9), 2(a), 3(a), 116 Stat. 2057, 2058, 2060–2061 (reaffirming the Pledge of Allegiance and the National Motto ("In God We Trust") and stating that the Pledge of Allegiance is "clearly consistent with the text and intent of the Constitution"). Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century.

*Id.* at 889 (Scalia, J., dissenting) (citations omitted).

121. *Id.* at 860 (majority opinion) ("[T]he 'First Amendment mandates governmental neutrality . . . between religion and nonreligion.'" (emphasis added) (quoting *Epperson*, 393 U.S. at 104)).

A fresh approach to teaching origins in public schools—one that permits, but does not require, schools to present religious viewpoints in an academic, nonsectarian fashion—would satisfy the great majority of Americans, while at the same time respecting the constitutional prohibition of an establishment of religion. Such a program, or at least the option of implementing such a program (at the local level and with full parental participation), would not only enhance students' education, but also, in a measure, "restore religion to an honorable place in public life."<sup>122</sup>

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122. Oaks, *supra* note 9, at 8.