

D. Teaching About Design Theory, Like Teaching About Neo-Darwinism, Has Only An Incidental Effect On Religion

State action that results in an indirect or secondary benefit (or detriment) to religion is not unconstitutional under the second prong of the *Lemon* test. The Supreme Court has consistently held that the *primary* effect must be distinguished from incidental or secondary effects:

The Court has made it abundantly clear, however, that “not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon [religion] is, for that reason alone, constitutionally invalid.” Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental . . .³⁷

Under such logic, teaching about either Darwinian evolution or the theory of intelligent design could either inhibit or encourage religious belief, without violating the Establishment Clause, so long as the *primary* effect of such teaching is not to advance or inhibit religion. Just as the theory of intelligent design may have favorable implications for theistic, deistic, polytheistic, or even pantheistic systems of thought, so too might neo-Darwinism have favorable implications for atheistic or materialistic systems of thought. Obviously, the critical constitutional question in both cases is whether the alleged effect on religion from a policy permitting the discussion of such scientific theories is merely incidental or

³⁷ *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (internal citations omitted).

primary. In *Agostini v. Felton*,³⁸ the Supreme Court noted that benefits are incidental when they are provided “on the basis of neutral, secular criteria that neither favor nor disfavor religion.”³⁹

There are several neutral, secular criteria that could be the basis for including the theory of intelligent design in the science curriculum. For example, a school board might wish to (a) promote scientific literacy and (b) follow the Report language in the No Child Left Behind Act⁴⁰ by including “the full range of scientific views” about biological evolution in its science curriculum. Even if one result of such a policy was to encourage (or discourage) various religious or philosophical beliefs, such effects, by the standard enunciated in *Agostini*, would be merely incidental. Further, the variety of secular purposes for teaching about intelligent design cited in the previous section could generate other “neutral, secular criteria” that would justify teaching about intelligent design and render the effect of such a policy on religion merely incidental.

Precisely such logic has permitted the courts at once to acknowledge the anti-religious implications of teaching neo-Darwinism⁴¹ and at the same time to

³⁸ 521 U.S. 203, 231 (1997).

³⁹ *Id.* (because services to students in a religious school resulted in a benefit that had been distributed on a neutral, secular basis, program was constitutional).

⁴⁰ *Supra* note 6.

⁴¹ *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968). (Black, J., concurring).

authorize its presentation.⁴² In this case plaintiffs freely admit that teaching neo-Darwinism is offensive to certain religious beliefs;⁴³ indeed, their assertion of religious motivation is based on the claim that the conflict between neo-Darwinism and certain religious beliefs generated the DASB policy. More generally, many neo-Darwinists have openly acknowledged the anti-theistic implications of their theory. As Miller and Levine’s textbook originally stated, “Darwin knew that accepting his theory required believing in philosophical materialism”⁴⁴ Or, as Douglas Futuyma has stated in his authoritative textbook, “By coupling undirected, purposeless variation to the blind, uncaring process of natural selection, Darwin made theological or spiritual explanations of the life processes superfluous.”⁴⁵ Such statements raise an obvious question. As Justice Black asked in *Epperson*: “[I]f the theory [of evolution] is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an ‘antireligious’ doctrine to schoolchildren?” The answer to this rhetorical question is clear: courts have treated the religious implications of neo-Darwinism as merely an incidental effect of the secular purpose of teaching

⁴² *Id.*

⁴³ Plaintiffs’ Opposition to Motion for Summary Judgment, p. 59.

⁴⁴ KENNETH R. MILLER & JOSEPH LEVINE, *BIOLOGY: DISCOVERING LIFE* (1992), at 152; (2d ed. 1994), at 152.

⁴⁵ DOUGLAS FUTUYMA, *EVOLUTIONARY BIOLOGY* (3d ed.), p. 5.

students about a scientific theory.

E. Given That Both Theories Have Larger Implications, The Inclusion Of Intelligent Design In The Curriculum Could Advance Religious Neutrality.

Arguably, the theory of intelligent design has broadly theistic implications (since evidence of a prior intelligent cause is consistent with belief in a god or a creator). By the same logic, however, neo-Darwinism has equivalent atheistic or materialistic implications (since the neo-Darwinian theory that life arose by a purely undirected process is consistent with a materialistic or atheistic worldview). Although neither theory advances nor inhibits any specific religion or sect, both may have favorable implications for broad, if contradictory, systems of thought or worldviews. For this reason, teaching both neo-Darwinism and the theory of intelligent design could actually more closely approximate neutrality with respect to the Establishment Clause, since allowing students to learn about both theories advances metaphysical neutrality. Conversely, teaching only one of these two competing theories would not be metaphysically neutral, but instead would favor one class of religious believers to the detriment of others. In short, the broad relief demanded by the plaintiffs would stand the principle of religious neutrality on its head.

CONCLUSION

Because the inclusion of intelligent design in the science curriculum can serve a variety of important secular purposes, and because it has a primary effect of improving science education and even promoting religious neutrality, the plaintiffs' request for broad and precedent-setting relief should be denied.

Respectfully submitted,

/s/ Randall L. Wenger
Randall L. Wenger, Esq.
Pa. ID No. 86537
Leonard G. Brown, III Esq.
Pa. ID No. 83206
CLYMER & MUSSER, P.C.
23 North Lime Street
Lancaster, PA 17602
(717) 299-7101

David K. DeWolf, Esquire**
Professor of Law
Gonzaga University School of Law
WA Attorney I.D. No. 10875
721 Cincinnati Street
Spokane, WA 99220
ddewolf@lawschool.gonzaga.edu
(509) 323-3767