

## EVOLUTIONISM, CREATIONISM, AND TREATING RELIGION AS A HOBBY

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Contemporary liberalism faces no greater dilemma than deciding how to deal with the resurgence of religious belief. On the one hand, liberals cherish religion, as they cherish all matters of private conscience, and liberal theory holds that the state should do nothing to discourage free religious choice. At the same time, contemporary liberals are coming to view any religious element in public moral discourse as a tool of the radical right for the reshaping of American society, and that reshaping is something liberals want very much to discourage.

In truth, liberal politics has always been uncomfortable with religious fervor. If liberals cheered the clerics who marched against segregation and the Vietnam War, it was only because the causes were considered just—not because the clerics were devout. Nowadays, people who bring religion into the making of public policy come more frequently from the right, and the liberal response all too often is to dismiss them as fanatics. Even the religious left is sometimes offended by the mainstream liberal tendency to mock religious belief. Not long ago, the magazine *Sojourners*—published by politically liberal Christian evangelicals—found itself in the unaccustomed position of defending the evangel-

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\* Professor of Law, Yale University. A nearly identical version of this essay was delivered at the Third Annual Duke Law Journal Lecture on February 26, 1987. For publication, I have added a sprinkling of footnotes (most of them citations), clarified a few points that I learned from the question-and-answer session had not been put as precisely as they might have, and reintroduced a brief discussion, deleted at the podium, of the work of Mark Yudof and Bruce Ackerman. I have also inserted three brief references to the Supreme Court's decision in *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987), which was handed down after my delivery of the Lecture. Comments and criticism following the Lecture led into interesting areas that deserve exploration, and I am particularly grateful for insightful suggestions and other assistance from Enola Aird, Walter Dellinger, Bernard Dushman, Ronald Feenstra, Stanley Fish, Karen Porter, and Jennifer Weidman. Nevertheless, because the essay originated as a lecture, I have elected not to make substantive changes for publication.

ist Pat Robertson against secular liberals who, the magazine sighed, "see[m] to consider Robertson a dangerous Neanderthal because he happens to believe that God can heal diseases."<sup>1</sup> The point is that the editors of *Sojourners*, who are no great admirers of the Reverend Robertson, also believe that God can cure disease. So do tens of millions of Americans. Conservatism, with its deep emphasis on the immutability of certain traditional values, is relatively comfortable with the idea that the values it preserves may have a source beyond the arbitrary moral judgments of fallible humanity. Liberalism, steeped as it is in skepticism, rationalism and tolerance, unfortunately has little idea of how to cope with the millions of people who embrace so absurd a notion. The answer up to now has been to repeat, like a catechism, the language of the Supreme Court in *School District of Abington Township v. Schempp*:<sup>2</sup> "the command of the First Amendment [is] that the Government maintain strict neutrality, neither aiding nor opposing religion."

In this essay, I will suggest that the liberal response—the notion that the government must be "neutral" with respect to religion—bespeaks an underlying uncertainty about, or perhaps even a fear of, the role that religious belief might play in the dialogue that determines public policy. There are many battlegrounds on which liberal politics and religious belief carry on their struggle—prayer in the public schools, reproductive freedom, pornography, and sexual choice are just a handful of examples. But no current controversy poses the issue in quite so subtle and troubling a way as the fight by some states to require students in their public schools to study so-called scientific creationism alongside evolution theory in the biology classroom. By taking the scientific creationism debate as my example, I hope to expose the contradictions at the heart of the liberal theory of neutrality toward religion. In particular, I propose that in its stated zeal to cherish religious belief under the protective mantle of "neutrality," liberalism is really derogating religious belief in favor of other, more "rational" methods of understanding the world. The great risk lying a bit further down this path is that religion, far from being cherished, will be diminished, and that religious belief will ultimately become a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes.

I do not so much pass judgment on these consequences as insist that liberals ought to be aware of them, for a theory of law or politics that is afraid to analyze its own consequences is a theory with no right to sur-

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1. Collum, *The Kingdom and the Power*, SOJOURNERS, Nov. 1986, at 4; cf. Shriver, *What Can Liberals and Evangelicals Teach Each Other?*, 104 CHRIS. CENT. 687, 688 (1987) (arguing that liberal Christians should be less skeptical of beliefs of evangelical Christians).

2. 374 U.S. 203, 225 (1963).

vive. Thus, as I dissect the scientific creationism controversy and analyze the liberal response, my enterprise is not to argue against the liberal theory of religion (for it has much to recommend it), but to count its costs.<sup>3</sup> I am thus less interested in undertaking concrete constitutional analysis than in exploring the instincts that form the background for the widespread insistence, recently ratified by the Supreme Court as constitutional dogma,<sup>4</sup> that the first amendment must be read to prohibit the teaching of scientific creationism. To begin my exploration I will consider the problem of scientific creationism itself, before drawing back to consider what the controversy teaches about liberal law and politics.

## I. THE CREATION SCIENCE CONUNDRUM

What we have come to call creation science or creationism or, the term that I use here, scientific creationism, is less a clear theory than a reaction to a theory. Scientific creationism, when sketched without reference to the Bible, is defined primarily through its disagreements with both classical Darwinian evolutionary theory and modern gene-based evolutionary theory. Evolutionists posit an earth billions of years old in which higher forms of life evolved from lower, and lower forms of life quite likely evolved from the inanimate, a world in which mutation is beneficial and new species are sometimes created. Creationists posit instead a much younger world in which life in nearly all of its forms came upon the world quite suddenly, a world in which mutation is harmful, and in which no important new species appear.<sup>5</sup> I describe the creationist theory as a reaction more than a theory because the scientific evidence the creationists put forth, while occasionally calling into question the conclusions of evolutionists, only rarely does anything to bolster the claims of creationism.<sup>6</sup>

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3. Mine is not, of course, the first effort in this direction, and much of the work is recent. See, e.g., McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (arguing that pluralism and liberty should define church and state relationship); Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986) (arguing that republican tradition must play important role in religion clause interpretation).

4. See *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (holding Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public Instruction Act, which forbids teaching of evolution without accompanying instruction in creation science, invalid under establishment clause).

5. Henry Morris, in an all-too-brief but still interesting table, has laid out many of these differences. H. MORRIS, *SCIENTIFIC CREATIONISM* 13 (public school ed. 1974); see also P. KITCHER, *ABUSING SCIENCE: THE CASE AGAINST CREATIONISM* 41 (1982) (same table); Cracraft, *The Scientific Response to Creationism*, in *CREATIONISM, SCIENCE, AND THE LAW: THE ARKANSAS CASE* 138 (M. La Follette ed. 1983) (attacking creationism's central "scientific" assertions).

6. A detailed but critical recounting of much of the evidence on which creationists rely is in P. KITCHER, *supra* note 5, at 30-44, 55-123. A more sympathetic assessment of the evidence against evolution, by a critic of creationism, is G.R. TAYLOR, *THE GREAT EVOLUTION MYSTERY* (1983). An account by a prominent creationist of the case against evolution is D. GISH, *EVOLUTION? THE*

Although creationists are quick to point out that many of those who support their view of the origin of earth and of life hold advanced degrees in the sciences,<sup>7</sup> it would, I suspect, be an error to suppose that many creationists came to their views by a careful study of scientific evidence. The liberal critic may be right to say that creationism is bad science. But why should that issue be the crucial one? Creationists are not irrational merely because they are unscientific. Creationism was not created from thin air; creation theory developed as a consequence of the preferred hermeneutical method of many Christian fundamentalists for understanding the world. This hermeneutical approach is best expressed by the combination of the following propositions drawn from the Articles of Affirmation and Denial adopted in 1982 by the International Council on Biblical Inerrancy: (1) "the normative authority of Holy Scripture is the authority of God Himself"; (2) "the Bible expresses God's truth in propositional statements, and . . . biblical truth is both objective and absolute"; (3) "since God is the author of all truth, all truths, biblical and extrabiblical, are consistent and cohere, and . . . the Bible speaks truth when it touches on matters pertaining to nature, history, or anything else"; and (4) "Genesis 1-11 is factual, as is the rest of the book."<sup>8</sup>

Critics of scientific creationism may doubt the validity of these propositions, but there is hardly any room for doubt that those who profess them are sincere. And once the adherent of this literalist hermeneutic states these propositions, what chance is there that the theory of evolution is correct? Virtually none. Evolution is just a theory, scientific creationists insist, and must, as a theory, be open to challenge. And challenge it they do, pointing to mountains of exceptions and inexplicable transitions.<sup>9</sup> To the Biblical literalist, however, the most important evidence against evolution theory is not the complexity of the fossil record or the troubling matter of falsification, but the beginning of the Book

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FOSSILS SAY NO! (public school ed. 1978). There is, of course, a considerable risk in arguing from a gap in the evidence to a certainty that a theory is wrong, "because the frontiers of knowledge often move quite rapidly." Consequently, "[i]t never pays to base a philosophical position on what scientists do not know." J. TREFIL, *THE MOMENT OF CREATION: BIG BANG PHYSICS FROM BEFORE THE FIRST MILLISECOND TO THE PRESENT UNIVERSE* 178 (1983).

7. See Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 *YALE L.J.* 515, 517 n.13, 555 n.198 (1978). This note was authored by Wendell Bird, then a law student, who has subsequently become the most important creationist legal theorist. He argued and lost *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987), in the Supreme Court of the United States.

8. *The Chicago Statement on Biblical Hermeneutics*, reprinted in *A GUIDE TO CONTEMPORARY HERMENEUTICS: MAJOR TRENDS IN BIBLICAL INTERPRETATION* 21, 22-25 (D. McKim ed. 1986).

9. See generally D. GISH, *supra* note 6 (arguing that fossil record does not support major claims of evolutionary theory); H. MORRIS, *supra* note 5 (arguing that evolutionary change is too slow to be reasonable and occurrence of small variations fails to prove essential change into higher life form).

of Genesis, comprising, as one creationist has written, "eleven chapters of straightforward Bible history which cannot be reinterpreted in any satisfactory way."<sup>10</sup>

I emphasize these points because I believe that critics often overlook that there is a nontrivial hermeneutic and a rational application of it behind the creationist rejection of evolutionary theory.<sup>11</sup> The creationist position is no mindless assault on modernism in general or on secular science in particular, although obviously it contains elements of hostility to both. Nor do the "equal time" statutes necessarily represent officially authorized proselytizing. It is something of a commonplace in liberal theory to treat the parental attempts to control the school curriculum as though the parents are trying to impose their own religious beliefs on others, but I very much doubt that this vision is a realistic one. More likely, the parents are frightened of the conflict between religious authority on the one hand, and the authority of secular society—as represented by the schools—on the other.

These parents, very devout and very worried, are trying to protect the core of their own beliefs. It is not that the parents want the public schools to proselytize in their favor; it is rather that they do not want the schools to press their own children to reject what the parents believe by calling into question a central article of their faith. The response of the Christian fundamentalist to evolutionary theory may thus be more consistently viewed as a reaction to a fear of indoctrination: religion demands one intellectual position, and the state seeks to command another. Liberalism is curiously intolerant of what certainly may be viewed as a classic case of conscience interposed before the authority of the state. Nor have the consciences of the protestors been formed without any thought. They understand quite well that the hermeneutic they have chosen has interpretive implications, not just for the Bible, but for the entire natural world, and devout literalists understand and accept them. The creationist parents are not a superstitious rabble. They are independent thinkers who insist on a right to their own means for seeking knowledge of the world, and they deny the right of the state to tell their children that their worldview is wrong.

On this vision, a public school curriculum perceived as secular and modernist is a grave and obvious threat to the efforts of parents to raise their children in their religious belief with its hermeneutical implications.

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10. D. WATSON, *THE GREAT BRAIN ROBBERY* 46 (1976).

11. Christian fundamentalists, in fact, insist that their faith itself is based on reason, rejecting both the modern liberal notion that an unexplained "leap of faith" is needed to explain religious belief, and the popular understanding of a sharp separation between the task of religion and the task of science. See H. COX, *RELIGION IN THE SECULAR CITY* 53-59 (1984).

Thus, the question that moves the debate—who shall control the education of children?—is starkly posed. Liberalism may insist that the public schools should be neutral on questions of religious belief, but the parents will no doubt protest that this insistence is simply window dressing for something more sinister. What the schools are offering, the parents will charge, is not a neutral curriculum, but one that can only call into question—or place into ridicule—their most cherished religious beliefs. For those whose Biblical hermeneutic insists on literalism and inerrancy, the tension between a disdainful science and an unchallengeable core belief is plain.

One early response to the tension was the effort to ban the teaching of Darwinian evolution. Many have forgotten that in the *Scopes* case<sup>12</sup> this ban was justified not as a means of protecting a particular religious view from contradiction, but rather as a way of easing the move toward modernization of the science curriculum in the public schools of Tennessee. In affirming the conviction of Mr. Scopes for teaching evolution theory, the state supreme court held that the legislature could make the judgment that popular prejudice would make a sophisticated science curriculum impossible unless, at least for the short term, the curriculum omitted all discussion of the origin of humanity.<sup>13</sup> This justification might have been a smokescreen, but if sincere, it was neither foolish nor venal. It might even represent a compromise between the demands of some citizens for a modern science course for their children, and the insistence of others that the state not trivialize their core religious beliefs.

I do not mean this to be taken as a call to ban the teaching of evolution, but only as a suggestion that the ban might, in some set of historical circumstances, have represented wise policy. Of course, historical circumstances may change, and by the time the Supreme Court, in *Epperson v. Arkansas*,<sup>14</sup> brushed aside a ban on the teaching of evolution as a plain violation of the establishment clause, the statutes still on the books in many states apparently were not being enforced. The tension, however, had not died. With the political rebirth of the Christian fundamentalist movement beginning in the mid-seventies, the objection of parents to what their schools were teaching took on a new form, driven by a new insight: in a political world emphasizing rationality and pluralism, the effort of parents to protect their children from what they considered antireligious indoctrination by the state would have to present itself as both rational and pluralistic. By calling their interpretive conclusions “sci-

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12. *Scopes v. State*, 154 Tenn. 105, 117-18, 289 S.W. 363, 366 (1927).

13. *Id.*

14. 393 U.S. 97, 107-09 (1968).

ence," the parents chose a fresh face that would, they hoped, survive constitutional scrutiny.

The courts, however, have viewed this fresh face as a subterfuge. The Supreme Court, in *Edwards v. Aguillard*,<sup>15</sup> has rejected entirely the effort to make creation theory a part of the science curriculum, but the judicial hostility predates *Edwards*. Certainly, there was little sympathy in the forceful opinion of Judge Overton in *McLean v. Arkansas Board of Education*,<sup>16</sup> the first federal court case dealing with the merits of a facially neutral statute requiring equal classroom time for evolution and creation. The court faced the difficulty of adapting the Supreme Court's establishment clause precedents to a situation that the Justices who wrote them could never have envisioned: the state's endorsement of a theory whose proponents base their particular version of truth on their religious beliefs.

I will not in these brief remarks analyze the court's opinion in detail, but there is one point that does bear mention, because it illustrates the contradiction within liberal constitutional doctrine on religious belief. According to the Supreme Court, one requirement of the establishment clause is that a statute's "primary effect must be one that neither advances nor inhibits religion."<sup>17</sup> In *McLean*, the court found that the equal time statute failed this test, and the analysis on this point is intriguing: "The facts that creation science is inspired by the Book of Genesis and that Section 4(a) [of the Act] is consistent with a literal interpretation of Genesis," the judge argued, "leave no doubt that a major effect of the Act is the advancement of particular religious beliefs."<sup>18</sup>

The conclusion may well be right, but the analysis is surely imprecise. To see why, one may suppose that Albert Einstein had stated publicly that his theories of general and special relativity were "inspired" by his musings on some sacred text. Suppose further that the state mandated the teaching of his theories through a statute that was "consistent with a literal interpretation" of his sacred text. These are not reasons to refuse to teach in school what he has discovered, unless one is prepared to assert what I assume the court in *McLean* would not—that nothing consistent with any religious belief may be taught.

Judge Overton did not rest his opinion only on the consistency of scientific creationism and a particular religious belief; he also relied on expert testimony to conclude that scientific creationism could not pass

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15. 107 S. Ct. 2573 (1987).

16. 529 F. Supp. 1255 (E.D. Ark. 1982), *aff'd*, 723 F.2d 45 (8th Cir. 1983).

17. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citation omitted).

18. 529 F. Supp. at 1266.

the establishment clause test because *it was not science*.<sup>19</sup> I will not labor this point, which has been the subject of much comment elsewhere,<sup>20</sup> except to suggest that while I am sure that such was never Judge Overton's intention, the establishment of a test of this nature risks creating a new interpretive rule in which the operative question is not whether a curriculum furthers religion, but whether it masquerades as science when it is not. It is as though the command of the first amendment is not to cherish religion, but to cherish science.<sup>21</sup>

From the beginning, the constitutional case against creationism seemed bound up inextricably with the scientific case against it. This seems to me a profoundly mistaken course. A statute simply cannot be said to further religion on the ground that a majority of scientists do not believe that it furthers science. So what if the "scientific" case for creationism is appallingly shoddy and naive? What has this to do with constitutionality?

We live in a world in which epistemology may sometimes reflect religious belief—a world in which religious belief may move people to decide, quite sincerely, whether to accept or reject both moral and factual propositions. Consequently, there is little except the conflict with science to distinguish religiously motivated legislation requiring the teaching of creation theory from religiously motivated legislation to implement the Biblical injunction "Thou shalt do no murder"—or religiously motivated legislation in response to the Roman Catholic bishops' call for a more equitable sharing of the nation's wealth. A prohibition of murder, like a forced redistribution of wealth, might be religiously motivated; but only the teaching of creationism conflicts with natural science.

I do not mean by any of this to suggest that *McLean* was wrongly decided, but rather to raise the question of why liberalism insists—as it surely does—that the decisions in *McLean* and in *Edwards* are right. Liberals are most comfortable, I suspect, treating the question as a purely constitutional one, without deep implications for liberal theory or religious belief. But reducing the problem to one of constitutional interpretation slips around the heart of the matter without ever piercing through. For the underlying question remains: why is it that contemporary liber-

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19. See *id.* at 1267-72.

20. See, e.g., Laudan, *Commentary on Ruse: Science at the Bar—Causes for Concern*, in CREATIONISM, SCIENCE, AND THE LAW: THE ARKANSAS CASE, *supra* note 5, at 161-66 (complaining that prohibiting creationism because it is unscientific "leaves many loopholes for the creationists to exploit").

21. Steven Goldberg has deduced from the Constitution's language and history what he calls the "implied science clause," which holds that "Congress may legislate the establishment of science, but shall not prohibit the free exercise of scientific speech." Goldberg, *The Constitutional Status of American Science*, 1979 U. ILL. L.F. 1, 1.



alism, which proclaims the freedom of individual conscience, values conscience less when an individual chooses to discover the world through faith rather than through reason? What is it about religious belief that liberalism so fears?

## II. LIBERALISM AND RELIGION

Let's go back a step: the rule prohibiting religiously motivated instruction in public school classrooms is a commonplace of liberal, political, moral, and constitutional dialogue. It is supported by the charming notion that autonomous individuals have the right to make up their own minds about which religious belief to accept, or whether to accept any at all, and that the state may not, through placing its imprimatur on one set of religious beliefs, implicitly cast doubt on the others. Liberalism recites its catechism: the government must "maintain strict neutrality."

"Neutrality" has become a political and constitutional buzzword, a term—so constitutional theorists tell us—embodying the twin requirements that the government neither encourage one religious belief nor discourage another. This vision of the sort of freedom from orthodoxy that the Constitution protects, and the kind of imposition of belief that it forbids, possesses so obvious an appeal that it would be a shame to let it go untested.<sup>22</sup> But in order to test the neutrality principle, it is necessary first to understand why liberalism is so troubled by public moral discourse rooted in religious belief.

I will begin by disposing of one relatively uninteresting response. I have in mind the argument that the neutrality principle fosters religious pluralism. Of course it does so at its core, by prohibiting the imposition of someone's religious ritual or belief on someone else. But the proposition that the state must be neutral in order to foster plurality of religious belief has no bearing on the question of whether the state can ever act on the basis of the religious motivation of legislators or constituents. In a nation that prides itself on cherishing religious freedom, it is something of a puzzle that a Communist or a Republican may try to have his worldview reflected in the nation's law, but a religionist cannot; that one whose basic tool for understanding the world is empiricism may seek to have her discoveries taught in the schools, but one whose basic tool is Scripture cannot; that one whose conscience moves him to doubt the validity of the social science curriculum may move to have it changed, but

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22. A wave of recent scholarship has already tested this neutrality principle, and found it wanting. See, e.g., McConnell, *supra* note 3, at 8-13 (asserting that first amendment permits government action to facilitate religious liberty without regard to nonreligious activities); cf. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2595 (1987) (Scalia, J., dissenting) (arguing that state must sometimes act affirmatively to remove threats to religious liberty).

one whose religious conviction moves her to doubt the validity of the natural science curriculum may not. If a statute prohibits pornography, it is not immediately clear why the judgment on its constitutionality should turn on whether the legislators said "This is morally necessary to help end the degradation and oppression of women" or "This is morally necessary to please our God." The statute would in either case have the same effect on purveyors of pornography. Neither legislative justification, moreover, would have any effect on the ability of all citizens to pursue their own religious beliefs. If the statute itself inhibited religious belief, then neither of these justifications might be sufficient to save it. In short, something more than the desire to foster religious pluralism is needed to explain why liberalism so fears religious motivation.

The best explanation for the fear of public action motivated by religious belief rests on the reliance of liberalism on dialogue and rationality as indispensable components of its political theory, and the often unstated premise of many liberal theorists that reasoning and religious belief are mutually exclusive means for understanding the world.

The primacy of reason has been the theme of any number of liberal critiques of society in the past few years. Mark Yudof, for example, not long ago brought forth a book-length analysis of the ways in which officially sanctioned speech can become officially sanctioned indoctrination, and of possible paths by which the legal system can help citizens to resist.<sup>23</sup> But why does any of this matter? Because, Professor Yudof explains, "The ideology of democratic government posits the existence of autonomous citizens who make informed and intelligent judgments about government policies, free of a state preceptorship that substantially impedes individual choice and consent by selective transmission of information."<sup>24</sup> People need information so that they can make up their minds in a manner that is "informed" and "intelligent"—in other words, rational.

A similar understanding must move Bruce Ackerman, who has devoted a book to demonstrating a conception of liberalism resting on dialogue among citizens.<sup>25</sup> What matters most in the liberal state, Professor Ackerman insists, is not the efficacy with which its government structure aggregates private preferences into policy, but rather the validity—as demonstrated in conversation—of the reasoning that undergirds the policy. Nor will just any conversation do: in order to qualify as *liberal* conversation, the dialogue must be governed by concepts of neutrality

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23. M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

24. *Id.* at 32.

25. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

and rationality.<sup>26</sup>

These and other theories share in common a vision that an earlier generation of liberal theorists perhaps left ambiguous: that the key to liberalism is dialectic, and that intelligent, informed citizens can engage in rational conversations and reach rational results. By necessary implication, it follows that state action that interferes with this dialogue is impermissible.<sup>27</sup>

Liberals display a single-minded fanaticism in upholding the right to freedom of speech (even when the speech might lead to destruction of their ideals) because speaking—which always implies the possibility of convincing others—is at the heart of liberal politics. The liberal is essentially an optimist, a believer in the underlying goodness of humanity. The liberal believes in persuasion: we can persuade the hostage-takers that their efforts are counterproductive, we can persuade the Soviet Union to abandon its affection for expensive weapons, we can persuade the segregationist to let a black family live next door, we can persuade the South Africans to move toward pluralism, we can persuade everyone who is wrong to do what is right. The modern liberal, in short, is essentially a Kantian: the liberal believes that reason is the most important human faculty, and that amenability to reason is the trait that distinguishes humans from the rest of creation.

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26. *Id.* at 11-12, 34-45.

27. Interestingly, both Professor Ackerman and Professor Yudof are quick to dismiss religious dialogue, although they are concerned with different aspects. For Professor Yudof, what is crucial is that the state not interfere, through an endorsement of a particular religious belief, with the freedom of citizens to make up their minds independent of official indoctrination. M. YUDOF, *supra* note 23, at 164-65. For Professor Ackerman, the question of what God thinks is logically irrelevant to liberal policy analysis, because it is not neutral and nonverifiable even if neutral. B. ACKERMAN, *supra* note 25, at 40-41, 280-82. Professor Yudof does not consider the possibility that religious parents and their children might see the curriculum as it now exists as an actively indoctrinating one; Professor Ackerman does not consider the sensitivity of dialectic to the preconceptions of the interlocutors, who might, for example, *know* that Genesis is true in the same way that Professor Ackerman knows that no citizen, “regardless of his conception of the good . . . is intrinsically superior to one or more of his fellow citizens.” *Id.* at 11; *cf. id.* at 281 (Neutrality means that no one may claim “privileged access to the meaning of the universe.”). Both these omissions illustrate a fundamental principle of contemporary hermeneutics: what you see depends a good deal on where you are standing. See D. HOY, *THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS* 48-51 (1978) (arguing that psychoanalysis as a method of interpretation “is an inquiry in which the objectivity of the interpretation cannot be determined independently of the value or use of the interpretation”).

I do not wish to carry my doubts about the adequacy of their treatments of religious belief too far, because a liberal analysis of religion is not the main point of what either Professor Ackerman or Professor Yudof proposes. More important is their shared image of patient, rational dialogue among citizens, and the faith that this image demonstrates in the power of reason. It is this faith that is at the center of modern liberal theory, and it is this faith that is threatened when citizens’ public political posture turns on private religious belief.

Without this faith in the ability of individual humans to recreate themselves and their world through dialogue, without this trust in the power of reason to move others to action, liberalism becomes an impoverished philosophy: either a simple-minded majoritarianism, in which preferences are aggregated formally (if inefficiently) through a legislative process, and in which those who lose in that process are without recourse; or a variant of Leninism, because it has nothing behind it but an insistence on one set of values as the correct one, and a willingness to back that conviction with all the power of the state. In short, without a faith in the faculty of reason, liberalism has nothing whatever to recommend it.

This faith is reflected, for example, in David A. J. Richards's recent reformulation of the Constitution's religion clauses.<sup>28</sup> Because of the richness of what Professor Richards proposes, it is worth considering his analysis in some detail, both for what he has to say about the nature of liberal society, and because of the way his analysis illustrates some of the inevitable inconsistencies in the neutrality principle.

The underlying theme of the free exercise and establishment clauses, Professor Richards tell us, is "toleration" of the conclusions dictated by conscience. "[J]udgments of true belief are for good reason forbidden as the measure of universal toleration," and "comparable judgments about the acceptability of things believed should be similarly suspicious."<sup>29</sup> I assume Professor Richards to be putting the case that all religious belief is presumptively the result of an exercise of the faculty of moral judgment—a faculty which, in classical liberal analysis, rests on reason—and therefore dismissing the contention that some religious beliefs, because irrational, are not acceptable.

Thus, the primacy of reason and religious toleration would seem to merge nicely, and so they do in his theory, until he faces the problem of the establishment clause, or, as Professor Richards would have it, the "Antiestablishment" clause. Resting his argument here, as elsewhere, on the primacy of reason in settling matters of individual conscience, Professor Richards paraphrases Jefferson's functional justification for the establishment clause: "Since conscience is an inalienable human right, the formation and revision of conscience in accord with religious teaching must be completely disassociated from state power . . . ."<sup>30</sup>

So far, well and good—but look what happens when Professor Richards moves on to confront the claims of the creationists. Ever meticu-

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28. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

29. *Id.* at 138.

30. *Id.* at 147.

lous, he tries, before refuting them, to state the arguments for equal time in their strongest terms. Unlike the flat prohibition on the teaching of Darwinian theory, he notes, what the creationists demand “is not a sectarian exclusion of a neutral educational good, but a more equal dialogue among points of view on scientific truth, method, and inquiry.”<sup>31</sup> Nevertheless, he rejects the dialogue, because it “is not an intrascientific dispute relevant to the educational mission of a science curriculum.”<sup>32</sup> Instead, he explains: “Creationist science is not science in the sense that is of interest to the educational mission of the public schools.”<sup>33</sup> Why isn’t it? Because “[i]t is not training in a neutral method of critical inquiry, expressive of our capacities of epistemic rationality, whose educational importance is training our capacities of critical rationality to follow reason wherever it leads, upsetting and challenging beliefs and preconceptions.”<sup>34</sup> This observation is the key to the entire analysis presented by Professor Richards, and to understanding the core of the liberal objection to scientific creationism. I pause to make two points about it.

Note first the crucial assumption Professor Richards is making about the tools that are needed for life in liberal society and those that can be disregarded. “Critical rationality” is the faculty that the schools ought to promote; students should be trained to challenge “beliefs and preconceptions.” One need not quarrel with this vision of what citizens will need in their lives to recognize that it is a profoundly secular one, and one that almost in so many words throws down the gauntlet before the religious. “Send us your children,” the schools proclaim, “and we will send them back to challenge your most cherished beliefs.”

The other problem with responding to scientific creationism by claiming that it necessarily runs counter to the need to develop the critical faculties is that the objection is probably beside the point. Quite likely it would be possible to design a creation science curriculum fitting that description—one that would help develop critical faculties.<sup>35</sup> Even

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31. *Id.* at 153.

32. *Id.*

33. *Id.* at 154.

34. *Id.*

35. The Supreme Court impliedly endorsed this proposition (or at least left it open) even as it rejected scientific creationism in the form challenged in *Edwards v. Aguillard*: “We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught.” 107 S. Ct. 2573, 2582 (1987). Further, the state might “validly” require classroom instruction in a “variety of scientific theories about the origins of humankind” if “done with the clear secular intent of enhancing the effectiveness of science instruction.” *Id.* at 2583. This much, perhaps, Professor Richards would accept, although “enhancing the effectiveness of science instruction” was precisely the justification offered by the State of Tennessee for the ban on the teaching of Darwinian evolution tested in the *Scopes* case. See *supra* text accompanying note 13.

were that task impossible, it is difficult to imagine that Professor Richards seriously wants to ban from the public school classroom whatever does not encourage critical thinking or challenge beliefs and preconceptions. Surely very little of the public school curriculum—as taught to and as understood by students—could fit that description.<sup>36</sup> I recall from my own childhood being taught in a public school of the District of Columbia, as though there were no room for debate on the matter, that the slaves in the antebellum South were essentially happy and had no desire to be free. That example admittedly is anecdotal, but the scientific creationists, whatever the other inadequacies of their method, are demons at tracking down others.

Undoubtedly aware of this possibility, Professor Richards goes on to distinguish scientific creationism in a second, more interesting way. The point of scientific creationism, he contends, “is to show how its view of the truth of the Bible *could* be rendered consistent with the scientific record.”<sup>37</sup> To permit its teaching would be to allow “distortion of a neutral educational good by a substantive conception of sectarian religious belief.”<sup>38</sup> This, too, might be true, although it fails to consider the possibility that the legislators voting in favor of a scientific creationism curriculum *really believe*, for whatever complex set of reasons, that they are voting to offer an alternative vision of scientific truth. The scientific conclusions of the legislators might be at odds with the consensus of scientists working in the field, but if the legislators in good faith believe that they are promoting the critical faculties, in the same way that they are when offering other science courses, then it is difficult to see why Profes-

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36. “It is not possible for educators to convey only information; for information itself, and the manner of its selection and presentation, will lead to socialization to widely accepted values.” M. YUDOF, *supra* note 23, at 53. To illustrate the point, Professor Yudof quotes Bertrand Russell:

It is not altogether true that persuasion is one thing and force is another. . . . Consider what we do to our children. We do not say to them: “Some people think the earth is round and others think it is flat; when you grow up, you can, if you like, examine the evidence and form your own conclusion.” Instead of this we say: “The earth is round.” By the time our children are old enough to examine the evidence, our propaganda has closed their minds, and the most persuasive arguments of the Flat Earth Society make no impression.

*Id.* (quoting B. RUSSELL, *POWER: A NEW SOCIAL ANALYSIS* 368-69 (1938)). It is not really a response to say that the Flat Earth Society deserves to be ignored; the issue is not one of truth, but of the ability of individuals to decide truth for themselves. Although children are taught critical thinking, they must be taught some axioms, too, and when they are, indoctrination occurs. That the indoctrination may be perceived by the indoctrinator as truth does not make it any less indoctrination.

37. D. RICHARDS, *supra* note 28, at 154. In support of this proposition, Professor Richards cites only the work of critics of scientific creationism. *See id.* at 154 n.199.

38. *Id.* at 154.

sor Richards ought to object.<sup>39</sup>

Professor Richards' test, moreover, would require the judge faced with the scientific creationism case or a similar one to continue along the path on which the court in *McLean* took the first, shaky steps: finding a definition of science, and testing the so-called science curriculum against that definition. On this approach the possible religious motivation behind the teaching of creation theory alongside evolution theory becomes less important than the issue of whether scientific creationism is or is not science. Down this metaphysical slope await all the obstacles that I have mentioned, not the least of them is one which should give Professor Richards pause: suddenly science, not conscience, holds primacy in human affairs, or at least in the supposedly neutral education of children. Scientists deserve our applause, our support, and our thanks for all the technological progress that has vastly improved our lives and for all the fresh advances we can expect in the future. But no matter how great our veneration of the scientific enterprise, its conclusions ought never serve as the critical test in constitutional interpretation.

But that path I have already criticized, so let me return for a final time to the views of Professor Richards. Toward the end of his discussion, he concludes that keeping scientific creationism out of the classroom—preventing the state from reinforcing, as Professor Richards would have it, “a substantive conception of sectarian religious belief”—is ultimately justified because of a philosophy aimed at nurturing the individual conscience in its critical rational judgments.<sup>40</sup> Religion, he says, is contrary to this philosophy of criticism. One may fairly dispute his claim that the philosophy he prefers “no more sanctifies the secular than it attacks the religious,”<sup>41</sup> but that is hardly the point. The point, I think, is that Professor Richards, reflecting the mainstream liberal objection, is in effect throwing up his hands and saying, “But one cannot rea-

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39. As J. Thomas Cook has pointed out, even a decision to make one's self believe a thing may be reached and carried out through the faculty of reason. See Cook, *Deciding to Believe Without Self-Deception*, 84 J. PHIL. 441, 441 (1987). And even if the belief systems of the legislators are disliked, one may challenge the logic or the possibility of inquiring into the motivation of the legislators at all. See *Edwards v. Aguillard*, 107 S. Ct. 2573, 2605-07 (1987) (Scalia, J., dissenting). This is an old debate among constitutional scholars, and leading theorists have grappled for decades with the problem of legislative motivation. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 208-21 (1962) (“[I]f the . . . legislative leaders declare, not that the statute is to have this or that effect, but that one effect among many is the one that chiefly motivates them, how can that be imputed to every member of a legislative majority?”); J. ELY, *DEMOCRACY AND DISTRUST* 136-45 (1980) (“[I]t would be next to impossible for a court responsibly to conclude that a decision was affected by an unconstitutional motivation whenever it is possible to articulate a plausible legislative motivation for the action taken . . .” (footnotes omitted)).

40. D. RICHARDS, *supra* note 28, at 154-55.

41. See *id.* at 155.

son with these religionists!" It is that intuition—the understanding that religion and reason exist in tension with one another—which bottoms the liberal discomfort with public religious argument. In the end, we come back to the beginning: those who believe that God can heal disease *are* dangerous primitives. They are primitive because they do not celebrate reason as the path to knowledge of the world. They are dangerous because if they do not celebrate reason, they may not be amenable to reason, and anyone not amenable to reason is a threat to liberal society.

### III. COPING WITH FAITH: RELIGION AS HOBBY

Suppose now the case which, depending on point of view, is either the best or the worst: suppose that every member of the legislature accepts the hermeneutic of a literally inerrant Bible. Suppose that the same legislature now examines the curriculum. The legislators are furious to learn that only evolution theory is offered in the science classroom. The liberal critic might say that the legislators are furious because evolution runs counter to the teachings of their religion, but to make that the end of the matter is simplistic. Yes, the teachings of evolutionary theory are doubtless contrary to what the legislators hear in church and read in the Bible, but they are more than that, too. To the devout fundamentalist who accepts the principles of literalism and inerrancy, evolution theory is not simply contrary to religious teachings; it is *false*. Nor is it false in some intuitive or metaphysical sense. Based on the interpretive tools with which members of the legislature are accustomed to understanding the universe, it is *demonstrably* false.

The liberal, convinced that the legislative tools are bad ones and that the tools of science are superior, might shift into epistemology, contending that science deals with *knowledge* about the natural world, and is based on evidence, whereas religion is simply a system of *belief*, based on faith. One may criticize the implicit balancing of the relative merits of empirical evidence and spiritual faith, and many have done so.<sup>42</sup> But I am not even sure why the legislators should concede the initial proposition, that one involves knowledge and the other does not. Here, I am put in mind of Wittgenstein, who observed:

But I might also say: It has been revealed to me by God that it is so. God has taught me that this is my foot. And therefore if anything happened that seemed to conflict with this knowledge I should have to

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42. One of the most cogent criticisms was voiced by William James in his Gifford Lectures:

[I]f we look on man's whole mental life as it exists, on the life of men that lies in them apart from their learning and science, and that they inwardly and privately follow, we have to confess that the part of it of which rationalism can give an account is relatively superficial.

W. JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 72 (1902).



regard *that* as deception.<sup>43</sup>

This, of course, is precisely the logic that motivates many Christian fundamentalists to oppose the teaching of evolution or support the teaching of creation theory. They are informed by God's revelation; no artifice of mortal man can contradict that; and any "evidence" that the revelation is incorrect is either erroneous or deceptive.

This is the worldview of Christian fundamentalists. This is more than what they believe. In any sensible use of the word, this is what they *know*. Their fury that their children are taught in school something contrary to what they know to be true is like the fury of the black parents when my eighth-grade history teacher told us about the happiness of the slaves. There is no apparent reason to take the fury of the creationist parents less seriously, once one grants their right to their own epistemological choice.

If on the other hand the liberal refuses to accept the claim that the devout religionist knows rather than simply believes, then the argument that religion is nevertheless cherished stumbles near the edge of a frightening and perhaps unbridgeable precipice, yawning with the prospect of the humiliating dismissal of what liberal thought claims to cherish. If the arguments of the parents offended by the teaching of evolution are entitled to less weight than the arguments of the parents offended by the teaching of racist history, the reason must surely be that the second set of arguments is clothed in an appeal to liberal rationality and the first is not. The black parents, perhaps, can "prove" the racist history wrong; whereas the "proofs" offered by the creationist parents are irrational, which is to say, crazy.

The psychology of liberalism probably makes this diagnosis inevitable, because liberalism distinguishes sharply between facts and values in a way that religion does not. The liberal celebration of the freedom of individuals to pursue their desires rests on the presumption that they first agree on the characteristics of the world in which they live, and only subsequently decide how to value them. But as Roberto Unger has written, "The contrast of understanding and evaluation is foreign to the religious consciousness, for its beliefs about the world are simultaneously descriptions and ideals."<sup>44</sup> Liberalism rests critically on that contrast, and no simple call upon a principle of neutrality toward religion can hide the implicit tension. The question for the future of liberalism, then, is whether the tension between religion and reason is to be ignored, or cele-

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43. L. WITTGENSTEIN, *ON CERTAINTY* 47e para. 361 (D. Paul & G. Anscombe trans. 1969).

44. R. UNGER, *KNOWLEDGE AND POLITICS* 157-58 (1975); *see also id.* at 41 ("Wherever liberal psychology prevails, the distinction between describing things in the world and evaluating them will be accepted as the premise of all clear thought.").

brated, or softened. A different possible future lies beyond each of those choices.

If the tension is ignored—if liberalism continues paying lip-service to a principle of “neutrality” while in effect permitting official indoctrination in a philosophy that runs contrary to deeply held religious beliefs—then what is left for the parents who want to rear their children in a belief in Biblical inerrancy? One possibility is exit: the parents might try, after the example of the Amish, to have their children excused from the objectionable instruction.<sup>45</sup> This solution, however, has three obvious difficulties. First, by being forced to be the ones to opt out, to act differently from their classmates, the children whose parents oppose the teaching of evolution risk all the psychological trauma usually cited by liberals as the reason that an opting-out privilege cannot save the constitutionality of organized prayer in the public school classroom. Second, there is a dramatic slippery slope problem, as one imagines parents removing their children from one course after another because of conflict with religious knowledge, until, finally, the children are no longer receiving any education apart from home instruction. Third, as we know from *Mozert v. Hawkins County Public Schools*,<sup>46</sup> when parents do try to remove their children from objectionable courses of instruction, the state may try to keep the children in class. By refusing to excuse the children from instruction, the school would be telling the parents what Justice Douglas implied in his partial dissent in *Wisconsin v. Yoder*:<sup>47</sup> your children’s education is not yours to choose.

It may be, then, that the tension cannot be resolved within a liberal politics that claims to cherish both religion and reason. Perhaps to cherish both is impossible, and if it is, the liberal state might make a second choice, the choice for candor, the choice to celebrate the tension, by being open about the lurking contempt for any serious effort to gain knowledge through religious belief. The tools of secular science and rationalism, liberals might announce, are the proper tools for understanding the universe and the tools of religious belief are not. The state is free to indoctrinate through use of its schools, and except within certain

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45. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (approving in narrow circumstances the right of parents to exclude their children on religious grounds from secondary public education).

46. 647 F. Supp. 1194 (E.D. Tenn. 1986) (rejecting state’s effort to force students to use textbooks offensive to parents’ religious views), *rev’d sub nom. Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3569 (1988).

47. See 406 U.S. 205, 244-45 (1972) (Douglas, J., dissenting in part) (“While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views . . . . It is the student’s judgment, not his parents’, that is essential . . . .”); see also B. ACKERMAN, *supra* note 25, at 139-63 (challenging notion that parents should have plenary discretion over education of their children).

narrow limits, the parents are not free to shield their children from the state's effort to wean them from the religion of their parents. The parents may try to educate their children in their religion at home and in the church, but if the parents fail, even if they fail in part because the state insists on teaching something different, there is no one to whom a complaint fairly may be directed. Nor would this be simply a policy proposal; in a liberal politics of candor, this might be fundamental law.

The third possibility is an effort to transcend these difficulties, and perhaps to transcend liberalism itself, by softening the tension inherent in the liberal principle of neutrality toward religion. The softening would imply doing what many critics have already proposed: finding ways to take seriously the deep religious feelings that motivate so many Americans in their daily lives.<sup>48</sup> To take religious motivation seriously would not necessarily imply permitting the religious to impose their religious doctrines on the rest of society; it would suggest meeting policy proposals on their own grounds, rather than dismissing them because of the religious motivations of their supporters, a dismissal that carries with it an all but explicit ridicule of religious belief itself. A softened liberal politics would not insist on reason as the only legitimate path to knowledge about the world, and if, in the end, only one path were taught in school, at least it would not be taught as though no other path were possible. I will confess that I have not worked out the details of a liberal politics that would acknowledge and genuinely cherish the religious beliefs that for many Americans provide their fundamental worldview; but my sense is that a liberal politics that tries to do this is a liberal politics more likely to survive the resurgence of religious belief.

And yet.

And yet one may respond, no, this analysis is all wrong, the neutrality principle is an excellent one to preserve, and in its practical operation, it possesses the additional virtue of being in accord with intuition. But it is that very intuition that should finally be troubling, for that is the intuition that says of religious belief, "Yes, we cherish you—now go away and leave us alone." It is an intuition that makes religion something that is believed in privacy, not something that is paraded; and if religion *is* paraded, it is this same intuition that assures that it will likely be dismissed. This intuition says that Pat Robertson is stupid or fanatical in believing that God can cure disease, and the same intuition makes sure that everyone understands that his belief is a kind of mystic flight from hard truths—it has nothing to do with the real world. The same intui-

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48. The weakness of the third possibility is reflected in Mark Tushnet's suggestion that "[w]hen the liberal tradition takes religion seriously, the result subverts the individualist premises of the very theory into which religion is supposed to fit." Tushnet, *supra* note 3, at 734 (footnote omitted).

tion tells the religious that those things that they know to be true are wrong or irrelevant; that they cannot serve as the basis of policy; that they cannot even be debated in the forum of public dialogue on which liberalism depends.

The intuition says, in short, that religion is like building model airplanes: something quiet, something private, something trivial—and not really a fit activity for intelligent, public-spirited adults. This intuition, then, is one that in the end must destroy either religion or liberal theory. That is a prospect that can please only those who hate one or the other or both.