

## Marketing Creation: The Law and Human Origins\*

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Every day in public schools, universities, houses of worship and coffee shops a battle rages over where humanity came from, or more specifically how humans came to be human. Much of the debate focuses on whether a supposedly new concept of human origins—intelligent design—should be taught in public schools, and whether that concept has any merit. Yet few people know much if anything about this “new” concept, how it came to the fore, and what it means for science, faith and constitutional law.

Intelligent design (ID) is, in part, a response to the constitutional battles lost by creationists and “creation scientists.” ID is primarily aimed at gaining academic and legal recognition for a theistic view of nature so that it may be taught in the public schools and accepted in public discourse. ID advocates have learned many lessons from earlier defeats under the First Amendment to the United States Constitution. This is why they rarely acknowledge that the “intelligent designer” could be G-d or that their approach is heavily derived from the natural theology of the eighteenth and early nineteenth centuries. Natural theology, at least in that era, was connected to Christian apologetics, but the general concept goes back at least as far as Plato’s *Timeaus*.

Of course, many people of faith believe that G-d must have had some role in the complexity we see in the universe. Unlike ID proponents, however, many of these people believe in what can loosely be called “theistic evolution”—the notion that the scientific proof for evolution is so overwhelming it would be ludicrous to ignore it, but this in no way precludes a belief that G-d created life. Evolution might simply be the mechanism that G-d used. To theistic evolutionists faith is faith and not science.

The existence of theistic evolution, and support for it from prominent biologists such as Kenneth Miller, is important. One of the ID movement’s major arguments is that teaching evolution promotes scientific materialism and methodological naturalism. They use this, along with the so called “gaps” in evolutionary theory, to argue that ID is a viable alternative to evolution that should be given equal access in educational settings. The argument goes something like this: “Since teaching evolution promotes a materialistic and naturalistic position on the origins of complex life forms, and because there are gaps in that theory, ID should be

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\* This paper is a brief description of some of the issues addressed in FRANK S. RAVITCH, *MARKETING CREATION: THE LAW AND INTELLIGENT DESIGN* (Cambridge Univ. Press, expected 2010).

taught as an alternative because it helps fill the gaps and offers an alternative to the prevailing materialistic approach. Failure to allow ID to be taught and included in scientific discourse discriminates in favor of naturalistic views on ultimate questions and against religiously or supernaturally inspired views.” Yet, theistic evolution demonstrates the flaws in this reasoning. As Kenneth Miller has pointed out (along with numerous religious leaders) there is no inherent tension between faith and evolution. Teaching evolution may be inconsistent with some faiths, but so is reading *Lord of the Flies* in literature classes. From a constitutional perspective there is a big difference between taking a position on ultimate questions in public schools and teaching material that is inconsistent with some faiths, which can happen in many secular courses.

Intelligent design proponents also make a “scientific” argument for design. They use concepts such as irreducible complexity and complexity by design in an attempt to demonstrate that design exists and therefore there is a designer. Thus, they seek to explain the existence of the designer through what they argue is science, an argument that is at the core of the controversy. Thus, ID proponents enter what I have called the “proof game.”\*\* The proof game is at the center of the scientific and philosophical debates over ID. More importantly, it is also at the center of the legal and educational debates over ID that may ultimately determine the outcome of the scientific and philosophical debates.

The key is that in order to justify including intelligent design in science the ID movement needs to rely on scientific relativism and redefine science in a manner that has serious implications. ID proponents would need to combine relativist arguments from philosophy of science with free speech and equal access concepts from constitutional law. This would allow them to argue that exclusion from government sponsored scientific fora, including classrooms, is a form of viewpoint discrimination that violates the Free Speech Clause of the First Amendment to the United States Constitution. Yet, both constitutional law and scientific philosophy work against such arguments.

Many ID proponents argue that ID is simply a new or alternative paradigm for science, and as such, should be a valid topic of scientific debate. They base these arguments in part on the famous work of scientific historian Thomas Kuhn. Rather than attack Kuhn’s philosophy as some ID opponents have, it is illuminating to carefully explore Kuhn’s work. It turns out that his theories actually work against the acceptance of ID by mainstream science even if ID represents an alternative scientific paradigm. The epistemological possibility of multiple scientific paradigms, which Kuhn and scientific relativists address, says nothing about how and why a given paradigm would come to actually be accepted by mainstream science.

ID need not be part of legitimate scientific debate any more than other supernatural

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\*\* See Frank S. Ravitch, *Playing the Proof Game, The Law and Intelligent Design*, 113 PENN STATE L. REV. 841 (2009).

theories such as astrology. This is important, because twisted versions of the legal concepts of equal access and viewpoint neutrality could potentially require all valid scientific approaches to be included in scientific fora that are promoted, funded, or sponsored by the government. From a constitutional perspective these arguments seem odd, but at least as to funding fora the Supreme Court's move toward formal neutrality in recent years, and the suggestion in some cases, that government funding open to a variety of private entities might create a limited public forum, give some potential support for such arguments; albeit weak support. Public school classrooms are not public fora for speech, but some ID proponents have made arguments suggesting otherwise.

There is yet another facet to the ID debate. It involves claims of persecution and discrimination against ID advocates. In a recent movie called, *Expelled: No Intelligence Allowed* (2008), Ben Stein suggests that intelligent design advocates are being persecuted in the educational and scientific arenas and that this conflicts with free speech and intellectual fairness. Similar arguments have been made by a number of ID proponents. Yet, there are standards and law that relate to what can and can not be done in academic contexts, and as with most things, the story of these "expulsions" told by Stein and others leaves out many salient and important facts. In other words, few if any of these situations involve constitutional violations or violations of employment law.