A True Marketplace of Ideas

Why Designing the Ideal Curriculum Depends on Questioning the Right Answer

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In this paper, we will argue that in order to guarantee children their First Amendment rights, the government must provide unobstructed access to a free and open marketplace of ideas. To make this point, we will first define an idea and explain why a child's access to the marketplace is a matter of supreme importance. Next we will show why an ideal marketplace requires a curriculum that classifies ideas according to their kind, and why there may be no such thing as a bad idea. And finally, we will determine if creation science fits into the curriculum and what its exclusion could mean.

The Bill of Rights precludes any state or school board from denying children access to ideas.[1] But there is as much variance among ideas as there is among children, and courts have granted school boards much discretion in constructing curricula. Education, according to Friedrich Nietzsche, is a pitiable extension of a decadent society, indoctrinating children to a false ideal that deprives them of their natural abilities to reason. Unfortunately, other than abject avoidance of traditions that operate to suppress the senses, he doesn't describe the ideal process whereby a potential *superman* might attain the necessary virtues in a post-modern society. [2] In contrast to Nietzsche's rather nihilistic view, the Supreme Court has endeavored to preserve the status quo. Through the

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1. Michael J. Kaufman & Sherelyn R. Kaufman, Education Law, Policy, and Practice: cases and materials 387 (2d ed. 2009)
2. Friedrich Nietzche, Ecce Homo 18 (R.J. Hollingdale trans., Penguin Books Ltd 1992) (1888)

Establishment Clause of the Constitution, the Court has struck down statutes smacking of a non-secular purpose, and, despite being tasked also with the schizophrenic role of protecting citizens' rights to free exercise, have done so rather unequivocally.[3]

But is the ideologically neutral result the kind of education that is sufficient to "acquire, to study and to evaluate, to gain new maturity and understanding?" [4] In dealing with these issues, has the Court focused too acutely on separation of Church and State conservatism while paying scant attention to whether that which is being guarded is in fact Constitutionally sound? Such questions may fall more squarely within the province of the states where they can fashion curricula with boots on the school grounds, but the Court has cautioned that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [5] The First Amendment guarantees not only a right to express ideas, but also to receive them; a marketplace consisting only of cherry-picked institutional orthodoxy may instead be the dangerous ideal Nietzsche warned of.

Granting meaningful access to an education is not the same as providing access to a meaningful education. Although the Court has hinted at requiring an education that is at least minimally adequate, it has not yet announced it as a fundamental Constitutional right. Yet in principle--and often in grandiloquent language—the Court has championed education as vital in "opening up to the individual the central experience of our culture," lending it an, "importance that is undeniable."[6] A claim that education is undeniably

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3. Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940)
4. Michael J. Kaufman & Sherelyn R. Kaufman, Education Law, Policy, and Practice: cases and materials 91 (2d ed. 2009)
5. Tinker v. DeMoines Ind. Comm. Sch. Dist, 393 U.S. 503, 506 (1969)
6. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 5 (1973)

important seems self evident, but there is hardly a consensus as to why education is accorded such respect. In a rather bleak 2008 N.Y. Times article, Bruce Fuller argued that the socio-economic landscape is changing so rapidly, people ought to think about foregoing education altogether and instead focus on non-cognitive social skills around the community where it will serve their own "economically sustainable enlightenment." [7] There were 1.5 million more restaurant jobs in 2012 than there was in 2002. Memorizing the ingredients in the Thursday night special hardly seems in keeping with the American Dream. Has education become more of a symbol—a hallow political talking point—than a pursuit with practical value?

In Wisconsin v. Yoder, the state tried to compel an Amish family to abide by a compulsory school attendance law, arguing that a child must be protected from "ignorance." The Court disagreed. [8] In fact, Justice Berger argued it might actually be harmful to wrench the children from a faith-oriented way of life that was both, "symbolic and practical." And there, in that pithy three-word summation, punctuating his illuminating discussion of the arguments, Berger provided both an intended analysis as well as an unintended meta-analysis: education, too, is vital because it is itself symbolic and practical. For it is access to ideas that informed Justice Berger's decision; it is access to ideas that permitted probing examination into the Amish mode of dress, communication,

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7. Bruce Fuller, Why we Educate our Children (2008), *in* New York Times, 28-29 (2008)
8. Wisconsin v. Yoder, 406 U.S. 205, 217 (1972)

and labor. Like all those justices garbed in black before him and since, who were privy to "worldy" influences, enabling them to intelligently compare and contrast competing ideas, Justice Berger examined two disparate ways of life before reaching an educated decision.

Ideas add context. While there will always be intractable dogmatism amidst what Nietzsche called the "buffoons of politics and the church," education has nevertheless become an enduring symbol, etched indelibly on society's collective psyche because it is practical. Whether in the form of logarithm, historical fact, or theory, ideas are undeniably valuable because they are the only true tonic to ignorance. Education is a method by which a child gains access to ideas and in so doing, "awakens the child to cultural values." [9] After all, if education were only symbolic, the Courts reasoning wouldn't have much meaning.

To implement such a sweeping approach to ideas is not to be utterly indiscriminate. Designing a curriculum that provides a child access to a diverse marketplace involves more nuance than the religious battle in Yoder would suggest. For instance, despite being so diametrically opposed in the public debate, science and creation science are considered by many to be quite coterminous. Creationism is not, by definition, anti-naturalist--it does not deny the physical laws of the universe, which we observe and test empirically. Instead, the explanatory focus of Creationism is on the source of the laws; it attempts to explain the watch by providing a watchmaker. And by focusing its attention there, a priori, it seizes

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9. Brown v. Board of Education, 347 U.S. 483, 493 (1954)

on a fundamental mystery that will perhaps always prove resistant to empirical study. Indeed, the leap from science to what evolutionary biologist Richard Dawkins calls "*bad science*," perhaps only happens when one asks one simple question: "why?" [10] And it is this question that provides the blueprint for how the marketplace of ideas ought to be designed.

Scientific knowledge tells us *how*, but, according to metaphysician Wesley Salmon, to know *why*, "we must go outside of science, perhaps to metaphysics or theology." [11] Schools have traditionally provided the answers to *how* by way of classroom instruction and experimentation; the why, though, can be provided by way of literature, publications and media in the modern library. In Board of Education v. Pico, Justice Brennan, in his full-throated endorsement of the sanctity of the school library, argued that it is "a place to test or expand upon ideas presented to him in or out of the classroom." [12] He regarded the library as an especially appropriate place where a student's First Amendment rights are to be protected. A newfound emphasis on a library that is not stocked exclusively with yellowed pages of historical, political or religious leanings, but that is also festooned with technological resources where students can seek out answers to questions raised in lecture is what creates an open marketplace of ideas.

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10. Richard Dawkins, *Is Science a Religion*, *in* Readings in the Philosophy of Science 318-322 (Theodore Schick, Jr. ed., Mayfield Publishing Company 2000)
11. Wesley Salmon, Why Ask, "Why?" *in* Readings in the Philosophy of Science 79-86 (Theodore Schick, Jr. ed., Mayfield Publishing Company 2000)
12. Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869 (1982)

If a student learns about *how* the laws of supply and demand work in economics class, he might then seek out theories explaining why those laws operate that way in a book on John Maynard Keynes or perhaps add context with Karl Marx's *Communist Manifesto*. After studying atoms of elements in chemistry, a student may be inspired to seek out theories on the Big Bang, Babylonian creation myths, or Creation Science. After reading *Thus Spoke Zarathustra*, a student may read two opposing critical essays online about Nietzsche and decide for herself if his peevish disposition was due to the naggings of his overweening sister, or syphilis.

If the Court seemed to declare the library an impenetrable sanctuary for First Amendment rights, it also hedged slightly by disqualifying materials that are 'educationally unsuitable' and 'pervasively vulgar,' the latter already being outlawed by harmful to minor statutes. The nebulous 'educationally unsuitable,' description, though, was evidence that the Court still accords schools significant discretion in defining the curricula, perhaps trusting that they'll just know 'unsuitable' when they see it.[13] Computer technology in particular poses an interesting dilemma because today there is immediate access to mind-boggling amounts of data. Filtering systems have thus become commonplace. In United States v. American Library Ass'n, the Court found a computer filtering system Constitutional, but added that minors had a Constitutional right to request that material be unblocked without explanation.[14] In other words, they needn't explain why they are asking *why*. If the responsibility of protecting students' First Amendment rights while

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13. In Jacob Ellis v. Ohio (1964) Potter Stewart wrote in his short concurrence that "hardcore pornography" was hard to define, but that, "I know it when I see it."
14. United States v. American Library Ass'n., 539 U.S. 194, 209 (2003)

simultaneously filtering out vulgar material seems unduly burdensome for a librarian, it needn't be: in a statutorily designed marketplace of ideas, nothing short of 'pervasively vulgar' ought to be banned.

Guarding against vulgarity is one thing, but could there be a statutory duty to *include* titles and media, and if so, are we on a slippery slope right back to orthodoxy? Overt violations of the marketplace, such as the removal of *Slaughterhouse Five* from the bookshelf, might be easy to identify, but the courts have consistently deferred to school boards in deciding what ought to be placed there to begin with. If a child is not aware of an idea, how can she know when her First Amendment rights are being violated?

One way to affect change in the marketplace is through the spending power of the Constitution. Congress can make policy decisions based on the general welfare of the students by penalizing non-compliant schools and libraries applying for funds from the state. Whether through internet access available pursuant to the Communications Act or the Museum and Library Services Act, schools will not be permitted to receive funds unless they certify that they have in place a policy that guarantees access to the statutorily required marketplace of ideas. A five-year time limit could be placed on school districts to design a library catalogue that adequately supplies, without bias, a reasonable amount of diverse ideas. The goal is quantitative instead of qualitative—albeit with an effort to provide reasonable guidance to students in connecting classroom instruction to library theories. The template upon which a reasonable marketplace ought to be modeled is one without suspicious patterns of omissions or additions. A library utterly devoid of creation myths contrary to the Jewish faith, for example, would raise a red flag.

One might argue that such a broad approach to education would drop the child, dizzyingly, into a vast wilderness of ideas. According to Salmon, when one asks why too often, "this way lies madness." Dawkins himself argues that perhaps all theories of creation should be given equal time "so that students may make up their own minds" but then concedes that it wouldn't leave time for much else.[15] To be sure, the traditional pillars of the curriculum—the *how*—such as biology, mathematics, and history, will always compete for time and supremacy. But in the library, where there once was profound logistical limitations, now, in the digital age, access to ideas is near boundless. And it needn't be overwhelming. When a student is in search of possible theories to help explain why a natural law behaves the way it does, options can be catalogued intuitively and presented in accessible unbiased ways that are extensions of classroom instruction. That way, students can be given guidance without disabusing them of the choice in how to seek answers according to their own impulses, thus emancipating them from what Nietzsche considered education's assault on natural instincts.

At first blush, the line of demarcation between *how* and *why* may seem open to interpretation, leading to disparate classifications and rendering curricula vulnerable to the kinds of limitations the marketplace of ideas rejects. Perhaps making such distinctions is as confusing as determining what is "educationally unsuitable." Interestingly, an educated man, garbed in black, had an idea that may provide an applicable measuring stick. In *McLean v. Arkansas*,[16] where The Arkansas Balanced Treatment Act was struck down for trying to impose the teaching of creation science, Judge William Overton, with impressive

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15. Richard Dawkins, *Is Science a Religion*, *in* Readings in the Philosophy of Science 318-322 (Theodore Schick, Jr. ed., Mayfield Publishing Company 2000)
16. McLean v. Arkansas, 529 F. Supp. 1255, 1258 (1982)

scientific erudition, set forth a criteria that distinguishes scientific knowledge from other kinds: to be scientific, he argued, a theory must be 1) guided by natural law; 2) testable; and 3) falsifiable. According to Overton, theories are not indisputable truths, but best educated guesses. Despite the reverence accorded Einstein's Theory of Relativity, it is still but a theory. Evolution, too, is a best educated guess based on some independently testable hypothesis, as well as large body of assumptions that are conceivably falsifiable. Some corroborative results are observable; some are not. In other words, fossil records and carbon dating are *how* questions, rooted in natural laws, that are observable and testable in a classroom--the inferences drawn from them, however, such as the notion of natural selection, are *why* questions within the province of the library.

The marketplace is a place for quiet competition; ideas are meant to jockey with one another for intuitive appeal without promotion or suppression. Particle Scientists who posit theories on Dark Matter would undoubtedly bristle at sharing a broad classification with theories that run towards the fantastical. But the decision rests with students alone. Rudyard Kipling's *Just-so* stories provide children with entertainingly imaginative reasons as to why leopards have spots and giraffes long necks. And eventually, as young readers mature and gain access to more ideas, they will embrace zoology's more explanatory appeal, and assign Kipling, lovingly, to the fiction section. The marketplace itself operates in a kind of Darwinian system: there are no good or bad ideas, just those that suffer or benefit from natural selection. Whether the inquiry is why the leopard got its spots or why the universe got its stars, so long as the selection is natural and not due to ideological influence, the marketplace is preserved.

Having classified ideas for the purpose of designing an ideal marketplace in accordance with scientific criteria, we can revisit the Creationism debate to determine where it fits into the curriculum. Creationists argue for the inclusion of scripture in the classroom as an alternative to science, and in a clever field-leveling maneuver, accuse scientists of ideological fervor when feverishly indoctrinate the masses to their beloved theories. Dawkins admits that scientists are sometimes guilty of too much zeal, but, unlike creationists, they do not refuse to accept that which is independently verifiable. That, in a nutshell, has been the debate thus far--usually over a statute permitting creation science--that culminates, rather simply, in a mechanical non-secular purpose test. But failing that test does not mean it is a bad idea---it means it is not a *how* question.

The fatal flaw to creation science, according to Judge Overton, is not that it isn't rooted in natural laws, but that it is not falsifiable under any conceivable scenario. No matter how many times the fossil record is reinforced by a new link, there is no way to prove that it wasn't by design. It is neither testable nor falsifiable, and is therefore not, in the scientific sense, a theory at all. Still, an idea rooted in faith is not false because it isn't falsifiable. It simply doesn't pass Constitutional muster when it is masqueraded as a *how* question because it takes on a non-secular purpose. The natural law assumptions it shares with evolutionary theory are still preserved in the classroom, while the inferences drawn from them then compete in the library. If the government is going to ensure children have unfettered access to a meaningful marketplace of ideas, it cannot permit the banning of creation science, the Jewish creation myth, or Darwinian theory because, quite simply, there is no compelling reason for the suppression of any non-vulgar idea. Schools still must compartmentalize the subject matter accordingly—to the *how* and the *why*--and then step

back and respect the students' First Amendment rights to investigate for themselves what explanations make the most sense with the facts they've been given.

Richard Dawkins regarded religious indoctrination of children as a form of mental child abuse.[17] The same could be said about the deprivation of ideas. It is only when ideas are accessible that they cease to be misunderstood. And while courts like the one in Wisconsin v. Yoder defended a parent's First Amendment rights to raise her child as she sees fit, it also recognized that the education of the child has many social implications for which "the child will often have decided views."[18] Nine years after Yoder, in Bolger v. Youngs Drug Prods. Corp., the Court attacked a federal ban on unsolicited contraceptive advertisements because it ignored adolescents, "pressing need for information about contraception."[19] To be "worldly" doesn't mean what it meant thirty years ago, nor will it mean the same thing thirty years from now. But the Constitution has always regarded students as "persons," not "closed circuit recipients of only that which the state chooses to communicate."[20] Garbed in black, but sounding every bit like a philosopher, Oliver Wendell Holmes thought that the best test of truth was introducing an idea into the marketplace--yet another echo of the notion that one cannot gain understanding without meaningful access to a diversity of ideas. Even Nietzsche mused, "one repays a teacher badly if one remains only a pupil."

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17. Richard Dawkins, *Is Science a Religion*, *in* Readings in the Philosophy of Science 318-322 (Theodore Schick, Jr. ed., Mayfield Publishing Company 2000) He was appalled at seeing a photograph in a 1995 Christmas issue of London's *The Independent*, featuring three pre-school aged children dressed up for a nativity scene as a Muslim, a Hindu, and a Christian.
18. Wisconsin v. Yoder, 406 U.S. 205, 244 (1972)
19. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983).
20. Tinker v. DeMoines Ind. Comm. Sch. Dist, 393 U.S. 503, 511 (1969)