

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1513

TITLE EDWIN W. EDWARDS, ETC., ET AL., Appellants V.
DON AGUILLARD, ET AL.

PLACE Washington, D. C.

DATE December 10, 1986

PAGES 1 thru 61



(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 EDWIN W. EDWARDS, ETC., ET AL., :

4 Appellants :

5 v. : No. 85-1513

6 DON AGUILLARD, ET AL. :
7 -----X

8 Washington, D.C.

9 Wednesday, December 10, 1986

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:05 a.m.

13 APPEARANCES:

14 WENDELL R. BIRD, ESQ., Special Assistant Attorney

15 Generaly for Louisiana, Atlanta, Georgia;

16 on behalf of the Appellants.

17 JAY TOPKIS, ESQ., New York, New York; on behalf

18 of the Appellees.
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
WENDELL R. BIRD, ESQ.,	
on behalf of the Appellants	3
JAY TOPKIS, ESQ.,	
on behalf of the Appellees	31
<u>REBUTTAL ARGUMENT OF:</u>	
WENDELL R. BIRD, ESQ.,	
on behalf of The Appellants	58

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

2
3
4

5
6

7
8

9
10

11
12
13
14
15

16
17
18

19
20
21

22
23
24
25

1 order to apply the tripart test, and which preclude
2 summary judgment; and then, second, the Constitutional
3 question, particularly of the abundant evidence in the
4 record of a secular purpose, although not an exclusively
5 secular purpose, we concede.

6 I'll mention the relevant facts in connection
7 with each of these two major issues.

8 The first major question is the procedural
9 question which the State believes should be decisive.
10 The decision under review contradicts the unquestioned
11 procedural rule for summary judgment regarding
12 uncontradicted affidavits and material factual issues,
13 as the seven dissenting judges acknowledged.

14 The uncontroverted factual issues of the State

15 --

16 QUESTION: Well, this wasn't really an en banc
17 decision, was it?

18 MR. BIRD: No, sir, it wasn't. It was denial
19 of rehearing en banc. And in fact, the eight judge
20 majority did not enter a written opinion. It simply
21 affirmed; in effect, denied rehearing of the three-judge
22 opinion. Seven judges disagreed very strongly.

23 The uncontroverted affidavits --

24 QUESTION: Of course, they just said the case
25 should be reheard en banc.

1 MR. BIRD: Yes. Yes, Your Honor, that's
2 correct.

3 QUESTION: Diagreers always disagree very
4 strongly.

5 (Laughter.)

6 MR. BIRD: And in this case, they certainly
7 upheld that tradition.

8 The uncontroverted affidavits of the State on
9 factual issues erroneously were not taken as true or
10 admitted for purposes of summary judgment and appeal.

11 The other factual issues raised by the State
12 in its Brandeis memorandum of 630 pages, with nearly
13 2,000 citations, were not viewed in the most favorable
14 light, like the affidavits, and in fact, were hardly
15 given credence at all. They certainly weren't accepted
16 as true for purposes of summary judgment.

17 The facts in regard to this procedural issue
18 are that the State filed affidavits by creationist and
19 evolutionist scientists; by a creationist philosopher;
20 an evolutionist theologian; and a creationist educator.

21 They were not only Protestants, but two Roman
22 Catholics and one agnostic.

23 QUESTION: Mr. Bird, what would you say was
24 the factual issue that had to be resolved?

25 MR. BIRD: Your Honor, the definition of

1 creation science is one very important factual issue,
2 what the statute's about.

3 QUESTION: You don't think the statute defines
4 the term adequately?

5 MR. BIRD: Well, Your Honor, it does give a
6 definition that's highly scientific, and referring only
7 to scientific evidences, and inferences from those
8 scientific evidences.

9 QUESTION: But the factual issue was, what
10 does -- what does the statutory term mean, is that what
11 it is?

12 MR. BIRD: Yes, sir. A very important factual
13 issue in order --

14 QUESTION: And these people, who had nothing
15 to do with enacting the statute, are able to tell us
16 what the statute means?

17 MR. BIRD: Because it is bringing a term from
18 a technical term into a statute, yes, Your Honor, much
19 like in some of the technical regulatory statutes that
20 might take a term of art from another field without
21 attempting to give a plenary definition in the statute.

22 And besides the definition, another factual
23 issue is the religious -- the nonreligious nature of
24 that scientific evidence supporting creation.

25 And a third factual issue, the scientific

1 nature of creation science as compared with evolution.

2 QUESTION: Why is the meaning of the statute a
3 factual issue? I would think that that's a legal
4 issue. And indeed, haven't we in earlier cases
5 abstained from passing on the Constitutionality of
6 statutes until the State courts could tell us what their
7 own statute meant?

8 Isn't the meaning of it ultimately a question
9 of Louisiana law for the Louisiana courts?

10 MR. BIRD: Your Honor, taking those questions
11 in reverse, the Louisiana Supreme Court has reviewed
12 this statute on different grounds, and has upheld it
13 under applicable provisions of the Louisiana
14 Constitution regarding prescribing curriculum.

15 It did not see fit to give a definition of
16 creation science, or even to indicate that it regarded
17 that as within its prerogatives.

18 I'd suggest --

19 QUESTION: As within its prerogative? Within
20 whose prerogatives would it be, if not within the
21 prerogatives of the Louisiana Supreme Court?

22 MR. BIRD: Because a term that is a technical
23 term, a term used within the scientific field, was being
24 embodied in the statute, the State submits, Your Honor,
25 that the definition of that term is a factual matter,

1 appropriate for resolution by expert testimony on that
2 field, much like if the State had regulated some
3 particular form of, say, asbestos contamination, or
4 whatever, and had used technical terms of art.

5 It wouldn't be an issue of State law as to
6 what they meant, when the intent was to bring in a
7 technical definition from the relevant academic field.

8 QUESTION: So if we, as a Federal court, say
9 that the Louisiana statute means X, the Louisiana
10 Supreme Court couldn't say, no, it doesn't mean X, it
11 means Y?

12 MR. BIRD: Well, Your Honor, I would suggest,
13 in the context of the procedural issue, that this Court
14 should not be saying, the statute means X, but instead,
15 should allow the case to go to trial, a trial it's never
16 had, in order to develop a factual record on that issue.

17 QUESTION: In order that we can say whether it
18 means X. I mean, ultimately, you want us to say whether
19 it means X or Y. And why is that our business rather
20 than the Louisiana courts?

21 MR. BIRD: Your Honor, with all respect, what
22 we would like you to say is that this Court should not
23 have to say whether it means X or Y, but that a trial,
24 with factual development, ought to occur to enable
25 expert witnesses on both sides to give definitions.

1 QUESTION: After which -- after which a
2 Federal court will say whether it means X or Y. Isn't
3 that what you're saying?

4 MR. BIRD: Not quite, Your Honor, because a
5 Federal court --

6 QUESTION: You're just quarreling that it was
7 done too soon; not that it shouldn't be done by Federal
8 courts.

9 MR. BIRD: Your Honor, I'm suggesting --

10 QUESTION: And I'm questioning whether --

11 MR. BIRD: -- that the only thing a Federal
12 court ought to do is review whether the factual
13 determination by the trial court, after a trial, is
14 clearly erroneous.

15 This Court, in *Lynch v. Donnelly*, used the
16 clearly erroneous standard in reviewing district court
17 findings. And in fact, the dissenting opinion did the
18 same thing in footnote 11, recognizing the heavily
19 factual issue of many issues of that nature.

20 The role of this Court, the State would
21 suggest, is not to determine, as the two lower courts
22 did, out of thin air, what a technical term means, but
23 to recognize that that is a factual issue, or at least
24 involved factual issues that this Court is entitled to a
25 trial record on before this Court is asked to apply the

1 clearly erroneous standard.

2 QUESTION: What if Louisiana chooses to use a
3 technical term in an inaccurate sense? Can it do that
4 if it wants to?

5 MR. BIRD: A State certainly could use a term
6 and define it differently.

7 QUESTION: Of course it could. And isn't it
8 up to Louisiana State court to say whether it's using a
9 technical term accurately or inaccurately? It could use
10 that term any way it wants, couldn't it?

11 MR. BIRD: Your Honor, recognizing the
12 correctness of your point about State interpretations of
13 terms that have a -- have a State law background behind
14 them, the term in this statute was a term borrowed from
15 a technical field.

16 And it's our suggestion that the trier of
17 fact, at the trial court level, can correctly determine
18 the meaning of that term, based on the legislative
19 history and expert testimony, whether that trier of fact
20 is a State court or a Federal court.

21 QUESTION: Well, Mr. Bird, I understood the
22 opinion of the Fifth Circuit, from which you're
23 appealing, to say that the statute was unconstitutional
24 because it had no secular purpose, and it failed that
25 part of the so-called Lemon test.

1 Is it really necessary to get into all this
2 meaning of technical terms in order to review that what
3 seems to be a rather narrow ruling of the Fifth Circuit?

4 MR. BIRD: Well, Your Honor, first, I think
5 it's very important to notice that the Fifth Circuit and
6 the District Court did not rely at all on the
7 legislative history in reaching that determination.

8 They instead said, effectively by judicial
9 notice we submit, creation science means X. It means
10 religious doctrine including a creator. Not based on
11 any factual evidence in the record, but just a priori.

12 And consequently, those courts were not even
13 applying the purpose prong of the establishment clause
14 test in the way that this Court has indicated it should
15 be applied.

16 QUESTION: Well, Mr. Bird, if we were to do
17 that here, wouldn't we just look at the legislative
18 history and the stated purpose of the legislature in
19 making that determination?

20 Why would we have to perpetuate the alleged
21 error you think was made below? Why couldn't we look at
22 the record here and determine whether the court was
23 correct in its decision on the purpose prong of the
24 Lemon test?

25 MR. BIRD: Your Honor, that might be possible

1 given two caveats.

2 The first is that the legislative history does
3 involve technical terms of science, not only terms such
4 as creation science and creation and their meaning, but
5 also terms about mathematical probability, paleontology,
6 and so forth.

7 This Court could assume that all of the
8 State's allegations are correct on those factual issues,
9 and in that context, could interpret the legislative
10 history, including those terms.

11 Now, the appellees are also arguing that the
12 social context is relevant to a determination of
13 legislative purpose. We do disagree with that,
14 particularly where there is a clear legislative history
15 and where there is a clear statute.

16 However, addressing the social context
17 involves questions of history which similarly are
18 factual issues.

19 My second caveat is, if this Court were to
20 apply the purpose prong of the tripartite test, ab
21 initio, it again ought to determine all historical,
22 factual type questions in the light most favorable to
23 the State, just as it should the definitional questions.

24 In that sense, it might be possible for this
25 Court to reach a purpose determination based on a full

1 review of the record.

2 I'd urge the Court not to do so. Because
3 certainly for effect and entanglement, the definitions
4 of terms are highly critical.

5 But if the Court did so, I -- I would urge
6 this Court to give the kind of full review of the
7 legislative history I know it would.

8 We have, for the convenience of the Court, in
9 our reply brief, footnotes 56a to 56c, cited some of the
10 most important portions of the legislative history on
11 the purpose to advance academic freedom, students right
12 to hear, by teaching additional scientific information,
13 a nonreligious information.

14 It's critical that the legislative history be
15 read in context.

16 It's also critical that the standard applied
17 by this Court, at all times in the past for purpose
18 review, be applied; that it is not necessary to have an
19 exclusively secular purpose; but instead, it is
20 sufficient to have a secular purpose.

21 In fact, I think the legislative history in
22 this case indicates a primary secular purpose, although
23 the State does recognize that there are tertiary
24 religious purposes indicated in the record.

25 We would suggest that the appellees highly

1 selective --

2 QUESTION: What are those religious that you
3 acknowledge are indicated in the record?

4 MR. BIRD: Your Honor, we'd suggest that the
5 legislative history indicates that there were a variety
6 of reasons for this Act being passed.

7 QUESTION: No, I just asked you what were the
8 religious purposes that are -- that you acknowledge are
9 present.

10 MR. BIRD: As a tertiary purpose only, not as
11 the primary --

12 QUESTION: I understand.

13 MR. BIRD: -- or even the secondary purpose,
14 we'd recognize that, doubtless, some legislators had a
15 desire to teach religious doctrine in the classroom.

16 We feel that was a small minority of the
17 legislators, as indicated by the record.

18 But certainly there's no question that in this
19 mixture of many different purposes that would certainly
20 be a tertiary or less important purpose, along with
21 basic concepts of fairness; the academic freedom concern
22 of students' right to receive --

23 QUESTION: Do you think there was also a
24 purpose -- do you think there was also a purpose to
25 exclude the teaching of evolutionary science, or

1 whatever you might call it?

2 MR. BIRD: No, sir, I don't. It is true that
3 there are --

4 QUESTION: So to the extent that there's a
5 religious purpose, it's to add to the curriculum, rather
6 than to subtract from it?

7 MR. BIRD: Yes, sir. And if that were the
8 case, I'd suggest that the courts could properly address
9 any -- that issue if they -- if they saw that issue
10 being a sufficiently significant purpose, simply by
11 stating what the State agrees wholeheartedly with, that
12 the teaching of the Bible, as part of implementing this
13 statute, would be unconstitutional.

14 The State has consistently taken the position
15 that that, in a science classroom, would not be
16 appropriate under the Constitution or under the statute.

17 QUESTION: Mr. Bird, do you think that it is
18 Constitutional within the establishment clause to teach
19 a purely religious concept in public school in order to
20 balance other concepts that are perceived to be
21 anti-religious?

22 MR. BIRD: Your Honor, not in this case, and
23 not in the general case.

24 QUESTION: Well, in general, I asked.

25 MR. BIRD: Yes, Your Honor.

1 QUESTION: In general. Is that -- is that
2 valid?

3 MR. BIRD: No.

4 QUESTION: No?

5 MR. BIRD: Only in the limited context this
6 Court has recognized in Shemp and other decisions of an
7 objective, neutral discussions of a wide variety of
8 religious views.

9 We don't believe that that is even applicable
10 to this case. The State has consistently taken the
11 position that to teach religious doctrine would not only
12 violate the establishment clause in science classes, but
13 would violate the terms of the statute.

14 It's critical, as many of the questions, I
15 believe, reflect, to know what creation science is. We
16 --

17 QUESTION: Mr. Bird, before you go further,
18 you acknowledge before that a purpose was -- tertiary
19 purpose on the part of some legislators was to teach
20 religious doctrine.

21 Assuming I think that only a purpose that is
22 effectuated in the statute is relevant, do you
23 acknowledge that that purpose is effectuated in the
24 statute?

25 MR. BIRD: Absolutely not. The statute itself

1 refers to scientific evidence. The affidavits,
2 established for purposes of this appeal, that creation
3 science consists of scientific evidence and scientific
4 interpretations.

5 The State's Brandeis memorandum, in fact,
6 cites 170 pages of that scientific evidence in defining
7 creation science and its content.

8 QUESTION: Does it necessarily require the
9 teaching of a God, a personal God, as opposed to a first
10 cause that may be quite impersonal, or a giant slug, for
11 all we know?

12 MR. BIRD: Your Honor, teaching creation
13 science does not entail, necessarily, the teaching of
14 any of those concepts.

15 In other words, with creation science
16 consisting of scientific evidence, such as the abrupt
17 appearance of complex life in the fossil record, the
18 systematic gaps between fossil categories, the
19 mathematical improbability of evolution, the vast
20 information content of all living forms, the genetic
21 limits of viable change -- in none of that is there any
22 concept of a creator, and certainly no concept of
23 Genesis.

24 That is scientific data. As you'll find
25 summarized in the Joint Appendix from our long

1 memorandum, pages G66 to 168, 356 to 87, 457 to 90. In
2 fact, the term "creation" is used in much scientific
3 discussion without any reference to a creator.

4 The Big Bang theory is often described as a
5 theory of creation, without necessarily having any
6 concept of a creator embodied in it.

7 QUESTION: Well, that may or may not be so.

8 MR. BIRD: It's a factual issue.

9 QUESTION: Either a factual issue or an issue
10 of law to be decided by some court. It depends on what
11 creation in the statute means, doesn't it?

12 MR. BIRD: Yes, sir, it does. And it depends
13 on what creation science means; what the scientific
14 evidences mean.

15 In fact, many of the --

16 QUESTION: Let me ask you a question there --

17 QUESTION: May I interrupt you?

18 MR. BIRD: Yes, Your Honor.

19 QUESTION: Did I understand you to say that it
20 would be unconstitutional to have a course in the
21 Louisiana schools or colleges on religion?

22 MR. BIRD: No, Your Honor, not under the
23 narrow exception this Court has recognized for
24 objective, neutral, discussion of religion.

25 However, my suggestion was simply that there's

1 no need to bring religion into this subject matter,
2 because --

3 QUESTION: Right. But I think it's helpful,
4 at least to me, to know what actually is being done in
5 Louisiana.

6 MR. BIRD: Yes sir.

7 QUESTION: Louisiana State, I looked at the
8 catalogue, as I count has seven courses on religion.
9 Every other State college or university -- do you want
10 to know what the courses are? Well, I won't take the
11 time --

12 MR. BIRD: I'll certainly take your word for
13 it.

14 QUESTION: They have a course called,
15 Introduction to Religion. They have a course on the
16 Old Testament. They have a course on the New
17 Testament. They have one on faith and doubt. Jesus in
18 history and tradition. Eastern religions. Philosophy
19 of religion. And so on.

20 I would guess that most of the universities in
21 the United States have similar courses. They're all
22 right, aren't they?

23 MR. BIRD: Your Honor, that's not before the
24 Court in this case --

25 QUESTION: I understand that.

1 MR. BIRD: -- but certainly, we have no reason
2 to --

3 QUESTION: But I'm trying to find out what --
4 what your position really is.

5 MR. BIRD: My answer to your first question
6 was in the context of elementary and secondary schools.

7 QUESTION: Yes.

8 MR. BIRD: And I think this Court has
9 recognized, because of the different maturity level, the
10 different critical thinking level of students at the
11 upper -- at the university and college level, that a far
12 broader variety of courses of the type that you've just
13 described would be generally permissible at the
14 university level.

15 QUESTION: And of course at the university
16 level they also have biology courses --

17 MR. BIRD: Absolutely.k

18 QUESTION: -- that no doubt go into evolution.

19 MR. BIRD: Absolutely.

20 QUESTION: Are you saying that all we have
21 before us today is what happens at the public school
22 level?

23 MR. BIRD: Yes, it is.

24 QUESTION: What about elementary school?

25 MR. BIRD: This would include elementary

1 schools to the extent they're teaching anything about
2 origins today.

3 QUESTION: It's curious, or so it seems to me,
4 that the statute is very explicit in requiring that,
5 with respect to everything that goes on in the
6 classroom, in the textbooks, in the libraries, and in
7 all instructional matters, that this statute has to be
8 complied with.

9 How in the world can that be monitored?

10 MR. BIRD: Well, Your Honor, this Court has
11 charged public schools with keeping impermissible
12 religious material out of the classrooms already.

13 And in terms of that monitoring, first, you
14 mentioned textbooks. This Court has upheld --

15 QUESTION: You can monitor a textbook.

16 MR. BIRD: Yes, sir. Board of Education v.
17 Allen, Mueller, and so forth.

18 This Court, in the Regan decision, made much
19 the same point regarding the classroom teaching,
20 particularly when we're talking about a public school
21 teacher.

22 We don't have any issue, as in cases from the
23 last term --

24 QUESTION: Would you have to have monitors in
25 every classroom?

1 MR. BIRD: Your Honor, certainly not. Because
2 this Court does assume the good faith of teachers. This
3 Court has said that it will not assume bad faith of
4 teachers.

5 Moreover, any religious material that could
6 impermissibly enter the science classroom, based on the
7 teaching of creation science, already could enter that
8 classroom based on the teaching of evolution.

9 For instance, the question, who created, or
10 who began, the evolutionary process? Where did the Big
11 Bang come from? What guided the evolutionary process?

12 And it's to be presumed -- certainly there's
13 no evidence to the contrary in this case, because we
14 haven't even been to trial yet -- that teachers will not
15 do that which is impermissible.

16 If they do, the Attorney General does have
17 enforcement authority under the Louisiana Constitution,
18 and has stated his intent to ensure that only scientific
19 evidence is taught, as the statute refers to, and not
20 that any impermissible religious material is taught,
21 particularly Genesis, in teaching the balanced
22 treatment. That would be impermissible.

23 The definition of creation science is
24 critical. And even opponents of creation science in
25 some cases have acknowledge that creation science is

1 scientific material; not religious material.

2 For instance, one of the affidavits
3 establishing the issue for purposes of summary judgment
4 and appeal, said, by Dr. W. Scott Morrow, I'm not a
5 creationist or a religious fundamentalist, and instead,
6 am an evolutionist and an agnostic -- our brief at page
7 19. My conclusions are that creation science is
8 scientific, nonreligious, and educationally worthwhile.

9 QUESTION: Mr. Bird, can I ask you, you gave
10 an example a moment ago of a Big Bang theory to mention
11 the evolutionary process.

12 Supposing there was a Big Bang a million years
13 ago that created much of what we know on the Earth, but
14 -- everything except man. And then after that, there
15 was evolution to what we now know as man.

16 Would a person who believed that be a
17 evolutionist or a creation scientist?

18 MR. BIRD: That would really depend on their
19 own categorization. Because you have identified an
20 issue where there is a difference, even among those
21 scientists --

22 QUESTION: Well, I mean, it seems to me some
23 people might be a creationist within your definition at
24 a certain point, but then believe that evolution
25 followed that beginning moment.

1 MR. BIRD: Yes, sir.

2 QUESTION: And I'm just wondering how you
3 classify that person.

4 MR. BIRD: There's certainly no question that
5 some people would take elements of what the statute
6 envisions as creation science and combine those with
7 elements of evolution. That's their right.

8 The fact that two --

9 QUESTION: Do you -- do you think there's --
10 they are two mutually exclusive categories? Or could a
11 person be both?

12 MR. BIRD: Your Honor, we cited about 25
13 noncreationist parties --

14 QUESTION: Well, I'd rather not refer --

15 MR. BIRD: -- who do view them as mutually
16 exclusive.

17 QUESTION: You view them as mutually exclusive?

18 MR. BIRD: In the views of many people --

19 QUESTION: Now, can you tell me, then, which
20 category my example falls in?

21 MR. BIRD: Well, Your Honor, we have taken the
22 position that the Big Bang theory would be an
23 evolutionary explanation of cosmic evolution, as
24 described by Carl Sagan and others.

25 QUESTION: Well, can you tell me which theory

1 -- which category my example falls under?

2 MR. BIRD: Probably the evolutionary category,
3 though some people would differ.

4 QUESTION: Well, what if the -- what if I
5 included, say, Neanderthal, and then -- but say that it
6 was a lower form of life than present man? Would it
7 still be -- then would that be a creationist or an
8 evolutionist?

9 MR. BIRD: That would probably be categorized
10 as an evolutionist view, with the creationist scientists
11 at trial anticipating testimony that Neanderthal man
12 certainly existed, but that the physical evidence is
13 that it was simply someone comparable to modern humans
14 with bone disease, causing a bowing of the bones.

15 QUESTION: All of your examples of people who
16 are creation scientists would deny any evolutionary
17 process at all?

18 MR. BIRD: No, Your Honor. Our expert
19 witnesses include, of course, some evolutionists, who
20 would anticipate testifying at trial, along the lines of
21 Dr. Morrow, who I quoted.

22 Some would take sort of an intermediate
23 position, saying that they're either not sure or --

24 QUESTION: Well, how can they -- if they're
25 mutually exclusive categories, how can there be an

1 intermediate position? And if there can't be, I really
2 don't quite understand what the dividing line between
3 the two is.

4 MR. BIRD: Your Honor, I guess my point, to
5 try to say it more clearly, is that many evolutionists
6 do recognize creation science and evolution as mutually
7 exclusive on each issue, as a logical matter. Some
8 people disagree.

9 That's an area where the scientific community
10 does appear to disagree.

11 QUESTION: Well, but do you have a position?
12 Do the people supporting this legislation say it draws
13 such a distinction?

14 MR. BIRD: Yes, Your Honor, we -- the State
15 has taken the position consistently that creation
16 science and evolution do reflect two separate positions
17 --

18 QUESTION: Mutually exclusive positions, and
19 if there's any evolution at all, then you're in the
20 evolutionary category?

21 MR. BIRD: Well, if you define evolution as
22 being macroevolutionary change, yes. But creation
23 scientists recognize the occurrence of change;
24 microevolution, without any question.

25 So to say that change occurs certainly is not

1 an evolutionary statement. It's a statement that
2 essentially every scientist on either side would agree
3 to.

4 The question is whether evolution occurred
5 from one or a few simple single-celled living forms,
6 through fish, amphibia, reptiles, primates, and so
7 forth.

8 QUESTION: Well, if that's the test, your
9 answer to my question is easy. The example that I gave
10 is that you're a creationist.

11 MR. BIRD: Yes, Your Honor, I suppose so.

12 QUESTION: Even though there's a very definite
13 process of evolution from the Neanderthal man to the
14 present society.

15 MR. BIRD: And that's an area of disputed
16 fact. Scientists disagree --

17 QUESTION: Well, but I mean, even if one
18 believed that, he would still be a creationist under
19 your definition, because he doesn't believe everything
20 started from an amoeba, or something like that.

21 MR. BIRD: He'd certainly be taking at least
22 many creationist assumptions and interpretations of the
23 evidence, yes.

24 QUESTION: Well, see, the difficulty I have is
25 when you talk about many and some is, I'm trying to

1 decide whether they are mutually exclusive categories or
2 not, and whether teachers who have to administer this
3 Act fall in one camp or the other, or could they fall in
4 both.

5 MR. BIRD: A teacher could fall in both. The
6 evidence can be categorized without coercing any student
7 to accept only one or the other. Just as a logical
8 matter, the universe either always existed or came into
9 being abruptly, the first life either came into being
10 abruptly or evolved through a chemical evolutionary
11 process.

12 The various living forms, the basic forms,
13 either appeared abruptly or evolved from simple to
14 complex.

15 In that sense, they're logical alternatives.
16 But people certainly have the right, which Louisiana
17 schools ought to respect, to accept elements of both.

18 QUESTION: Isn't it possible that some of them
19 appeared abruptly, and others evolved from what first
20 appeared abruptly?

21 That's what I don't understand.

22 MR. BIRD: I'm afraid I didn't hear the end of
23 that, Your Honor.

24 QUESTION: I say, is it not possible that some
25 forms of life appeared abruptly, and others evolved from

1 those that did appear abruptly?

2 MR. BIRD: Absolutely. And I guess the basic
3 point --

4 QUESTION: And if that's true, I don't see how
5 you can avoid the possibility that a person could be
6 both an evolutionist and a creation scientist.

7 MR. BIRD: Well, many people do combine
8 elements of both, and in that sense, fit your
9 categorization.

10 I guess the point is that the Louisiana
11 legislature determined that students were not receiving
12 all of the scientific information on the subject. They
13 were receiving, in general, only that which supported
14 evolution; and that those students were entitled to
15 receive additional scientific information, however those
16 students chose to categorize.

17 That's the issue in this case, when we get
18 into the Constitutional question.

19 QUESTION: Mr. Bird?

20 MR. BIRD: Yes, Your Honor.

21 QUESTION: May we come to a lower level of
22 discourse, and not talk about philosophy.

23 (Laughter.)

24 MR. BIRD: I'm sure it won't be lower, but
25 I'll be very happy to --

1 QUESTION: Well, it'll be a lot lower.

2 MR. BIRD: -- try addressing it.

3 QUESTION: You have private schools in
4 Louisiana, don't you?

5 MR. BIRD: Yes, Your Honor.

6 QUESTION: Some religious and some not?

7 MR. BIRD: Yes, Your Honor.

8 QUESTION: Does your State Board of Education
9 have to certify those schools?

10 MR. BIRD: Your Honor, I'm not -- yes, that is
11 correct.

12 QUESTION: They do in Virginia.

13 MR. BIRD: Pardon me?

14 QUESTION: They do in my State of Virginia,
15 and I think in 22 of the States they do.

16 MR. BIRD: Yes, sir.

17 QUESTION: And what means is that a minimum
18 course of study is prescribed; otherwise you don't have
19 a certificate, and graduates are unable to get in good
20 colleges.

21 MR. BIRD: Yes, Your Honor.

22 QUESTION: What I'm leading up to ask you is,
23 does this statute apply to those schools?

24 MR. BIRD: No, it does not. It address only
25 public schools, much like most of the other 16 Louisiana

1 statutes prescribing courses of study.

2 QUESTION: So if pupils didn't like these
3 course, they could go into private schools or parochial
4 schools?

5 MR. BIRD: In that, different standards for
6 private schools is something that is widely practiced
7 and certainly is Constitutional justification.

8 QUESTION: If they could afford to go?

9 MR. BIRD: If they could afford to, yes, sir.
10 If there are no further questions, I'll
11 reserve my remaining time.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bird.
13 We'll hear now from you, Mr. Topkis.

14 ORAL ARGUMENT OF JAY TOPKIS, ESQ.,

15 ON BEHALF OF THE APPELLEES

16 MR. TOPKIS: Mr. Chief Justice, if the Court
17 please:

18 Mr. Bird was complaining at some length about
19 how the Court of Appeals ignored the legislative
20 history. I'm perfectly content to discuss the
21 legislative history, but I'd like to take as my starting
22 point Justice Frankfurter's dictum that when there's
23 some uncertainty about the legislative history, it's not
24 forbidden to look at the plain language of the statute.

25 (Laughter.)

1 What's all this talk about technical terms?
2 These are not polysyllabic scientific words beginning
3 with polymicro-something-or-another. These are words
4 that we've all heard since we were kids.

5 Creation. Creation -- that's a word we're all
6 familiar with.

7 Let me just go to the dictionary quickly.
8 Webster's Third International.

9 QUESTION: Why don't we go to the affidavits
10 in the case?

11 MR. TOPKIS: I'm scrry, Your Honor?

12 QUESTION: Why don't we go to the affidavits
13 in the case? Now, this -- this was decided on a motion
14 for summary judgment.

15 MR. TOPKIS: Yes, Your Honor.

16 QUESTION: There was an affidavit by Dr. Scott
17 Morrow, a Doctor in Biochemistry.

18 MR. TOPKIS: Yes.

19 QUESTION: Academic credentials. Which said
20 creation -- Ph.D. in biochemistry from the University of
21 North Carolina, M.S., St. Joseph College.

22 Creation science, he said, is a scientific
23 model or hypothesis that attempts to account for the
24 origins of material entities or systems in our world by
25 means of their relatively sudden or abrupt appearance.

1 Now, that is really not the way I would be
2 inclined to define it. But I don't know. I'm not a
3 biochemist.

4 Now, here you have an affidavit that's filed
5 in the case that says it means that. How can I be sure
6 that it doesn't mean that?

7 And anyway, is it either my view or Dr.
8 Morrow's that ought to govern, but rather the view of
9 the -- of the Supreme Court of Louisiana?

10 MR. TOPKIS: Well, Your Honor, this litigation
11 was brought in the Federal court. And because that's
12 the court to which citizens traditionally look for
13 protection of their Constitutional liberties.

14 But going directly to your question, Dr.
15 Morrow comes along, years after the statute is enacted,
16 and says that to him, creation science means these
17 buzzwords.

18 And those buzzwords come right out of Mr.
19 Bird's lexicon. He's been using them for years.
20 They're his.

21 The Louisiana legislature never heard anything
22 about abrupt, relatively sudden, or abrupt appearance in
23 complex form, et cetera, et cetera.

24 QUESTION: I thought you were talking about
25 the plain language, with resort to legislative history?

1 MR. TOPKIS: I am. I'm talking about what the
2 word "creation" means, according to Webster. And that,
3 it seems to me, is what in all likelihood the Louisiana
4 legislature dealt with.

5 And what the word means, according to Webster,
6 is, the act of bringing into existence, from nothing,
7 the universe or the world or the living and nonliving
8 things in it.

9 Now, the statute, of course, also uses the
10 term "creationism". And Webster defines that, too: A
11 doctrine or theory of creation holding that matter, the
12 various forms of life and the world were created by a
13 transcendent God out of nothing.

14 That's what Webster's Third, published in
15 1981, the year this statute was adopted, gave as the
16 definitions of these two key words.

17 Now, maybe that was a little ahead of its
18 time. Let's go to Webster's Second. No great
19 difference. Webster's Second, published in '34, defines
20 "creation": The act of creating or the fact of being
21 created; specifically, the act of causing to exist or
22 the fact of being brought into existence by divine
23 power, or its equivalent.

24 Creationism --

25 QUESTION: What about Aristotle's view of a

1 first cause, an unmoved mover?

2 MR. TOPKIS: Yes, Your Honor.

3 QUESTION: Would that be a creationist view?
4 I don't think Aristotle considered himself as theologian
5 as opposed to a philosopher.

6 MR. TOPKIS: No, but --

7 QUESTION: In fact, he probably considered
8 himself a scientist.

9 MR. TOPKIS: -- Aquinas had a somewhat
10 similar view.

11 QUESTION: Yes, but I want to go back earlier.

12 (Laughter.)

13 QUESTION: Because my next question is going
14 to be whether you considered Aristotleanism a religion?

15 MR. TOPKIS: Of course not.

16 QUESTION: Well, then, you could believe in a
17 first cause, an unmoved mover, that may be impersonal,
18 and has no obligation of obedience or veneration from
19 men, and in fact, doesn't care what's happening to
20 mankind.

21 MR. TOPKIS: Right.

22 QUESTION: And believe in creation.

23 MR. TOPKIS: Well, believe in creation? Not
24 when creation means creation by a divine creator.
25 That's the test.

1 And the Louisiana --

2 QUESTION: And I ask you, it depends on what
3 you mean by divine. If all you mean is a first cause,
4 an impersonal mover --

5 MR. TOPKIS: Divine, Your Honor, has
6 connotations beyond, I respectfully submit.

7 QUESTION: But the statute doesn't say
8 "divine."

9 MR. TOPKIS: No.

10 QUESTION: All it says is "creation".

11 MR. TOPKIS: But when you look to see what
12 "creation" means, it means "divine."

13 And, I go further, if I may, the Louisiana
14 legislature has been perfectly clear on what words mean
15 in Louisiana.

16 The Louisiana Civil Code, Article XIV, says
17 that the words of a law are generally to be understood
18 in their most usual significance, without attending so
19 much to the nicety -- niceties of grammar rules as to
20 the general and popular use of the words.

21 QUESTION: Is it the Louisiana legislature
22 that determines what Louisiana statutes mean? Or is the
23 Louisiana Supreme Court?

24 MR. TOPKIS: It is the Louisiana legislature,
25 Your Honor, which writes statutes, employing the common

1 parlance --

2 QUESTION: We have a doctrine --

3 MR. TOPKIS: -- and which, when courts are
4 called on to interpret those statutes, courts, whether
5 State, Federal or whatever, are obligated to follow and
6 interpret those statutes in the light of the meaning of
7 the Louisiana legislature.

8 QUESTION: Mr. Topkis, we have a doctrine
9 called the Pullman doctrine, which is succinctly
10 described as follows: No principle has found more
11 consistent or clear expression than that the Federal
12 courts should not adjudicate the Constitutionality of
13 State enactments fairly open to interpretation until the
14 State courts have been afforded a reasonable opportunity
15 to pass on them.

16 MR. TOPKIS: Quite so, Your Honor. I'm
17 familiar with that.

18 QUESTION: Now, does -- do we have any idea
19 what Louisiana courts thinks this phrase, creation,
20 means in this statute?

21 MR. TOPKIS: We have only the very brief
22 decision of the Louisiana Supreme Court to the effect
23 that this statute does not offend the Louisiana
24 Constitution.

25 That's all we've got.

1 QUESTION: Mr. Topkis, you're arguing here in
2 support of the Fifth Circuit, not only the judgment but
3 the rationality, I take it, that there is no secular
4 purpose for this statute?

5 MR. TOPKIS: Right, Your Honor.

6 QUESTION: But I didn't understand the Fifth
7 Circuit to rely as heavily as you apparently do on
8 dictionary definitions of the terms in the statute?

9 MR. TOPKIS: Well, I thought, as I read the
10 Fifth Circuit opinion, that they said, everybody knows
11 what creation and creationism is. It's a basically
12 fundamentalist point of view.

13 And I would not think that we would have much
14 uncertainty about it, were it not for the fact that
15 people whose objectives are plain seek to invoke
16 familiar --

17 QUESTION: Well, I thought part of the Fifth
18 Circuit opinion could be read as saying that if there
19 was -- if the statute was passed for religious purposes,
20 say, fairly broadly interpreted like, love thy neighbor
21 as theyself, or something, that the statute might be
22 bad.

23 You wouldn't go that far, would you?

24 MR. TOPKIS: That the statute might be --?

25 QUESTION: That the statute might be

1 unconstitutional as being an establishment of religion.

2 MR. TOPKIS: I would not regard love thy
3 neighbor as thyself as a necessarily religious
4 doctrine. I would think of it as a proposition in
5 morality.

6 QUESTION: But supposing it's a morality
7 subscribed to by many religious faiths.

8 MR. TOPKIS: Well, there are lots of
9 propositions that are subscribed to by religious faiths,
10 but they do not become religious, as I understand,
11 merely by virtue of that subscription.

12 For example, most religions forbid or speak
13 against homicide. But a civil -- pardon me, a criminal
14 statute making homicide criminal is not a religious
15 statute.

16 QUESTION: Even though, perhaps, a number of
17 church people go down and say, we want this statute
18 passed because it's consistent with our religious belief?

19 MR. TOPKIS: Even though.

20 Now --

21 QUESTION: Mr. Topkis, can I ask you a
22 question?

23 When the case was referred on the State
24 Constitutional issue to the Supreme Court of Louisiana,
25 I believe you were involved in the litigation at that

1 point.

2 Was the Louisiana Supreme Court asked by
3 either party to interpret the meaning of the definition
4 of creation science?

5 I know the court did not do it, but --

6 MR. TOPKIS: I do not believe so, and my
7 colleague assures me that that's his recollection, also.

8 QUESTION: So there's no request by either
9 party for abstention to have the State court advise the
10 parties on the meaning?

11 MR. TOPKIS: Neither the parties nor the Fifth
12 Circuit; I don't believe so, Your Honor.

13 QUESTION: Mr. Topkis --

14 MR. TOPKIS: Justice Scalia.

15 QUESTION: -- this question is sort of like
16 the Chief Justice's last question, but I think it's a
17 little closer to this case.

18 I'm concerned about whether purpose alone
19 would invalidate a State action, if a State action has a
20 perfectly valid secular purpose.

21 Let's assume that there is an ancient history
22 professor in a State high school who has been teaching
23 that the Roman Empire did not extent to the southern
24 shore of the Mediterranean in the 1st Century A.D.

25 And let's assume a group of Protestants who

1 are concerned about that fact, inasmuch as it makes it
2 seem that the Biblical story of the crucifixion has
3 things a bit wrong -- because of that concern, and
4 really, no other reason -- I mean, this fellow's also
5 teaching other things that are wrong. He's teaching
6 that the Parthians came out of Egypt. They don't care
7 about that.

8 They do care that Romans were in Jerusalem in
9 the 1st Century A.D. So they go to the principal of the
10 school, and say, this history professor is teaching what
11 is just falsehood. I mean, everybody knows that Rome
12 was there.

13 And the principal says, gee, you're right.
14 And he goes in and directs the teacher to teach that
15 Rome was on the southern shore of the Mediterranean in
16 the 1st Century A.D.

17 Clearly a religious motivation. The only
18 reason the people were concerned about that, as opposed
19 to the Parthians, was the fact that it contradicted
20 their religious view.

21 Now, would it be unconstitutional for the
22 principal to listen to them, and on the basis of that
23 religious motivation, to make the change in the high
24 school?

25 MR. TOPKIS: I wouldn't think so, Your Honor,

1 because the principal wouldn't be acting out of
2 religious motivation. He would be acting out of the
3 scholar's interest in truth.

4 And when for whatever reason factual error was
5 called to his attention, he would do his best to correct
6 it.

7 QUESTION: And here, do we know that the State
8 is acting out of religious motivation?

9 MR. TOPKIS: By every index that we can
10 possibly have, Your Honor, yes.

11 QUESTION: Which is what?

12 MR. TOPKIS: We take a look at the vocabulary
13 of the statute; it is religious. We take a look at what
14 the legislators said at the time they acted; it is
15 nothing but religious.

16 We can go through this entire record without
17 finding anybody talking about a secular purpose. They
18 talk about how terrible evolution is. Why? Because
19 it's godless evolution, and what we got to do is bring
20 God into balance with evolution.

21 QUESTION: So in the case I gave, if it was
22 the school board that went to the high school principal,
23 and the members of the school board were upset about
24 this, as opposed to Parthia, because of their religious
25 affiliations, then it would be bad, and you would have

1 to leave the teacher in and continue to teach that Rome
2 was not on the southern shore of the Mediterranean.

3 MR. TOPKIS: Well, again, I'm following your
4 hypothetical, and I think that the -- are you still
5 assuming that it is the superintendent who makes the
6 decision?

7 Because I'm responding to you that he makes it
8 out of his quest for truth.

9 QUESTION: No, he's directed by the school
10 board.

11 MR. TOPKIS: Yes? He's directed by the school
12 board, and they are motivated -- but nonetheless, what
13 they are doing is not teaching religion. They are
14 teaching history out of a religious motive.

15 QUESTION: I agree with you there. And once
16 you say that what they're doing is teaching religion,
17 it's a different ballgame. If that is motivated by a
18 religious purpose, then I think you're quite right.

19 But that is an essential part of what you have
20 to establish, though, isn't it? Not just that a secular
21 action is ultimately motivated by some religious concern?

22 MR. TOPKIS: Quite so. Quite so.

23 QUESTION: Okay, I'm with you then.

24 MR. TOPKIS: All right. Now, I said before
25 that this definition that Mr. Bird is so fond of, and I

1 quote it -- origin through abrupt appearance in complex
2 form of biological life, life itself, and the physical
3 universe -- one thing we know about that collection of
4 words is that it has never before been seen upon the
5 face of the Earth except in Mr. Bird's briefs, and the
6 affidavits prepared.

7 Mr. Bird is a little slender to play
8 Tweedledum, but that's what he's trying to do. He wants
9 words to mean what he says they mean.

10 And that didn't fool Alice, and I doubt very
11 much that it will fool this Court.

12 QUESTION: Don't overestimate us.

13 (Laughter.)

14 MR. TOPKIS: Your Honors, I'd like now to go
15 to another of Mr. Bird's buzzwords, academic freedom.

16 The idea of academic freedom that is advanced
17 here is, again, unlike any previous notion of that
18 term. It's not a term; it's an incantation, as he uses
19 it.

20 This statute calls for the very antithesis of
21 academic freedom. It says that the teacher must give
22 balanced treatment, regardless of whether the evidence
23 is balanced.

24 It says the teacher may teach evolution only
25 at the price of teaching what he or she knows to be

1 pseudoscience.

2 And the teacher may teach only the evidences
3 for creation; none against.

4 I can't imagine anything farther from the idea
5 of academic freedom.

6 QUESTION: Well, now wait a minute --

7 QUESTION: Mr. Topkis, there's very little
8 (inaudible) in elementary schools, do you agree?

9 MR. TOPKIS: Yes and no, if I may, Your
10 Honor. Yes in the sense that most elementary school
11 teachers are autocrats. I can remember my own Miss
12 Bremner very well.

13 And -- but I think that the teacher is pretty
14 free to teach what the teacher believes to be truth,
15 even in elementary schools.

16 QUESTION: Isn't it true that in elementary
17 school, the principal goes in and out to make sure what
18 you're teaching?

19 MR. TOPKIS: I -- I think that's --

20 QUESTION: Of course. Well, that's the
21 opposite of academic freedom?

22 MR. TOPKIS: Well --

23 QUESTION: Where you (inaudible).

24 MR. TOPKIS: Well, academic freedom is not
25 incompatible with supervision, I think, Mr. Justice

1 Marshall.

2 QUESTION: Well, let me put it this way: Do
3 you need it for this case?

4 MR. TOPKIS: I don't think I do, no.

5 QUESTION: I'd like to follow up on that a
6 little bit.

7 MR. TOPKIS: Mr. Justice Powell.

8 QUESTION: Think about the high school level.

9 MR. TOPKIS: Yes?

10 QUESTION: In the State of Louisiana, as I
11 think we've mentioned before, the courses are prescribed
12 by the State Board of Education.

13 MR. TOPKIS: Yes, sir.

14 QUESTION: And teachers are not free, absent
15 permission, to teach different courses.

16 And the State Board of Education also selects
17 the textbooks.

18 MR. TOPKIS: Quite so.

19 QUESTION: It may give the local school board
20 a choice between two or three. I agree with you that
21 once you get into the classroom -- and that'll be true
22 under this statute -- the teacher is going to teach
23 whatever she or he really thinks, despite what may be
24 written in a textbook.

25 But the point I'm making is, it seems to me

1 your academic freedom argument would be well directed at
2 the college level. But I question, really, whether it's
3 relevant, particularly, as Justice Marshall indicates,
4 at the public school level.

5 MR. TOPKIS: I see it's relevance, if I may,
6 Mr. Justice Powell, only in the sense that this statute
7 is defended as advancing academic freedom.

8 And it seems to me that when you give explicit
9 commands -- teach equally, teach for -- you are not
10 talking about academic freedom. That's the entirety of
11 my contention on the point.

12 QUESTION: Perhaps it would be irrelevant to
13 both arguments, both sides?

14 MR. TOPKIS: Could be.

15 QUESTION: What if you had a statute, Mr.
16 Topkis, that said, we think an awful lot of teachers in
17 the school system in this State have presented only the
18 Protestant view of the Reformation in their medieval
19 history classes, and so we want to give equal time to
20 the Catholic view?

21 Do you think that that would -- suppose it was
22 passed with a purely -- interest in historical truth --
23 do you think that would raise any problems? Perhaps
24 even though a lot of Protestant religious people got
25 behind it, or a lot of Catholic religious people got

1 behind it?

2 MR. TOPKIS: So long as the purpose of the
3 school authorities, in taking this position, was an
4 historical purpose rather than a religious one, I
5 couldn't quarrel with it.

6 QUESTION: It certainly wouldn't vindicate
7 academic freedom, in the normal sense.

8 MR. TOPKIS: No. No, it wouldn't vindicate
9 academic freedom. But on the other hand, I would think
10 that only -- no, pardon me. I would think that it would
11 be a requisite of a teacher who professed to be
12 indulging in or utilizing his academic freedom to give
13 fair treatment to the history of both -- I forget Your
14 Honor's example -- the Reformation and the
15 Counter-Reformation, or whatever.

16 To pull somebody up who is, out of his own
17 personal prejudices -- or views; I'll not use the
18 perjorative -- overstressing one side of a controversy,
19 or one aspect of history, is not to deprive him of
20 academic freedom.

21 Academic freedom does not mean the right to
22 teach exclusively one particular view, as I see it, at
23 any rate.

24 I take it -- I had planned to discuss the
25 legislative history of this statute a little bit, but I

1 rather imagine that my time is running on.

2 I think that I'll just rest with this
3 statement. There is nothing in the legislative history
4 which speaks of a secular purpose: No sponsor of the
5 legislature -- of the legislation; no witness; nobody.

6 The one witness I love is a Ms. Babbs
7 Minhinit, who said: I think if you teach children that
8 they are evolved from apes, then they will start acting
9 like apes. If we teach them possibly that they were
10 created by an Almighty God, then they will believe that
11 they were a creature of God and start acting like one of
12 God's children.

13 That's what she told the Senate before the
14 Senate voted.

15 Now, I don't, of course, take issue --

16 QUESTION: Mr. Topkis, let me just be sure:
17 Is there nothing in the legislative history supporting
18 the -- this academic freedom argument?

19 MR. TOPKIS: Oh, sure, Your Honor. Academic
20 freedom. We got to give God equal time. That's their
21 idea of academic freedom.

22 QUESTION: Well, or at least there is
23 something in the legislative history that some were
24 motivated by a desire to counteract the evolutionary
25 subject with teaching of another subject that would have

1 a different message.

2 MR. TOPKIS: But not, Your Honor -- academic
3 freedom does not --

4 QUESTION: I mean, you say that's not academic
5 freedom.

6 MR. TOPKIS: That's right.

7 QUESTION: And maybe you're right. But at
8 least when they make that argument, there is something
9 in the history that provides a basis for it. That's
10 what I'm asking you.

11 MR. TOPKIS: Yes, and what they want to do is
12 see to it that their version of religion -- they start
13 with the premise that evolution is religious. It's
14 secular humanism. It's godless.

15 And what they want to do is counter this
16 religion -- and they repeatedly call evolution a
17 religion -- and they say, let's give equal time to the
18 other religion.

19 Well, that's not academic freedom.

20 Now --

21 QUESTION: Mr. Topkis.

22 MR. TOPKIS: Justice Scalia.

23 QUESTION: In your legislative history, and
24 you know, I've read it, there are statements of the sort
25 you -- you quoted, including some by the sponsor of

1 this, especially the first time around, the bill that
2 was in a different form and didn't get passed.

3 But isn't what counts what the intent of the
4 entire legislature was? And I just -- it never occurred
5 to me that Louisiana was a State dominated by --
6 religiously by fundamentalists. And I think the
7 statistics bear that out.

8 As far as I know, the Catholics and atheists
9 alone -- or agnostics alone -- account for 56 percent of
10 the population. Never mind some other religious groups
11 that are not necessarily fundamentalists.

12 Now, it was, after all, the entire legislature
13 that passed the bill.

14 MR. TOPKIS: Right.

15 QUESTION: Now maybe the motive of those who
16 introduced it and were most zealous for it may have been
17 a fundamentalist Christian motive, but can we be sure
18 that that was the motive of the entire legislature of
19 Louisiana in passing the bill?

20 MR. TOPKIS: Well, Your Honor, when we try to
21 figure out what the legislature meant, we look first at
22 its plain words; then at the words of the sponsors and
23 so on; and then we listen, or we look, for anything
24 else.

25 There isn't a single word in this history of

1 secular interst.

2 Mr. Bird and we, at an earlier stage, in a
3 parallel litigation, the record of which is part of this
4 record, took 40 depositions; there's not a word in those
5 depositions, Mr. Bird hasn't brought one forward, about
6 secular purpose.

7 QUESTION: (Inaudible) balance secular
8 purpose. Now, what they're saying is --

9 MR. TOPKIS: True.

10 QUESTION: -- most of the imbalance complained
11 of is complained of on religious grounds. But isn't
12 righting what the State legislature considered an
13 imbalance in instruction a secular purpose; that only
14 one side of an issue is being presented?

15 MR. TOPKIS: Not, Your Honor, with respect,
16 when the complaint is, they're teaching that religion.
17 Why don't they teach my religion?

18 And that's what the legislature said. And
19 that's what the witnesses said. Over and over again.

20 There's nobody coming forward and taking any
21 other position.

22 Now, this bill was of course drafted by a
23 theologian, or somebody versed in apologetics. There's
24 an amusing bit of evidence on that subject in the very
25 language of the bill.

1 The bill keeps using -- the Act keeps using
2 the term "evidences" in the plural. We lawyers never
3 speak of "evidences" in the plural. We speak of
4 "evidence", the singular.

5 And I got nagged by it, and I looked it up the
6 other day. And of course the only dictionary reference
7 to "evidences" is to Christian apologetics: the
8 evidences for Christianity.

9 This is a matter of theological disputation.

10 And going back if I may, Mr. Justice Scalia,
11 there wasn't offered here any affidavit from Senator
12 Keith, or any other legislator, about what their purpose
13 was.

14 They were apparently content, or stuck, with
15 their record.

16 Now, again, where does this come from? Let me
17 note one unusual fact about one of those five affidavits
18 that Mr. Bird came up with.

19 He offers an affidavit by a Dr. Terry Meith,
20 who tells us that he's a philosopher and a theologian,
21 and that he possesses three graduate degrees, two
22 doctorates and a Master's. He even tells us what grade
23 point averages he got at two of the schools. He got a
24 3.94 at one school, and a 3.97 at another school.

25 I've never seen an expert qualified precisely

1 that way. They usually settle for saying, I was Phi
2 Beta Kappa. But okay, he says 3.94 and 3.97 at two
3 schools.

4 He omits USC. Well, I don't attribute any
5 significance to that. USC I have heard is a rather
6 difficult school, and maybe he didn't do so well there.
7 I'm not going to fault him for that.

8 But the omission I do find significant is in
9 his employment record. He signed the affidavit in
10 1974. And he does not state where he was then
11 employed. All of the other affidavits that Mr. Bird
12 submits do give that information.

13 And we found the explanation yesterday. The
14 affidavit's jurat reads: Lynchburg, Virginia. And just
15 on a hunch, my colleague, Mr. Harper, called Liberty
16 University where Reverend Jerry Falwell is the
17 Chancellor. And wouldn't you know it, we got right
18 through to Dr. Meith.

19 He's been on that faculty since 1984. And
20 apparently, was not very interested in this case, which
21 deals so much with fundamentalist, with acknowledging
22 where he was employed.

23 I --

24 QUESTION: Some of the experts who provided
25 affidavits were agnostics, at least one of them.

1 MR. TOPKIS: One of them so stated, yes, Your
2 Honor.

3 QUESTION: Said he was an agnostic. Is there
4 any difference in your mind between purpose of the law
5 and motivation of those who want to get the law enacted?

6 I mean, in the example I gave you earlier
7 where the school board directs a change in the ancient
8 history instruction motivated by the fact that this
9 particular error is inconsistent with their religious
10 beliefs, although teaching it right doesn't necessarily
11 make their religious beliefs any more credible, would
12 you say that there they had an evil purpose, that the
13 purpose of the change was a religious one?

14 MR. TOPKIS: I'm not sure I follow your
15 question. I'm sorry, Your Honor.

16 QUESTION: Well, the school board is moved to
17 correct the instructor whose teaching the wrong thing
18 about Rome --

19 MR. TOPKIS: Right.

20 QUESTION: -- by the fact that it's
21 inconsistent with their religious beliefs.

22 MR. TOPKIS: Right.

23 QUESTION: And it makes their religious look
24 absurd. Not that it makes their religious beliefs
25 believable if you teach the right thing about Rome.

1 MR. TOPKIS: Right.

2 QUESTION: Okay, so that's the reason they're
3 concerned about it.

4 MR. TOPKIS: Yes?

5 QUESTION: Now, would you say that there
6 purpose is to further their religion, or is their
7 purpose of get the curriculum right and get the correct
8 thing taught about --

9 MR. TOPKIS: I don't care about their purpose;
10 as long as what they do is get the true historical facts
11 taught, I'm not going to be terribly concerned.

12 QUESTION: Okay. So it does come back to
13 whether this statute requires the teaching of creation
14 in some divine sense.

15 MR. TOPKIS: Exactly, exactly. Now --

16 QUESTION: Mr. Topkis, I just want to ask one
17 quick question.

18 MR. TOPKIS: Justice Powell.

19 QUESTION: Would you view the teaching of
20 religious courses at the college level -- state
21 colleges, state universities -- differently from the
22 position that you take here today?

23 MR. TOPKIS: I shouldn't think so, no, Your
24 Honor.

25 QUESTION: In other words, you would think a

1 Constitutional question were raised if a university
2 taught a course on the Bible?

3 MR. TOPKIS: No, not a bit.

4 QUESTION: What do you think?

5 MR. TOPKIS: I studied the Bible -- well, I
6 didn't go to a State university. But of course there's
7 nothing inappropriate about teaching the Bible, or
8 teaching Spinoza's demonstration of the existence of God
9 by mathematical principles.

10 QUESTION: (Inaudible.)

11 MR. TOPKIS: I'm sorry?

12 QUESTION: I didn't understand you.

13 MR. TOPKIS: I don't see anything --

14 QUESTION: Is it appropriate for a State
15 university to teach Biblical courses, to teach a course
16 on the Bible?

17 MR. TOPKIS: Absolutely, as long as it is
18 taught in neutral fashion; as long as the State does not
19 say, as long as no professor comes into class, and
20 announces: Ladies and gentlemen, today I'm going to
21 prove to you that the Bible is right.

22 QUESTION: If -- if the university has courses
23 in biology and chemistry and teaches specifically
24 courses in evolution, would you object to courses on the
25 Bible?

1 MR. TOPKIS: I would -- I have no objection to
2 courses on the Bible. When they are taught from a
3 pro-Bible perspective, I would think that
4 Constitutionally they ought to be left to Notre Dame,
5 Southern Methodist, and other institutions of proclaimed
6 orientation.

7 QUESTION: But not in public universities?

8 MR. TOPKIS: Not in public universities; no,
9 Your Honor.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Topkis.

12 MR. TOPKIS: Thank you very much, Mr. Chief
13 Justice.

14 CHIEF JUSTICE REHNQUIST: Mr. Bird, do you
15 have any more? You have two minutes remaining.

16 REBUTTAL ARGUMENT OF WENDELL R. BIRD, ESQ.,

17 ON BEHALF OF THE APPELLANTS

18 MR. BIRD: Thank you, Your Honor.

19 The procedural issue, the State submits,
20 should be decisive in this case. And Mr. Topkis has
21 done a very nice job of demonstrating the factual
22 disputes between the parties, disputes that ought to be
23 decided on the basis of evidence at a trial.

24 It would simply subvert the purposes of the
25 summary judgment rules to allow a court to take a leap

1 of faith over the issue at hand to apply the tripartite
2 test to an unknown subject.

3 If this Court chooses to rely on
4 Constitutional grounds, however, there's a great deal of
5 argument in support of the State's position that, we
6 submit, should lead to a favorable conclusion: not only
7 the Engel line of cases; not only the historical
8 evidence; but the tripartite test itself shows the
9 Constitutionality of this statute.

10 The purpose was stated as to advance academic
11 freedom.

12 QUESTION: May I ask about --

13 MR. BIRD: Yes, Your Honor.

14 QUESTION: -- academic freedom for a moment?
15 Would you say it would advance academic freedom if the
16 school was told you cannot teach a German -- a student
17 the German language unless he's also willing to study
18 French?

19 MR. BIRD: If they were within the same
20 subject area, such as conversational German versus
21 formal German --

22 QUESTION: No, no, just German -- they didn't
23 particularly like Germans and they do like French. So
24 what they say to the student is, you can't study German
25 unless you study French. Would that advance academic

1 freedom?

2 MR. BIRD: Well, of course, that's not the
3 wording of this statute.

4 QUESTION: Well, it's pretty close.

5 MR. BIRD: It is a balanced treatment
6 statute. But --

7 QUESTION: You can't teach evolution unless
8 you teach this other subject.

9 MR. BIRD: Your Honor, if the assumption of
10 the legislature there, as here, was that most or nearly
11 all teachers would opt for teaching both --

12 QUESTION: I'm just asking, would it advance
13 academic freedom?

14 MR. BIRD: Yes, it would.

15 QUESTION: They'd come in and say, we did it
16 to advance academic freedom. Would you accept that
17 rationale?

18 MR. BIRD: Yes, it would, if you recognize
19 that a legislature may not use the terms "academic
20 freedom" in the correct legal sense. They might have in
21 mind, instead, a basic concept of fairness; teaching all
22 of the evidence.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bird.
25 The case is submitted.

1 (Whereupon, at 11:07 a.m., the case in the
2 above-entitled matter was submitted.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1513 - EDWIN W. EDWARDS, ETC., ET AL., Appellants V..

DON AGUILLARD, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

RECEIVED
SUPREME COURT U.S.
MARSHAL'S OFFICE

'86 DEC 15 P 3:38