115. RHR

Draft

Published in *Atlanta Journal and Constitution* (December 23, 2005): A15

Intelligent Design v. Evolution: Both Right and Left Misguided in Fight: [Scopes II and Beyond]

John Witte, Jr.

Eighty years ago, the nation stood transfixed by the spectacle of two giants, William Jennings Bryan and Clarence Darrow, fighting valiantly over the place of creation and evolution in the public school. Bryan, three-time presidential candidate, defended creationism as “inerrant fact” and denounced evolution as “atheistic fiction.” Darrow, celebrated lawyer for the new ACLU, insisted that evolution was “scientific fact” and creationism “obsolete myth.” Bryan won the argument. But the 1925 *Scopes* case was a storm signal of many battles to come between law and religion and religion and science.

This fall, the nation stood transfixed again by the same battle rejoined in Dover, Pennsylvania – now pitting proponents of intelligent design (ID) against the ACLU. This time the ACLU won handily. Their main argument: ID is simply biblical creationism by another name, and to teach it in public schools violates the First Amendment prohibition on government establishments of religion.

The ACLU had strong precedent on its side. In 1968, the Supreme Court had ruled that states may not ban the teaching of evolution in public schools. In 1987, the Court had ruled that states may not require that creationism be given equal time with evolution in the science curriculum. Creationism is religion not science, several later federal courts concluded, and the establishment clause forbids its teaching in the public school science classroom – whether directly or indirectly.

Given these precedents, the result in the Dover case was almost inevitable. Public school board officials required biology teachers to tell their students that evolution was not a “fact” but “a theory” with ample “gaps for which “there is no evidence.” Students were thus encouraged to consider the “explanations of intelligent design” and directed to a standard ID textbook for more details.

Judge John Jones, a recent Bush appointee and professed Christian, found the Dover school policy patently unconstitutional and its litigation strategy a form of “breath-taking inanity.” Intelligent design is not science but creationism in a new guise, he concluded, and the school board’s attempts to deny its religious inspiration and implications depended on “subterfuge” and “hypocrisy.” The Judge was particularly incensed that the defenders of the policy “who so staunchly and proudly touted their religious convictions in public” were repeatedly

Electronic copy available at: https://ssrn.com/abstract=3445698

caught “lying” and engaging in “sham arguments” to disguise their true religious convictions.

For all its purplish prose, and for all the national celebration and lamentation it has occasioned, the Dover decision is legally very narrow. It applies only to a single district in Pennsylvania, not to the whole nation. The decision precludes intelligent design only from public school *science* classes. It does not preclude stories of creation and its variants from public school classes in philosophy, logic, poetry, literature, cosmology, and more. The decision applies only to actual instructional time in the classroom. It does not preclude the teaching or celebration of creation by voluntary student groups meeting in public school classrooms after school hours, let alone when they leave the school grounds. And the decision applies only to public schools. It has no bearing on private (religious) schools.

This last point bears emphasis. The Dover case reflects only one side of the two-sided compact that the Supreme Court has constructed over the past half century to govern religion and education questions. Yes, the First Amendment establishment clause prohibits religion from many parts of the public school. But the First Amendment free exercise clause protects religion in all parts of the private school. While confessional creationism might not be welcome in public schools, it can have full ventilation in private schools, including their science classes.

This two-sided compact on religion and education, while by no means perfect, strikes me as a prudent way to negotiate the nation’s growing religious and intellectual pluralism. Religious liberty litigants, on both the right and the left, should stop trying to renegotiate the basic terms of this compact, and spend more time trying to maximize liberty for all within these terms. The right has spent tens of millions this past decade trying to introduce bland prayers, banal morals, and now bleached theology into public schools. That money could have been much better spent on a national scholarship and voucher program that gives real educational choice to the poor. The left has spent tens of millions more trying to cut religious schools and their students from equal access to funds, facilities, and forums available to all others. That money could have been much better directed to shoring up the many public schools that are demonstrably failing. We have the luxury in this country of litigating about religious symbolism. But we would be better served by tending to the weightier matters of the law.

Electronic copy available at: https://ssrn.com/abstract=3445698