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THE WISDOM AND CONSTITUTIONALITY OF TEACHING INTELLIGENT DESIGN IN PUBLIC SCHOOLS

ARNOLD H. LOEWY *

INTRODUCTION

I am frequently asked: “Why would a liberal First Amendment theorist like you support teaching intelligent design in public schools?” Personally, I eschew the “liberal” tag¹ in favor of a philosophy that prefers to examine each question individually with the recognition that neither liberals nor conservatives have a monopoly on all wisdom. Nevertheless, I readily concede that I regularly support such things as eliminating “under God” from the flag salute (or at least invalidating its prescribed recitation in the classroom while that phrase remains in it), eliminating “In God We Trust” from our coins, and replacing the Supreme Court’s daily invocation (“May God save the United States and this honorable Court”) with “May the United States and this honorable Court be saved.”²

So why would somebody who maintains these positions support teaching intelligent design? The short answer is that I take the endorsement/disapproval test seriously. That is, I believe in neutrality towards religion, not hostility. In analyzing this question, we should never forget that Justice O’Connor’s test³ forbids disapproval, as well as

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1. Although many of my students say that I can’t disclaim it.

2. See Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under The Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C. L. REV. 1049 (1986).

3. First enunciated in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). (O’Connor, J., concurring).

endorsement, of religion. And what could be more disapproving of religion than condemning one scientific theory to the unspeakable because a majority of other scientists differ with its validity, and the minority theory coincides with a powerful religious belief in this country?

We must be careful not to confuse neutrality with either endorsement or disapproval. So, when the late Chief Justice Rehnquist lamented in *Santa Fe Independent School District v. Doe*⁴ that the Court “bristles with hostility to all things religious in public life,”⁵ he was wrong. The Court was neutral to all things religious. Religion cannot be endorsed or disapproved. The appropriate position is to say nothing one way or the other.

Had Rehnquist made his remarks about a decision permanently forbidding the exploration of intelligent design in a public school classroom, his criticism would have been justified. To allow all ideas about the origin of man that do not presuppose an intelligent designer, but forbid all theories that explore the possibilities of such a designer, expresses hostility, not neutrality, towards religion.

I. *EDWARDS V. AGUILLARD* REVISITED

Nearly two decades ago, *Edwards v. Aguillard*⁶ invalidated Louisiana’s effort to teach creation science in public schools. In my opinion, *Edwards* was good policy,⁷ but bad Constitutional law. The decision is good policy because the evidence that the earth is less than six thousand years old is so flimsy that it would be a more productive use of students’ time for them to direct their energies elsewhere.⁸

4. 530 U.S. 290 (2000) (invalidating a public prayer at a high school football game).

5. *Id.* at 318 (Rehnquist, J., dissenting).

6. 482 U.S. 578 (1987).

7. I use “policy” in the narrow sense of meaning that it was good that students were not taught that the earth was less than six thousand years old.

8. “Creation science,” and particularly the “young earth” theory that the earth itself is only six thousand years old, has been widely discredited. See PHILIP KITCHER, *ABUSING SCIENCE: THE CASE AGAINST CREATIONISM* (1982); ROBERT T. PENNOCK, *TOWER OF BABEL: THE EVIDENCE AGAINST THE NEW CREATIONISM* (3rd prt. 1999). See also *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1267-72 (E.D. Ark. 1982) (“Section 4(a) [of the Arkansas Act] lacks legitimate educational value because ‘creation science’ as defined in that section is simply not science.”)

Declaring a law unconstitutional, however, is a different matter. For one thing, the case was decided on summary judgment. The Court's theory was that it did not need to hear the testimony of those scientists who believed in the soundness of creation science. In the Court's view, even if the scientists were correct, it did not matter because the State's purpose was to introduce religion. Though I agree that in a few rare cases, the purpose to advance religion may be so overwhelming that such a decision may be warranted,⁹ *Edwards* was nowhere close to being such a case.¹⁰

By disallowing the testimony of creation scientists, the Court duplicated the travesty that was *Scopes*.¹¹ Who could ever forget the Spencer Tracy character in "Inherit the Wind"¹² calling scientist after scientist to testify to the scientific validity of evolution only to be arrogantly rebuffed by the judge who disallowed the testimony because it wasn't consistent with his understanding of the Bible? Something is fundamentally askew when a modern court elevates Darwin to the status

(alteration added); Kent Greenawalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 383 (2003) ("Creation science is not genuine science because neither its theses nor the techniques of its practitioners are genuinely scientific, and its conclusions conflict with the overwhelming weight of scientific evidence . . .").

9. For example, "Whereas it is the desire of the school board to inject as much religion as possible into the curriculum to combat godless Darwinism, be it enacted that henceforth the schools shall spend equal time teaching evolution and creation science."

10. As Justice Scalia noted in his dissenting opinion,

The Louisiana legislators . . . each of whom had sworn to support the Constitution, were well aware of the potential Establishment Clause problems and considered that aspect of the legislation with great care. After seven hearings and several months of study, resulting in substantial revision of the original proposal, they approved the Act overwhelmingly and specifically articulated the secular purpose they meant it to serve.

Edwards, 482 U.S. at 610 (Scalia, J., dissenting). See also *id.* at 619-26 (tracing in detail the path of the legislation as it was carefully considered and repeatedly amended to ensure that it did not violate the constraints of the Establishment Clause).

11. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

12. *INHERIT THE WIND* (MGM Pictures 1960) (based loosely on the *Scopes* trial).

the Bible held during the *Scopes* trial, and disallows any evidence tending to prove the validity of a conflicting theory. And the incongruity only heightens when one realizes that, had the evidence been introduced, it almost certainly would have been rejected as factually deficient.¹³

The harder question in *Edwards* is whether creation science should have been constitutionally permissible to teach even if the Court believed it to be bad science. In my opinion, it should have. The reason is simply that it is not the Court's job to distinguish good science from bad in the realm of education.¹⁴ By way of illustration, let us assume that 1450 Spain had a Constitution similar to ours. Further, assume that there was a group that developed what they called "The Round Earth Society." Assume that this group believed, contrary to the prevailing science of the day, that God created the earth and had made it round. Assume further that this group sought to introduce such scientific evidence as they had to prove that the earth was round. Finally, assume that they had persuaded the Barcelona School Board to give equal time to teaching round earth science along with the prevailing wisdom, flat earth science.

If the Spanish Supreme Court followed the future logic of the United States Supreme Court in *Edwards*, it would have had to invalidate teaching round earth theory. Today, of course, that sounds preposterous. But the point is that today's judges—or for that matter, today's scientists—may not know ultimate truth. Most of us are pretty confident that creation science, with its six-thousand-year-old earth, will never be proven true, but so were the wise men of 1450 Spain in the Round Earth Society hypothetical. It is for that reason that the very purpose of the First Amendment is to allow for all ideas to be exchanged without judicial pronouncement of truth or falsity.¹⁵

13. See discussion *supra* note 8.

14. This is distinguished from issues of evidence admissibility, where, of course, the Court must decide which items of evidence are admissible and which are not. See *generally* *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

15. See *generally* *Abrams v. United States*, 250 U.S. 616, 629-31 (1919) (Holmes, J., dissenting).

II. TWO SURPRISES

I have recently read two documents that have surprised me: *Kitzmiller v. Dover Area School District*¹⁶ and the school textbook *Of Pandas and People*.¹⁷

It would not surprise the reader who has been with me thus far to know that I expected to disagree with *Kitzmiller*. In fact, I did not. The evidence of religious purpose in this case was so overwhelming that there can be little doubt that the School Board was seeking to inject as much religion as possible into the curriculum.¹⁸ Thus, the concept of “purpose” so wrongly relied upon in *Edwards*, where the purpose was at best ambiguous, makes perfect sense here.

16. 400 F. Supp. 2d 707 (M.D. Pa. 2005).

17. PERCIVAL DAVIS & DEAN H. KENYON, OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS (Charles B. Thaxton ed., 1989).

18. The Court concluded that there was “[d]ramatic evidence of ID’s religious nature and aspirations,” *Kitzmiller*, 400 F. Supp. 2d at 720 (alteration added), and that the school board publicly “advocated for the ID Policy in expressly religious terms.” *Id.* See also *id.* at 734 (“We have now found that both an objective student and an objective adult member of the Dover community would perceive Defendants’ conduct to be a strong endorsement of religion pursuant to the endorsement test.”).

The court found several instances of Board member Buckingham expressing a desire to insert his own religious views into the curriculum. For instance, at the conclusion of the Board’s meeting on June 7, 2004, Buckingham stated that “[t]his country was founded upon Christianity and our students should be taught as such.” *Id.* at 751 (alteration added). After a classroom mural depicting evolution had been destroyed, Buckingham stated, “I gleefully watched it burn;” he then conditioned his support for purchasing a much-needed biology textbook upon an agreement with the teachers “that there would never again be a mural depicting evolution in any of the classrooms.” *Id.* at 753. Based on these facts, among several others, the court concluded that “the thought leaders on the Board made it their considered purpose to inject some form of creationism into the science classrooms, and by the dint of their personalities and persistence they were able to pull the majority of the Board along in their collective wake.” *Id.* at 763.

At trial, the Board attempted to disguise this bias by using “selective memories and outright lies under oath.” *Id.* at 727 n.7. “A reasonable observer . . .,” the Court concluded, “would ‘perceive the School Board to be aligning itself with proponents of religious theories of origin,’ thus ‘communicat[ing] to those who endorse evolution that they are political outsiders, while . . . communicat[ing] to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders.’” *Id.* at 732 (alterations added) (quoting *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1308 (N.D. Ga. 2005)).

My other surprise was *Of Pandas and People*. I had fully expected to read a religious book and found myself surprisingly reading a book that was anything but religious. No reference was made to a deity with any particular characteristics. The book clearly indicated that it was to be read alongside other science books to give the students multiple perspectives.¹⁹ The book consistently spoke in probabilistic terms.²⁰ It even referred to fossils whose age was estimated to be in the millions,²¹ a sharp contrast to the six thousand year-old theory of creation science. In short, *Of Pandas and People* bore little resemblance to any religion with which I am familiar. Indeed, the book bore such little resemblance to religion that I found it hard to believe that people on either side of the debate cared very much that children were reading it.

III. THE WISDOM OF TEACHING INTELLIGENT DESIGN IN SCHOOLS

One of the first things to note about teaching intelligent design in schools is how different it is from teaching it in church. Schools examine and evaluate propositions. Churches frequently indoctrinate their parishioners in them.²² Schools ask: "What evidence is there of intelligent design?" Many churches say: "The Bible says God created the earth in six days. That's all you need to know." As far as the school is concerned, the "designer" could be a now-extinct evil committee. No religion of which I am aware would accept that. Indeed, evolution and intelligent design are not inherently incompatible. Although most intelligent theorists reject evolution, it is certainly plausible that the "designer" intended the final product to appear gradually in stages, much as a moth morphs into a butterfly.

I sometimes wonder why a devout fundamentalist would want intelligent design taught in school. When taught in church, it is unlikely to be contradicted. In school, however, if evidence of intelligent design

19. DAVIS & KENYON, *supra* note 17, at vi.

20. See, e.g., *id.* at viii ("We don't propose to give final answers, nor to unveil *The Truth*. Our purpose, rather, is to help readers understand origins better, and to see why the data may be viewed in more than one way.").

21. See *id.* at 91-115 ("Excursion Chapter 4: The Fossil Record").

22. Concededly, some churches encourage their parishioners to explore competing ideas and draw their own conclusions, but typically this is not the approach of the more fundamentalist churches. See generally JIMMY CARTER, OUR ENDANGERED VALUES: AMERICA'S MORAL CRISIS 34-35 (2005).

is taught, it will be contradicted by evidence of life evolving by random chance. In my view, students should be exposed to both sides of the question, but I'm not so sure I'd agree if I were a deeply religious fundamentalist who believed in the infallibility of a literal reading of the Bible.²³

Undoubtedly, I am profoundly influenced by my own education. As a sophomore at Boston University, my English literature class read a series of essays debating what today would be called "intelligent design." We read such authors as C.S. Lewis, who defended the concept, and Aldous Huxley, who attacked it. I came away from that class unsure of the answer, but profoundly glad that I had the opportunity to explore the question. Frankly, the intricacy of the question is such that it should not be left to the church. Students are entitled to the opportunity to study the question in a setting of exploration rather than indoctrination.²⁴

IV. THE CONSTITUTIONALITY OF TEACHING INTELLIGENT DESIGN

As the reader must have deduced by now, I believe that teaching intelligent design in public schools is constitutional (outside of the unusual context of the *Kitzmiller* situation).²⁵ First, under Establishment Clause doctrine, States may not disapprove of religion. And, *a fortiori*, courts cannot disapprove of religion. Of course, I am not arguing that a State *must* teach intelligent design. States are free within quite broad parameters to set their own curricula. As important as the question of intelligent design is, failure to teach it hardly constitutes disapproval of religion. But when the Court invalidates teaching a theory of origin because of its partial congruence with religion, that is disapproval.

23. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

24. Perhaps it would not be appropriate for grade school students, but I do think that high school students are mature enough to study the question. I was only 18 when I studied it at Boston University.

25. See *supra* Part II.

More importantly, invalidating the teaching of intelligent design in public schools is flatly inconsistent with free speech principles. Members of the Court have frequently fought over the extent to which schools *can* ban ideas. For example, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,²⁶ a sharply divided Court had problems with a library's removal of certain books. But apart from *Edwards v. Aguillard*, which frankly ignored the problem, no case has suggested that a court can *force* a state to remove something from its curriculum. Excessive and wrongful reliance on motive led to the unfortunate result in *Edwards*.²⁷ If the Supreme Court ever gets a case, unlike *Kitzmiller*,²⁸ where the School Board or Legislature's apparent motive for integrating intelligent design into the curriculum is to maximize student exposure to different ideas about the origin of the species, and not to indoctrinate religion, the Court should uphold the provision.

CONCLUSION

The very purpose of the free speech clause of the First Amendment is to ensure that all ideas are subject to debate in the marketplace of ideas, and that only the fittest survive. Would it not be the most extraordinary irony to exempt Darwinism from that crucible? I certainly think so.²⁹

26. 457 U.S. 853 (1982).

27. *See supra* Part I.

28. Which will not be appealed anyway because the offending School Board is no longer in power.

29. I am indebted to Luke Heilbuth, a visiting student from Australia, for suggesting this last thought in a paper that he wrote for me.