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INTELLIGENT DESIGN AND JUDICIAL MINIMALISM: FURTHER THOUGHTS ON THE "IS IT SCIENCE?" QUESTION

JAY D. WEXLER*

A few years ago, at a conference on religion in the public schools sponsored by the *First Amendment Law Review* at the University of North Carolina, I argued that although I thought Judge Jones' opinion in *Kitzmiller*[1] was mostly correct, the judge erred by deciding that Intelligent Design (ID) is not science.[2] Although I continue to believe that teaching ID in public schools is unconstitutional—I have argued this point for a dozen years and will not reiterate my reasoning here[3]—I also continue to agree with my original assessment of the judge's treatment of the so-called "is it science?" question. In other words, I continue to believe that this particular aspect of the decision was unnecessary, unjustified (the judge did not explain why he was deciding the question), in excess of the judicial role, and unpersuasive, given the judge's lack of training in the philosophy of science.[4]

Also in attendance at the same conference was Richard Katskee, from Americans United for the Separation of Church and State. Katskee was one of the lawyers for the plaintiffs in *Kitzmiller*. Katskee criticized my position and wrote his own article entitled *Why it Mattered to Dover that Intelligent*

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* Professor of Law, Boston University School of Law. This paper had its origins, so to speak, as a presentation I made at a symposium on intelligent design held at Liberty University in February 2009. I thank my fellow participants and the lively, thoughtful audience for comments and questions that improved my thoughts on this issue significantly.

1. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005).

2. *See* Jay D. Wexler, *Kitzmiller and the "Is it Science?" Question*, 5 FIRST AMEND. L. REV. 90 (2006-2007).

3. If you are interested in the reasoning, *see* Jay D. Wexler, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439 (1997); Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751 (2003); Jay D. Wexler, *Intelligent Design and the First Amendment: A Response*, 84 WASH. U. L. REV. 63 (2006); Jay D. Wexler, *From the Classroom to the Courtroom: Intelligent Design and the Constitution*, *in* NOT IN OUR CLASSROOMS: WHY INTELLIGENT DESIGN IS WRONG FOR OUR SCHOOLS 83 (Eugene C. Scott & Glenn Branch, eds., 2006).

4. *See* Wexler, *supra* note 2 at 96–110.

Design Isn't Science.[5] In the article, he advanced a number of arguments regarding why Judge Jones was right to decide the question. This piece will address only one of Katskee's arguments; namely his contention that Judge Jones owed it to the participants in the case, particularly the defendant school board, to issue a broad and comprehensive decision that would at least try to end the controversy over ID across the country.

In Katskee's words, Judge Jones needed to issue a

> [D]ecisive ruling that would not only resolve the dispute in Dover, but also give guidance to other public-school officials elsewhere, and in the process forge a common understanding that would begin to heal the religiously based political and social divides that the school board had wrought in Dover and the ID movement was attempting to export to other communities across the country.[6]

Elsewhere, he said the public had the right to "expect a reasonable return on the investment [after following the case for close to a year] in the form of a decision that actually made headway toward resolving the cultural controversy."[7] Put another way, Katskee argued that if the judge had "dodged" the "is it science?" question, the decision "would have done nothing to quell a growing political and social controversy that otherwise would have continued to create religiously based rifts in the social fabric of communities."[8]

To put Katskee's words in the context of an ongoing discussion among judges and scholars over the proper mode for constitutional decision-making, he was arguing that Judge Jones had an obligation to issue a "maximalist" decision rather than a "minimalist" one. The terms judicial minimalism and judicial maximalism originally come from Cass Sunstein, who first talked about these ideas in the mid-1990s in a book[9] and in the Foreword to the *Harvard Law Review*'s 1995 Supreme Court issue.[10] Minimalism, according to Sunstein, is the "phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided."[11] Minimalist decisions are "narrow" in that they only decide the specific case on its particular facts and do not craft broad rules to govern a wide range of cases,[12] and "shallow" in that they do not provide deep

5. Richard B. Katskee, *Why it Mattered to Dover that Intelligent Design Isn't Science*, 5 FIRST AMEND. L. REV. 112 (2006).

6. *Id.* at 116.

7. *Id.* at 158.

8. *Id.* at 152.

9. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).

10. *See* Cass R. Sunstein, The Supreme Court, 1995 Term—*Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

11. *Id.* at 6–7.

12. *Id.* at 15–20.

theoretical justifications for outcomes.[13] Maximalist decisions, on the other hand, are both broad and deep: they control a wide range of possible future cases, and they try to provide deep theoretical justifications for their outcomes.[14]

Minimalism has its virtues and disadvantages. According to Sunstein, and others, minimalism is both democracy-friendly and democracy-forcing because it "leaves issues open for democratic deliberation . . . and ensures that certain important decisions are made by democratically accountable actors."[15] It also minimizes judicial mistakes. This may be particularly important in cases surrounded by morally charged disagreement where a maximalist decision may "activate forces of opposition," "produce an intense social backlash," and "hinder social deliberation, learning, compromise, and moral evolution over time."[16] On the other hand, minimalism has its drawbacks, including increasing the decision costs for lower courts, practitioners, and individuals who may wish they had additional judicial guidance regarding what is legal and what is not.[17]

Kitzmiller was a maximalist decision. Rather than "leaving as much as possible undecided,"[18] Judge Jones basically left as little as possible undecided. Generally, you can tell that a decision is going to be maximalist if it lasts for 139 pages and weighs as much as a small rhinoceros. For one thing, the decision is broad: it did not limit itself to the facts of the specific case as it surely could have. This is a particularly easy case from a religious purpose perspective, given the statements made by board members and the like.[19] Moreover, Judge Jones attempted to provide a deep theoretical justification for his outcome by delving into the philosophy of science, trying to come up with a definition of science, and finding that a field of inquiry does not count as science.[20]

Kitzmiller should have been decided in a more minimalist fashion. First, deciding the "is it science?" question was unnecessary. Nothing prohibits public schools from teaching non-science in their classrooms. If a school wants to teach philosophy, for example, in a biology or French class, it can. There is nothing unconstitutional about that. Therefore, deciding ID is not science did not answer whether Dover could teach ID in its public schools. The question whether teaching ID promotes or endorses religion remains.

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13. *Id.* at 20.
14. *Id.* at 15.
15. *Id.* at 7.
16. Sunstein, *supra* note 10 at 33.
17. *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 305 (1998).
18. Sunstein, *supra* note 10 at 6–7.
19. *Kitzmiller*, 400 F. Supp. 2d at 750–53 (detailing statements made at school board meeting).
20. *See Kitzmiller*, 400 F. Supp. 2d 707.

Moreover, even if ID is science in some fashion or to some degree, it does not necessarily follow that it can be taught in public schools. Again, the question is more nuanced than that. The correct analysis under the Supreme Court's endorsement test looks at all the circumstances to see if a policy decision would send a message to a reasonable person that the curriculum was determined by religion.[21]

Take this analogy, for instance: a school in a district with a large number of Chinese Taoists teaches only French and Spanish in its foreign language department. Many of the students' parents want the school to teach Japanese or German. They think the students need some other options to participate in the world community. The school board, however, is dominated by Taoists who decide that instead of teaching Japanese or German, like nearly every other school district does, it will teach classical Chinese. A school board member says that Chuang Tzu "took it on the chin from the Confucians for us 2500 years ago, let's do something for him." It is clear that the reason the board chooses classical Chinese is because a majority of the board members think students should be able to read the *Lao Tzu* and the *Chuang Tzu*, the two classic works of philosophical Taoism. Non-Taoists in the community feel like this curricular decision was based on religion. They sue and say the curricular decision endorses Taoism. The school responds, "But classical Chinese is a language. This is a language department; end of story." Is the board right? No, of course not. The question is whether, given all the facts, the board has endorsed religion. Maybe it has, and maybe it has not. The fact that classical Chinese is a language does not decide the question at all.

Second, the endorsement test is itself a minimalist test that the Court has used, presumably because it views (rightly, I think) the questions raised by disputes over religion as particularly suited to a minimalist approach. By employing a "look at all the circumstances" test, the Court is basically directing lower courts to decide questions in a minimalist fashion, based only on the circumstances before them. Judge Jones arguably departed from the spirit of the Court's approach to sensitive and controversial questions regarding religion in the public square by fitting a maximalist analysis into an area where the Court has signaled the suitability of minimalism.

Finally, and most importantly, the question of how to teach origins in the public schools is clearly so controversial, so difficult, so fundamental, so enduring, and so large, that we should encourage more discussion, discourse, and deliberation, rather than less. The idea suggested by Katskee that a district court in Pennsylvania could "forge a common understanding," "heal social divides," and "resolve" or "quell" the "cultural controversy"

21. *See* Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

over evolution[22] is simply wrong. Has *Kitzmiller* resolved the controversy? Of course not. No more than the arguably maximalist decisions in *Epperson*[23] and *Edwards*[24] did, as is now clearly evident.

The evolution controversy is one that the courts can affect but by no means resolve. The more that courts try to resolve the controversy by issuing maximalist decisions, the more resistance they are likely to encounter. Under the criteria for distinguishing the conditions favorable to minimalism from those favorable to maximalism, the questions of whether ID is science, and more generally, whether ID violates the First Amendment, are best suited for minimalist decisions. *Kitzmiller*, at least in its discussion of the science issue, took the wrong jurisprudential route.

22. *See* Katzkee *supra* note 5 at 116.

23. Epperson v. Arkansas, 393 U.S. 97 (1968) (holding unconstitutional Arkansas' law prohibiting the teaching of evolution).

24. Edwards v. Aguilard, 482 U.S. 578 (1987) (holding unconstitutional Louisiana's equal time for creation science and evolution law).