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"Only Fools and Dead People Never Change Their Opinions"

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BOOK REVIEW

"Only Fools and Dead People Never Change Their Opinions"*

TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION. EDWARD J. LARSON, Oxford, Eng.: Oxford Univ. Press, 1985. Pp. 222. $21.95.

VITO J. TITONE**

I. INTRODUCTION

For many, the persistence and tenacity of the creationist movement seems a curious and perhaps even bizarre development in our highly secular western culture. This was true in 1925 when the creationist movement reached a crescendo and the famous *Scopes v. State*[1] trial captured the attention of the nation. It is equally true of the past two decades, which have seen a remarkable resurgence of the drive to inject biblical views of mankind's origins into the public schools. Edward J. Larson,[2] a practicing attorney, has written a lucid and thought-provoking account of the sixty-year battle between creationists and Darwinists. His thoroughly researched book, *Trial and Error: The American Controversy Over Creation and Evolution*, traces the various legislative and judicial skirmishes for control of the public schools' science curricula.

The book provides valuable information about the shifting strategies of the combatants and the motives that drove them. Mr. Larson has marshaled a wealth of details and facts, but his book is ultimately unsatisfy-

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* E. ANDREWS, A PRACTICAL COURSE IN BOTANY 362 (1911).

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1. 154 Tenn. 105, 289 S.W. 363 (1927) (For an account of the case itself and its courtroom legacy on creationism and evolution, see L. DE CAMP, THE GREAT MONKEY TRIAL (1968); R. GINGER, SIX DAYS OR FOREVER? TENNESSEE V. JOHN THOMAS SCOPES (1958); M. SETTLE, THE SCOPES TRIAL: THE STATE OF TENNESSEE V. JOHN THOMAS SCOPES (1972)).

2. In addition to holding a B.A. degree from Williams College and a law degree from Harvard University, Mr. Larson earned a Ph.D. in the history of science from the University of Wisconsin.

ing because it provides little insight into the social forces that have fueled the fervor that continues to surround this controversy. Moreover, although *Trial and Error* touches upon the legal problems that arise when the principles of the establishment clause, freedom of expression, and freedom of worship clash, it does not adequately explore those problems or offer substantive ideas that would aid in resolving them. Thus, while Larson has given us a scholarly review of the relevant facts and events, plausible answers to the many questions his work poses will have to await the work of future scholars.

II. THE CREATIONIST MOVEMENT'S ROOTS

Few of the scientists who were present when the modern theory of evolution was first publicly introduced on July 1, 1858 could have envisioned the sweeping revolution in scientific and social thought that it would eventually produce.[3] Charles Darwin's theory of natural selection transformed the science of biology from a simple systematic effort to classify the species, to a sophisticated study of the cause-and-effect relationships that exist in nature.[4] The theory also served as a model for the ideas of Social Darwinists, who used the concept of the survival of the fittest to justify some of the harsher aspects of modern industrial life, such as poverty, imperialism, and racial oppression.[5] Finally, Darwin's theory of evolution represented a direct challenge to the biblical view of mankind's origins and touched off a controversy that was to continue into the present day.

Due largely to advances in the technology of the printing press, Darwin's ideas spread rapidly throughout the scientific community.[6] Within thirty years of the publication of *Origin of the Species*, evolutionary concepts had made their way into scholastic textbooks. The earliest textbook treatments of the subject were efforts to reconcile Darwin's theory of

3. On that date, thirty members of the Linnean Society, a select group of naturalists, heard a brief presentation of the papers of Charles Darwin and Alfred Wallace, who had been simultaneously developing the theory that no two individual plants are alike and that the process of natural selection determines which characteristics of each plant specie will continue into future generations. Although Darwin's seminal book, ORIGIN OF THE SPECIES, was not published until 1859, most historians regard the presentation before the Linnean Society as the beginning of modern evolutionary thought. D. BOORSTIN, THE DISCOVERERS 465 (1983).

4. *Id.* at 420-64.

5. Social Darwinism may have been the natural intellectual successor to Calvinism, which saw differences in wealth and power as reflections of the choices in bestowing divine grace that had been made by the supreme being.

6. BOORSTIN, *supra* note 3, at 465.

evolution with that of divine creation.[7] By the turn of the century, however, the scientific theory of evolution had completely supplanted the biblical view of creation, and Darwinian thought was presented in increasingly dogmatic tones.

Nonetheless, an adverse public reaction to this direct assault on popular religious beliefs did not manifest itself until the early 1920s. Larson attributes the relatively sudden emergence of public concern to the expansion of secondary education in the 1920s and the concomitant increase in the public's interest in the high school curriculum (pp. 24-27). Whatever its immediate cause, the campaign to outlaw evolutionary teaching in the public schools did not begin in earnest until the period between 1920 and 1925.

As Larson's book makes clear, the anti-evolution movement of that period was the product of a variety of social forces (pp. 40-41). The widespread disillusionment that followed World War I coincided with the public concern over a perceived deterioration in the moral fabric of the nation. Disappointment with the results of the preceding generation's liberal experiments in social engineering induced public disenchantment with modernity. On the positive side were the progressive impulses of reformers concerned about such diverse evils as industrialization, urbanization, intemperance, and child labor. The perceived moral collapse and societal insecurity that characterized the postwar era led many to yearn for simpler times and simpler answers to seemingly unanswerable questions. Given the tenor of those tumultuous years, it was inevitable that many would turn to the comfort and certainty of old-time religion. When these revived Fundamentalist attitudes were combined with the contemporary progressives' instincts to use the machinery of government to effect social change, it was also inevitable that the attentions of those who were most concerned would focus on political solutions to the moral and social issues of the era.[8]

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7. Pre-Darwinian textbooks took for granted the divine origins of life. As Larson points out, one of the most important textbook authors of the nineteenth century, Asa Gray, posited in the original version of his book that "the Creator established a definite number of species at the beginning, which have continued by propagation, each after its kind" (pp. 9-10) (quoting A. GRAY, FIRST LESSONS IN BOTANY AND VEGETABLE PHYSIOLOGY 175 (1857)). Subtle alterations in the role of the Creator, however, began to appear in later editions. While God remained the primary cause of all life and order in the universe, the mechanism of evolution through natural selection was recognized as the secondary cause and the immediate explanation for nature's variety (p. 10).

8. For a thorough discussion of the social forces that produced the Fundamentalist revival of the 1920s, see W. GATEWOOD, PREACHERS, PEDAGOGUES AND POLITICIANS: THE EVOLUTION CONTROVERSY IN NORTH CAROLINA 1920-1927 (1966). Perhaps future generations of historians will identify similar social factors as causes of the current resurgence of Fundamentalism. Our con-

The Fundamentalist movement of the 1920s, which was fostered by such historically significant communications media as church meetings, Chautauqua conferences, and widely-distributed printed tracts, did not initially focus on evolutionary teaching as its main target. Rather, the earliest Fundamentalist preachers focused on vague concepts of modernism and infidelity to the teachings of the Bible as the primary sources of social evil. The turning point appears to have occurred in 1921, when William Jennings Bryan, one of the greatest orators and reformers of the period, called attention to Darwinian theory as a root cause of social depravity.

In what is perhaps his most significant contribution to our understanding of the anti-evolution phenomenon, Larson provides numerous excerpts from Bryan's speeches and writings that portray his motives as a peculiar admixture of reformist impulse and reactionary sentiment (pp. 45-47). To be sure, the focus of Bryan's speeches was the threat to Christian orthodoxy that Darwinism posed. Bryan's hostility to science was expressed in such beautifully cadenced prose as his famous observation that "it is better to trust in the Rock of Ages, than to know the age of the rocks; it is better for one to know that he is close to the Heavenly Father, than to know how far the stars in the heavens are apart" (p. 47). But the Great Commoner, who with his famous "Cross of Gold" speech had launched the attack on the monetary system that plagued debt-ridden American farmers, was also concerned with the impact that Darwinian thought was having on the social problems of the day. As Larson notes, Bryan's speeches reflected his belief that Darwin's notions about the survival of the fittest encouraged the exploitation of labor, furnished a justification for selfish competition, and dampened the possibilities for swift reform by stressing gradual evolutionary change (p. 47).

Although their motivating concerns were moral and social, Bryan and his Fundamentalist contemporaries chose to attack Darwin's theories on their scientific merits. Over and over again, these self-appointed twentieth-century prophets attempted to impugn the accuracy of Darwin's scientific findings, ridiculing them as unsupported speculations. It mattered little that by the 1920s Darwin's theories were widely accepted in the scientific community. After all, it was popular opinion and not

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temporary Fundamentalist movement was preceded by the debilitating and demoralizing war in Vietnam, a public perception that the social engineering of the Great Society was a failure, and a general sense of malaise about the moral health of society. While the parallels may be somewhat superficial, the resemblance between the present underlying social forces and those that fueled an earlier Fundamentalist drive in our history is enough to give one pause.

scientific thought that counted in the political arena in which Bryan and his followers were interested. Furthermore, since these early anti-evolutionists set the terms of the initial debate, popular opinion, rather than experimentally proven facts, was to govern public science as it was to be taught in the public schools.

Trial and Error makes much of the relationship between popular belief and the vicissitudes of the creationist movement. Larson's thesis is, in essence, that in the final analysis popular opinion concerning the legitimacy of Darwin's theories is the single most important factor in determining the fate of the creationist movement. Indeed, although he does not actually say as much, Larson suggests that the changing beliefs of a majority of the population were indirectly responsible for the change in the judicial climate that ultimately led to the movement's downfall. While there is some truth to Larson's thesis, his ideas suffer from an underestimation of the significance of the judiciary's increasing sensitivity to the values expressed in the first amendment.

III. THE *SCOPES* AFFAIR

The first legislation outlawing Darwin's teachings was enacted in Oklahoma in 1923 (p. 49). The statute, which was passed in a rush of emotionalism on the floor of that state's legislature, simply forbade all mention of evolution in textbooks to be used in the public schools. Florida soon followed suit with a resolution of its own that prohibited the teaching of evolution in the classroom (p. 53). Such early legislative efforts set the stage for the 1925 enactment of the Tennessee anti-evolution law that became the focus of the notorious *Scopes* trial. Governor Peay of Tennessee anticipated the legal theory that would subsequently be used to defend the law against constitutional attack when he decried the abandonment of the Bible as the source of the nation's contemporary problems and then asserted that "[t]he people have the right and must have the right to regulate what is taught in their schools" (p. 57).

According to Larson, the *Scopes* trial itself was as much a product of local boosterism as it was a judicial test of the sincerely held beliefs that characterized both sides of the argument (p. 58). The American Civil Liberties Union (ACLU) had advertised for a Tennessee teacher who was willing to act as a guinea pig in testing the statute. In doing so, the ACLU had captured the attention of several business and civic leaders in Dayton, who immediately perceived the commercial benefits that a highly publicized trial would bring. It was thus a small group of clever entrepreneurs that first approached John T. Scopes (who had taught biol-

ogy only in a brief course geared toward final-exam review) and prevailed upon him to stand as a defendant in a trial that would test the validity of the law.

At that point in our legal history, it was almost inevitable that the defenders of the anti-evolution statute would have the upper hand, despite the formidable legal and scientific talent that had gathered in Dayton to challenge it.[9] It was not until 1925, the same year as the *Scopes* trial, that the freedom of expression guaranteed by the first amendment was held applicable to the states through the fourteenth amendment.[10] Freedom of religious belief was not squarely incorporated in the liberties promised by the fourteenth amendment until 1940.[11] Thus, when the prosecution in the *Scopes* case advanced the unqualified argument that the state was entitled to direct the expenditure of its educational funds in the manner it saw fit and to prohibit the teaching of evolution as an incident of that power, Scopes' defenders had little in their legal arsenal to offer in opposition (pp. 67-72). Their principal argument—that the state may not constitutionally infringe upon individual liberties by an irrational exercise of its police powers—was tailored to lay the groundwork for the introduction of expert testimony to demonstrate that the theory of evolution was widely accepted in the reputable scientific community. Such testimony, however, became irrelevant when the trial judge, John T. Raulston, ruled that the state had the prerogative to outlaw evolutionary teaching regardless of the scientific merit of that doctrine (pp. 63-67).

With that ruling precluding the most fundamental of the defense's arguments, Scopes' conviction by the jury was a foregone conclusion. The outcome in the trial court was subsequently upheld on the merits by the Tennessee Supreme Court on the narrow theory that whatever private rights Scopes may have had, "he had no right or privilege to serve

9. Roger N. Baldwin, a founder of the American Civil Liberties Union and its then executive director, was involved in the early stages of the preparation for the trial. When Bryan announced his intention to contribute his services to the prosecution, the redoubtable Clarence Darrow and Dudley Field Malone, both former Bryan supporters, volunteered to try the case for the defense. Bainbridge Colby, Bryan's successor as United States Secretary of State, also participated in the pretrial defense preparation, although he was succeeded by Arthur Garfield Hays for the actual trial. The future Chief Justice of the Supreme Court, Charles Evans Hughes, agreed to represent Scopes in the United States Supreme Court if the case ever reached that stage (pp. 61-63).

10. Gitlow v. New York, 268 U.S. 652 (1925).

11. Cantwell v. Connecticut, 310 U.S. 296 (1940). Before *Cantwell*, it had been definitively held that the federal Constitution made "no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws." Permoli v. New Orleans, 44 U.S. (3 How.) 589, 609 (1845).

the State except on such terms as the State prescribed."[12] In an ironic twist, the Tennessee Supreme Court deprived Scopes' attorneys of the United States Supreme Court hearing they had hoped for when it overturned the judgment of conviction on purely technical grounds.[13]

Larson's own verdict on the *Scopes* affair is that it was a mixed victory, with each side gaining some, but not all, of the result it sought. The advocates of the freedom to teach evolution in the public schools gained the attention of the nation and the sympathy of the press, which repeatedly ridiculed the anti-evolution law under which Scopes was convicted as an atavistic curio, a foolish product of ignorance, bigotry, and intolerance. According to many other historians, the publicity that surrounded the *Scopes* trial effectively arrested the spread of the anti-evolutionary movement. Larson, however, stresses that the Tennessee Supreme Court's decision, which precluded constitutional review by the United States Supreme Court, left the way open for further state legislation and further controversy on the subject.

In the two or three years that immediately followed the *Scopes* trial, a frenzy of anti-evolutionary activity, especially in the South, resulted in the passage of numerous statutes and executive proclamations outlawing the teaching of Darwin's theories and the use of textbooks describing those theories. Larson attributes some of the energy that accompanied the renewed commitment to stamping out evolutionary teaching to the martyrdom of William Jennings Bryan, who died within days after the *Scopes* trial had ended (p. 75). Whatever the cause of this short-term burst of activity, however, the fervor had been dissipated by 1928, and for the next three decades an uneasy truce prevailed. Larson argues that the anti-evolutionist forces gained ground during this period of relative quiet because educators and textbook publishers simply minimized their discussions of Darwin's theories in the hope of avoiding further controversy (p. 84). The passage of time, however, ultimately caused the defeat of the anti-evolutionist movement, as the intervening years brought important changes in both the governing legal principles and the public's attitude toward science. These changes, in turn, dramatically altered the very assumptions on which the *Scopes* decision and others like it were based.

12. Scopes v. State, 154 Tenn. 105, 111, 289 S.W. 363, 364 (1927).

13. *Id.* at 120-21, 289 S.W. at 367. The error on which the judgment was reversed involved a procedural flaw in the imposition of Scopes' sentence—a $100 fine. The defense had waived its right to the proper procedure in the trial court and had not raised the issue on appeal. Like Scopes' trial counsel, Larson infers from these circumstances that the procedural reversal was a subterfuge to avert further review of the controversial issues raised by the trial (pp. 71-72).

IV. THE CHANGING LEGAL CLIMATE

The free exercise clause of the first amendment to the United States Constitution was first held applicable to the states in 1940.[14] Some seven years later, in *Everson v. Board of Education*,[15] the United States Supreme Court held for the first time that the states were also bound by the establishment clause of that amendment. The latter decision was particularly significant because it interpreted the establishment clause to preclude the states from aiding religion in general, rather than aiding or favoring a particular denomination over the others. The *Everson* decision thus transformed the establishment clause from a simple constitutional prohibition against establishing a state religion, to one requiring a "wall of separation" between all religion and government.[16] In the process, the Supreme Court also permanently transformed the terms on which the battle between the pro- and anti-evolutionists would thereafter be fought.

Within a year after *Everson* was decided, the Supreme Court invoked the establishment clause to invalidate a school district's practice of providing classroom space for on-site religious instruction.[17] In the same vein, the Court later invoked the establishment clause to prohibit an officially sponsored public classroom prayer, despite claims that the prayer itself was nondenominational and that its recitation was voluntary.[18] At approximately the same time, the Court held in *School District of Abington Township v. Schempp*[19] that the reading of the Bible in public school classrooms was inconsistent with the strictures of the establishment clause. Taking note of the overlapping and sometimes conflicting requirements of the free exercise and establishment clauses, the *Schempp* Court reiterated the importance of government maintaining a posture of strict "neutrality" toward religion.[20] Although it was acutely aware of the argument that banning all mention of religious concepts from the public schools would make them bastions of a "religion of secularism"[21] and might thereby impinge on the free exercise rights of believers, the Court

14. Cantwell v. Connecticut, 310 U.S. 296 (1940).

15. 330 U.S. 1 (1947) (upholding a local practice of supplying public transportation for parochial school students).

16. *Id.* at 15. In McGowan v. Maryland, 366 U.S. 420, 440-42 (1961), the Supreme Court took note of the historical arguments supporting the view that the establishment clause was designed only to forbid the creation of a national church. It went on to note, however, that judicial gloss had given the clause a far broader meaning.

17. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

18. Engel v. Vitale, 370 U.S. 421 (1962).

19. 374 U.S. 203 (1963).

20. *Id.* at 222-23.

21. *Id.* at 225.

gave that argument short shrift, stressing that the free exercise clause "never meant that a majority could use the machinery of the State to practice its beliefs."[22] In language that was to have special significance for the anti-evolutionist movement, the Court also held that to be consistent with the establishment clause, state enactments tinged with religious overtones must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[23]

These cases laid the legal groundwork for the second phase of the judicial debate over the place of Darwinian thought in the public school classroom. The rationale of the *Scopes* court—that the state had unlimited freedom to prescribe the science curriculum of the public schools—was no longer viable in light of the ruling in *Everson* that the states' freedom of action was circumscribed by the establishment clause. Furthermore, the emphasis in *Schempp* on strict neutrality and the need for a secular purpose made the continued existence of statutes banning the teaching of evolution difficult to justify.

Coincident with these changing views about the proper constitutional role of religious belief in the classroom was a gradually evolving change in the public's attitude toward the intellectual discipline of science. As Larson points out, the Cold War between the United States and the Soviet Union that emerged in the late 1940s and early 1950s brought with it a renewed interest in science as a means of promoting the national welfare. Soviet advances, such as the development of the technology necessary to build an atomic bomb by 1949, and to launch a satellite into space by 1957, caused American leaders concern and prompted them to examine the state of technology in the United States. Fearing that the Soviets, with their superior discipline and scientific training, would overtake the United States in weapon technology and space exploration, the federal government began pouring funds into scientific research and development projects. The United States government turned its attention to the science curriculum in the public schools, which many viewed as the breeding ground for the nation's future strength.

These developments had two important consequences. First, the belief of William Jennings Bryan and his followers, that the nation's well-being depended upon the moral education of its young, was supplanted by a belief that the national future rested on the quality of the secular

22. *Id.* at 226. To buttress its position, the Court also noted that the establishment clause might not necessarily prohibit a study of the Bible or of religion that was presented objectively and as part of a secular educational program. *Id.* at 225.

23. *Id.* at 222.

scientific training made available in the public schools. Second, the entirely distinct "religion" of science, with its unquestioning belief in the primacy of objectively observable phenomena and purely logical deductive thought, gained widespread public acceptance and, in some senses, replaced the traditional religions that were based on faith and belief in what was, of necessity, not objectively verifiable.

V. THE *EPPERSON* DECISION

These developments culminated in *Epperson v. Arkansas*,[24] the first challenge to anti-evolution legislation to reach the United States Supreme Court. The challenge was brought, with the encouragement of the ACLU and a local National Education Association affiliate, by a young public school biology teacher. She argued principally that the statute impaired her first amendment right to freedom of expression and that the statute was so vague as to violate due process of law (p. 109). The ACLU's Supreme Court brief argued that the legislation violated the establishment clause. The brief contended that the statute's sole purpose was to aid those who believed literally in the Genesis account of creation, and consequently, that the statute was invalid under the *Schempp* test (pp. 110-11). It was this view that the Court, in an opinion authored by Justice Abe Fortas, ultimately adopted.

In an uncharacteristic departure from the evenhanded stance he takes throughout the rest of his book, Larson is curiously savage in his criticism of the Fortas opinion in *Epperson* (pp. 115-19). He accuses Justice Fortas of accepting his law clerk's research uncritically and of basing his own conclusion about the religious purpose of the statute on inadequate historical information. Larson even goes so far as to suggest that Justice Fortas relied on a biased sample of the available historical material and that he was intellectually dishonest in his use of some of the material he cited. The documentation Larson provides for these rather serious accusations, however, is slim and not particularly persuasive.

Larson takes Justice Fortas to task for not recognizing a study indicating that the challenged Arkansas statute was not supported in disproportionate numbers by the Fundamentalist segment of the electorate (p. 115). He also argues that Justice Fortas should have noted the fact that the statute was enacted at a time when the leader of the anti-evolutionist movement, William Jennings Bryan, was advocating such legislation because he felt that the teaching of Darwin's theories indirectly promoted

24. 393 U.S. 97 (1968).

the kind of moral and social deterioration that leads to war, the exploitation of labor, and other societal evils (p. 115).

Finally, Larson points to Justice Fortas's truncation of a quotation from a contemporaneous newspaper advertisement championing the proposed statute in his final draft of the *Epperson* opinion.[25] Specifically, Larson takes issue with the deletion of the following two sentences: "The bill does not prohibit free speech, it does not seek to help the church. It simply forbids the state attacking the church by having evolution taught in the schools at taxpayers' expense" (p. 116).

Whatever Justice Fortas's motives were for deleting the quoted sentences, however, it can hardly be said that the deleted matter provides persuasive evidence for Larson's suggestion that the purposes underlying the statute were secular. To the contrary, the deleted sentences are simply an inverted way of saying that the state may censor its curriculum to protect the sensibilities of a particular religious viewpoint. Similarly, Larson's assumption that Bryan's linkage of anti-evolution legislation to the prevention of social evils furnishes a genuinely secular justification for such legislation seems naive, since, as Larson himself acknowledges, Bryan's oratory was merely a catalyst and a rallying point for those whose opposition to evolutionary teaching was purely religious in nature (p. 48). Finally, although Justice Fortas's opinion needs no defense, it seems worthy of note that neither the state's attorney, who halfheartedly argued that the challenged law should be upheld, nor the Arkansas high court, which wrote a cryptic two-sentence per curiam opinion on the subject, advanced a particular secular purpose for the statute (pp. 111-12).[26]

Moreover, Larson's contention that considerations other than purely legal ones contributed to the *Epperson* majority's conclusion has little to support it. It is true, as Larson notes, that the majority's language illustrated its own belief that the anti-evolutionist credo was simply a quaint anachronism that was indefensible in light of modern scientific knowledge.[27] The use of modern sensibilities as a litmus test for the constitutionality of longstanding laws and practices, however, was certainly not a surprising or untoward departure from the decision-making patterns of the Court that decided such landmark cases as *Brown v.*

25. The quotation, minus the deleted sentences, can be found in 393 U.S. at 108, n.16.

26. *See* Epperson v. Arkansas, 393 U.S. at 101 n.7, 109 n.18; *see also id.* at 109 (Black, J., concurring); *id.* at 114-15 (Harlan, J., concurring). As a judge having had occasion to consider cases in a similar posture, I can find no fault with the conclusion that a statute has no constitutionally permissible purpose when the state itself has offered none.

27. The Court, for example, referred to the statute derogatorily as a "monkey" law, 393 U.S. at 101, and "more of a curiosity than a vital fact of life in these States." *Id.* at 102.

Board of Education[28] and *Reynolds v. Sims*.[29]

Larson's other substantive basis for attacking the integrity of the *Epperson* opinion is his own conclusion that the decision is inconsistent with the Court's earlier application of the *School District of Abington Township v. Schempp* test in *McGowan v. Maryland*,[30] which involved an establishment clause challenge to "blue laws" that require businesses to close on Sunday, the Christian Sabbath. In Larson's view, the Court had strained to find a secular purpose for the laws challenged in *McGowan*, while in *Epperson* it had ignored available and plausible theories indicative of a secular purpose for the challenged law. One of the theories that Larson seems to endorse was expressed in Justice Hugo Black's concurring opinion in *Epperson*, which posited as a secular justification the state's interest in "withdraw[ing] from [the] curriculum any subject deemed too emotional and controversial for its public schools."[31] With all due respect to the usually scholarly and meticulous Justice Black, however, this proffered justification for the statute at issue in *Epperson* is, to say the least, questionable. Both prior and subsequent Supreme Court opinions make clear that the free speech clause of the first amendment precludes school regulations impairing freedom of expression that are premised solely on the fear that the suppressed ideas would be disturbing or even provocative.[32] Thus, eliminating a particular topic from the school curriculum on the ground that it is controversial hardly seems a viable basis for justifying the Arkansas statute. Larson's effort to draw an inference of disingenuous decision making from a comparison of the outcomes in *Epperson* and *McGowan* is also unpersuasive. The secular purpose the Court found in the latter case—the promotion of the public's health and well-being through a state-enforced day of rest[33]—was both instinctively obvious and historically supportable. In contrast, as Larson's book most vividly demonstrates, *all* of the historical circumstances surrounding anti-evolution statutes point to a religious purpose and no other.

28. 347 U.S. 483 (1954).

29. 377 U.S. 533 (1964).

30. 366 U.S. 420 (1961).

31. 393 U.S. at 113.

32. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 864-66 (1982); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508-09 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943).

33. *See* McGowan v. Maryland, 366 U.S. at 426-27.

VI. THE PROBLEM OF STRICT NEUTRALITY

Larson's uncharacteristic lapse in rigor in his discussion of the *Epperson* decision suggests that he has a hidden agenda, or at least a personal bias that is not made explicit in his book. Perhaps the key to Larson's underlying concern lies in his repeated emphasis on the legal theory, advanced in some of William Jennings Bryan's writings, that legislation prohibiting the teaching of evolution is necessary to maintain the state's neutrality toward religion. The strict neutrality argument was articulated most directly in Justice Black's concurring opinion in *Epperson*:

> A . . . question that arises for me is whether . . . forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine. If the theory is considered anti-religious . . . how can the State be bound by the Federal Constitution to permit its teachers to advocate such an "anti-religious" doctrine to schoolchildren? . . . The Darwinian theory is said to challenge the Bible's story of creation; so too have those who believe in the Bible, along with many others, challenged the Darwinian theory. Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the [majority] opinion.[34]

I agree with Justice Black that the question of the State's obligation to be neutral toward religion is a troubling one in this context, and I am sorry that Mr. Larson, an attorney by trade, did not go further in exploring it. There is ample language in the controlling Supreme Court opinions indicating that the state can neither promote nor discourage religion.[35] In *School District of Abington Township v. Schempp*, for example, the Court stated: "[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' "[36] While such homily is easy enough to recite, it is extremely difficult to apply in the host of situations that place the two principles

34. 393 U.S. at 113.

35. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1962); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

36. 374 U.S. 203, 225 (1963).

squarely in conflict and require analysis more sensitive than that suggested by the *Epperson* majority's opinion.[37] The controversy over teaching Darwinian theory in the public schools is but one example.[38] Unfortunately, the problem admits of no easy answer. To the extent that scientific ideas such as the theory of evolution are taught as truths, the state may indeed be said to lend its stamp of approval to an anti-religious or irreligious viewpoint, since the scientific and the literal biblical versions of the origin of the species are mutually exclusive theories in the minds of many Fundamentalists. For those Fundamentalists whose religious creed includes undeviating acceptance of the latter version, the teaching of Darwin in the public school classroom may be as offensive as is the recitation of a brief classroom prayer to those who do not accept the notion of a supreme being. Even where scientific ideas are taught as mere hypotheses,[39] the omission from the curriculum of the biblical

37. The problem presented in Sherbert v. Verner, 374 U.S. 398 (1963), is an example of the difficulty of applying the doctrine of strict neutrality to specific disputes in a society like ours, which is characterized by extensive governmental involvement in the everyday lives of citizens. The plaintiff in *Sherbert* was denied unemployment benefits because she refused to accept employment requiring her presence on Saturday, which was her religious Sabbath. The Supreme Court held that the denial of such benefits impermissibly infringed the plaintiff's rights under the free exercise clause of the first amendment. *Id.* at 410. While this holding seems to be a fairly straightforward application of modern first amendment principles, an argument could be made that the net effect of the *Sherbert* decision is to *favor* religion by giving claimants who refuse employment for religious reasons an advantage over those who do so for purely secular reasons. In any event, the *Sherbert* problem highlights the fact that there is often no truly neutral ground lying between favoring religion and treating it with hostility. Consequently, there are situations in which a choice of one or the other must be made. For a thought-provoking discussion of the values to be employed in making such a choice, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 813, § 14-7, at 833, § 14-10, at 846 (1978).

38. I had occasion to wrestle with the problem in an analogous context in *In re* Panarella v. Birenbaum, 60 Misc. 2d 95, 302 N.Y.S.2d 427 (Sup. Ct. Richmond County 1969), *rev'd*, 37 A.D.2d 987, 327 N.Y.S.2d 775 (2d Dep't 1971), *aff'd*, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (1973). In that case, a City College student newspaper, funded by mandatory fees and sponsored by the tax-supported institution, had published several articles violently attacking the Catholic Church and Christianity in terms that can only be characterized as obscene. The petition of several students seeking to enjoin the future publication of such articles required a careful balancing of the establishment clause's prohibition against governmental hostility to religion against the right of free expression guaranteed by the first amendment. Although I concluded that the latter right did not furnish a justification for the use of a government-sponsored newspaper as a vehicle for attacking a particular religion, 60 Misc. 2d at 98, 302 N.Y.S.2d at 431, the Court of Appeals ultimately struck a different balance by concluding that the state's provision of a neutral forum for expression did not, without more, violate the establishment clause, 32 N.Y.2d at 116-17, 296 N.E.2d at 241-42, 343 N.Y.S.2d at 338-39. *Cf.* Widmar v. Vincent, 454 U.S. 263 (1981) (having created a forum generally open to student groups, a state university cannot enforce a content-based exclusion based on religious speech). The differing analyses in the various opinions in the *Panarella* case highlight the difficulty of reconciling the competing rights and concerns that the first amendment implicates.

39. The significance of the distinction between teaching an idea as established "truth" and

view—an omission that may well be compelled by the Constitution[40]—leaves room for the argument that the state's presentation of the subject of mankind's origins is unbalanced unfairly in favor of the irreligious position.

The problem is by no means an academic one. The past decade has seen a resurgence of Fundamentalism and a renewed politicization of the Fundamentalist movement. Our current President, Ronald Reagan, has endorsed a balanced approach of teaching both Darwinian evolution and the biblical version of creation in the schools (pp. 126-27), and the advocates of the latter version have begun to compete with the traditional scientific establishment for intellectual legitimacy by developing their own theory of "scientific creationism" (pp. 123, 128-29). In the late 1970s and early 1980s, these factors coalesced to produce a spate of equal-time legislation designed to place scientific creationism on an equal footing with Darwinian teachings (pp. 125-67). Although most of this legislation was struck down as unconstitutional,[41] there can be little doubt that the legal debate over evolution in the public schools will continue as long as a substantial and vocal segment of the population persists

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teaching it as a mere hypothesis was a subject of discussion in Epperson v. Arkansas, 393 U.S. 97 (1968). The state court in that case had specifically declined to express an opinion on the question whether the challenged statute " 'prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true.' " *Id.* at 101 n.7. While the majority found both the distinction and the state court's refusal to reach the question irrelevant to its own conclusion, *see id.* at 102-03, the importance of the distinction was not lost on creationists, who launched a post-*Epperson* drive for legislation requiring that evolution be taught as only one of a number of theories explaining mankind's origins (pp.131-56).

40. In light of School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (no state law or school board may require that Bible passages or the Lord's Prayer be recited in the public schools even if students may be excused upon written request of their parents) and Engel v. Vitale, 370 U.S. 421 (1962) (state officials may not compose an official state prayer and require its recital in the public schools even if the prayer is denominationally neutral and pupils are allowed to remain silent or be excused during its recital) it is difficult to imagine a situation in which the biblical version of creation could be taught even as one of several theories explaining mankind's roots. Although *Schempp* struck down only the use of the Bible for devotional exercises and expressly left room for exposing students to the Bible as part of a secular course in literature or comparative religion, a biology curriculum which presented Genesis as a possible alternative explanation to that offered by Darwin would likely run afoul of the first amendment. Such a curriculum not only could be deemed a violation of the "wall of separation" but also could leave the state open to the charge that it was favoring adherents to the Bible over adherents to other religious credos.

41. *See, e.g.*, Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); Crowley v. Smithsonian Inst., 462 F. Supp. 725 (D.D.C. 1978), *aff'd*, 636 F.2d 738 (D.C. Cir. 1980); Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975); Willoughby v. Stever, Civil Action No. 1574-72 (D.D.C. Aug. 25, 1972), *aff'd*, 504 F.2d 271 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied sub nom.* Brown v. Houston Indep. School Dist., 417 U.S. 969 (1974).

in the view that biblical creation and Darwinian theory are irreconcilable.

It would be inappropriate, and probably counterproductive, for me to attempt to resolve here the thorny legal problems that Larson's work suggests. As an appellate judge with over eighteen years of experience in resolving similar controversies, I am acutely aware of the wisdom of deciding issues only within the framework of a particular factual setting, and only after the concerned parties have fully briefed and argued their competing positions, in the best traditions of our adversary system. For now, it seems sufficient to bear in mind the observation of an ACLU attorney that "the problem of creationism will persist because it is a legal problem only in part" (p. 171). Like the many other contemporary issues involving the relationship between governmental decisions and people's most passionately felt religious convictions, the notion of a permanent and fair judicial solution is simply unrealistic. The real key to resolving such issues lies not in the inherently coercive powers of the courts and legislatures, but rather in the voluntary acts of tolerance and accommodation that make the idea of a truly democratic society viable.

VII. CONCLUSION

Edward Larson has written a fact-filled and thought-provoking book, but in the end I found myself frustrated by its lack of analytical substance. *Trial and Error* provides the reader with a mountain of information about legislative debates, the positions of various factions, and the intimate decision-making processes of the combatants. What is sorely lacking, however, is a discussion of the larger social forces that have contributed to the creationist movement's longevity and perseverance throughout this century of rapid change.

When I first sat down to read Larson's book, I had a number of questions and concerns in mind. What is it in our American culture, for example, that drives so many to look to the legislatures, the courts, and even the public schools as the principal guardians of moral and spiritual values? This impulse, which is as strong today as it was in 1925, seems strange in a nation that was founded in part on the belief that neither the irreligious nor the devout are well served by a government that is entangled in matters spiritual.[42] The persistence of the highly politicized Fundamentalist movement in this country suggests to me a chasm between

42. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 259-60 & n.25 (1963) (Brennan, J., concurring).

the lofty values expressed in the Constitution and the actual sentiments of a substantial segment of the citizens governed by that document. If there is any truth to suggestion, it does not bode well for our democracy.

In his attempt to be evenhanded and balanced in his presentation of the creationist movement's history, it is unfortunate that Larson has simply sidestepped this central issue. As a consequence, his book sheds little light on one of our most important contemporary dilemmas—the need to reconcile the political demands of the devout with the rights of the remainder of the populace in a manner that is consistent with the maintenance of a democratic society. Thus, while his book may be of academic interest to some, it ultimately fails as a work of serious history since the paramount value of studying the past lies in its ability to lend perspective to the problems of the present, and to provide clues to their resolution.