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# The Scopes Trope

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WHERE DARWIN MEETS THE BIBLE: CREATIONISTS AND EVOLUTIONISTS IN AMERICA. By Larry A. Witham.** Oxford University Press. 2002. 330 Pp.

Although the legal issue involved in the prosecution of John Scopes[1] was simple enough—it took the jury only nine minutes to reach its unanimous decision that Scopes had violated the Tennessee statute barring the teaching of evolution in public schools[2]—the trial has had a lasting impact on the American consciousness.[3] In his Pulitzer Prize winning account of the trial, Edward J. Larson describes the complicated development of the trial's legacy over the past seventy-five years.[4] For the first several decades following the trial, Larson explains, the general public perceived the event as primarily representing a triumph for the forces of reason and science over the reactionary forces of fundamentalist religion,[5]

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[1] *See* Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) (observing that "Scopes was convicted of a violation of chapter 27 of the Acts of 1925, for that he did teach in the public schools of Rhea county a certain theory that denied the story of the divine creation of man, as taught in the Bible, and did teach instead thereof that man had descended from a lower order of animals"). The Tennessee Supreme Court upheld the statute against federal and state constitutional attack, *id.* at 366, but it reversed the judgment of the trial court on the ground that the judge violated the state constitution by imposing the $100 fine authorized under the statute himself, rather than asking the jury to do so. *Id.* at 367. Instead of sending the case back to the trial court for a new imposition of sentence, the judge suggested to the Attorney General that the prosecution be terminated. *Id.* ("We see nothing to be gained by prolonging the life of this bizarre case. On the contrary, we think the peace and dignity of the state, which all criminal prosecutions are brought to redress, will be better conserved by the entry of a nolle prosequi herein. Such a course is suggested to the Attorney General.").

[2] EDWARD J. LARSON, SUMMER FOR THE GODS: AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION 191 (1997). Larson points out that most of these nine minutes were "spent . . . getting in and out of the crowded courtroom". *Id.* The jury made its decision in the courthouse hallway. *Id.* at 191-92.

[3] *See id.* at 266 (noting that of all the prosecutions designated as the "trial of the century" over the years, "only the Scopes trial fully lives up to its billing by continuing to echo through the century").

[4] *See id.* at 225-66.

[5] This public understanding owed itself in part to the portrayal of the trial in several prominent books and works of art, including the stage and screen productions of *Inherit the Wind*, all of

even though the ACLU's original motivation for arranging the trial was to promote academic freedom and not to undermine religion.[6] The battle for *Scopes*'s legacy sharpened, however, in the wake of the Supreme Court's 1968 decision in *Epperson v. Arkansas*,[7] which held that Arkansas' anti-evolution statute violated the Establishment Clause of the First Amendment.[8] Following that decision, pro-creationism forces switched strategies, instigating efforts to require schools to devote equal time for so-called "creation-science" and evolution.[9] Supporters of these reforms turned to an alternative interpretation of the Scopes trial for support, claiming that the trial stood for the triumph of equality, academic freedom, and comprehensiveness in the science classroom rather than the triumph of science over fundamentalist religion.[10]

This clash over the contested meaning of the *Scopes* legend found full expression in the various judicial opinions issued in connection with the constitutional challenge to Louisiana's equal time statute brought nearly sixty years following Scopes' prosecution. As Larson describes,[11] when the split Fifth Circuit Court of Appeals invalidated that law, which required schools to teach creation-science whenever they taught evolution, the two sides disagreed not only on the result but also on their interpretation of *Scopes*. The opinion striking down the statute described the law as "continu[ing] the battle William Jennings Bryan carried to his grave."[12] The opinion dissenting from the court's subsequent decision not to rehear the case *en banc*, for its part, claimed that "[b]y requiring that the whole truth be taught, Louisiana aligned itself with Darrow; striking down that requirement, the panel holding aligns us with Bryan."[13] When the Supreme Court affirmed the lower court's

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which emphasized the science-versus-religion theme to the exclusion of other competing themes. *See id.* at 225-46.

[6] *Id.* at 228 (noting that "the ACLU . . . had instigated the trial as a means to fight for freedom rather than against religion").

[7] 393 U.S. 97 (1968).

[8] *Id.* at 109 ("Arkansas' law cannot be defended as an act of religious neutrality. . . . The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment of the Constitution.").

[9] *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, 448-50 (1997) (describing the development of "creation-science" and the switch in strategies).

[10] *See* LARSON, *supra* note 2, at 258 (noting that "[p]roponents [of equal-time statutes] turned the Scopes legend to their benefit by widely quoting a fictitious statement attributed to Darrow at Dayton, 'It is "bigotry for public schools to teach only one theory of origins"'").

[11] *See id.* at 259-60.

[12] Aguillard v. Edwards, 765 F.2d 1251,1257 (5th Cir. 1985). *See also id.* at 1251 ("This case comes to us against a historical background that cannot be denied or ignored. Since the two aged warriors, Clarence Darrow and William Jennings Bryan, put Dayton, Tennessee, on the map of religious history in the celebrated *Scopes* trial in 1927, courts have occasionally been involved in the controversy over public school instruction concerning the origin of man. With the igniting of fundamentalist fires in the early part of this century, 'anti-evolution' sentiment, such as that in *Scopes*, emerged as a significant force in our society.").

[13] Aguillard v. Edwards, 778 F.2d 225, 226 (5th Cir. 1985) (dissent from denial of rehearing *en banc*, on behalf of 7 judges).

decision a year later, it too split on the meaning of *Scopes*. Both Justice Brennan's majority opinion and Justice Powell's concurrence linked Louisiana's equal time law to *Scopes*,[14] while Justice Scalia's dissent referred to the law as "*Scopes*-in-reverse" and chided the majority's opinion as being "repressive" and attributable to an "intellectual predisposition created by the facts and the legend of [*Scopes*]."[15] As Larson concludes, "These clashing applications of the Scopes legend illustrate its broad appeal as folklore. Brennan could just as easily invoke it to support freedom from religious establishment as Scalia could use it to support academic freedom to teach alternative theories."[16]

The battle for *Scopes'* legacy continues unabated today. The most prominent current controversy regarding the teaching of evolution in public schools concerns whether those schools should also teach the purportedly scientific theory of intelligent design[17] as an alternative to evolutionary theory.[18] Across the country—from Ohio[19] to West Virginia[20] to Georgia[21] to the United States Senate[22]—intelligent design advocates have argued that

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[14] *See* Edwards v. Aguillard, 482 U.S. 578, 590 & n.10 (1987); *id.* at 603 (J. Powell, concurring).
[15] *Id.* at 634 (J. Scalia, dissenting).
[16] LARSON, *supra* note 2, at 260.
[17] In the words of one commentator, the theory of intelligent design refers to "an alternate theory of biological origins held by a number of scientists and philosophers who believe that 'intelligent causes rather than undirected natural causes best explain many features of living systems.'" Nicholas P. Miller, *Life, the Universe and Everything Constitutional: Origins in the Public Schools*, 43 J. CHURCH & ST. 483, 484 n.5 (2001).
[18] For a summary of these developments, see Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching About the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 761-76 (2003)
[19] In 2000, the state began a process of reforming its science standards to beef up the treatment of evolution. Intelligent design advocacy groups submitted two different sets of proposed reforms that would have weakened the state's presentation of evolution and authorized the teaching of alternatives such as intelligent design in the science classroom. When the state board of education ultimately approved of the new science standards, it rejected the proposals of design advocates, although it did call for schools to "describe how scientists continue to investigate and critically analyze aspects of evolutionary theory." Larry Witham, *Ohio Schools to Teach Evolution 'Controversy,'* WASH. TIMES, Oct. 17, 2002, at A1, *available at* 2002 WL 2919885. For a detailed discussion of the events in Ohio, see Wexler, *supra* note 18, at 117-25.
[20] In September of 2002, the school board in Cobb County, Georgia, voted unanimously to allow science teachers to introduce students to different views about origins. Mary McDonald & Mia Taylor, *Cobb Welcomes Alternate Views on Evolution*, ATL. J. & CONST., Sept. 27, 2002, at A1, *available at* 2002 WL 3739685. Clarifying guidelines issued in January of 2003 emphasized that county teachers should follow state standards and continue to teach evolution as they previously had been doing so. *See* Mary McDonald, *Cobb Issues Evolution Guidelines to Teachers*, ATL. J. & CONST., Jan. 9, 2003, at B1, *available at* 2003 WL 8962478.
[21] In West Virginia, the state Board of Education in February of 2003 rejected suggested revisions to the state's science standards advanced by supporters of intelligent design. Eric Eyre, *Teachers Will Explain Evolution Only by Science, but Not by Design*, CHARLESTON GAZETTE, Feb. 21, 2003, *available at* 2003 WL 5447641.
[22] In June of 2001, the U.S. Senate, by a vote of 91-8, adopted an amendment to President Bush's education bill, which stated the Senate's "sense" that: "(1) good science education should prepare students to distinguish the data or testable theories of science from philosophical or religious claims that are made in the name of science; and (2) where biological evolution is taught, the curriculum should help students to understand why the subject

notions of academic freedom, equality, and educational comprehensiveness require school boards and officials to allow and, in some cases, even require teachers to introduce students to intelligent design theory.[23] Opponents counter that because intelligent design is really a religious belief that has been roundly rejected by the scientific community, teaching it in public schools would be educationally and scientifically irresponsible as well as a violation of the First Amendment.[24]

Both sides in this controversy have looked to the *Scopes* legend for support. Those who support evolution and want to keep intelligent design out of the science classroom have often aligned themselves with *Scopes*, sometimes suggesting that the trial stands for the proposition that theories which reject evolution are inherently religious and therefore inappropriate for the public schools.[25] Design supporters, on the other hand, have argued that

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generates so much continuing controversy, and should prepare the students to be informed participants regarding the subject." 147 CONG. REC. S6147-48 (daily ed., June 13, 2001) (reprinting amendment); *id.* at S6153 (reporting vote). The floor statement by the sponsor of the bill, Senator Rick Santorum of Pennsylvania, made it clear that his purpose in sponsoring the amendment was to promote the teaching of alternatives to evolution in the science classroom, including intelligent design. *See, e.g.* 147 CONG. REC. at S6147-48 (remarks of Sen. Santorum). The amendment created a great deal of controversy. *See* Wexler, *supra* note 18, at 107-08. As a result, the amendment was ultimately removed from the bill by a Joint House and Senate Conference Committee on the bill in December of 2001, and an altered version of the language was placed in the explanatory Committee Report, not itself a source of law. *See* H.R. CONF. REP. NO. 107-334, at 703 (2001). The language in the Committee Report said: "The conferees recognize that a quality science education should prepare students to distinguish the data and testable theories of science from religious or philosophical claims that are made in the name of science. Where topics are taught that may generate controversy (such as biological evolution), the curriculum should help students to understand the full range of scientific views that exist, why such topics may generate controversy, and how scientific discoveries can profoundly affect society." *Id.*

[23] *See* Wexler, *supra* note 18, at 149-53 (describing arguments made by those who are in favor of teaching intelligent design in public schools). For more recent news on intelligent design controversies taking place in Alabama, Missouri, and Montana, among other places, see the website of the National Center for Science Education, www.natcenscied.org/pressroom.asp?branch=current.

[24] *See, e.g., id.* at 153-81 (arguing that encouraging or requiring teachers to teach intelligent design in the public schools would raise significant constitutional problems and would bring no significant educational benefits).

[25] *See, e.g.,* American Civil Liberties Union, *75 Years After Historic* Scopes *Trial, Religious Liberty Battles Continue*, http://archive.aclu.org/features/f070700a.html (explicitly linking ACLU battles over intelligent design and other attempts to teach creationism in the schools to its battle over Scopes); Diane Carroll, *Anniversary of Scopes Trial Brings More Evolution Debate*, www.kcstar.com/item/pages/printer.pat,local/37749810.709,.html (July 9, 2000) (describing events planned by evolution supporters to celebrate the 75th anniversary of the Scopes Trial in Kansas); Edward B. Davis, *Debating Darwin: The 'Intelligent Design' Movement*, http:www.religion-online.org/cgi-bin/re1searchd.d11/showarticle?item_id=83 (supporter of intelligent design claiming that: "The real story of the Scopes trial is that the stereotype it promoted helped the Darwinists capture the power of the law, and they have since used the law to prevent other people from thinking independently. By labeling any fundamental dissent from Darwinism as 'religion,' they are able to ban criticism of the official evolution story from public education . . . ."); *see also* Patricia Princehouse, *Ohio Overthrows Scopes Legacy: Big Loss for the Discovery Institute and "Intelligent Design,"* REP. NAT'L CEN. SCI. ED., Sept.-Oct. 2002, at 4 (linking evolutionist victory

intelligent design is historically distinct from the kind of religious ideas involved in Scopes[26] and that instead Scopes stands for the ideal of academic freedom to teach a variety of theories regarding origins in the science classroom. As one pro-intelligent design commentator has put it, teaching only Darwinian theory in science classrooms is "just as preposterous as the situation in Tennessee in 1925—and just as bad for freedom of thought. Once you weren't supposed to question God. Now you're not supposed to question the head of the biology department."[27]

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in Ohio to undoing of Scopes legacy in Ohio, which had kept evolution largely out of the science curricula for 77 years); Michael Bronski, *Monkey Business*, http://www.bostonphoenix.com/boston/news_features/other_stories/documents/02695920 (Feb. 19,2003) (linking John Ashcroft and others opposed to college biology professor's refusal to write letters of recommendation for students rejecting evolution to anti-evolution forces at time of Scopes trial); *Monkey Business: The State School Board Puts Politics Ahead of Science*, AKRON BEACON JOURNAL, Mar. 14, 2004, at 3, *available at* 2004 WL 56258249 (referring to efforts to bring intelligent design into Ohio classrooms and concluding that "Ohio's budding scientists, not to mention the state's national reputation, do not need academic distractions or a reprise of the Scopes monkey trial"); Mary McDonald, *'Evolution' Revisited: GOP Leaders Pressed for Answers*, ATLANTA JOURNAL-CONSTITUTION, Mar. 7, 2004, at F4, *available at* 2004 WL 68887137 (noting that several educational professionals responded to Georgia's attempt to rewrite science curriculum to disfavor evolution by asking "is Georgia going back to the days of the Scopes Trial?"); *cf.,* Susan Jacoby, *Caught Between Church and State*, N.Y. TIMES, Jan. 19, 2005 (editorial) (arguing that contrary to the views of one historian, the Scopes trial did not end attempts to promote anti-scientific thinking).

[26] *See, e.g.*, Francis Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 461, 497 (2003) (noting that intelligent design theory is not historically connected with Scopes); Gregg Easterbrook, *The New Fundamentalism*, WALL ST. J. Aug. 8, 2000, at A22 (arguing that intelligent design is not "religious doctrine").

[27] *See, e.g.,* Easterbrook, *supra* n. 26; *see also id.* ("[M]any school systems are steering away from teaching intelligent design, believing it to be an impermissible idea under the Supreme Court ruling. Editorials and columnists prefer not to mention the new theory, hoping to tar all non-Darwinian ideas as mere creationism. This isn't freedom of thought—it's the reverse. Where is the new Scopes who will expose the new dogma as being just as bad as the old?"); Nancy Pearcey, *Scopes in Reverse*, WASH. TIMES, July 24, 2000, at A17 ("As Kansas wound down its week long observance of the 75th anniversary of the Scopes Trial, a striking irony largely escaped from notice: Whereas in 1925 the teaching of evolution was banned from the classroom, in 2000 the teaching of anything but evolution is effectively banned from the classroom. Academic freedom is just as restricted as ever—only this time it's the pro-evolution side doing the censoring."); Janine Williams, *Question of Proof*, ORLANDO SENTINEL, Sept. 19, 2002, at A16 (letter to the editor) ("When the Scopes trial took place, the believers in creation were the ones threatened by the teaching of evolution. Now the shoe is on the other foot. True freedom—and true education—is the expression of open thought, the freedom to discuss all theories."); David Strausbaugh, *Evolutionists are Lacking in Tolerance,* COLUMBUS DISPATCH, Aug. 25, 2001, at 11A (letters to the editor) ("Americans should be concerned about the fundamentalism of those who reject academic freedom and show no tolerance for the unorthodox. Of course, I'm talking about evolutionists."); Jack L.B. Gohn, *Commentary: The Intelligent Design Debate: Dogmatists Keep Out*, THE DAILY RECORD, May 28, 2004, *available at* 2004 WL 63334153 (referring to Scopes incident alongside other examples of dogmatic rejection of scientific theories like the Inquisition and the purging of non-Lysenkists in Russia, and concluding that "[i]n resisting Intelligent Design the Natural Selection adherents sometimes seem as closed-minded as the Inquisitors who put down Galileo or Trofim Lysenko and his followers who set back Russian biology for half a century"); Debbie Cafazzo, *Some Teachers Talk of Alternatives to Evolution Theory,* SCRIPPS HOWARD NEWS SERVICE, May 8, 2001 ("[I]n a

In some sense, Larry Witham's new book about the evolution-creationism controversy[28] takes the *Scopes* legend as its starting point. Witham, who has written about issues involving religion for many years for the *Washington Times*,[29] suggests in his *Where Darwin Meets the Bible: Creationists and Evolutionists in America* that the way we think about the evolution-creationism controversy owes much to the categories established by the Scopes trial. This debt to Scopes in turn owes itself in large part to the way the media has used that classic trial to frame ongoing events. As Witham states in his chapter on the press: "The history of U.S. news coverage of the evolution-creation debate suggests that the Scopes trial has been nearly impossible to forget. Its symbols and themes have dominated the press's handling of the topic."[30] For Witham, this is not a good thing. In his opening chapter, he writes that: "Thanks to Scopes, the evolution-creation debate has become America's IQ test. Where you stand can be an instant pass or fail on being modern or backward, faithful or apostate. The snap-quiz approach, of course, is hardly conducive to a healthy conversation."[31]

Witham's goal in *When Darwin Meets the Bible* is to get beyond this "snap-quiz" approach to expose the more subtle and overlooked aspects of the evolution-creation controversy. In a series of chapters spanning over 300 pages, Witham introduces us to the various people, places, and issues that make up the controversy. Far from caricatures of godless scientists seeking to discard religion in the dustbin of history and reactionary religious fundamentalists decrying Darwinism as the downfall of mankind, Witham gives us the real stories of real people who dwell in shades far more gray than usually recognized.

Witham's objective is a worthy one, and his effort is, for the most part, quite effective. But it is hard to resist the urge to wish that Witham had gone further to tell us whether seeing the controversy in greater focus might help lighten some of the specific ongoing policy disagreements concerning evolution and alternative theories, such as the push to teach intelligent design

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situation that could be construed as Scopes in reverse—today teachers who question Darwin can find themselves under fire."); Eddie Roth, *Why Assail 'Intelligent Design'?*, DAYTON DAILY NEWS, Mar. 14, 2002, at 16A (editorial) (noting that intelligent design supporters believe that they are part of a "Scopes Trial redux" "with the tables turned" because they are "being persecuted" for "exposing students to scientific theory on the origins of life").

[28] LARRY A. WITHAM, WHERE DARWIN MEETS THE BIBLE: CREATIONISTS AND EVOLUTIONISTS IN AMERICA (2002).

[29] For examples of Witham's writing on issues of religion, see, *e.g.,* Larry Witham, *Senate Bill Tackles Evolution Debate*, WASH. TIMES, June 18, 2001, at A4; Larry Witham, *Religious Vote Credited in GOP Wins*, WASH. TIMES, Nov. 7, 2002, at A4; Larry Witham, *U.S. Religiousness Tops Among World's Industrial Nations*, WASH. TIMES, Dec. 20, 2002, at A6. A search for articles authored by Witham in the allnews database of Westlaw between January 1, 1999 and July 1, 2003, turns up 563 documents. Witham has also recently published a second book on intelligent design. LARRY WITHAM, BY DESIGN: SCIENCE AND THE SEARCH FOR GOD (2003).

[30] WITHAM, *supra* note 28 at 227.

[31] *Id.* at 9.

in the public schools.[32] One wonders whether the subtleties Witham describes suggest any possible areas of potential reconciliation and sympathy between the various sides of the policy debates, or whether they are ultimately of too minor importance to affect the actual decisions that are made by educators, administrators, and politicians. Witham's final chapter does "gaze speculatively into the future,"[33] but his ideas there turn out to be confusing and unsatisfying. Most problematic is Witham's final suggestion in the book that although "polarization" between creationists and evolutionists "seems inevitable and perennial,"[34] this polarization might be surmounted "at least momentarily,"[35] by viewing either side as an "underdog" in American culture.[36] Not only is it unclear exactly what Witham means by this argument, but the argument also seems to be potentially self-defeating. If both sides battle over the title of underdog, might this simply replicate the battle over the legacy of *Scopes* all over again? Witham's argument, far from suggesting a way to surmount the polarization between the two sides, instead suggests that the battles over *Scopes'* legacy may indeed be inevitable, regardless of how well the participants understand each other.

This Review suggests a different approach to understanding the legacy of *Scopes*, one that builds upon Witham's efforts to deepen our understanding of the evolution controversy and that hopefully might help diffuse the enduring controversy over how evolution is treated by our public schools. Surmounting polarization on this divisive issue will require compromise. Most importantly, of course, society must reach a policy-based compromise with respect to presenting evolution and its alternatives in the public schools. I have argued elsewhere on this note that schools ought to teach about the evolution-creationism controversy in social science and religious studies classes but not within the science classroom itself.[37] But the compromise must reach farther and deeper than mere policy reform. The policy solution must also be accompanied and supported by a richer, more nuanced understanding of the American historical narrative regarding the clash of religion and science in the public schools, of which the *Scopes* trial was probably the most prominent moment.

To reach civil peace on the topic of evolution, we should neither seek to forget *Scopes* nor continue to assert that it represents only one fixed meaning. Rather, our task should be to re-imagine the trial's significance and embrace the trial's meaning in its complex entirety. *Scopes* should not be understood as a symbol for either complete academic freedom for teachers to teach whatever they want in science classrooms or as a symbol for the complete rejection of religion from the public school setting. It stands for

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[32] *See* text accompanying notes 125-46, *infra*.
[33] WITHAM, *supra* note 28, at 10.
[34] *Id.* at 269.
[35] *Id.*
[36] *Id.* at 269-70.
[37] *See* Wexler, *supra* n. 18, at 776-831.

neither liberty nor secularism to the exclusion of all other values. We should understand that the trial represents several significant and potentially complementary aspirations, including promoting individual liberty as a bulwark against government control, ensuring that students learn about a wide variety of theories regarding the origin of the human species, respecting the scientific profession and its accompanying norms, and resisting governmental imposition of a specific religious perspective on its citizens. Such a nuanced understanding of the multiple meanings of *Scopes* would not only be a pragmatic solution that might support much-needed, compromise-based policy reforms in the area, but would also be faithful to the case itself, which indeed did involve all of these important themes.

This Review proceeds in three parts. Part I summarizes Witham's descriptive project. Part II argues that the descriptive project is highly effective, with only a couple of exceptions. Part III considers Witham's projections for the future and the implications of his work for current controversies. The final subsection of this Part argues that if Witham is right that the way we think about the evolution-creationism controversy owes much to the categories established by the *Scopes* trial, then we need a more complex and inclusive way of thinking about that trial if we are ever going to reach any lasting compromise over the divisive issue of how to teach evolution and its alternatives in the public school system. The Review concludes by proposing a new interpretation of *Scopes* to serve this purpose.

## I. Beyond the "Snap Quiz" Approach

Witham's introduction sets the stage for the later chapters by sketching the broad contours of the debate over evolution in the United States.[38] Following a brief investigation into the various ways that Americans have understood the relationship between science and religion,[39] Witham observes that "American literacy on the topic [of evolution and creationism] is surprisingly low"[40] even though nowhere in the world "does the debate [over evolution] reach such dizzying heights and political lows, as in the United States."[41] Measuring the current state of affairs, Witham concludes that although evolution has met with great success in America—most notably among college graduates[42] and in the popular culture[43]—creationists have also made notable strides as of late.[44] On this latter point, Witham cites

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[38] *Id.* at 3-10.

[39] *Id.* at 3-5 (explaining the position of the National Academy of Sciences, which takes the position that science and religion are "mutually exclusive" and the position that religion and science can be reconciled, as well as the position of some that the two sources of knowledge conflict in some instances).

[40] *Id.* at 5.

[41] *Id.*

[42] *Id.* at 7 ("[A] college education is a significant indicator—though no guarantee—that a person will accept the theory of evolution.").

[43] *Id.* ("The popular culture has smiled on evolution as well.")

[44] *Id.* at 7-9.

the recent assault on Darwinism by intelligent design theorists like Philip Johnson and Michael Behe, observing that "[t]he debate has switched from defending religious scripture to making scientists explain the holes in evolutionary theory"[45] and concluding that "Americans have shown increased reluctance to give science a blank check on every question of the day."[46] At the end of the chapter, Witham makes his point about Scopes creating a "snap-quiz approach" to the debate[47] and quotes a former senior scientist at the Field Museum of Natural History who explains that fanatics on both sides have shut down discussion by drawing extreme conclusions about those who disagree with them.[48] Witham concludes by promising in the "story that follows" to "plac[e] where Darwin meets the Bible in the open sunlight."[49] He says that the story will "frequently reach back to the past" and then, in the final chapter" "will gaze speculatively into the future."[50]

In the body of the book—chapters one through fourteen, making up the vast majority of the work[51]—Witham sketches in great detail the various people, places, events, ideas, issues, and themes that have made up the evolution-creationism controversy in the United States over the past 150 years. Witham devotes a great deal of attention to describing the people who have played a role in the ongoing debates. Two entire chapters are dedicated to this purpose. Chapter Five describes the lives, careers, and views of six prominent evolutionists;[52] the next chapter does the same for six influential creationists.[53] Parts of other chapters are about people as well.[54]

With these portraits, Witham demonstrates that it is easy to over-generalize when talking about the two sides of the evolution-creationism controversy. For instance, in the chapter on prominent scientists, we learn that not all evolutionists are bitterly opposed to those who hold creationist viewpoints, but instead exist on a spectrum with respect to their attitudes toward religionists. Ernst Mayr, "Darwin's bulldog," may refuse to debate

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[45] *Id.* at 8.
[46] *Id.* at 9.
[47] *Id.* at 10.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 11-260.
[52] *Id.* at 74-102. The figures described in the chapter are Joseph McInerney, Ernst Mayr, Michael Ruse, Francisco Ayala, Niles Eldredge, and David Raup.
[53] *Id.* at 103-32. The figures described here are Kurt Wise, John Wiener, Henry Morris, Howard Van Till, Owen Gingerich, and Michael Behe.
[54] For instance, Chapter Four, entitled "Hearts and Minds," has about fifteen pages devoted to descriptions of two of the most prominent participants in the current debates over evolution and intelligent design, Eugenie Scott of the National Center for Science Education, the foremost organization devoted to promoting evolution education in the science classroom, and Philip Johnson, a professor at Boalt School of Law at the University of California at Berkeley, who is one of intelligent design's leading voices. *Id.* at 57-73. Chapter Fourteen, which Witham calls "The Good Society," introduces the reader to various figures who have written about the implications of modern science for understandings of human nature, including Philip Kitcher, Richard Dawkins, Frans de Waal, and Nancy Murphy. *Id.* at 245-52.

with creationists,[55] but Francisco Ayala is a former priest who still "moves easily" in theological circles,[56] and David Raup, though a "devout evolutionist," nonetheless thinks that it is "fun" to talk to academic creationists and that evolutionists "protest too much."[57] On the other side, we see a similar spectrum. There is Henry Morris, perhaps the most influential creation science supporter of the last century,[58] but we also meet Howard Van Till, a Christian physicist who has endorsed biological evolution,[59] Owen Gingerich, who says that intelligent design "does not speak" to him,[60] and Michael Behe, whose purportedly scientific volume supporting intelligent design theory critiques William Paley's classic defense of design and stops short of reaching theological conclusions.[61]

Several other chapters concentrate on various "focal points" for the evolution-creationism controversy—the places, events, and arenas where the debate has been focused. Chapter Seven, for instance, discusses the role of the controversy in politics,[62] while Chapter Twelve, perhaps the most interesting and unique in the book, discusses the various public debates that creationists and evolutionists have engaged in over the past nearly 150 years.[63]

Finally, in several places in the book, Witham addresses specific prominent issues or themes that have permeated the controversy over the years. In Chapter Fourteen, Witham discusses some of the different ways that various scientists and theologians have approached the question of human nature,[64] as a way of exploring the claim made by some religionists that evolutionists have promoted a view of humans that "corrupt[s] society."[65] Witham's third chapter[66] takes on an equally important question:

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[55] *Id.* at 79-84. According to Witham, Mayr, who is now 96, has only engaged in one public debate with creationists. *Id.* at 83.
[56] *Id.* at 91.
[57] *Id.* at 98, 101.
[58] *Id.* at 112-17.
[59] *Id.* at 118.
[60] *Id.* at 126.
[61] *Id.* at 131.
[62] *Id.* at 133-46. This discussion includes portions dealing with the debate over the use of federal funds for controversial curricula, *id.* at 135, the adoption by the Senate in 2001 of a pro-intelligent design statement, *id.* at 136, and the discussion of evolution-related issues in political campaigns, *id.* at 137.
[63] *Id.* at 212-26. Chapter Eight and Chapter Nine present in-depth information about the role of evolution and creationism in schools; the former chapter deals with controversies at the secondary school level, *id.* at 147-61, while the latter discusses colleges and universities, *id.* at 162-78. Chapter Ten focuses on the places where evolution and creationism can be found most prominently on display—natural history museums in the case of evolution, *id.* at 187-91; churches and other sanctuaries in the case of creationism, *id.* at 189-94. Finally, Chapter Thirteen, clearly of great importance to Witham, deals with the media's treatment of the controversy. *Id.* at 227-41.
[64] *Id.* at 242-260.
[65] *Id.* at 242 (noting that "evolutionists are offended by charges they are corrupting society.").
[66] *Id.* at 42-56. The title of the Chapter is "Looking for Boundaries."

What features or characteristics define those people generally referred to as "evolutionists" or "creationists"? After all, the very subtitle of the book refers to "Creationists" and "Evolutionists," so it makes sense that Witham would want to address the meaning of these critical terms. With respect to both camps, Witham finds a spectrum of beliefs rather than any monolithic set of ideas.[67]

Are there possible areas of reconciliation between those in the theistic evolution camp and those who describe themselves as progressive creationists? Witham probes this question a bit, but the conclusion, though mixed, ultimately appears pessimistic. On the one hand, Witham observes that "efforts to create a semantic unity between the two [camps] are common in groups such as the American Scientific Affiliation,"[68] and he quotes a Stanford University scientist who claims that "'[e]volution can be considered without denying creation; creation can be accepted without excluding evolution.'"[69] But on the other hand, Witham points out that for the progressive creationists, these "semantics are not enough,"[70] and that intelligent design theory has "been the bane of all evolutionists."[71] On this latter point, Witham explains that this is true even for theistic evolutionists: "Theistic evolutionists have accepted the anthropic principle of a universe mathematically apprehended by the human mind, and an order of atomic

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[67] With respect to evolutionists, Witham suggests that at least in theory they are unified by their rejection of the "four darling concepts of natural philosophers": (1) "supernatural intervention in nature"; (2) "any interruption in the regularity of natural law"; (3) "nature has any ultimate teleology"; and (4) "preordained 'types' in biological life." *Id.* at 44. Witham proceeds, however, to suggest that this unity is more theoretical than real, and that "in the real world, not everyone wearing an evolution badge is a purist." *Id.* He says that: "While negation of all four ideas draws an ultimate boundary, behind it there are plenty of internal differences. An evolutionist may indeed want to keep one or more—but never all—of the four propositions." *Id.* As examples of the differences lying within the evolutionist camp, Witham points to the late Stephen J. Gould's controversial theory of punctuated equilibrium, *id.* at 44-45, and, more importantly, to the theistic evolution of Cambridge physicist John Polkinghorne, *id.* at 47-48, and Brown University cell biologist Kenneth Miller, *id.* at 49. According to Witham, those in this latter camp view natural history as "gradual, continuous, and even random," but nonetheless "view God as working 'in and through' nature." *Id.* at 47.

Among so-called "creationists," Witham also finds a spectrum instead of uniformity. Such a spectrum has existed since at least 1859, says Witham, at which time, according to some "top American naturalists," the various kinds of creationism "'spanned a conceptual spectrum ranging from a virtual infinitude of miraculous interventions . . . to perhaps only three.'" *Id.* at 49. Witham discusses two main camps within the creationist community. The first, so-called "young-earth creationists," take the creation story of the Book of Genesis at "face value," and believe in a "sudden Creation over days and, according to the genealogy in Genesis from Adam to Moses, from six thousand to ten thousand years ago." *Id.* at 52-53. So-called "progressive creationists," on the other hand, accept an ancient earth but believe in two key tenets: "some historic authenticity to the sequential Genesis days, and that divine intervention may override 'natural causation' in a singular act of creation." *Id.* at 50. The progressive school of creationism, Witham notes, has gained momentum as of late due to the emergence and success of the intelligent design movement. *Id.*

[68] *Id.* at 49.

[69] *Id.* at 50.

[70] *Id.*

[71] *Id.*

forces seemingly aimed to produce humans. But they will not go down the creationist road of intelligent design, with its ideas such as 'irreducible complexity' and the 'explanatory filter.'"[72]

As noted above, Witham's concluding chapter, which he calls "Search for the Underdog,"[73] "gaze[s] speculatively into the future."[74] In this short (ten page) chapter, Witham tries to provide some answers to these key questions: "Will [the controversy] get worse and then better, or has science morally and technically already won? Will some form of creationism, on the other hand, gain ground in one of the areas covered by this book—schools, textbooks, churches, museums, the science profession, public debates, media coverage, or the study of human nature?"[75] As a preface to what he says next, Witham prudently observes that "[r]eading crystal balls is risky business."[76]

Witham's subsequent discussion consists of three distinct parts. Initially, Witham "describes three American contexts that might color the future debate."[77] Specifically, Witham suggests three developments that all seem to favor, at least somewhat, the creationist cause. First, he notes that "social conservatism has moved into America's suburbs," which means that "creationism has gained social mobility, both financial and educational."[78] Second, he predicts the fall of "apocalyptic" and other sorts of "more sectarian" creationism, and their replacement by more moderate forms such as intelligent design.[79] Finally, he observes that Darwinism, and particularly the concepts of mutation and natural selection, are in crisis.[80]

These observations lead to the second part of the conclusion, in which Witham identifies five areas in which the two sides must show candor and humility in order "[t]o bring clarity" to the debate.[81] Witham's points here are not always clear, but he seems to be making the following five arguments: (1) both sides ought to admit that their beliefs cannot provide

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[72] *Id.* at 51.
[73] *Id.* at 261.
[74] *Id.* at 10.
[75] *Id.* at 262.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 263 ("[T]he mainstreaming of the Christian right could be deflating apocalyptic creationism, which has long associated the end of the world with a recent young earth."); *id.* ("[T]he less moderate, more sectarian young-earth creationism, which included a large package of other religious mandates, may have to leave center stage."); *id.* at 264 ("The populist creationist movement in the United States is probably on a down cycle.").
[80] *Id.* at 264 ("A third major trajectory is seen in the evolutionist camp: a dead end for Darwinism."); *id.* at 265 ("The point is that materialism is not in a crisis in biology, but the power of Darwinian evolution—mutation and natural selection—to explain all things seems to be.").
[81] *Id.* at 265.

answers to all relevant questions;[82] (2) scientists ought to consider focusing on "practical and commonsense" concerns rather than also searching for "'universal truths'" and a "special 'way of knowing,'";[83] (3) relatedly, evolutionists ought to steer clear of "making fairly absolute and religion-like claims," that "take in everything" including the "ultimate beginning of life itself";[84] (4) intelligent design supporters ought to recognize that their likelihood of success in the courts is "tenuous";[85] and (5) theologians should carefully consider whether it is in religion's best interest to "pu[t] God back further and further into realms of transcendent mystery or increasingly under rubrics of doctrinal logic," even if this concept of the divine might seem more consistent with the claims of modern science, rather than insisting that "God interferes in nature."[86]

Finally, in the last two pages, Witham provides a glimpse of hope that the perennial clash between evolutionists and creationists might be "surmoun[ted], at least momentarily."[87] The solution, it seems, is to view both sides (or perhaps for each side to view itself) as the underdog. Witham says:

> The polarization seems inevitable and perennial, but one way to surmount it, at least momentarily, is through a shift in perspective. To evoke an idea that Churchill also surely knew, either side can be portrayed as an underdog. Great cultural arguments often produce a perceived underdog. It is a sympathetic status that evolutionists and creationists as causes and as people both may claim—depending on the circumstances.[88]

Witham then explains how both sides view themselves as the underdog in the controversy. Evolutionists claim to be underdogs because they are losing the battle of public opinion and because creationists have significant power

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[82] *Id.* at 265-66.
[83] *Id.* at 266-67.
[84] *Id.* at 267.
[85] *Id.* at 268 ("The courts' means of ruling on what is secular and what is religious is truly a tangled equation, jurists agree. Speaking to some of this legal morass, the intelligent design advocates say that drawing inferences of intelligence from nature is not religion: it is neither a form of worship nor a dogma. . . . This . . . joy at finding 'intelligence' is nature may have public appeal. . . . But this will finally be a legal matter, and that puts success within tenuous reach of creationists."). For arguments by intelligent design advocates that teaching design does not violate the Establishment Clause of the First Amendment of the U.S. Constitution, see generally, *e.g.*, FRANCIS J. BECKWITH, LAW, DARWINISM, AND PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN (2002); David K. DeWolf et al., *Teaching the Origins Controversy: Science, or Religion, or Speech?,* 2000 UTAH L. REV. 39 (2000); Miller, *supra* n. 17. For an argument (more or less) the other way, see Wexler, *supra* note 18, at 162-79.
[86] *Id.* at 268-69.
[87] *Id.* at 269.
[88] *Id.*

"in the statehouses, on school boards, and in national elections."[89] Creationists, on the other hand, see themselves as the underdogs because the judges, the "cultural elite," and the people who control access to federal funding are all supported or controlled by the evolutionists.[90] Following these observations, Witham concludes the book this way:

> What underdog status produces most in a democracy is public sympathy, which if broad enough can decide the social standing of an American institution. "America loves the underdog," is another way of saying it. "It's a very useful metaphor for both of us," says evolutionist Eugenie Scott, a participant in the debate for a quarter century. "They claim it as consciously as we do. There is truth on both sides."[91]

## II. "In the Open Sunlight"[92]

By shining a bright light on the evolution-creationism controversy, Witham has done scholars, participants in the debate, and the public a great service. At the most basic level, because of the uncharacteristic depth, breadth, and objectivity of his description, anyone who reads the book will come out of the experience with a deeper understanding of the scope, meaning, and importance of the controversy in American life over the past century and a half. Witham's description goes beyond simplistic snapshots to offer historical, philosophical, social, cultural, and even anthropological perspectives on the continuing tension over evolution's rise to scientific dominance and the ever-present rebellion against its ascendancy. If the book did nothing else, it would be an achievement for this reason alone.

Even more importantly, however, Witham's subtle account of the controversy has the potential to affect the controversy itself—if not the outcome, then at least the tone of the debate. Very often, debate between evolutionists and their foes is hostile and knee-jerk in nature, characterized by thoughtlessness, hostility, and downright incivility. For example, according to at least one report, Oxford zoologist and leading evolutionist Richard Dawkins has stated that "[i]t is absolutely safe to say that, if you meet somebody who does not believe in evolution, that person is either ignorant, stupid, or insane,"[93] while others refer to design supporters as "ridiculous,"[94] "know-nothin[g],"[95] "silly,"[96] "witless wonders."[97] On the

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[89] *Id.*
[90] *Id.* at 270.
[91] *Id.*
[92] *Id.* at 10.
[93] *See* Richard T. Halvorson, *Confessions of a Skeptic*, U-Wire, April 6, 2003, *available at* 2003 WL 16413799 (Apr. 6, 2003) (quoting Dawkins).
[94] Daniel W. Nebert, *Evolution is a Science that is Leading to Cures*, CINC. ENQUIRER, Oct. 18, 2002, at 11, *available at* 002 WL 101820709 (describing idea of teaching intelligent design "ridiculous"); C.D. Moulton, *Creating God from Nothing*, NEWS-PRESS, June 28, 2002, at 9B, *available at* 2002 WL 22105676 (rejecting rejection of evolution as "ridiculous"); Sarah E.

other hand, a quick glance at the nation's letters to the editor pages will reveal foes of evolution referring to the theory as a "made up"[98] "bogus"[99] "farce,"[100] a "folly,"[101] and a "fairy tale,"[102] while its supporters are referred to as "diabolical"[103] "quacks"[104] who will "burn in hell."[105]

Though the debate itself may never end—and it is not clear that we should expect that controversies like this one, that go to the heart of how Americans think about the most important of human issues, will ever be resolved—we ought to hope that at least the incivility of the discourse might in time be tempered. Not only is the incivility unseemly in itself, but it also stands in the way of progress. So long as the debates over the proper role of evolution in our schools and other public fora are filled with ad hominem invective, there is little hope that anything even resembling a compromise position on these public issues will ever be reached. Perhaps, if the hostile nature of the debate could be toned down a bit, there might be some hope for a less divisive future. Witham's account points the way toward such a future. Surely, at some inevitable level, the uncivil nature of the debate stems

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Henry, *Schools Shouldn't Teach Matters of Faith as Science*, LANCASTER NEW ERA, June 13, 2001, at A14, *available at* 2001 WL 9296165 (saying that there "is nothing more ridiculous" than teaching creationism in the public schools); T. Bruce McNeely, *God & Science,* NATIONAL POST, May 9, 2001, at A19, *available at* 2001 WL 20481413 ("What is most ridiculous is the idea of all these academics with their PhDs claiming scientific proof of their religious beliefs.").

[95] Geoff Burkman Ketterman, *Creationism Doesn't Belong in Ohio's Schools*, DAYTON DAILY NEWS, Feb. 8, 2002, at 13A, *available at* 2002 WL 6590607 (referring to two state school board members).

[96] Moulton, *supra* note 125 (calling anti-evolution argument "paradoxical and silly").

[97] Ketterman, *supra* note 126. *See also* Byron LaMasters, *I'm Intolerant and I'm anti-Christian*, www.burntorangereport.com/archives/002694.html (Nov. 22, 2004) ("I think creationism is stupid."); Andrea M. (commenting on LaMasters' post) (Nov. 23, 2004) ("[A]nyone who believes in creationism, Christian, Muslim, Jew, or what have you, is an idiot."); bob owns all, *Fuck the religious zealots who believe that I should be learning Creationism*, www.ubersite.com/m/59256 (last visited Feb. 22, 2005).

[98] Doug Weaver, *Evolution is a Theory for Quacks*, AUGUSTA CHRONICLE, Aug. 29, 2002, at A4, *available at* 2002 WL 26330045.

[99] Michael Kovacs, *Stop Teaching Evolution, Brainwashing Students*, ALLENTOWN MORNING CALL, Dec. 19, 2000, at A10, *available at* 2000 WL 29201362 (calling evolution a "ridiculous and bogus idea").

[100] Brian Jamelske, *Letter to the Editor*, POST-STANDARD SYRACUSE, May 26, 2003, *available at* 2003 WL 5830353.

[101] Jeffrey M. Reinharcz, *Evolution is Folly*, LAS VEGAS REVIEW JOURNAL, Dec. 29, 2000, at 10B, *available at* 2000 WL 8217502.

[102] Gary Masteller, *Evolution is Laughable*, ALLENTOWN MORNING CALL, Apr. 23, 2003, at A12, *available at* 2003 WL 17279287 ("I'm glad we have a president who doesn't believe in that 'fairy tale for adults,' evolution.").

[103] Jamelske, *supra* note 131.

[104] Weaver, *supra* note 129.

[105] *Id. See also* Dave, *Evolution is stupid!*, www.jesus-is-savior.com/Evolution%Hoax/evolution_is_stupid.htm (last visited Feb. 22, 2005) ("Evolution makes no sense at all. I just don't see how any intelligent person could believe such nonsense. . . . Evolution is for stupid people."); Katie (replying to previous posting on evolution), http://users.cgiforme.com/fbendz/messages/648.html ("Evolution is stupid. . . . Evolutionist [sic] are going to Hell.").

from deeply held emotions, and for this reason, it is unlikely that the debate will ever be completely devoid of meanness and ad hominem attacks. Arguments over such fundamental topics as religious belief, the origins of life on earth, and whether government ought to take a position on these matters rarely resemble benign debates over what we ought to eat for dinner or what movie we ought to go see. Nonetheless, it is also surely the case that some of this hostility is facilitated by unfamiliarity and ignorance. As long as creationists[106] understand evolutionists as two dimensional caricatures who are uncompromisingly hostile to any alternative, it will be far easier for the creationists to strike back in an equally uncompromisingly hostile fashion. And the same is true in the other direction.

Witham fractures this simplistic understanding with his detailed and nuanced portraits of the various characters in the ongoing drama over evolution and its detractors. As his various chapters on these individuals demonstrate, the classic caricatures of scientists who detest religion and religious believers who despise science are rarely accurate.[107] Not all evolutionists have the same attitudes toward religion, or even science. Not all creationists feel the same way about evolution, or even intelligent design. At least one prominent creationist has endorsed biological evolution;[108] at least one evolutionist is a former priest.[109] Even the leaders of the two camps (if it is even accurate to call them "camps") hold more nuanced views than one might otherwise think. As Witham explains, evolutionist Eugenie Scott has rejected the call of angry atheists who believe that the National Center for Science Education ought to be "'tougher on religion'" and "kneecap the theists as much as [it] can,"[110] while intelligent design advocate Philip Johnson has angered young-earth creationists for "wim[ping] . . . out" on what (or who) the alternative to evolution might be.[111] One only hopes that those who would use the public square to cast divisive personal aspersions will read Witham's careful account before communicating an abusive message at a school meeting, in a newspaper editorial, or over the radio airwaves.

Although Witham's work is important, thoughtful, and helpful, it is not flawless. Two small but nagging problems detract somewhat from the overall strength of the book. First, many of Witham's descriptive sub-arguments that permeate the various chapters are difficult to follow and

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[106] I recognize that using the term "creationist" to describe those who refer to themselves as "creation scientists" or "design theorists" or some other similar term is controversial. I use the term for convenience and to follow Witham's own use of the term in his book.

[107] *See* text accompanying notes 55-62, *supra*.

[108] *See* text accompanying note 60, *supra*.

[109] *See* text accompanying note 57, *supra*.

[110] Witham, *supra* note 28, at 64 (quoting Eugenie Scott).

[111] *Id.* at 68 (quoting young earth creationist and Harvard educated paleontologist Kurt Wise). Witham also points out that Johnson angered a "host" of evangelical Christians who were theistic evolutionists for "saying evolution could not create a part of nature, so God must have." *Id.*

frustratingly elusive. The most problematic instance of this difficulty is the argument Witham makes in the last chapter regarding "underdog" status, which will be addressed below, but there are other areas where the problem arises as well.

For example,[112] Witham's comparison of the public reaction to the Scopes trial and its reaction to the 1999 controversy over removal of macroevolution from state education standards in Kansas is confusing. Witham says that the public reaction to the two events "shared two similarities"—in both, there was a "populist-media split" and "the 'meaning' of the news swamped the facts of the news."[113] With respect to the first similarity, Witham says the media-public split after the Scopes trial, in which the media crowned Scopes a hero while the public voted for more laws prohibiting the teaching of evolution, was similar to the split after the Kansas controversy, in which "a large majority agreed with the 'Science Guy'"[114] that schools should teach evolution, while a "far larger majority in national polls wanted creationism taught somewhere in the public school curriculum."[115] But the description of what happened in Kansas does not support Witham's characterization of what happened as a "populist-media" split. Not only does the "Science Guy" not represent the whole of the national media, but there is nothing in Witham's description of public attitudes to demonstrate any necessary difference in opinion between the "Science Guy" and popular opinion. It would seem, indeed, that public opinion was united with the opinion of the "Science Guy" that schools should teach evolution, even if at least some of the same public thought that schools should *also* teach about alternatives to evolution.

The second similarity suggested by Witham—that the "'meaning of the news swamped the facts of the news"—is equally confusing. The clause is simply unclear: What do the phrases "meaning of the news" and "facts of the news" mean? At first glance, it would seem from the use of the word "swamped" that the media spent *more time* talking about import of the facts than the facts themselves. But in the next few sentences, Witham suggests instead that the media *misreported* Kansas's actions to make the story seem more like the Scopes story,[116] so perhaps the point is not that the facts were shortchanged as a matter of emphasis, but rather that the media affirmatively

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[112] Apart from the "underdog" example, and the one discussed here, there are other parts of the book I found difficult to follow. One particular area of difficulty, hinted at already, *see* text accompanying notes 82-89, *supra*, is the discussion in the concluding chapter regarding the "five areas" in which both sides of the debate must show "candor" and "humility." *See* Witham, *supra* n. 28, at 265-69. Another confusing sentence can be found in the Introduction of the book. Witham notes that the evolution-creation debate "seems likely to be perennial," but then he asks: "But is it helpful?" *Id.* at 6. I find the question strange, and I do not quite understand what it means to ask if a "debate" is "helpful."

[113] *Id.* at 238.

[114] *Id.* The "Science Guy" is public television's Bill Nye. *See* www.billnye.com.

[115] *Id.*

[116] *Id.* at 238-39.

distorted those facts to fit a preconceived message. Moreover, subsequent paragraphs make two additional points—that the Kansas story might never have been a national story because it never made prime-time news (according to one commentator) and that Kansas might have in fact promoted rather than demoted evolution in its educational standards[117]—but Witham does not make it clear whether these points are in fact related to the earlier argument about the similarity of Kansas and Scopes or not. The reader is left somewhat perplexed about the connection between all of the data points Witham discusses, and therefore about the exact meaning of his arguments.

Given the overall comprehensiveness of Witham's account of the controversy, it is probably somewhat unfair to raise this second nagging problem as a criticism of Witham's book, but it nonetheless seems important enough to deserve some mention. Although Witham looks at most conceivable angles of the controversy, he spends nearly no time at all considering what adherents of non-Christian religious traditions think about the controversy.[118] Even when Witham is talking about religion generally, he does not discuss non-Christian faiths. For example, when Witham discusses how "theological boundaries" are some of the more significant boundaries in American society, and cites an historian who observes that "theologies make a huge difference in the analysis of evolutionary proposals," Witham discusses Catholics, Lutherans, Calvinists, Seventh-Day Adventists, Presbyterians, Baptists, Anglicans, Congregationalists, and Methodists, but not Jews, Muslims, Buddhists, or any other non-Christian faith.

This oversight is somewhat unfortunate because America is hardly uniformly Christian in its religious beliefs. Indeed, as Harvard's Diana Eck has recently described, America has experienced an unprecedented blossoming of religious pluralism over the past thirty years.[119] Given this national religious diversity, the question naturally arises whether the evolution-creationism controversy in America is entirely driven by certain Christians[120] or whether it exists more broadly along the American religious

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[117] *Id.* at 239.

[118] There are a couple of counter-examples, however. For instance, in the Introduction, Witham notes that while Americans "hotly debate evolution, it is almost unanimously accepted in Western Europe and Japan," noting that the latter country is "a Buddhist society that has developed scientifically," though "its people still maintain a moderate mysticism about ancestors and are liberally open to nonmechanistic medicine." *Id.* at 6. Later in the book, Witham notes that in 1939, Rabbi Louis Finkelstein, the president of the Jewish Theological Seminary, "inaugurated a project to assemble scientists and religious thinkers for a great public discussion" on the conflict between science and religion. *Id.* at 27. In Chapter Three, Witham observes that "New Age beliefs" "embrace evolution with enthusiasm" while "Asian beliefs, *Star Wars* movies, and the new environmentalism" have "forged [an] amalgam of cosmic force and biological evolution." *Id.* at 56. But these references are very slight and intermittent.

[119] *See* DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS NOW BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION 4-5 (2001).

[120] Witham carefully explains that not all Christians feel the same way about the controversy. For example, the Catholic Church has been more amenable to evolutionary theory than some other Christian traditions. *See, e.g.,* Witham, *supra* note 28, at 36 ("[T]he Roman Catholic

spectrum. Specifically, it would be interesting to know whether other religious traditions, leaders, or believers also object to evolution, take a neutral position on the controversy, or support evolution, particularly as the controversy relates to difficult evolution-related policy decisions, such as what to teach in the public schools. If religious non-Christians object to evolution, on what basis do they object? If they support evolution, do they do so strongly and vocally or only in a passive manner? Are scientists of non-Christian faiths more or less likely to support the teaching of alternatives to evolution in the science classroom? Without answers to questions like these, a significant portion of the story regarding the interaction of evolution and religion remains untold.

## III. Getting Over Scopes?

### A. The Current Milieu

As events from the Scopes trial to the Kansas controversy have illustrated, the debate over evolution has hardly been confined to the pages of books or the sermons of ministers. The disagreement has consistently spilled over into public life, particularly to debates over how public schools and other educational institutions ought to treat evolution and its competing theories. In the winter of 2003, for instance, a biology professor at Texas Tech—a state university—caused an uproar by declaring on his webpage that he would not write a recommendation for graduate or medical school for any student who could not "truthfully and forthrightly affirm a scientific answer to [the] question" of "[h]ow do you think the human species originated?"[121] Witham recounts several other recent controversies involving universities, including a very public academic freedom dispute at San Francisco State University[122] and a hullabaloo over whether Liberty University's biology department—which, according to Jerry Falwell, teaches both "evolution and creationism in the classroom"—should have received accreditation from the Virginia Board of Education.[123]

Most of the controversy, of course, has centered around the nation's public elementary and secondary schools. Although the Supreme Court has struck down laws that have either prohibited schools from teaching

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Church has never condemned evolution, except when it was used ideologically by atheists . . . . Since [1871] theistic evolution has had the church's blessing in the United States.")

[121] *See* Nick Madigan, *Professor's Snub of Creationists Prompts U.S. Inquiry*, N.Y. TIMES, Feb. 3, 2003 (describing policy of Professor Michael L. Dini and the ensuing uproar). Dini subsequently changed his policy somewhat. His new question asks "How do you account for the scientific origin of the human species?" rather than "How do you think the human species originated?" *See* http://www2.tltc.ttu.edu/dini/Personal/letters.htm. Presumably, the change in wording was intended to free potential recommendees from having to affirm a belief in evolution, rather than having to explain evolutionary theory.

[122] *See* WITHAM, *supra* n. 28, at 162-66 (describing controversy involving Professor Dean Kenyon).

[123] *See id.* at 172.

evolution[124] or required them to teach creation science whenever they taught evolution,[125] opponents of evolution have recently turned to a variety of new strategies to undercut the straightforward presentation of evolution in the science classroom.[126] Prominent among these strategies have been requiring disclaimers regarding evolution to be placed in biology textbooks,[127] removing evolution from state standards or reducing its importance in those standards,[128] teaching arguments against evolution,[129] and stocking school libraries with anti-evolution volumes.[130] The most prominent recent strategy, however, has been the push to require or encourage public schools to teach the theory of intelligent design as an alternative to evolution in science classrooms. The movement—described by some as the "wedge" strategy[131]—has garnered a great deal of public support and has met with at least some limited success in the arena of public policy. For instance, intelligent design advocates were instrumental in getting the Ohio Board of Education to adopt a state science standard calling for schools to "describe how scientists continue to investigate and critically analyze aspects of evolutionary theory"[132] and the United States Senate in June of 2001 to adopt a resolution urging schools to "help students to understand why [evolution] generates so much continuing controversy,"[133] language intended by its sponsor to promote the teaching of alternatives to evolution in science classes.[134] Most recently, the school board in Dover, Pennsylvania adopted a policy requiring that students be informed of intelligent design theory; the ACLU has since filed suit to enjoin the policy.[135]

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124 *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

125 *See* Edwards v. Aguillard, 482 U.S. 578 (1987).

126 *See* Eugenie Scott, *Antievolution and Creationism in the United States,* 26 ANN. REV. ANTHROPOLOGY, 263, 277-85 (1997) (describing various strategies adopted by creationists since the Supreme Court decided *Edwards* in 1987); *see also* Wexler, *supra* n. 18, at 102-06 (same).

127 *See, e.g.,* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 349 (5th Cir. 1999) (finding unconstitutional a school board resolution requiring a disclaimer of endorsement before a school could teach evolution), *cert. denied*, 530 U.S. 1251 (2001).

128 This is what happened in Kansas. For discussions of the events there, see generally Douglas E. Stewart Jr., Note, *Going Back in Time: How the Kansas Board of Education's Removal of Evolution from the state Curriculum Violates the First Amendment's Establishment Clause*, 20 REV. LITIG. 549 (2001); Marjorie George, Comment, *And Then God Created Kansas? The Evolution/Creationism Debate in America's Public Schools*, 149 U. PA. L. REV. 843 (2001).

129 *See* Wexler, *supra* n. 18, at 103, n. 6 (citing examples).

130 *See id.* at 105 n. 10 (citing examples).

131 *See, e.g.,* Barbara Forrest, *The Wedge at Work: How Intelligent Design Creationism is Wedging Its Way into the Cultural and Academic Mainstream, in* INTELLIGENT DESIGN CREATIONISM AND ITS CRITICS: PHILOSOPHICAL, THEOLOGICAL, AND SCIENTIFIC PERSPECTIVES 5, 6-16 (Robert T. Pennock, ed., 2002).

132 *See* n. 19, *supra.*

133 *See* n. 22, *supra.*

134 *See* 147 CONG. REC. S6147-48 (daily ed. June 13, 2001) (remarks of Sen. Santorum, the sponsor of the amendment) (describing the amendment as "deal[ing] with the subject of intellectual freedom with respect to the teaching of science in the classroom.").

135 *See, e.g.*, *Evolution Shares a Desk With Intelligent Design*, WASH. POST, Dec. 26, 2004, at A1.

Elsewhere I have argued that school boards and legislatures should not require or encourage schools to teach intelligent design in the science classroom.[136] Not only would such an educational reform risk constitutional invalidation under the Establishment Clause,[137] but it is also not justified on grounds of educational policy.[138] For one thing, scientific consensus supports evolutionary theory and rejects intelligent design,[139] and therefore teaching design will not do much to teach students about the substantive state of scientific knowledge. Second, teaching alternatives to evolution in the science classroom, unlike teaching about religious views on origins in stand-alone religion classes,[140] would do nothing to further the concededly important goal of helping students understand why evolution does create so much controversy in our very religious nation, because that controversy primarily concerns religion, culture, and history, rather than science.[141] Third, although teaching about the process of science as a progressive discipline, in which certain accepted theories are challenged and sometimes replaced by rival theories, is an important goal of science education,[142] teaching students about intelligent design is not necessary or well suited to achieve this objective. Not only is it likely that many schools already teach about the scientific process, but intelligent design is not a good example of the phenomenon, as it has been roundly rejected by the scientific community.[143] In any event, schools have many other minority theories which would not raise constitutional concerns to choose from if they think it necessary to teach further about the nature of the scientific process.[144]

In addition to these concerns, a series of other arguments against teaching intelligent design stem not from the nature or status of the theory, but rather from the divisive nature over evolution itself. First, the controversy seems so intense that any attempt to teach intelligent design in classrooms will almost certainly invite immediate and protracted litigation. Second, the divisive nature of the controversy makes it extremely unlikely that representatives from both sides will be able or willing to come together

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[136] Wexler, *supra* n. 18, at 153-81.
[137] *Id.* at 164-179.
[138] *Id.* at 153-62.
[139] *Id.* at 153-57.
[140] I have argued that this would be a good idea. *See id.* at 126-49. On why schools should teach generally about religion, see WARREN A. NORD & CHARLES C. HAYNES, TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM (1998); Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159 (2002). For a sophisticated discussion of a plethora of issues involved with teaching about religion, see Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J.L. & POL. 329 (2002).
[141] *See* Wexler, *supra* n. 18, at 157-58.
[142] NAT'L COMM. ON SCI. EDUC. STANDARDS & ASSESSMENT, NAT'L RESEARCH COUNCIL, NATIONAL SCIENCE EDUCATION STANDARDS ch. 6 (1996), *available at* http://books.nap.edu/html/nses/html/6a.html#sis ("In learning science, students need to understand that science reflects its history and is an ongoing, changing enterprise.").
[143] Wexler, *supra* n. 18, at 153-57.
[144] *Id.* at 161-63, 181-84.

to develop materials and guidelines to help teachers teach about the controversy in an educationally responsible manner. This stands in stark contradistinction to the more successful recent movement to teach students about religion, in which believers from a variety of religious traditions (as well as non religious individual rights watchdog groups like the People for the American Way) have agreed on the importance of such a project and have indeed come together to develop such materials and guidelines.[145] Third, the controversy is so severe that even a seemingly innocuous reform, like introducing the evolution-intelligent design controversy as part of a general program of teaching various scientific controversies in science classrooms seems impossible. Although all sides might agree that such a program would be educationally valuable and constitutionally safe, it seems unlikely that they could ever agree as to whether the intelligent design controversy is a real scientific controversy that ought to be presented along other real controversies like the one over what has been causing deformities in frogs and other amphibians, or whether it is in fact just an assertion of oddballs, more like the controversy over UFOs or the existence of Big Foot than something worth taking scientifically seriously.[146]

### B. Witham's Crystal Ball[147]

It is to this last set of arguments that Witham's discussion is most relevant. If it is true that in fact evolutionists and creationists are not as diametrically and vehemently opposed as it would at first superficially appear, then perhaps it is not so unlikely that representatives from the two sides could come together to develop educationally responsible and balanced materials that could be used by science teachers in the classroom, and that the two sides could agree to move forward with such a program without the risk of immediate litigation. Given the relevance of this question for important questions of public educational policy, it is hard to read Witham's book without hoping for his view on whether this kind of compromise and mutual effort might be possible. It is somewhat of a disappointment that he does not explicitly address the question, since as an objective observer who perhaps has talked with more participants in the controversy than anybody else, he may be in the best position of anyone to know what the answer might be. Witham does observe that intelligent design is the "bane of all evolutionists,"[148] that evolutionists are far more aligned with each other than with those who oppose evolution,[149] and that evolutionists will band together

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[145] NORD & HAYNES, *supra* n. 140, at 15-34 (describing the "new consensus" on teaching about religion in the public schools).
[146] Wexler, *supra* n. 18, at 181-84.
[147] *See* WITHAM, *supra* n. 28, at 262. Witham notes that reading crystal balls "is risky business." *Id.*
[148] WITHAM, *supra* n. 28, at 50.
[149] *See id.* at 95-96.

despite their differences when challenged by opponents,[150] and these observations do suggest that there is little hope for reconciliation. Nonetheless, Witham unfortunately does not take on the question in any sustained fashion or relate his observations directly to current controversies in educational policy.[151]

This last point is less a criticism of Witham's book than a wish that Witham had written a slightly different book, as Witham's purpose is clearly to provide a comprehensive journalistic account of the various aspects of the controversy rather than to analyze the controversy and predict the future. On the other hand, Witham does say that he will, at least a bit, gaze speculatively into the future.[152] Given his immense knowledge of the subject, the reader naturally looks forward to the speculations that he ultimately provides in his final chapter. But these speculations turn out to be mostly disappointing. The three-part conclusion makes three descriptive observations, five normative ones, and the closing observation regarding "underdog" status.[153] Each raises more questions than it answers.

Witham's three descriptive observations—that creationism is gaining social mobility, that more moderate forms of creationism are replacing apocalyptic types, and that certain aspects of Darwinian theory are in crisis[154]—may be sound (though I suspect his point about Darwinism is far more controversial than he makes it out to be), but their implications are unclear. All three of the observations suggest a greater likelihood of success for creationist theories in the future in the realm of public educational policy, but Witham does not explicitly predict whether creationism will enjoy this success or how evolutionists and their allies might react to these trends.

Witham's five normative observations, most of which emphasize the need for both sides to exercise humility in putting forth their views,[155] are similarly unconnected to any concrete policy questions. Humility is certainly a virtue, but Witham never tells us exactly why humility is particularly important in this arena. He does say that humility is needed "[t]o bring clarity" to the debate, but it is unclear what this means. Is humility desirable

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[150] *Id.* at 189 ("[E]volutionists keep a united front, and nowhere more so than in America, where active creationists are always at the gates."); *id.* at 39 ("Official science has stood its ground on evolution in the broadest possible terms.").

[151] Witham has recently published another book that deals in more depth with the issues raised by the intelligent design movement. LARRY WITHAM, BY DESIGN: SCIENCE AND THE SEARCH FOR GOD (2003). Although the book describes some of the current controversies over teaching intelligent design in the public schools, *see id.* at 166-71 (describing events in Ohio and U.S. Senate), Witham does not take a normative position on those controversies or explain how his observations regarding the various participants in these controversies might point to possible solutions.

[152] *Id.* at

[153] *Id.* at 262-69.

[154] *Id.* at 262-65.

[155] *Id.* at 265-69. These observations suggest that both sides should admit they do not know all of the answers to relevant questions and should otherwise recognize their limitations.

simply to tone down the overly contentious nature of the debate, or does it also connect to what types of educational policies ought to be adopted? In my view, humility on both sides is necessary not only to tone down the divisive rhetoric often associated with the controversy, but also so that we might find compromise solutions in the realm of public policy. The most salient of these compromise solutions would be to teach about religious views on origins in stand alone religion classes, while avoiding any discussion of alternative "scientific" theories to evolution in science classrooms.[156] For this reform to be successful, both sides would indeed need to demonstrate humility as Witham rightly suggests: Creationists must realize that design theory does not belong in the science classroom, while evolutionists must realize that public schools wrongly shortchange religious perspectives by not including these perspectives in the curriculum.

Finally, Witham's concluding comments regarding the "underdog" status of evolutionism and creationism are both the most problematic and yet, in a sense, the most interesting observations in the book. Witham says that the "inevitable" and "perennial" "polarization" between the two sides might be "surmoun[ted]" "at least momentarily" if "either side [is] portrayed as an underdog."[157] One problem is that it is not clear what Witham is saying here. What exactly does he use the word "surmount," and why would this "surmount[ing]" be only "momenta[ry]"? More importantly, when he refers to the "portray[al]" of the two sides as underdogs, who does he imagine is doing the portraying? Is it the media that would be portraying the two sides as underdogs? Other non-participants in the controversy? Each side portraying itself as the underdog? The argument is simply imprecise. And, moreover, it seems self-defeating. It appears as if Witham is suggesting that the two sides of the controversy might overcome their differences by continuing to struggle with each other. But how would this work? Why would battling over the "underdog" label serve to diffuse the larger war over which side should be ascendant in the academy and in the realm of public policy?[158]

Witham's final observations perpetuate rather than overcome *Scopes*' difficulties. The struggle that Witham suggests ought to continue over the "underdog" label in large part replicates the battle over the legacy of the Scopes trial that it seemed like Witham intended to transcend in the first place. After all, isn't the battle over the *Scopes* legacy in large part about which side is really suffering the true oppression by overwhelming majority

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[156] *See generally* Wexler, *supra* n. 18.

[157] WITHAM, *supra* n. 28, at 269.

[158] It is possible that what Witham is saying here is that both sides need to understand that the other side, as well as its own, has legitimate claims that deserve accommodation. In other words, he might be saying that both sides should recognize the need to compromise, rather than the need to continue struggling over the "underdog" label (and everything else). If this is indeed the case, then Witham's position, though perhaps inartfully stated, is persuasive and consistent with the rendition of the Scopes Trial that is provided in Section III.C of the review below. *See* text accompanying notes 160-188, *infra*.

forces? Those who would argue that *Scopes* is really about academic freedom are arguing that the voices of intelligent design ought not to be silenced simply because the majority of those in charge of schools believe that evolution is the only possible truth. And those who would argue that *Scopes* is really about disestablishing religion in the public schools are arguing that the majority of American citizens who believe that an intelligent designer created mankind should not be able to force that religious belief upon nonbelievers in the public school classroom. Both sides, in facing off over the question of who can claim *Scopes* for support, are in essence arguing over which side is the true underdog in American society. When Witham observes in his final pages that the creationists see themselves "embattled by a battery of superior social forces, especially the lawyers of the American Civil Liberties Union," and that the evolutionists "see opinion polls in which more than half of Americans say 'we need more faith and less science' and in which 64 percent of teenagers say that if a scientific and a religious explanation disagree, they are 'more likely to accept the religious answer,'"[159] he is essentially suggesting that the battle over the legacy of *Scopes* continues to have lasting significance in modern America.

The fact that Witham comes back, however unintentionally, to the battle over *Scopes*' legacy, suggests something quite important about his views of the nature of the controversy over evolution and creationism. Witham has listened to the real voices involved in this controversy perhaps more than anyone else. If he thinks that the two sides will continue to try to portray themselves as the real underdog in American society—and that there might be some salutary reason for doing this—then it would seem that there might be something quite fundamentally intractable about the controversy. Far from getting over *Scopes*, Witham suggests that we might be stuck with it, at least for the foreseeable future. Perhaps the issues are simply too basic, too complex, and too heartfelt, for us to hope for any easy solutions any time soon. On the other hand, it is to some degree ironic, given Witham's terrific work, that the book ends with this basically pessimistic message. If there is to be any progress toward compromise in this area, it will be because both sides listen more carefully to the claims of the other. For this to happen, it will be necessary for more objective observers to give voice to the struggles of both sides. Witham's book might be the most successful attempt to provide such an objective presentation to date. Although *When Darwin Meets the Bible* suggests that we might be stuck with *Scopes* for the time being, it is only work like Witham's that provides any hope at all of overcoming the bitter struggle over the legacy of that most important trial.

C. Re-imagining *Scopes*.

If we are to move towards a more fruitful future with respect to the evolution controversy, then the task will be to build on work like Witham's to devise novel compromise solutions that people on both sides of the

[159] *Id.* at 269-70.

controversy can accept. Such compromise solutions may hopefully lead to something resembling civil peace on this most divisive of issues. Witham's work shows that the characters who populate the controversy are not nearly as two dimensional as many have previously assumed. Likewise, any potential solution to the public controversy surrounding the teaching of evolution will dwell somewhere along the spectrum between the two extremes of excluding religion completely from the public school curriculum and mandating that the public schools teach an essentially religious doctrine in the science classroom.

I have already mentioned one possible policy compromise that I believe holds some promise: Schools should not teach the theory of intelligent design or other purportedly scientific alternatives to evolution in the science classroom, but they should teach about comparative theories of human origins in stand alone religious studies classrooms (in which students learn generally about religion from an objective perspective) or other social science classes. As described above, teaching intelligent design in science classrooms is problematic for various policy and constitutional reasons.[160] But leaving religious views on origins out of the curriculum is also deeply problematic. Students must learn about religion generally, and religious views on origins specifically, if they are to graduate with the knowledge and understanding necessary to participate intelligently and thoughtfully in American democratic processes and institutions. Religion is such an important and pervasive phenomenon not only in American life but in the life of all the world's peoples that students can hardly expect to be able to understand the world around them without a basic understanding of religious history, traditions, and concepts. Because views on human origins are at the center of many religious traditions, students likewise must learn about those views on origins if they are to understand religion in any sophisticated and meaningful way.[161]

Such a compromise will more likely succeed if it is possible to conceive of the solution not as embarking upon a radical new direction in American life but rather as being at least somewhat continuous with the currents of modern American social and intellectual history. As many legal scholars have observed, the narratives that we as a society use to make sense of our experiences and history profoundly affect the directions that we are willing to travel in the future.[162] With this observation in mind, the question

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[160] *See* text accompanying notes 136-146, *supra*.

[161] For detailed discussion of all of these points, see Wexler, *supra* n. 18, at 776-790; Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WILLIAM & MARY L. REV. 1159, 1191-1243 (2002).

[162] On the importance of narrative, see, *e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative* 97 HARV. L. REV. 4 (1983); Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 507, 529 (1999) (describing the "shared historical and cultural narrative" of the *Scopes* trial as "powerful" and "comprehensible"); Anne M. Coughlin, *C'est Moi*, 83 MINN. L. REV. 1619, 1633 (1999) ("It is through this process of selection that narratives do the work we want them to do, namely, the work of conferring

arises: Is it possible to tell a story of modern American history in which such a compromise policy solution fits at least somewhat comfortably?

As evidenced by how it is constantly invoked whenever Americans talk about evolution,[163] the *Scopes* trial is probably the most prominent moment in the history of the evolution controversy. So, how does the compromise policy solution described above fit with our understanding of *Scopes*? Not very well, if *Scopes* is understood as standing solely either for the idea that teachers should have wide-ranging academic freedom to teach whatever scientific theories they want in the science classroom or for the idea that science has so roundly triumphed over religion that there should be no place for religious ideas in the public school curriculum.[164] The question, therefore, is whether it is possible to re-imagine *Scopes* so that it lends support to the compromise policy solution articulated here.

I believe that such a re-imagination is possible. The key to this process will be to recognize that the various strands of *Scopes* picked up by the contestants in the ongoing evolution controversies are not necessarily mutually exclusive. Instead, we can understand these various strands as coexisting in a creative tension to produce a complex and nuanced message about religion, science, education, and personal liberty that could support a range of compromise policy positions, including teaching about religious views of origins in social science classes but not intelligent design in science classes.

We need go no farther than Larson's extraordinary presentation to find at least four different strands of meaning in the *Scopes* trial that combine to create the complex message we might take from the event: (1) the importance of freedom and liberty from government control, particularly the professional liberty known as academic freedom; (2) the need for students to learn comprehensively about views on human origins; (3) the view that the scientific method and profession are entitled to enormous respect by government decision-makers; and (4) the value of maintaining a healthy suspicion of attempts by the state to impose a particular set of religious values upon its citizens.

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meaning or value on the events they record."); Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L. J. 417 (1997) ("The narrative process is one in which a person 'orders a sequence of events [[[or, I would add, people or things or concepts] for the purpose of revealing or creating meaning.'") (citations omitted); Lynne Henderson, *Without Narrative: Child Abuse*, 4 VA. J. SOCIAL POLICY & L. 479, 483 (1997) ("Narrative provides individuals with cognitive and schematic frameworks for organizing, interpreting, and expressing their experiences both internally and to others. Narrative patterns construct categories, events, and associations among events, determining what is accepted as 'true' and 'untrue' (whether inaccurate, mistaken, or just plain 'false') by imposing a meaning on those events.").

[163] *See* LARSON, *supra* n. 2, at 265-66.

[164] *See* text accompanying notes 25-27, *supra* (describing the use of *Scopes* by both sides of the evolution controversy to stand for their representative positions)

Larson's account makes it clear that the three primary strategies emphasized by the defense in *Scopes* were to deride doctrinaire religious beliefs, celebrate science, and promote individual liberty against majoritarian domination. As Larson notes in his description of events leading up to the trial: "Already, the three main tactics of attacking the antievolution measure had emerged: the defense of individual freedom, an appeal to scientific authority, and a mocking ridicule of fundamentalists and bibilical literalism; later, they became the three prongs of the Scopes defense."[165] These three themes were echoed by Scopes' lawyers during both the trial phase[166] and the appellate phase of the case.[167] For instance, with respect to the defense's argument on appeal before the Tennessee Supreme Court, Larson notes that, "[o]nce again, the defense stressed that the anti-evolution statute unreasonably restrained the individual liberty of teachers and students by establishing a preference in public education for a particular religious belief over the conclusions of modern scientific thought."[168] Although the different legal teams representing Scopes' position may have disagreed markedly on which of these themes to emphasize—the ACLU and John Neal stressed individual liberty notions[169] while Clarence Darrow emphasized the religion and science arguments[170]—there is no question that all of the themes were central to the meaning of the case, as underscored by the fact that the State explicitly took the contrary position on all three of them.[171]

Although not nearly as prominent as the other three themes,[172] the notion that public education ought to be comprehensive and not subverted by ideological narrowness was also articulated (if somewhat inchoately) by Scopes' defenders. For example, Larson's description of the ACLU's early position regarding academic freedom indicates that the association thought comprehensive education was preferable to one-sided education. Larson writes: "[W]hen the ACLU turned its attention to defending unpopular speakers, its efforts widened to include fighting classroom restrictions on unpopular ideas. 'The attempts to maintain a uniform orthodox opinion

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165 LARSON, *supra* n. 2, at 53.

166 *See, e.g., id.* at 60, 63, 65, 73 (describing ACLU emphasis on academic freedom); *id.* at 178-79 (describing speech by Scopes' lawyer Dudley Malone focusing on liberty and science issues); *id.* at 162-63, 187-90 (describing Darrow's berating of Bryan on the stand relating to Bryan's religious beliefs and their inconsistency with certain scientific observations). *See also* Larson, *supra* n. 191 (describing ACLU's academic freedom approach to the trial, and the legacy of that position).

167 *See* n. 197, *infra.*

168 *Id.* at 213; *see also id.* at 218 (describing Clarence Darrow's speech before the Tennessee Supreme Court that also emphasized these themes).

169 On Neal, see *id.* at 107, 138-39. On the ACLU, see *id.* at 60-65, 228. On how the ACLU did not want Darrow involved in the case, see *id.* at 100. On how the agendas of Neal and the ACLU differed from Darrow's, see *id.* at 107.

170 On Darrow's disdain for religion, see *id.* at 3, 6, 71.

171 *See, e.g., id.* at 58 (describing governor of Tennessee's support of the anti-evolution bill on majoritarian, anti-science, and religious grounds); *id.* at 98 (recounting a speech by Bryan at the time of Scopes' arrest focusing on these three grounds).

172 *See id.* at 257 ("Defense counsel at Dayton did not endorse the idea of teaching both evolution and creationism in science courses.").

among teachers should be opposed,' the ACLU's initial position statement declared. 'The attempts of education authorities to inject into public schools and colleges instruction propaganda in the interest of any particular theory of society to the exclusion of others should be opposed.'"[173] Likewise, both Neal and Dudley Malone, another of Scopes' many lawyers in the case, made public statements in favor of non-distorted education. Neal, for example, stated that Scopes' case turned on "'the lack of power upon the part of the legislature to limit the inquiry of the truth in our high schools and universities,"[174] while Malone, according to Larson, "came the closest of anyone at Dayton to endorsing a two-view approach to teaching origins when in his great plea for tolerance he declared, 'For God's sake let the children have their minds kept open—close no doors to their knowledge.'"[175] Given statements like these, and their complementary fit with notions of academic freedom also articulated during the case, it is not surprising that evolution opponents have recently turned to *Scopes* to support their view that public schools ought to introduce students to alternatives to evolution.[176]

In sum, the *Scopes* defense, which is the side of the case ordinarily invoked to represent the trial's legacy,[177] relied, in the aggregate,[178] on at least four themes: a pro-science theme, a pro-liberty or academic freedom theme, and anti-religion theme, and a pro-comprehensive education theme. Of course, if these themes or values are understood as absolutes or in their strongest possible terms, then they will almost certainly conflict. For example, Darrow was vehemently opposed to organized religion.[179] If the

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[173] *Id.* at 74; *see also id.* at 81(quoting ACLU chair as saying: "The public mind is poisoned at its source when special interests take hold of educational institutions for their own propaganda.").
[174] *Id.* at 107.
[175] *Id.* at 257. Larson does note that Malone made this statement after he "shouted at prosecutors" to "[k]eep your Bible in the world of theology where it belongs and do not try to . . . put [it] into a course of science." *Id.*
[176] *See* text accompanying notes 24-27, *supra.*
[177] As Larson points out, early reactions to the trial did not assume that the defense had made the strongest arguments in the case. *See* LARSON, *supra* n. 2, at 206 ("At the time, in sharp contrast with later legends about the Scopes trial, no one saw the episode as a decisive triumph for the defense."). Nonetheless, subsequent events, including portrayals of the trial in the popular media, have tended to result in a historical legacy in which Scopes' side is seen as being in the right, for whatever reason, at least among social elites. *See id.* at 234 ("America's social elite . . . institutionalized its view of the Scopes trial . . . the trial became an increasingly significant symbolic victory for liberal progress over the forces of reaction."). With respect to the ongoing debate over intelligent design, both sides, although they differ on which arguments made by Scopes' defense are the most relevant, nonetheless invoke arguments made by Scopes' side rather than on arguments advanced by Bryan and the State. *See* text accompanying notes 25-27, *supra.*
[178] I say "in the aggregate" to call attention to the fact that not every defender of Scopes invoked the same themes. For example, the ACLU and Neal stressed notions of individual liberty, while Darrow emphasized the anti-religion and pro-science themes. *See* text accompanying notes 169-170, *supra.* It is interesting to note, as Larson observes, that because of the portrayal of the trial in popular books, plays, and movies, most notably *Inherit the Wind*, the religion and science themes became dominant, and "the ACLU and all of Darrow's co-counsel entirely lost their place in history." LARSON, *supra* n. 2, at 236.
[179] *See id.* at 3, 6, 71.

anti-religion theme is understood in this extreme fashion, it might dictate a near-complete separation of religion and government that would preclude the state from also taking a robust view of academic freedom. If a public school, for instance, took the anti-religious position that it should not even expose its students to purportedly dangerous religious perspectives,[180] then it could not also fully embrace the academic freedom rights of teachers who think it is very important to expose students to such perspectives, traditions, and ideas. Likewise, it would be difficult for the state to maintain both extreme pro-science and extreme comprehensive education views, because given the limited amount of room in the public school curriculum, it would likely be impossible to teach any more science than is already taught without requiring tradeoffs in other important disciplines, some of which might expose students to perspectives that are either inconsistent with some scientific assumptions or that at least would point students in non-scientific directions.

The key to integrating the four themes from *Scopes*, then, is to understand them in less absolute terms. What if the message we took from *Scopes* was that religion, although not something to be reviled, is nonetheless something that the government ought not impose upon its citizens; that the scientific disciplines and professions, although not worth idolizing, are nonetheless worth serious our serious respect; that education, although it cannot cover every possible topic or perspective, should nonetheless aspire to be comprehensive; and that academic freedom, although it cannot be absolute, should nonetheless be taken very seriously? Would such a message be consistent with the trial itself? It is hard to know for sure what each of the players thought in a broad sense; most of them articulated their views, after all, in the context of zealous representation in a particular case. But it is hard to imagine that taken as a whole, they would have disagreed that the four themes should be understood in a qualified fashion. Even the serious anti-religious theme voiced by Darrow during the proceedings was counterbalanced by the ACLU, which did not take an anti-religion stance during the case[181] and which has fought for religious freedom throughout its history.

Perhaps more to the point than the degree of historical accuracy, however,[182] understanding *Scopes* in this way might help, in conjunction with Witham's nuanced presentation of the controversy's many other aspects, to point the way towards compromise policy solutions such as the one advanced above. Of course, re-imagining *Scopes* as outlined here is not going to be a cure-all. Those on both sides of the battles over evolution can always argue that a particular policy proposal weighs too heavily on one side of the

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[180] Many schools in fact do not teach their students anything about religion. *See* Wexler, *supra* n. 191, at 1164-65, 1181-83.

[181] *See* LARSON, *supra* n. 2, at 228.

[182] As Larson (and Steven J. Gould) have pointed out, the legacy of the trial has not necessarily been tied to the historical events, as accurately understood. *See id.* at 245.

balance than the other—that it over- or under-values one or more of the four themes that emerge from *Scopes*. For instance, one could argue that teaching about religious views on origins in social studies classes but not about intelligent design in biology classes undervalues the need to be skeptical of religion's presence in public schools, because teachers authorized to teach about religion will often simply use that authorization as an excuse to inculcate students in their view of religious truth.[183] Or, alternatively, one could argue that the compromise undervalues academic freedom, by prohibiting (or at least discouraging) teachers from teaching a theory (intelligent design) they believe is persuasive.[184] Nonetheless, re-imagining *Scopes* in this way would be greatly preferable to using it, as Witham says, to create a "snap-quiz approach," which, he correctly observes, "is hardly conducive to a healthy conversation."[185]

In my view, teaching about religious views in social studies classes but not about intelligent design in biology classes honors all four of *Scopes*' themes. First, the compromise solution affords appropriate respect to the scientific profession by recognizing that under the norms that govern that profession, intelligent design, which has not fared well in the peer-review process, does not qualify as good science.[186] Second, the solution is appropriately skeptical of governmental efforts to impose religious beliefs upon its citizens by recognizing not only that intelligent design is an essentially religious belief but also that only religious motivations can fully explain the impulse to reform science education by focusing exclusively on evolution.[187] Third, the solution properly furthers the goal of comprehensive education by emphasizing the need to teach students about religious views on human origins, so that they can understand how many people understand this important issue and so they can appreciate why teaching evolution in science classes causes so much controversy.[188] Finally, although the solution is perhaps weakest in advancing notions of academic freedom, it does allow and encourage social studies and religious studies teachers to teach topics that most have thus far been discouraged from teaching, and it does not preclude even science teachers from at least mentioning the existence of the controversy and noting that some who call themselves scientists do adhere to a theory that is at odds with evolution.

## *Conclusion*

In *Where Darwin Meets the Bible*, Larry Witham has undertaken a very important task, and he has completed it well. By introducing readers in great

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[183] For more on this argument, see Wexler, *supra* n. 191, at 1244-48. This might be particularly true in small schools where the same teacher teaches both the social science classes and the physical science classes.
[184] *See* text accompanying notes 26-27, *supra*.
[185] WITHAM, *supra* n. 28, at 9.
[186] *See* Wexler, *supra* n. 18, at 803-07.
[187] *See id.* at 814-29.
[188] *See id.* at 776-86.

detail to the many people, places, and themes that make up the divisive controversy over evolution in the United States, Witham has demonstrated that the debates and personalities involved in the controversy are not nearly as clear-cut or two-dimensional as many have previously thought. Perhaps understandably given his purpose, Witham does not pursue this point to show its possible implications for defusing the tension over the various public policy disputes involving evolution, most notably the debate over teaching intelligent design in the public schools. Nonetheless, Witham's nuanced presentation provides at least some hope that policymakers can fashion compromise solutions to defuse these disputes to some degree. In this spirit, this Review has proposed a more nuanced interpretation of the meaning of the *Scopes* trial to complement Witham's nuanced presentation of the rest of the controversy. If we can re-imagine *Scopes* as holding out a variety of important themes for our aspirations, then the task of devising compromise solutions may become easier, as those solutions may appear at least somewhat consistent with the most prominent moment in our nation's difficult history of dealing with the topic of evolution, rather than being in stark contrast to that moment. The road ahead is long, and it will continue to be challenging, but work like Witham's is an important step in the right direction.