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RESURGENCE OF THE EVOLUTION DEBATE: POLICY IMPLICATIONS

Overview

Recently, two newspaper articles caught my attention. Appearing on the front page of The Washington Post, the first one described how a subcommittee of the Kansas State Board of Education heard testimony by scientists who support the idea of *intelligent design* being included in public school curriculum. According to the *intelligent design* proponents, reports Peter Slevin, “modern Darwinian theory relies too much on unproven reasoning. Gaps in science...leave open the possibility that a creator, or an unidentified ‘designing mind’ is responsible for earthly development.” As one researcher who supports the *intelligent design* theory suggested, “DNA itself is the work of an intelligent being.” It therefore follows, argued the same researcher, that students in public schools “should be told that.” Slevin The Washington Post (May 6, 2005) Kansas is considering adding *intelligent design* to its statewide science standards.

The second article appeared one week later in the Richmond Times Dispatch. This piece described a local school board primary election in Pennsylvania where a major issue dividing the candidates is “the teaching of evolution and the origin of life.” According to article, the Dover, Pennsylvania, school board voted (6 to 3) last October “to require all ninth grade students to be told about intelligent design when they learn about evolution in biology class.” In the reporter’s opinion the current primary election “promises to be a battle royal among the 18 candidates evenly divided over the intelligent design mandate...” The article also reports that the school board’s intelligent design policy is the subject of a federal court suit in which eight families claim, among other things, that the intelligent design policy “is merely biblical creationism disguised in secular language, and has no place in a science classroom.” According the school board, however, “it merely wants students to know about weaknesses in Charles Darwin’s theory.” Raffaele, Richmond Times Dispatch (May 14, 2005)

Will the teaching of evolution in public school classrooms once again, as in years past, become a hot issue in school law? In this writer’s opinion an affirmative answer is possible. While two newspaper articles do not present enough evidence that a major controversy is imminent, the teaching of evolution has been and remains a volatile topic in some places. To some, it is a subject that pits the liberty interests of parents to decide what is best for their children squarely against the legal prerogatives of school officials to decide what should or should not be required in the public school curriculum. As one legal source reminds us, “[t]he most common objections to curriculum and instruction have had a religious basis. Perhaps the best known issue is parental

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objection, on religious grounds, to the inclusion of the theories of natural evolution in the school curriculum.” Fischer, Schimmel, and Kelly (1999)

The purpose of this commentary is to look back at the case law involving the teaching of evolution in public schools, in an effort to seek out guidance for local educational policy formulation.

Scopes v Tennessee (1927). The earliest and most famous court case involving the teaching of evolution involved the trial of John T. Scopes, a teacher who had taught his students that man descended from lower forms of animals. In a highly publicized criminal trial involving lawyers William Jennings Bryan and Clarence Darrow, and one that was decided on a technicality, the state court spoke directly to Scopes’ role as a public school teacher. In the court’s view, while Mr. Scopes could believe and teach natural evolution outside of school, he had no right to teach such a doctrine in school. So long as he served the state he had to abide by the state’s requirements. “His liberty, his privilege, his immunity to teach and proclaim the theory of evolution elsewhere than in the service of the state, was in no way touched by this law.” Scopes v Tennessee (1927)

The United States Supreme Court Speaks. More than forty-years after the Scopes trial, the United States Supreme Court held the State of Arkansas’ anti-evolution statute unconstitutional. The statute in question was one passed in 1928. In what is best described as a religion case, the high court ruled that the First Amendment does not permit a state to require that teaching and learning in public schools must be tailored to the principles and prohibitions of any sect or dogma.

It was clear to the court’s majority that the state statute was enacted to protect the preeminence of the teaching of the Biblical version of the creation of mankind in the public school curriculum. “In the present case,” said Justice Fortas, “there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man.” Epperson v State (1968)

In the wake of the Supreme Court’s decision, the State of Mississippi’s highest court overturned that State’s anti-evolution statute. In Smith v State (1970) the court ruled that the statute violated the Free Exercise Clause of the First Amendment. Three years later, the United States Court of Appeals for the Fifth Circuit upheld a state law that permitted students to leave the classroom during presentations (e.g., discussions of evolution) that offend their religious beliefs. In the court’s view, “[t]eachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise.” Wright v Houston I.S.D. (1973)

Related Issues and Case Law

The lack of agreed upon definitions of the terms *curriculum* and *religion* often produces constitutional and legal issues, especially where both concepts are present and have become intermingled. Boshier, Kaminski, and Vacca (2004) In the past, there have been several court cases where a constitutional issue has grown out of efforts to either integrate into the public forum or to secularize otherwise religious symbols, scenes, objects, exercises, or practices. Lynch v Donnelly (1984) In such cases courts consistently apply Lemon v Kurtzman (1971). More specifically, judges search for evidence of a truly *secular purpose* and reject efforts by legislators and state policy makers to disguise an underlying religious intent. Vacca and Boshier (2003)

In 1975, the United States Court of Appeals for the Sixth Circuit held that a Tennessee statute that required a disclaimer to be used any time evolution was presented or discussed in public schools. The disclaimer read that

evolution was based on theory and not scientific fact. The statute also required the inclusion of the Genesis version of the creation of mankind without the inclusion of the disclaimer. The appellate court held the state statute violated the First Amendment. In the court's view the statute gave preferential treatment to the Book of Genesis. Daniel v Walters (1975)

McLean v Arkansas (1982) contained a similar set of facts. McLean involved a state statute that required the presentation of the Biblical version of creation each time evolution was presented to students. A federal district court judge declared the statute unconstitutional. In his opinion the *equal or balanced treatment* statute violated the Establishment Clause of the First Amendment. That same year, a public school teacher in South Dakota was terminated from employment because he spent too much instructional time discussing *evolution* and *creationism* and not enough time (almost to the exclusion of) teaching the general biology curriculum. Dale v Board of Education (S.D. 1982) More than a decade later, the Court of Appeals for the Ninth Circuit declared that a biology teacher did not have the professional prerogative to omit the teaching of evolution in his classroom simply because it was different from his own religious beliefs. Peloza v Capistrano U.S.D. (9th Cir. 1994)

Two decades after the Epperson (1968), the United States Supreme Court had a chance to make another definite ruling on the subject. This time a Louisiana statute requiring every public school that included *evolution* in the curriculum to also teach *creation science* was before the high court. Both a federal district court and an appellate court had struck down the law. The Supreme Court agreed with the lower courts by a vote of 7 to 2. Justice Brennan, for the majority, said that the Louisiana statute violated the First Amendment's principle of neutrality, because it was written to advance religion. The purpose of the statute, he said, was "to advance the religious viewpoint that a supernatural being created mankind...." In his view *creationism* is a "religious theory and not a scientific theory." Justice Scalia, in dissent, characterized the majority opinion as a "repressive policy toward Christian fundamentalists." He argued that there should be opportunities for evidence against evolution to be presented in the schools. Edwards v Aguillard (1987)

Freiler v Tangipahoa Parish Board of Education (5th Cir. 2000) involved a Louisiana state law that mandated a disclaimer be read to all students in elementary and secondary schools every time evolution was discussed. The disclaimer emphasized that evolution was a scientific theory and was not intended to influence or dissuade the Biblical version of creation or any other concept. The court applied the Lemon test and declared the state law unconstitutional. The disclaimer policy violated the First Amendment's Establishment Clause.

Finally, two other court decisions (not specifically involving evolution) will prove informative and helpful to educational policy makers. One decision comes from the Eleventh Circuit. In a Tennessee case, plaintiff parents objected on First Amendment Free Exercise Clause grounds to the assignment of stories contained in required textbooks. In their view, the stories might cause their children to adopt "feminist, humanist, pacifist, anti-Christian, vegetarian, or one-world government views." While the parents prevailed at trial, the appellate court rejected their claims and reversed the lower court decision. The stories may be objectionable, said the court, but there is no evidence of inculcation of ideas, and the students did not have to affirm or deny a religious belief. Mozert v Hawkins County (6th Cir. 1987)

The second decision is from the United States Supreme Court and involves graduation prayer. In Lee v Weisman (1992), Justice Kennedy created the "coercion" test. More specifically he cautioned public school officials not to *coerce* any student to support or participate in a "religious exercise." Both Lee and Mozert (above), when taken together, make a strong case for providing students with an "opt-out" or "opt in" alternative

where class discussions or other in-school activities may in some way run counter to their personal religious beliefs.

Policy Implications

It is difficult to predict if and when the teaching of evolution in public school classrooms might once again become a source of heated debate at local school board meetings. However, if the situations in Kansas and Pennsylvania cited at the beginning of this commentary are evidence of things to come, it behooves local educational policy makers to be proactive. What follow are some suggestions gleaned from past case law. These suggestions are offered for consideration as current policies are audited and new ones are drafted.

School board policies must make it clear that:

- It is the intent of the board of education (the board) to comply with all state mandated curricular requirements.
- The board is, by law, the final decision-maker regarding the curriculum in each school.
- The superintendent and his/her staff, school principals, and classroom teachers occupy advisory positions to the board in all curriculum-related decisions.
- The board expects all principals, classroom teachers, and other staff to implement the school system's official curriculum.
- The board expects that principals, classroom teachers, and other staff members will refrain from presenting and discussing their personal political, social, or religious views with students.
- In situations where alternate theories and doctrines are included in class discussions, projects, or activities, the board expects that these matters will be directly related and appropriate to the subject of the class.
- The board maintains open and direct channels of communication with parents on all curriculum-related matters.
- The board, administrators, classroom teachers, and all other staff members will not ignore the personal and bona fide religious beliefs of parents and students, and will work to accommodate their diverse opinions in curricular decision-making.
- No student will be punished solely for expressing his/her personal religious beliefs in class discussions, activities, and projects; or, when participating in school-related activities.
- The board maintains "opt-out" and "opt-in" alternatives for students whose bona fide religious beliefs require that they not participate in particular class discussions, activities, and projects; or, in other school-related activities.

A Final Thought. In the recent edition of *NSBA Legal Clips* it is reported that a pilot sex education program in the Montgomery County, Maryland, School System has been taken into a federal district court. Objecting to the program on "religious grounds," plaintiffs in the suit have, among other things, focused their objections on a portion of the program that discusses "sexual orientation" and contains "materials that refute the idea that sexual orientation is immoral and a choice." NSBA (May 19, 2005)

In this writer's opinion the Maryland sex education dispute, when added to the resurgence of the evolution debate in Kansas and Pennsylvania, signals a renewed focus on the content of public school curriculum. Past experience tells us that local school boards, administrators, and classroom teachers must be prepared for the challenges to come.

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