

**INHERIT THE MYTH: HOW WILLIAM JENNINGS
BRYAN'S STRUGGLE WITH SOCIAL DARWINISM AND
LEGAL FORMALISM DEMYTHOLOGIZE THE SCOPES
MONKEY TRIAL**

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The trial of John T. Scopes is an important milestone in the history of American legal thought. Known in the vernacular as the “Scopes Monkey Trial,” the case took place in Dayton, Tennessee in the summer of 1925.¹ It concerned a substitute high school biology teacher who was arrested and convicted for teaching evolutionary theory in violation of a Tennessee anti-evolution act.² At the time, the trial was the most public confrontation between religious fundamentalism and modern science. By 1955, Jerome Lawrence and Robert E. Lee had written a play about the trial called *Inherit the Wind*,³ and film treatments of that play followed.⁴ These fictionalized accounts helped to create a mythic view of the case in popular culture. Today, the case is usually seen as a fable that cautions against the dangers of religious establishment.⁵

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¹ Many books have been written on the Scopes Trial. For a short summary of the historical background, see EDWARD CAUDILL ET AL., *THE SCOPES TRIAL: A PHOTOGRAPHIC HISTORY* (2000).

² *Scopes v. State*, 289 S.W. 363, 363 (1927). For the full text of the Act, see The Tennessee Anti-Evolution Act, 1925 Tenn. Pub. Acts 27.

³ JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND* (1955).

⁴ *INHERIT THE WIND* (Metro-Goldwyn-Mayer 1960); *INHERIT THE WIND* (Metro-Goldwyn-Mayer 1999).

⁵ See, e.g., EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* 225-46 (1997); PAUL K. CONKIN, *WHEN ALL THE GODS TREMBLED: DARWINISM, SCOPES, AND AMERICAN INTELLECTUALS* 98-108 (1998).

This interpretation of the case, however, omits key facts. Most importantly, the motivations of the Christian fundamentalists in seeking to ban the teaching of evolution must be questioned beyond the commonplace myth because, prior to the turn of the twentieth century, fundamentalists voiced no opposition to Darwin's evolutionary theory.⁶ It was after the First World War and after the legal environment for the poor and labor had been transformed through the rising tide of legal formalism that the fundamentalists began to reject theories of evolution.⁷ Without such crucial historical facts, the case appears to convey a simple and clear polemical message: fundamentalism ignores reason, and evolutionary theory is scientific, rational, and progressive. When one considers the complaints that the fundamentalists had against evolutionary theory, the popular account of the case seems at best incomplete.

This Article argues that a more thoroughgoing analysis of the history of the case, and especially the role of William Jennings Bryan, who was a leader of the fundamentalists' anti-evolution efforts, is needed to correct the distorted view of the popular understanding. As some historians have noted,⁸ the case took place in a period when the theory of *social* evolution that is associated with Herbert Spencer deeply influenced social thought.⁹ Spencer's philosophy of social evolution would later come to be called Social Darwinism, although its connections to Charles Darwin are largely illusory.¹⁰ It was Social Darwinism, not Darwin's theory of evolution through natural selection, that influenced intellectual thought in a variety of areas by providing a philosophical basis for the laissez-faire economics that was characteristic of American social thought after the Civil War and well into the 1920s.¹¹

The influence that the philosophy of Herbert Spencer had on the development of legal theory has been given less consideration. By the 1920s, there had been a series of cases in which the courts sought to promote "individualism as a moral and economic ideal."¹² For many jurists during this period, law came to be seen as a means for maintaining

⁶ See, e.g., MARTIN E. MARTY, MODERN SCHISM: THREE PATHS TO THE SECULAR (1969).

⁷ See discussion *infra* Part II.B.

⁸ See, e.g., CONKIN, *supra* note 5, at 43.

⁹ See RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT: 1860-1915 21, 32-33 (1944); MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11 (1957).

¹⁰ For a discussion of the differences between Social Darwinism and Charles Darwin's theory of evolution, see discussion *infra* pp. 352-56.

¹¹ WHITE, *supra* note 9, *passim*.

¹² NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 26, 30-32 (1997).

private ownership and contractual rights.¹³ Courts sought to apply formal legal principles without regard to inequalities that might exist in the distribution of power and wealth in society.¹⁴ Moreover, any governmental actions that would disturb existing distributions of property ownership or interfere with freedom of contract were viewed as arbitrarily partisan and working against the moral advancement of society.¹⁵ These actions were particularly detrimental to working class persons and to organized labor.¹⁶ In case after case, the courts struck down attempts to guarantee labor rights that interfered with or limited freedom of contract.¹⁷ The legal thought of this period of ridged legalism has come to be called “Classical Legal Thought” or “Legal Formalism.”¹⁸

In the late nineteenth and early twentieth century, fundamentalists such as William Jennings Bryan were largely neutral toward evolutionary theory.¹⁹ Some fundamentalists became suspicious of it, however, as they saw the effects that Social Darwinism was reaping for the working class and the poor.²⁰ As the plight of exploited workers grew deeper in the face of the near imperial presence of industrial magnets, fundamentalists such as Bryan became distrustful of evolutionary theory, eventually leading to outright hostility by the end of the First World War.²¹ After the war, Bryan viewed Spencer’s evolutionary theory as part and parcel with German scientism, and its place in American social thought as a pernicious influence.²² He viewed the nascent German biblical scholarship of the late nineteenth century, which sought to modernize Biblical hermeneutics by applying historical-critical methods, as an attempt to secularize scripture by using science to rob it of its spiritual content.²³ In all of this, Bryan fed on the rampant anti-German sentiments of the day, giving birth to an anti-evolution movement that did not see a clear separation between Darwin’s theory of speciation through natural selection and Social Darwinism’s claims of moral progress through free market competition. Seen from this perspective then, the Scopes case illustrates the frustration that labor supporters were feeling during the period following the First World War,

¹³ See discussion *infra* pp. 356-57.

¹⁴ See discussion *infra* Part I.B.

¹⁵ See discussion *infra* pp. 360-61.

¹⁶ See discussion *infra* pp. 360-61.

¹⁷ See discussion *infra* pp. 360-61.

¹⁸ See discussion *infra* p. 353.

¹⁹ LAWRENCE W. LEVINE, DEFENDER OF THE FAITH OF WILLIAM JENNINGS BRYAN: THE LAST DECADE, 1915–1925 260-64 (1965).

²⁰ See discussion *infra* Part II.A.

²¹ See discussion *infra* Part II.B.

²² See discussion *infra* pp. 367-69.

²³ See discussion *infra* pp. 367-69.

and how that frustration was fueled by post-war anti-German mania to ignite a reactionary movement against the teaching of evolutionary theory.

By placing the *Scopes* case in the proper context, the role of Social Darwinism, the development of legal formalism, and a richer understanding of the history of fundamentalist social criticism prove to be powerful correctives to the confused and incomplete mythic version of the case perpetuated by the dramatic representations of it. This Article seeks to begin the process of demythologizing the case by presenting a more complete understanding of the historical background.

I. AMERICAN SOCIAL THOUGHT: 1860S TO 1930S

The anti-evolution act under which John T. Scopes was convicted proscribed teaching a belief “that denies the story of the divine creation of man as taught in the Bible.”²⁴ Scopes was accused of teaching the theory of evolution developed by Charles Darwin.²⁵ The Darwinian theory was not, however, the only theory of evolution that existed at the time, nor was it the most influential.²⁶ There was, in fact, a long history of evolutionary theories dating back at least to the eighteenth century. Many philosophers and natural scientists speculated on the nature of change in societies and individual organisms, offered theories about the mechanism of change, and hypothesized about the moral significance of gradual development. One theory in particular, that of Herbert Spencer, was deeply influential in American social thought in antebellum America²⁷ and remained so at the time of the *Scopes* trial. Spencer’s theory had become an accepted view among social scientists²⁸ and had helped to create the legal thought of the age. Most notably, Spencer’s view played a formative role in the infamous Supreme Court decision in *Lochner v. New York*,²⁹ which articulated the view of freedom of contract that would survive well into the 1930s.³⁰ This case would have a direct influence on the outcome of the *Scopes* case.

A. *Evolutionary Theory in American Social Thought*

Evolutionary theory appears to have come to the United States with the force of a cannonball at the close of the Civil War.³¹ During that period of rapid industrialization and colonial expansion, many American

²⁴ *Scopes v. State*, 289 S.W. 363, 363-64 n.1 (1927).

²⁵ See CONKIN, *supra* note 5, at 83.

²⁶ See discussion *infra* pp. 350-56.

²⁷ HOFSTADTER, *supra* note 9, at 19-22.

²⁸ ROBERT J. RICHARDS, DARWIN AND THE EMERGENCE OF EVOLUTIONARY THEORIES OF MIND AND BEHAVIOR 244-46 (1987).

²⁹ 198 U.S. 45 (1905).

³⁰ *Id.* at 53-54, 57-64; see also discussion *infra* pp. 360-61.

³¹ See HOFSTADTER, *supra* note 9, at 1-2.

intellectuals viewed free markets as a moral force and an economic ideal.³² The laissez-faire ideal held that free markets would exercise a selective force in such a way that gradual progress toward a more efficient and moral society would result.³³ Eventually, it found support and encouragement by the Victorian evolutionary theorist, Herbert Spencer.³⁴ Even before the Victorian era, however, various theories of gradual, but inexorable human progress, playing out through the workings of natural forces, were forwarded by philosophers and natural scientists.³⁵ The belief in a mechanism of gradual change over time had been “in the air” so to speak, for quite some time.³⁶

In the eighteenth century, philosophers attempted to articulate the basis for an understanding of biological change occurring through the forces of nature.³⁷ Although one finds a tantalizing reference in Hume’s *Dialogues Concerning Natural Religion*,³⁸ a more developed conceptualization

³² *Id.* at 21-22.

³³ See WHITE, *supra* note 9, at 32-47.

³⁴ See *id.* at 11, 39.

³⁵ See HOFSTADTER, *supra* note 9, at 1-2.

³⁶ See *id.*

³⁷ See *id.*

³⁸ DAVID HUME, *DIALOGUES CONCERNING NATURAL RELIGION* (Prometheus Books 1989) (1779). Hume seems to have come close to the notion of natural selection as he described, in a Socratic dialogue, a position with which he disagreed that seems to anticipate evolutionary theory:

Look round the world: contemplate the whole and every part of it: You will find it to be nothing but one great machine, subdivided into an infinite number of lesser machines, which again admit of subdivisions to a degree beyond what human senses and faculties can trace and explain. All these various machines, and even their most minute parts, are adjusted to each other with an accuracy which ravishes into admiration all men who have ever contemplated them. The curious adapting of means to ends, throughout all nature, resembles exactly, though it much exceeds, the productions of human contrivance; of human design, thought, wisdom, and intelligence. Since therefore the effects resemble each other, we are led to infer, by all the rules of analogy, that the causes also resemble; and that the Author of Nature is somewhat similar to the mind of man, though possessed of much larger faculties, proportioned to the grandeur of the work which he has executed. By this argument *a posteriori*, and by this argument alone, do we prove at once the existence of a Deity, and his similarity to human mind and intelligence.

Id. at 27.

appears in Immanuel Kant's thought. For example, in his essay, *Idea for a Universal History with a Cosmopolitan Intent*, Kant writes, "All of a creature's natural capacities are destined to develop completely and in conformity with their end," and that "[i]n man (as the sole rational creature on earth) those natural capacities directed toward the use of his reason are to be completely developed only in the species, not in the individual."³⁹ It is clear in this essay that Kant views history as a gradual progress of creatures toward their ends (*Zwecken*), and human history as a gradual progress toward a complete and universal rationality (and thereby to Kant's moral ideal, the kingdom of ends).⁴⁰ For Kant, it is the human species as a whole that advances toward a unity of rational intention (the good will).⁴¹ In this early example of Kant's thought, then, a unity of human purposes and intuition will come about through the operation of the forces of nature.⁴²

As Kant explains in *To Perpetual Peace: A Philosophical Sketch*, written late in his life, the forces of nature are as coercive and violent as they are unavoidable.⁴³ It is therefore learning to manage and confine nature that is a necessary condition for the rule of reason.⁴⁴ This claim sets out an "ontology of violence" wherein Kant sees essential forces in nature that guide humanity toward an end that would unite social groups in a common will.⁴⁵ As Hannah Arendt put it, "[t]his is 'world history,' seen in analogy to the organic development of the individual—childhood, adolescence, maturity."⁴⁶

Kant's belief in the gradual maturing of the human species was taken up by Herbert Spencer and incorporated into a theory of social evolution in

³⁹ IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Intent* (1784), in PERPETUAL PEACE AND OTHER ESSAYS 30 (Ted Humphrey trans., 1983) (emphasis omitted).

⁴⁰ *Id.* at 31.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See IMMANUEL KANT, *To Perpetual Peace: A Philosophical Sketch* (1795), in PERPETUAL PEACE AND OTHER ESSAYS, *supra* note 39.

⁴⁴ See *id.* at 129.

⁴⁵ See *id.* at 127-29. John Milbank developed the position that modernity is inescapably committed to an ontology of violence that is fundamentally at odds with the Christian ontology of peace. JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* 278-80 (1990).

⁴⁶ HANNAH ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* 8 (Ronald Beiner ed., 1982).

his systematic treatise, *Social Statics*, first published in 1851.⁴⁷ This publication was so widely influential that some historians argue that it helped to establish the social thought of the United States for an entire generation.⁴⁸ One gets some idea of how ripe the times were for a theory for progress through struggle from the experience of the young Oliver Wendell Holmes, Jr., who was wounded three times during the Civil War.⁴⁹ Three months into his service with the Twentieth Massachusetts Regiment, Holmes was wounded in the chest at Ball's Bluff.⁵⁰ He was nearly killed at Antietam Creek when he suffered a bullet wound in the neck, and, at Chancellorsville, he took a musket ball in the heel.⁵¹ As Holmes lay recovering from his third wound, he read Spencer's *Social Statics*.⁵² In Spencer, Holmes saw a great revolution in thought, once claiming that he doubted that "any writer of English except Darwin has done so much to affect our whole way of thinking about the universe."⁵³

It is important to recognize, however, that Spencer's theory is distinct from Darwin's.⁵⁴ Spencer was most concerned with social change, and it was this concern that would lead to his theory eventually being given the name "Social Darwinism."⁵⁵ However, one ought not to be confused by the term. There were many fundamental differences between Darwin and Spencer.⁵⁶ Most notable, perhaps, was that Spencer viewed natural selection as a progressive force, tending toward increasing complexity and moral growth.⁵⁷

Spencer believed that societies evolve progressively according to moral laws of nature.⁵⁸ The two principles that guide moral development he called the "greatest happiness principle" and the "principle of equal freedom."⁵⁹ According to the first principle, an individual's happiness

⁴⁷ See HERBERT SPENCER, *SOCIAL STATICS: THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* (Robert Schalkenbach Foundation 1970) (1851).

⁴⁸ See HOFSTADTER, *supra* note 9, at 36.

⁴⁹ See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 43 (2000).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 45.

⁵³ *Id.* at 49.

⁵⁴ For a brief introduction to Spencer's life and thought, see RICHARDS, *supra* note 28, at 243-313.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at 255.

⁵⁸ *Id.* at 258.

⁵⁹ *Id.*

consists in the free exercise of all the individual's faculties, and therefore the principle dictates that restrictions among faculties are to be minimized and overall freedom of expression is to be maximized.⁶⁰ Note that Spencer views happiness in Aristotelian terms. The second principle holds that a society's happiness is dependent upon the proportionate functioning of all its constitutive parts.⁶¹ This second principle demands that no one part of a society gains the control over the rest.⁶² For Spencer, a person "must have liberty to do all that his faculties naturally impel him to do."⁶³ Since God wills human happiness, all persons have a natural right to liberty, and since this right applies to all, it can only be limited by others exercising their freedom.⁶⁴ The only legitimate function of the state, for Spencer, is the protection of the equal property and contract rights of all.⁶⁵ If the state attempts to do more, "it necessarily infringe[s] on the rights of some in order to give unfair advantage to others."⁶⁶

Against this view, Darwin argued that evolutionary change serves no transcendent moral purpose.⁶⁷ Its goal or end is not the metaphysical good or right.⁶⁸ It is simply survival of the species through adaptive advantage.⁶⁹ Darwin viewed natural selection as merely a force tending to bring about greater adaptation of a species to its environment.⁷⁰ He was even reluctant to call his theory of descent with modification a theory of "evolution" because he feared that the progressive implications of the term would be misleading.⁷¹ In the end, however, he reluctantly adopted the term, in part because Spencer had already popularized it.⁷²

Darwin's theory has grown in respect over the years as Spencer's has declined,⁷³ but many people still confuse the two theories, usually with

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ SPENCER, *supra* note 47, at 69.

⁶⁴ *Id.* at 102.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See STEPHEN JAY GOULD, EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY 24-25 (1977).

⁶⁸ *See id.*

⁶⁹ *Id.* at 45.

⁷⁰ *Id.*

⁷¹ *Id.* at 36.

⁷² *Id.*

⁷³ See RICHARDS, *supra* note 28, at 243.

heinous consequences.⁷⁴ On the confusion between Spencer and Darwin, Stephen Jay Gould writes:

This discredited theory ranked human groups and cultures according to their assumed level of evolutionary attainment, with (not surprisingly) white Europeans at the top and people dwelling in their conquered colonies at the bottom. Today, it remains a primary component of our global arrogance, our belief in dominion over, rather than fellowship with, more than a million other species that inhabit our planet. The moving finger has written, of course, and nothing can be done; yet I am rather sorry that scientists contributed to a fundamental misunderstanding by selecting a vernacular word meaning progress as a name for Darwin's less euphonious but more accurate "descent with modification."⁷⁵

Due in no small part to this confusion, Darwin's theory, when it was published in 1859, gave great credence to Spencer's. Together the two theories seemed to reinforce each other, creating an intellectual climate that saw great promise in theories of unencumbered progressive evolution.⁷⁶

⁷⁴ For a discussion of some abuses of Social Darwinism, see generally STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1996).

⁷⁵ GOULD, *supra* note 67, at 37-38.

⁷⁶ See HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S* 87 (1950).

At this juncture, the evolutionary philosophies of Darwin and Spencer saved the day. They answered, almost miraculously, the needs of their generation. Although at first they seemed to threaten the very foundations of traditional belief, a more mature appreciation of their meaning—[John] Fiske's, for example—discovered that the substitution of evolution for the Scriptures or for Reason derogated neither from the sovereignty of the Supreme Lawgiver nor from the majesty of the laws. The doctrines of evolution certified a universe governed by Law and the progressive destiny of Man, not on the basis of fallible Reason nor on mere intuition but by the irreproachable findings of science. . . . Morality itself was furnished, for the first time, with a scientific foundation. Reason and intuition had wrestled vainly with the problem of evil in a universe logically or ideally good; evolution made the problem irrelevant, for evil, which was now seen to be but a maladjustment to nature, was destined inevitably to disappear in that larger harmony which was good.

Id.

William Graham Sumner, who in 1872 was given a post as a professor of Political and Social Science at Yale University, was one early proponent of Social Darwinism.⁷⁷ He used this teaching position as a vehicle for promoting his synthesis of Spencerian and Darwinian evolutionary thought.⁷⁸ For Sumner, unrestricted competition was central to continued development of a free society.⁷⁹ In an 1879 lecture, he criticized those who were fearful of his vision:

Many of them are frightened at liberty, especially under the form of competition, which they elevate into a bugbear. They think it bears harshly on the weak. They do not perceive that here “the strong” and “the weak” are terms which admit of no definition unless they are made equivalent to the industrious and the idle, the frugal and the extravagant. They do not perceive, furthermore, that if we do not like the survival of the fittest, we have only one possible alternative, and that is the survival of the unfittest. The former is the law of civilization; the latter is the law of anti-civilization.⁸⁰

For Sumner and many like him, civilization is, at its base, a battle for survival.⁸¹ What matters to civilization is not the individual, not the

⁷⁷ HOFSTADTER, *supra* note 9, at 39.

⁷⁸ *See id.* at 39-40.

⁷⁹ *Id.* at 43.

⁸⁰ *Id.* (quoting 2 ESSAYS OF WILLIAM GRAHAM SUMNER 56 (Albert Galloway Keller & Maurice R. Davie eds., 1934)).

⁸¹ *See* COMMAGER, *supra* note 76, at 88. Commager described the influence of the theory as follows:

For evolution, operating remorselessly through cosmic laws, promised ultimate perfection, to be sure, it was a perfection to which man made and could make no independent contribution. Though it seemed at first glance far from exacting in its demands, it imposed in the end a price higher than that required even by Calvinism—the logical abandonment of free will. For having pushed God back to a first cause and denied Him the privilege, so carefully safeguarded by the Calvinists, of being arbitrary, it proceeded to remove man from the controls, to reduce him to a passive element in nature rather than an active agent in working out his own salvation. By subjecting the destinies of man to the inexorable operations of natural selection, it vetoed man’s interposition and nullified his own efforts. Progress was sure, but the price was submission and conformity.

Id.

coercion or oppression of persons, but the unknowable intentions of a heartless nature that guides the species to an inexorable end.⁸²

With advocates like Sumner, social evolutionary theory became a powerful cultural force. In economics, it justified the rise of John D. Rockefeller, who monopolized the nation's oil industry.⁸³ In foreign policy, it legitimated a policy of might makes right.⁸⁴ In law, it justified the mechanical application of abstract legal principles, blind to their social effect.⁸⁵ G. Edward White suggests, "Judges began their decisions by making verbal distinctions, defining concepts in useful ways. They then pronounced their definitions as axiomatic."⁸⁶ In seeking to protect the "liberty" to compete in the social battle for the "survival of the fittest," the law became increasingly concerned with maintaining and defending property and contract rights.⁸⁷

Spencer's theory of gradual social progress thus became the context for theories of social control and development.⁸⁸ Laissez-faire economists and assorted "men of affairs" who objected to any form of governmental intervention found in Spencer's writings a philosophy (or pseudo-philosophy) that justified their position.⁸⁹ Neil Duxbury suggests, "Swayed by evolutionary economics, late nineteenth-century American public figures and policy-makers were on the whole convinced that the economy was fated to rise and fall at regular intervals in accordance with the natural laws of the market."⁹⁰

B. *Social Darwinism and the Law*

In the nineteenth century, a distinctively American form of legal thought developed known as Classical Legal Theory⁹¹ or Legal Formalism.⁹² The rise of this form of legal theory was associated with the professionalization of the practice of law and the origins of American legal

⁸² See *id.*

⁸³ See LOUIS W. KOENIG, *BRYAN: A POLITICAL BIOGRAPHY OF WILLIAM JENNINGS BRYAN* 606-07 (1971).

⁸⁴ *Id.*

⁸⁵ G. EDWARD WHITE, *From Sociological Jurisprudence to Realism; Jurisprudence and Social Change in Early Twentieth Century America*, in *PATTERNS OF AMERICAN LEGAL THOUGHT* 99, 105 (1978).

⁸⁶ *Id.* at 101.

⁸⁷ *Id.* at 100-07.

⁸⁸ See WHITE, *supra* note 9, at 246.

⁸⁹ See *id.* at 37-38; DUXBURY, *supra* note 12, at 28-29.

⁹⁰ DUXBURY, *supra* note 12, at 29.

⁹¹ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 3-6 (1992).

⁹² See DUXBURY, *supra* note 12, at 10-11.

education.⁹³ It was also part of the larger trend to elevate social thought in the United States by making it more similar to the natural sciences.⁹⁴ The goal of Formalism during this period was to make law a science, and lawyers and judges professional experts with “a scientific knowledge” of their subject.⁹⁵ Law was viewed as “scientific” inasmuch as it was regulated by formal principles that were rulemaking and regular in character. To make law a science required that the irregularities that arise through the political processes be limited to the greatest extent possible.

According to Morton J. Horwitz, the desire to make law a science resulted in part from a debate concerning the nature of the relationship between law and politics.⁹⁶ At issue in this debate was the proper role for the courts in restraining the democratic legislatures of the states from the threat of “tyranny of the majority.”⁹⁷ Horwitz explains that at the center of this debate was a concern about the dangers of faction, which Madison had described in *The Federalist*.⁹⁸ Madison stated that “the most common and durable source of factions had been the various and unequal distribution of property.”⁹⁹ Madison recognized that in a democracy, a strong tendency would exist to achieve equality through coercive measures unjustly imposed by the majority on the wealthy minority.¹⁰⁰ The advocates of codification saw the promulgation of legal codes, as distinct from common law judges, as providing clear and certain legal principles that were separated from the political processes, thus acting as a buffer between the individual property owner and the political majority.¹⁰¹ This process began in the years following the Revolutionary War¹⁰² and culminated with the founding of professional schools for lawyers in the mid-nineteenth century.¹⁰³

In education, Formalism’s clearest promoter and defender was Christopher Columbus Langdell, the first dean of Harvard Law School.¹⁰⁴ He had been a New York lawyer prior to his appointment to the newly

⁹³ *Id.* at 24-25.

⁹⁴ *See generally* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

⁹⁵ *Cf.* JOSEPH H. BEAL, I A TREATISE ON THE CONFLICT OF LAWS (2d ed. 1935).

⁹⁶ *See* HORWITZ, *supra* note 91, at 9.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ DUXBURY, *supra* note 12, at 12-13.

¹⁰⁴ *Id.* at 13.

created post,¹⁰⁵ and his experience as a practitioner shaped his view of the law, giving him a deep respect for stare decisis.¹⁰⁶ His experience also led him to realize that most lawyers relied on only a limited number of cases.¹⁰⁷ He surmised that if only a few cases were needed to grasp the relevant legal principles, then the number of fundamental principles must be limited.¹⁰⁸ As he saw it, the task of the lawyer and judge is to discern these few fundamental legal principles in the reported cases, determine their relation, and apply them to the actual cases before them.¹⁰⁹ He developed the case study method to inculcate in the novice law student the skills of inductive reasoning and respect for stare decisis that would serve him in the profession.¹¹⁰ Langdell's conception of law and legal education was remarkably successful. By 1900, Legal Formalism was taught by the case method nearly uniformly in all the law schools in the United States.¹¹¹

For jurists, however, Formalism took on a more explicitly Spenserian caste.¹¹² This was nowhere more obvious than in the doctrine of freedom of contract developed by the Supreme Court over an extended period. As early as 1897, in *Allgeyer v. Louisiana*,¹¹³ the Court defined the term "liberty" for the purposes of the Fourteenth Amendment:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹¹⁴

¹⁰⁵ *Id.* at 15.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See James Brook, *A Comment on Style: The Elevator as Metaphor*, 30 N.Y.L. SCH. L. REV. 548-49, 555 (1985) (commenting on remarks given by Professor Chase at New York Law School's Symposium on Legal Education). New York Law School was one small refuge that preferred commentaries over casebooks. *Id.* at 555-56 n.32.

¹¹² See DUXBURY, *supra* note 12, at 28; WHITE, *supra* note 9, at 37-38.

¹¹³ 165 U.S. 578 (1897).

¹¹⁴ *Id.* at 589.

This conceptualization of liberty is consonant with Madison's concerns about the power of faction. It views liberty as being furthered in society by protecting contract as a private law sphere that could act as a buffer between the individual and the political majority.¹¹⁵ It also is Spencerian in as much as it effectively excluded government from regulating the private sphere so created.¹¹⁶ One historian observes that "[b]y drawing a sharp distinction between public and private, and by opposing state regulation of private economic relations, the courts were effectively saying that the market governed itself."¹¹⁷ In seeking to protect the "liberty" to compete in the social battle for the "survival of the fittest," the law became increasingly concerned with maintaining and defending property and contract rights.¹¹⁸ This was the legal component of the laissez-faire economics that Veblen and others advanced.¹¹⁹

This laissez-faire approach to contract reached its zenith in the case of *Lochner v. New York*,¹²⁰ in which the Supreme Court declared that a New York statute limiting the number of hours that a baker may work in a week to sixty was unconstitutional because it interfered with the bakers' freedom to contract for labor on whatever terms they deemed fit.¹²¹ *Lochner* again revealed the Social Darwinist theory of limited government by asserting that government, especially in exercising its police powers, must be limited in its legitimate exercise of power to protecting those individual rights that enhance the "total" public good.¹²² Such rights were conceived of as an amalgam of the aggregate welfare of individuals and furtherance of conventional morality.¹²³ The Court again conceived of liberty in terms of the private rights of contract.¹²⁴ Statutes that sought to redistribute economic and political arrangements were perceived by the Court to be unprincipled and depended upon partisan judicial activism.¹²⁵

The *Lochner* Court sought to satisfy both of Spencer's principles of moral progress. The "greatest happiness" principle is furthered by

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ DUXBURY, *supra* note 12, at 30.

¹¹⁸ *See id.*

¹¹⁹ *Id.* at 10-11.

¹²⁰ 198 U.S. 45 (1905).

¹²¹ *See id.* at 64. For a discussion of the historical significance of the case, see generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

¹²² *See* LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-4, at 438-39 (1978).

¹²³ *See id.* § 8-4, at 439 n.6.

¹²⁴ *Lochner*, 198 U.S. at 53.

¹²⁵ *See id.* at 55-56, 63-64.

attempting to maximize the expression of societal difference,¹²⁶ and the “principle of equal freedom” is furthered by limiting government’s ability to limit or ameliorate the consequences of societal differences.¹²⁷ In the context of the *Lochner* case, the greatest happiness principle demands that the Court protect the rights of the bakers to freely enter into contracts with their employers because bakers are of full legal capacity and, in the words of the Court, are “in no sense wards of the State.”¹²⁸ Thus, the greatest happiness, in the sense of maximizing the expression of individual capabilities, was furthered by the Court’s approach. The Court also furthered the principle of equal freedom by putting sharp limits on the government’s ability to act for the benefit of those who could not protect themselves in the marketplace.¹²⁹ Attempting to assist those who were disadvantaged in the marketplace was seen as a partisan subsidy.¹³⁰

II. RELIGIOUS RESPONSES TO SOCIAL DARWINISM

A. *Fundamentalist Reaction to Evolutionary Theory Before the First World War*

Initially, fundamentalists did not oppose evolutionary theory.¹³¹ There was already present among many American Protestants a belief that religion needs to find the means to accept modern science.¹³² George Marsden argues that when Darwinism was brought to the Americas, it was secular science that became hostile to religion, as evidenced by the vigorous promotion by scientists of the metaphor of a war between science and religious doctrine in books such as Andrew Dixon White’s two-volume, *A History of the Warfare of Science with Theology in Christendom*,¹³³ published in 1896.¹³⁴

Among religious communities in America, the reaction to the growing influence of Social Darwinism was divided.¹³⁵ Liberal Protestants tended to believe that it was necessary for Christianity to re-formulate theology to

¹²⁶ SPENCER, *supra* note 47, at 6-7.

¹²⁷ *Id.* at 175-76, 184-85.

¹²⁸ *Id.* at 57.

¹²⁹ *See id.* at 59-60.

¹³⁰ *See id.*

¹³¹ *See generally* MARTY, *supra* note 6.

¹³² *See* GEORGE M. MARSDEN, UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM 139-41 (1991).

¹³³ ANDREW D. WHITE, A HISTORY OF THE WARFARE OF SCIENCE WITH THEOLOGY IN CHRISTENDOM (George Braziller 1955) (1896).

¹³⁴ MARSDEN, *supra* note 132, at 139-41.

¹³⁵ *See* MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 373 (1992).

bring it into accord with the norms defining modern culture.¹³⁶ At the University of Chicago, Shailer Mathews was one of the more influential liberal religious scholars.¹³⁷ His book, *The Faith of Modernism*,¹³⁸ was heralded as “the most widely distributed statement of this new reading of Christian faith.”¹³⁹ Mathews believed that evolutionary theory was a part of the modern views to which Christian beliefs must be conformed.¹⁴⁰ On the other hand, more conservative Protestants, including the fundamentalists, worked to find a basis for maintaining the Christian tradition in the face of modernity.¹⁴¹ The result was frustration. Liberals saw the fundamentalists’ efforts as futile and their message as ineffectual.¹⁴² Mathews captured the frustration that liberals felt towards fundamentalists when he wrote:

The world needs new control of nature and society and is told that the Bible is verbally inerrant. . . . It needs a means of composing class strife, and is told to believe in the substitutionary atonement. . . . It needs faith in the divine presence in human affairs and is told it must accept the virgin birth of Jesus Christ.¹⁴³

For Mathews and other liberal theologians like him, the need for control and social order were the most pressing needs of the age, and he saw no resources within the traditional Christian worldview for obtaining what society needed most.¹⁴⁴

Conservative fundamentalists, including J. Gresham Machen who opposed Mathews, were equally frustrated with the liberal re-interpretation of Christianity, finding it to be so far removed from tradition that it could scarcely be called Christian at all.¹⁴⁵ Even among those who called themselves fundamentalists, however, there was initially much more acceptance of the theory of evolution than commonly imagined. Two important texts bear this out. The *Scofield Reference Bible*, the most important fundamentalist interpretation and commentary,¹⁴⁶ allowed in the

¹³⁶ See *id.* at 373-76.

¹³⁷ *Id.* at 375.

¹³⁸ SHAILER MATHEWS, *THE FAITH OF MODERNISM* (J.J. Little Ives & Co. 1925) (1924).

¹³⁹ NOLL, *supra* note 135, at 375.

¹⁴⁰ See *id.* at 375-76.

¹⁴¹ *Id.* at 383.

¹⁴² See *id.* at 375.

¹⁴³ *Id.* at 375-76 (quoting MATHEWS, *supra* note 138, at 10).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 376.

¹⁴⁶ *Id.* at 378.

margin commentary that the account of Genesis “refers to the dateless past, and gives scope for all the geologic ages.”¹⁴⁷ Also, *The Fundamentals*, an evangelical journal that existed from 1909 to 1915, published articles favoring some sort of theistically controlled evolution.¹⁴⁸ One article, entitled *Science and Christian Faith*, dealt explicitly with the theory of evolution.¹⁴⁹ It states:

Here [in the scriptures] certainly is no detailed description of the process of the formation of the earth in terms anticipative of modern science—terms which would have been unintelligible to the original readers—but a sublime picture, true to the order of nature, as it is to the broad facts even in geological succession.¹⁵⁰

These early assessments by fundamentalists did not oppose evolutionary theories, but saw them as offering a view of nature generally compatible with the Christian ontology.¹⁵¹

There was, indeed, a long tradition within Christianity of interpreting the creation story “figuratively.” Augustine of Hippo, one of the early fathers of the Church, had a clearly established practice of “figurative” reading.¹⁵² For example, in his *The Literal Meaning of Genesis*, he writes:

In all the sacred books, we should consider the eternal truths that are taught, the facts that are narrated, the future events that are predicted, and the precepts or counsels that are given. In the case of a narrative of events, the question arises as to whether everything must be taken according to the figurative sense only, or whether it must be expounded and defended also as a faithful record of what happened. No Christian will dare say that the narrative must not be taken in a figurative sense. For St. Paul says: *Now all these thing that happened to them were symbolic.* And he explains the statement in Genesis, *And they shall be two in*

¹⁴⁷ THE SCOFIELD REFERENCE BIBLE: THE HOLY BIBLE CONTAINING THE OLD AND NEW TESTAMENTS 3 n.2 (Rev. C.I. Scofield ed., 1917).

¹⁴⁸ See, e.g., George Fredrick Wright, *The Passing of Evolution, in THE FUNDAMENTALS: THE FAMOUS SOURCEBOOK OF FOUNDATIONAL BIBLICAL TRUTHS* 613, 613, 616-17 (R.A. Torrey et al. eds., 1990).

¹⁴⁹ See James Orr, *Science and Christian Faith, in THE FUNDAMENTALS: THE FAMOUS SOURCEBOOK OF FOUNDATIONAL BIBLICAL TRUTHS*, *supra* note 148, at 125-27.

¹⁵⁰ *Id.* at 133.

¹⁵¹ Wright, *supra* note 148, at 613.

¹⁵² ST. AUGUSTINE, *THE LITERAL MEANING OF GENESIS 1-2* (John Hammond Taylor trans., 1982).

one flesh, as a great mystery in reference to Christ and to the Church.¹⁵³

Augustine actually is not original in this figurative reading of Scripture. The recognition that at least some passages of scripture cannot be understood literally extends even to Paul's famous exegesis of the story of Abraham, Sarah, and Hagar.¹⁵⁴ Since the early response of the fundamentalists seems to have been following roughly along lines that Augustine would have accepted as figurative, one is given to wonder what change occurred that would cause fundamentalists to repudiate evolutionary theory.

B. *Fundamentalist Reaction to Evolutionary Theory After the First World War*

The fundamentalists' initial accommodation of evolutionary theory seemed to dissolve with the devastation of the First World War.¹⁵⁵ Similar to many segments of American society, fundamentalists seem to have taken the war as an indication that something had gone terribly wrong with society.¹⁵⁶ America had gone to war with great hopes for the war as a means to bring world peace.¹⁵⁷ The phrase "war to end all wars" was more than a bit of propaganda dreamed up by militarists to persuade a reluctant nation; it was a war that was met with enthusiasm by most theological liberals of the age, who saw in it the hand of God.¹⁵⁸ The historian of American religion, George Marsden, observes that liberal theologians, such as Shailer Mathews, who believed that God's providence worked in and through the "survival of the fittest," saw the war as a great Christian cause.¹⁵⁹ Mathews captured this view and spirit in his ecstatic exclamation, "For an American to refuse to share in the present war . . . is not Christian."¹⁶⁰ Even the Federal Council of Churches, a liberal Protestant Ecumenical organization¹⁶¹ of which Mathews was President,

¹⁵³ *Id.* at 19 (footnote omitted).

¹⁵⁴ See GALATIANS 4:24. For a discussion of the long history of allegorical or figurative reading of the Christian Scripture, see BIBLICAL INTERPRETATION IN THE EARLY CHURCH 8-23 (Karlfried Froehlich ed. & trans., 1984).

¹⁵⁵ See SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 909 (1972).

¹⁵⁶ See MARSDEN, *supra* note 132, at 59.

¹⁵⁷ AHLSTROM, *supra* note 155, at 881.

¹⁵⁸ See MARSDEN, *supra* note 132, at 52-53. For a discussion of the Protestant understanding of the war and reaction to it, see AHLSTROM, *supra* note 155, at 877-917.

¹⁵⁹ MARSDEN, *supra* note 132, at 51-52.

¹⁶⁰ *Id.* at 52.

¹⁶¹ AHLSTROM, *supra* note 155, at 803.

called the nation to war, declaring “[t]he war for righteousness will be won! Let the Church do her part.”¹⁶²

This religious crusade to make the world safe for progressive liberalism ended badly. Of the nearly 65 million soldiers who fought in the war, over 37 million died, were wounded, or were listed as missing.¹⁶³ This crusade for destiny brought human suffering on a scale that was then unimaginable. The war shook the nation’s confidence in progress, modernization, and technology.¹⁶⁴ Military historian Paul Fussell suggests: “[The war] was a hideous embarrassment to the prevailing Meliorist myth which had dominated the public consciousness for a century. It reversed the Idea of Progress.”¹⁶⁵ He then quotes a letter written by Henry James to a friend:

The plunge of civilization into this abyss of blood and darkness . . . is a thing that so gives away the whole long age during which we have supposed the world to be, with whatever abatement, gradually bettering, that to have to take it all now for what the treacherous years were all the while really making for and *meaning* is too tragic for any words.¹⁶⁶

When the war ended, nearly four million American soldiers returned home¹⁶⁷ to tell their stories. The crusading fervor gave way to a growing bitterness.¹⁶⁸

A few social and political leaders opposed the war and were concerned about the effect that the war and the resulting war debt would have on labor.¹⁶⁹ William Jennings Bryan, the man who prosecuted Scopes, was one of these.¹⁷⁰ Bryan was one of the leading politicians of the era. He was nominated three times as the Democratic candidate for the presidency: in 1896, 1900, and 1908.¹⁷¹ He was a lifelong advocate for the rights of labor,¹⁷² arguing in his famous “cross of gold” speech, an argument against

¹⁶² *Id.* at 884.

¹⁶³ Spartacus Educational, *Casualties: First World War*, at <http://www.spartacus-schoolnet.co.uk/FWWdeaths.htm> (last visited Nov. 4, 2004).

¹⁶⁴ See WHITE, *supra* note 9, at 181.

¹⁶⁵ PAUL FUSSELL, *THE GREAT WAR AND MODERN MEMORY* 8 (1975).

¹⁶⁶ *Id.*

¹⁶⁷ Spartacus Educational, *supra* note 163.

¹⁶⁸ See MARSDEN, *supra* note 132, at 51.

¹⁶⁹ LEVINE, *supra* note 19, at 29-30.

¹⁷⁰ *Id.* at 30.

¹⁷¹ MARSDEN, *supra* note 132, at 91.

¹⁷² WILLARD H. SMITH, *THE SOCIAL AND RELIGIOUS THOUGHT OF WILLIAM JENNINGS BRYAN* 8 (1975).

unlimited silver coinage given at the 1896 Democratic National Convention, “You shall not press down upon the brow of labor this crown of thorns, you shall not crucify mankind upon a cross of gold.”¹⁷³ From 1913 to 1915, he served as Secretary of State to Woodrow Wilson, and he urged a pacifist policy that helped to keep the United States out of the First World War for several years.¹⁷⁴ He resigned from the post when it became clear to him that President Wilson was pushing the country to war enthusiastically.¹⁷⁵

Bryan mixed his religion and politics.¹⁷⁶ His pacifism and support for labor were both part of what he called applied Christianity.¹⁷⁷ By this he meant that he believed that Christianity provided the principles for public policy and an approach to public life.¹⁷⁸ One historian recalls:

On one occasion Bryan was asked why Democrats were so earnest about democracy. He replied that to every Democrat “who knows what democracy means—it is a religion, and when you hear a good democratic speech it is so much like a sermon that you can hardly tell the difference between them.” This was true, Bryan continued, because a good sermon is built upon the ten commandments, the sermon on the mount, and the eleventh commandment: “Thou shalt love thy neighbor as thyself.” “And a good democratic speech is built upon the doctrine of human brotherhood, equal rights, and self government.” Though admitting that democracy at times did not go as far as he would have liked, he optimistically concluded that when “you get down to bed rock you find that love of mankind is the basis of both, and democracy

¹⁷³ KOENIG, *supra* note 83, at 197.

¹⁷⁴ SMITH, *supra* note 172, at 9, 24.

¹⁷⁵ *Id.* at 4. At a luncheon at the University Club of Washington, D.C., following his last Cabinet Meeting, Bryan explained to his staff:

I have had to take the course I have chosen. . . . I cannot go along with him [Wilson] in this [diplomatic] note. I think it makes for war. I believe that I can do more on the outside to prevent war than I can do on the inside. I can work to control popular opinion so that it will not exert pressure for extreme action which the President does not want. We both want the same thing, Peace.

Id. (footnote omitted).

¹⁷⁶ *Id.* at 18.

¹⁷⁷ *Id.* at 21.

¹⁷⁸ See LEVINE, *supra* note 19, at 358-59.

can never die while there is in democracy a love of mankind.”¹⁷⁹

His Christian faith was the source of liberalism in social policies, particularly in his support for labor, and an ardent conservatism in theology.¹⁸⁰ He viewed faith in Christ as demanding both.¹⁸¹ Shortly before his death, he told a reporter, “People often ask me why I can be a progressive in politics and fundamentalist in religion. The answer is easy. Government is man made and therefore imperfect If Christ is the final word, how may any one be progressive in religion?”¹⁸² This duality in his thought has led to a bifurcated view of his life—seeing him as a liberal radical in his youth and a reactionary conservative in his old age.¹⁸³ But, this is a distortion, as Lawrence W. Levine has shown in his biographical work on Bryan’s last years.¹⁸⁴ He explains, “In William Jennings Bryan, reform and reaction lived happily, if somewhat incongruously, side by side. The Bryan of the 1920’s was essentially the Bryan of the 1890’s: older in years but no less vigorous, no less optimistic, no less certain.”¹⁸⁵

Levine argues that Bryan viewed the brutality and devastation of the war as an outcome of the evolutionary theory that was so influential in America.¹⁸⁶ But, he failed to make a clear distinction between Darwin’s theory and Spencer’s Social Darwinism.¹⁸⁷ Bryan saw its influence as nothing short of demonic, writing in one impassioned speech: “The same science that manufactured poisonous gases to suffocate soldiers is preaching that man has a brute ancestry and eliminating the miraculous and the supernatural from the Bible.”¹⁸⁸ He argued that the cruelty implied by “survival of the fittest” subverted the moral teachings of Christianity.¹⁸⁹ For Bryan, evolutionary theory was the cause of German aggression.¹⁹⁰ Three books appear to have confirmed Bryan’s assertion. One was Vernon L. Kellogg’s *Headquarters Night*,¹⁹¹ which gave first-hand accounts of conversations with German officers, purportedly revealing that the Darwinian theory of natural selection had played a role in Germany’s

¹⁷⁹ SMITH, *supra* note 172, at 19.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *Id.* at 18.

¹⁸³ *Id.* at 11.

¹⁸⁴ *See* LEVINE, *supra* note 19, at 358-65.

¹⁸⁵ *Id.* at vii.

¹⁸⁶ *Id.* at 262-63.

¹⁸⁷ *See generally id.*

¹⁸⁸ RONALD L. NUMBERS, *THE CREATIONISTS* 41 (1992).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 41-42.

¹⁹¹ VERNON KELLOGG, *HEADQUARTERS NIGHTS* (1917).

decision to declare war.¹⁹² Another book was Benjamin Kidd's *The Science of Power*,¹⁹³ which attempted to link Darwinian theories to German militants.¹⁹⁴ The third was James H. Leuba's *The Belief in God and Immortality*,¹⁹⁵ which offered statistical evidence that belief in God was less likely among the college educated.¹⁹⁶ Bryan saw in these books evidence that the German acceptance of Darwinism had not only led to the war, but also led to its merciless destructive force.¹⁹⁷

Bryan, with his national recognition and gift for oratory, became the leader of the fundamentalist fight against Darwinism and was joined by J. Gresham Machen and Curtis Lee Laws.¹⁹⁸ Machen had taught at Princeton Seminary before establishing Westminster Theological Seminary in a suburb of Philadelphia,¹⁹⁹ and Laws had coined the term "fundamentalist" in 1910 "as a designation for those who were ready 'to do battle royal for the Fundamentals.'"²⁰⁰ They gathered together to fight the influence of Darwinism in American society.²⁰¹ In the wake of the war, Bryan began a campaign to eliminate Darwinism in all its forms.

As one of the greatest orators of his time, Bryan turned to the lecture circuit to mount his attack.²⁰² His most popular lecture was "The Menace of Darwinism," in which he summed up his belief that Darwinism was a series of "guesses strung together."²⁰³

The evolutionist guesses that there was a time when eyes were unknown—that is a necessary part of the hypothesis. . . . A piece of pigment, or, as some say, a freckle appeared upon the skin of an animal that had no eyes. This piece of pigment or freckle converged the rays of the sun upon that spot and when the little animal felt the heat on that spot it turned the spot to the sun to get more heat. The increased heat irritated the skin—so the evolutionists guess, and a nerve came there and out of the nerve came the eye!²⁰⁴

¹⁹² *Id.*

¹⁹³ BENJAMIN KIDD, *THE SCIENCE OF POWER* (1918).

¹⁹⁴ *Id.* at 42.

¹⁹⁵ JAMES H. LEUBA, *THE BELIEF IN GOD AND IMMORTALITY* (1916).

¹⁹⁶ *Id.*

¹⁹⁷ SMITH, *supra* note 172, at 191.

¹⁹⁸ NOLL, *supra* note 135, at 383.

¹⁹⁹ *Id.* at 376.

²⁰⁰ *Id.* at 382-83.

²⁰¹ *Id.*

²⁰² NUMBERS, *supra* note 188, at 42.

²⁰³ *Id.*

²⁰⁴ *Id.* at 42-43.

Bryan was probably aware that the evolution of the eye was a matter of some concern for Darwin, who realized that he could not offer an account for it.²⁰⁵ In the *Origin of Species*, Darwin noted that although the idea that the eye could have evolved through natural selection seems improbable, “logical consistency impelled [him] to extend ‘the principle of natural selection to such startling lengths.’”²⁰⁶

Although Bryan’s attack was directed against Darwin, it does not appear that he objected to the distinctively Darwinian elements to evolutionary theory. Rather, it was the stance that social evolutionary theories took toward divine action. Obviously, both Darwin’s theory and Spencer’s Social Darwinism, which the *Lochner* Court had adopted, pose alternative accounts to human origins from the cosmology set out by a literal interpretation of Genesis. But, it was the policies that Social Darwinism justified to which Bryan was especially opposed. He claimed that the “survival of the fittest” mentality gave rise to the ideology he associated with German aggression, and that was what led him to oppose the teaching of evolution in the schools.²⁰⁷

III. THE SCOPES TRIAL

A. *The Anti-Evolution Acts*

1. *Religious Liberty in the 1920s*

To understand Bryan’s strategy in forming his response to Social Darwinism, it is helpful to recall that in the 1920s, there was no clear constitutional bar to requiring the teaching of the Bible in public schools. During the first half of the twentieth century, the constitutional doctrine of government neutrality towards religion was in its infancy. The First Amendment to the United States Constitution, the bulwark of American commitment to religious liberty, had not been applied yet to cases involving citizen suits against a state. Religious liberty was a matter for the states, and not federal intervention.

Religious rights of individuals living in states were viewed as beyond the jurisdiction of the federal courts. For example, in *Permoli v. City of New Orleans*,²⁰⁸ the Supreme Court held that the federal courts lacked jurisdiction to hear the appeal of a priest who had been fined for conducting a requiem mass at an unlicensed chapel.²⁰⁹ And in *Barron v. Mayor and City Council of Baltimore*,²¹⁰ the Court held that the Bill of

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 43.

²⁰⁷ *See id.* at 41.

²⁰⁸ 44 U.S. (3 How.) 589 (1845).

²⁰⁹ *See id.* at 590-91, 610.

²¹⁰ 32 U.S. (7 Pet.) 243 (1833).

Rights was not to be applied to the states, but merely represented rights of the people against the federal government.²¹¹ It was not until 1940 in *Cantwell v. Connecticut*²¹² that the Supreme Court incorporated the First Amendment against the states, holding that the Free Exercise Clause of the First Amendment was applicable to the states through the Fourteenth Amendment.²¹³ The Court found that “[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws [limiting the free exercise of religion].”²¹⁴ Seven years later in *Everson v. Board of Education*,²¹⁵ the Court incorporated the establishment clause against states, holding that “[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.”²¹⁶

In the 1920s, issues of religious liberty were therefore still matters of concern to the states and usually handled in state courts. And only a very few cases were brought in state courts challenging the establishment of religion under state constitutions.²¹⁷ Indeed, religious establishments had been maintained in several states well into the nineteenth century.²¹⁸ Disestablishment came to Vermont in 1807, Connecticut in 1818, New Hampshire in 1819, and Massachusetts in 1833.²¹⁹ So, when Bryan and his followers organized politically, attempting to bring together those who resisted modernization at the local level, they saw no clear constitutional bar to seeking a legislative redress to the threat they perceived.

2. *The Anti-Evolution Acts*

The Tennessee anti-evolution act was one of several such acts to be passed in the early part of this century.²²⁰ Over twenty state legislatures debated similar acts, but only three states, Tennessee, Arkansas, and Mississippi, passed anti-evolution acts.²²¹ Oklahoma passed an act prohibiting the use of textbooks that taught evolution, and Florida passed a resolution condemning the teaching of evolution as an immoral act, but not

²¹¹ See *id.* at 250-51.

²¹² 310 U.S. 296 (1940).

²¹³ *Id.* at 303.

²¹⁴ *Id.*

²¹⁵ 330 U.S. 1 (1947).

²¹⁶ *Id.* at 16.

²¹⁷ See ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 20 (1990).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ NUMBERS, *supra* note 188, at 41.

²²¹ *Id.*

proscribing it.²²² Even the United States Senate debated an act that would have prohibited evolutionary theory from being discussed on the radio, but the bill was defeated.²²³

Tennessee State Senator John A. Shelton introduced an anti-evolution bill to the Tennessee legislature on January 20, 1925.²²⁴ Shelton's act banned the teaching of evolution in public schools, but did not stipulate the penalty for the offense.²²⁵ Shelton sent a note to Bryan, who thanked him, but suggested that the act carry no stipulated penalty.²²⁶ On the following day, however, John Washington Butler submitted the revised act, which stipulated a penalty of not less than \$100 nor more than \$500.²²⁷ The bill was not met with uniform approval, and its opponents tried to amend it to make it ludicrous.²²⁸ One proposal added a prohibition on teaching that the earth is round.²²⁹ The amendment was defeated and the Butler Act passed easily.²³⁰ Governor Austin Peay signed the bill into law, claiming that although he thought it a necessary statement, he doubted that it would ever be enforced.²³¹

Governor Peay was wrong. The American Civil Liberties Union placed an advertisement in the *Daily Times* of Chattanooga, promising to pay the costs of defending anyone willing to challenge the Butler Act.²³² Walter White, the superintendent of the Rhea County schools and president of the local business association in Dalton, noticed the posting and considered the prospects of a test case in Dayton. Superintendent White called an informal meeting of the school board at the local drugstore that he operated. The board decided to look for a likely candidate to test the Butler Act, and Scopes' name was mentioned. Scopes happened to come into the drugstore while they were meeting, and White asked him if he would stand as defendant in a test case.

²²² *Id.*

²²³ *Id.*

²²⁴ LARSON, *supra* note 5, at 49.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 50.

²²⁸ CAUDILL ET AL., *supra* note 1, at 4.

²²⁹ *Id.*

²³⁰ LARSON, *supra* note 5, at 50-51.

²³¹ CONKIN, *supra* note 5, at 81-83.

²³² For a discussion of the events leading up to the Scopes trial, see generally LARSON, *supra* note 5, at 50-51, 83, 88-90, and CONKIN, *supra* note 5, at 81-83.

B. *The Trial*

John T. Scopes was twenty-four years old, a recent graduate of the University of Kentucky, and a native of Illinois.²³³ He had been hired by the Rhea County School Board to teach physics and math and to coach football at the Dayton Public High School.²³⁴ Late in 1924, the regular biology teacher, W. F. Ferguson, took ill, and Scopes was asked to teach his class for about two weeks.²³⁵ He taught from the biology textbook supplied by the state, *Civil Biology* by George W. Hunter.²³⁶ The book contained passages stating that the human species stands at the apex of an evolutionary series that begins with a single-celled form of life and proceeds through “ape-like mammals.”²³⁷ Scopes had not actually taught the section of the course that dealt with evolution.²³⁸ He had merely graded the exams of the students that had tested the students on that topic.²³⁹ Nonetheless, Scopes agreed to stand as defendant, but expressed his doubts that he could be found to have violated the act since he did not actually teach evolution in the classroom.²⁴⁰ A dispatch was sent to the *Daily Times*, and Scopes was arrested.²⁴¹ The indictment charged that he “[taught] in the public schools of Rhea county [Tennessee] 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.”²⁴² The American Civil Liberties Union sent Clarence Darrow, a well-known attorney and agnostic, to represent Scopes.²⁴³ The state asked Bryan to prosecute Scopes.²⁴⁴

The legal issues presented at trial were trivial. Scopes was charged with violation of a state law that was seen by the trial court as a legitimate exercise of the state’s police powers. Although initially Darrow challenged the constitutionality of the Butler Act on several theories, the trial court rejected each of his claims, commenting only that Darrow had effectively reserved these arguments for appeal. Thus, at the trial, the only

²³³ CAUDILL ET AL., *supra* note 1, at 5.

²³⁴ *Id.*

²³⁵ CONKIN, *supra* note 5, at 83.

²³⁶ CHARLES MORROW WILSON, *THE COMMONER: WILLIAM JENNINGS BRYAN* 430 (1970).

²³⁷ *Id.*

²³⁸ CONKIN, *supra* note 5, at 83.

²³⁹ *Id.*

²⁴⁰ LARSON, *supra* note 5, at 90.

²⁴¹ *Id.* at 91.

²⁴² *Scopes v. State*, 289 S.W. 363, 363 (Tenn. 1927).

²⁴³ LARSON, *supra* note 5, at 100.

²⁴⁴ *Id.*

issue that the court found to be relevant was the factual question of whether Scopes had indeed violated the Butler Act. Darrow, planning to make a constitutional case on appeal, refrained from attacking the obvious factual inadequacy that Scopes had raised in agreeing to be the defendant—that is, that by merely grading the students' exams, Scopes had not actually taught the offending material. Instead, Darrow argued that what the biology text theorized was more reasonable than the literal interpretation of the creation story of Genesis. He sought a direct confrontation between the reasonableness of evolutionary theory and the fideism of the literal interpretation of the Bible.

To bring this confrontation about, Darrow sought to bring expert witnesses to the stand to testify about evolution and biblical interpretation.²⁴⁵ The trial judge, Judge Raulston, ruled that since the meaning of the Butler Act could be constructed without appeal to special knowledge, Darrow's experts were irrelevant to the sole factual issue on trial: did Scopes violate the act.²⁴⁶ Judge Raulston excluded a long list of expert witnesses whose testimony Darrow sought.²⁴⁷ Darrow then asked Bryan if he would take the stand as an expert on the Bible.²⁴⁸ Bryan, perhaps hoping to grandstand, accepted the unusual request.²⁴⁹ Darrow's examination turned into a humiliating Socratic dialogue that left Bryan broken.²⁵⁰

In his examination of Bryan, Darrow's tactic was to expose Bryan's ignorance and implicate his fundamentalism as its cause.²⁵¹ He began with asking Bryan about Confucianism, Buddhism, and Hinduism.²⁵² Bryan displayed his ignorance of these traditions with great flourish.²⁵³ Then, Darrow began to question Bryan about the historical truth of the Bible.²⁵⁴ The complete transcript of the event spans many dozens of pages, in which Darrow attempted to show that the literal interpretation of Genesis is incoherent.²⁵⁵ Darrow's questioning of Bryan about why the serpent "crawls on its belly" serves as an illustration of his approach.²⁵⁶

²⁴⁵ See CONKIN, *supra* note 5, at 91.

²⁴⁶ *Id.* at 92.

²⁴⁷ *See id.*

²⁴⁸ See CAUDILL ET AL., *supra* note 1, at 16.

²⁴⁹ *Id.*

²⁵⁰ *See id.* at 16-17.

²⁵¹ See KOENIG, *supra* note 83, at 651.

²⁵² *Id.* at 650.

²⁵³ *Id.*

²⁵⁴ *See id.* at 649-51.

²⁵⁵ *See id.*

²⁵⁶ *Id.* at 651.

Darrow: And you believe that is the reason that God made the serpent to go on his belly after he tempted Eve? . . . “And the Lord God said unto the serpent, Because thou has done this, thou art cursed above all cattle, and above every beast of the field; upon thy belly thou shalt go, and dust shalt thou eat all the days of thy life.” Do you think that is why the serpent is compelled to crawl upon his belly?

Bryan: I believe that.

Darrow: Have you any idea how the snake went before that time?

Bryan: No, sir.

Darrow: Do you know whether he walked on his tail or not?

Bryan: No, sir. I have no way to know.²⁵⁷

Journalists present at the trial reported that at this point a great burst of laughter arose in the courtroom.²⁵⁸

Bryan: Your honor, I think I can shorten this testimony. The only purpose Mr. Darrow has is to slur at the Bible. But I will shorten his question. I will answer it all at once, and I have no objection in the world. . . . I want the world to know that this man, who does not believe in God, is trying to use a court in Tennessee—

Darrow: I object to that!

Bryan: To slur at it. . . . and, while it will require time, I am willing to take it!

Darrow: I object to your statement! . . . I am examining you on your fool ideas that no intelligent Christian on earth believes!²⁵⁹

At this point, there was a great commotion in the court.²⁶⁰ One account recalls how Judge Raulston brought his gavel down and shouted, “Court is adjourned until nine o’clock tomorrow morning!”²⁶¹

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

The media quickly chose Darrow as the victor of the exchange, as is reflected in the description by one eye-witness, Paul Y. Anderson, who wrote:

Two old men, one eloquent, magnetic and passionate, the other cold, impassive and philosophical, met as the champions of these ideas and as remorselessly as the jaws of a rock crusher upon the crumbling mass of limestone, one of these old men caught and ground the other between his massive erudition and his ruthless logic. Let there be no doubt about that. Bryan was broken, if ever a man was broken. Darrow never spared him. It was masterly, but it was pitiful.²⁶²

When Bryan died several days later from unspecified causes, the media took his death to be caused by an apoplectic response to the trial.²⁶³ H. L. Mencken wrote, "Upon [Darrow's cruel] hook, in truth, Bryan committed suicide, as a legend as well as in the body. He staggered from the rustic court ready to die, and he staggered from it ready to be forgotten, save as a character in a third-rate farce, witless and in poor taste."²⁶⁴

There is arbitrariness about this. Had Bryan survived, or if it had been Darrow who had died and Bryan who had lived, the trial might be remembered differently. No formal determination was made of the cause of Bryan's death, but it seems unlikely that it was caused by the psychological trauma of the trial.²⁶⁵ Larson reports that in the few days he had remaining in his life, Bryan was undeterred in his anti-evolution stance and, indeed, had renewed his offensive.²⁶⁶ The day following his examination by Darrow, Bryan issued a press statement arguing the following: "The issue is so large that individuals and locations are relatively unimportant Is the Bible true is the question raised by the Tennessee law, and that question is answered in the affirmative as far as this trial can answer it."²⁶⁷ And he turned Darrow's aggressiveness against the cause of evolutionary theory, arguing that it showed the moral decay that evolutionary theory wrought.²⁶⁸ Finally, acknowledging that he had been undermined by the clever Darrow, Bryan argued, "Evolution overestimates the influence of the mind on life and underestimates the

²⁶² L. SPRAGUE DE CAMP, *THE GREAT MONKEY TRIAL* 413 (1968).

²⁶³ *See id.* at 439.

²⁶⁴ H.L. Mencken, *In Memoriam: W.J.B.*, *BALTIMORE EVENING SUN*, July 27, 1925, *reprinted in* *THE VINTAGE MENCKEN* 165 (Alistair Cooke ed., 1955).

²⁶⁵ *See* DE CAMP, *supra* note 262, at 439.

²⁶⁶ *See* LARSON, *supra* note 5, at 197-99.

²⁶⁷ *Id.* at 197-98.

²⁶⁸ *Id.* at 198.

influence of the heart.”²⁶⁹ Darrow also thought that his examination of Bryan was unrelated to Bryan’s death.²⁷⁰ When news of Bryan’s death reached Darrow while he was vacationing in the Smoky Mountains, he reportedly told a reporter that he thought Bryan had “died of a busted belly,” a reference to Bryan’s famed overeating.²⁷¹ If Bryan, an accomplished politician who had suffered many political defeats in his long career, lived to continue this rhetoric, the case might be remembered differently than it is. Nonetheless, by this accident of history, Bryan’s death contributed to the meaning of the trial in the popular imagination.

The Scopes trial came to an end on the day following the examination of Bryan.²⁷² Darrow rested his defense and the case went to the jury.²⁷³ In his closing remarks, Darrow told the jury that he planned to make an appeal to the Tennessee Supreme Court, but could only do so with a conviction.²⁷⁴ He asked the jury to find his client guilty so that the issue could be taken up in the higher forum.²⁷⁵ Scopes was then convicted at the request of his lawyer.²⁷⁶

C. *The Appeal*

Scopes appealed his conviction to the Tennessee Supreme Court.²⁷⁷ The arguments raised by Scopes’ attorneys on appeal challenged a number of aspects of the Butler Act.²⁷⁸ One argument questioned the validity of the Butler Act on the basis of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and a parallel clause in the Tennessee Constitution.²⁷⁹ The court found little merit in the claim.²⁸⁰ Relying on a number of United States Supreme Court decisions, the Tennessee Supreme Court found that Scopes was under contract with the state and “had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to

²⁶⁹ *Id.* at 198.

²⁷⁰ *Id.* at 200.

²⁷¹ *Id.*

²⁷² *Id.* at 190-91.

²⁷³ *Id.* at 191.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 192.

²⁷⁷ *Scopes v. State*, 289 S.W. 363, 363 (Tenn. 1927). Darrow did not participate in the appeal, largely because some “blamed Darrow for the failure of the Scopes defense to stem the tide of fundamentalism.” LARSON, *supra* note 5, at 206.

²⁷⁸ *Scopes*, 289 S.W. at 363.

²⁷⁹ *Id.* at 364.

²⁸⁰ *Id.*

teach and proclaim the theory of evolution, elsewhere than in the service of the state, was in no wise touched by this law.”²⁸¹

Relying on the reasoning of the United States Supreme Court in *Lochner v. New York*, the Tennessee Supreme Court asserted that the principle of Due Process requires courts to do no more than maintain and protect natural rights: the right to own property and freedom of contract.²⁸² In this view, the Due Process Clause exists to ensure that the political branches of government do not interfere with the ownership of property or the freedom to enter contracts on whatever terms one might wish.²⁸³ Such political interference with these natural rights was deemed by the courts to interfere with the workings of the forces of nature, and thus interfering with social progress.²⁸⁴ Political interference with natural rights, then, was the equivalent to interference with the natural evolution of the species—since natural rights were the very instruments of natural selection of social groups—and the principle of Due Process is the constitutional bulwark against tampering with natural selection of social groups.

The Tennessee Supreme Court thus saw the relationship between Scopes and the State as a product of the natural right of freedom of contract.²⁸⁵ Citing one of the *Lochner* prodigies, *Atkin v. Kansas*,²⁸⁶ the court explained:

It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.²⁸⁷

The Tennessee Supreme Court saw the State of Tennessee as merely presenting a condition on the employment of Scopes and other public school teachers—that they refrain from teaching evolution.²⁸⁸ By entering

²⁸¹ *Id.*

²⁸² *Id.* at 367; *Lochner v. New York*, 198 U.S. 45, 53 (1905).

²⁸³ *Lochner*, 198 U.S. at 53.

²⁸⁴ *See id.* at 63-64.

²⁸⁵ *Scopes*, 289 S.W. at 364.

²⁸⁶ 191 U.S. 207 (1903).

²⁸⁷ *Scopes*, 289 S.W. at 365 (quoting *Atkins*, 191 U.S. at 222-23).

²⁸⁸ *Id.*

into such a contract, Scopes and the State had agreed to the terms of public employment, and the value of those terms of employment would be determined by unencumbered competition.²⁸⁹ That is, the State simply set a condition on the employment of Scopes and other public school teachers, and if such a legislative effort should prove disadvantageous, the forces of natural selection will drive it from the field.²⁹⁰ Presumably, this would mean that other legislators would be elected to address and correct the disadvantage.²⁹¹ If the court were to oversee such actions of the legislature, it would mean interfering with the working of natural selection.²⁹²

Another argument advanced by Scopes relied on a portion of the Tennessee Constitution that mandated that the General Assembly “cherish literature and science.”²⁹³ The court likened the duty that this clause imposed on the General Assembly to a private trust.²⁹⁴ It noted that under existing case law, “[i]f a bequest were made to a private trustee with the avails of which he should cherish science, and there was nothing more, such a bequest would be void for uncertainty.”²⁹⁵ By analogy, the court argued that it was powerless to restrain the General Assembly on such a vague requirement.²⁹⁶ Moreover, the court argued that it could not imagine any circumstance under which it would consider whether the state legislature had satisfied the obligation:

If the Legislature thinks that, by reason of popular prejudice, the cause of education and the study of science generally will be promoted by forbidding the teaching of evolution in the schools of the state, we can conceive of no ground to justify the court’s interference. The courts cannot sit in judgment on such acts of the Legislature or its agents and determine whether or not the omission or addition of a particular course of study tends “to cherish science.”²⁹⁷

Next, the court addressed the claim that the Butler Act violated section 3 of article 1 of the Tennessee Constitution, which read in relevant part “that no preference shall ever be given, by law, to any religious

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 367.

²⁹¹ *Id.*

²⁹² *See id.*

²⁹³ *Id.* at 366.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

establishment or mode of worship.”²⁹⁸ The court expressed its belief that this section was drafted into the state constitution in order to prevent any state establishment of religion in Tennessee, but in its analysis of the relationship between evolution and institutionalized religious beliefs, as they were then practiced in Tennessee, the court concluded:

We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship . . . So far as we know, the denial or affirmation of such a theory does not enter into any recognized mode of worship.²⁹⁹

The court refused to consider the intent of the General Assembly, stating emphatically, “[T]he validity of a statute must be determined by its natural and legal effect, rather than proclaimed motives.”³⁰⁰ Thus, the court argued that a statute should be evaluated by its effects rather than by the legislative intent.³⁰¹ The *Scopes* court cited *Lochner* for this proposition, noting that, in *Lochner*, the Supreme Court stated that it was not substituting its judgment for the judgment of the legislature of the State of New York.³⁰² The reason for this is that the courts must be the guardians of rights, and therefore they must be concerned with the effects of legislative enactments on natural rights.

Finally, the court stated the rationale for reversing the conviction of Scopes.³⁰³ The court found that the fine of \$100, which Judge Raulston had imposed, violated section 14, article 6 of the Tennessee Constitution, which required that all fines greater than \$50 be imposed by a jury.³⁰⁴ The court further argued that since Scopes had left his teaching position and was no longer in the service of the state, nothing could “be gained by prolonging the life of this bizarre case.”³⁰⁵ The court went on to state, “We think the peace and dignity of the state, which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a nolle

²⁹⁸ *Id.* (quoting TENN. CONST. art. 1, § 3).

²⁹⁹ *Id.* at 367.

³⁰⁰ *Id.* (citing *Lochner v. New York*, 198 U.S. 45 (1905); *Grainger v. Douglas Park Jockey Club*, 148 F. 513 (1906)).

³⁰¹ *Id.*

³⁰² *See id.*

³⁰³ *See id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

prosequi herein.”³⁰⁶ The prosecution agreed to the court’s request and withdrew the indictment of Scopes, thereby ending the case.³⁰⁷

D. *Subsequent Influence of the Trial*

As a matter of formal legal precedent, the *Scopes* case is of little consequence. The Tennessee Supreme Court reversed the penalty imposed by the trial court, but affirmed the validity of the anti-evolution act, stating that it was a valid and enforceable legislative act within the strictures of both the state and federal constitutions. As a matter of formal legal precedent, the *Scopes* case should stand for the constitutional validity of anti-evolution acts.

When later courts have cited to the *Scopes* case, however, it has not been for its formal holding. Rather it has been cited in the context of furthering arguments against religious establishment. That is, later courts refer to the *Scopes* case as persuasive, not in its formal legal holding, but for the popular memory of Darrow’s examination of Bryan. Of course this sort of testimony is not usually considered relevant to legal precedent or to the authoritative meaning of the case. But, this disjunction between formal legal meaning and informal cultural memory seems lost to the later courts. For example, the *Scopes* case is cited by the United States Supreme Court in its opinion in *Epperson v. Arkansas*,³⁰⁸ which held that an Arkansas statute nearly identical to the Butler Act was an unconstitutional violation of the First Amendment.³⁰⁹ Justice Abe Fortas, writing for the majority in *Epperson*, mentions that the Tennessee Supreme Court upheld the constitutionality of the Butler Act in the *Scopes* case,³¹⁰ but nevertheless cites to Darrow’s autobiography to illustrate the *inconsistency* of the fundamentalist reading of the creation account.³¹¹ What Justice Fortas finds persuasive is Darrow’s recollection that the fundamentalists were not opposed to teaching that the world is round.³¹² And later in the opinion, Justice Fortas suggests that Arkansas drafted its anti-evolution act in a less inflammatory manner in response to the “sensational publicity” that the *Scopes* trial had produced, but he ignores the holding of the Tennessee Supreme Court.³¹³

³⁰⁶ *Id.* A *nolle prosequi* is a formal entry into the record by a prosecutor that a case will not be prosecuted by the state. BLACK’S LAW DICTIONARY 945 (5th ed. 1979).

³⁰⁷ *Scopes*, 289 S.W. at 367.

³⁰⁸ 393 U.S. 97 (1968).

³⁰⁹ *See id.* at 109.

³¹⁰ *Id.* at 98.

³¹¹ *Id.* at 98, 102 n.9.

³¹² *See id.* at 102 n.9.

³¹³ *Id.* at 109.

Similarly, in the 1975 case *Daniel v. Waters*,³¹⁴ a Tennessee statute that banned public school textbooks teaching evolution was overturned by the Sixth Circuit Court of Appeals.³¹⁵ In the course of its analysis, the court cites to the *Scopes* appeal, noting that the trial was a celebrated case, and then asserts that “the purpose of establishing the Biblical version of the creation of man over the Darwinian theory of the evolution of man is as clear in 1973 as it was in the statute of 1925.”³¹⁶ Again, the court ignored the Tennessee Supreme Court’s opinion and refused to look at the legislative purpose in enacting the Butler Act. Nevertheless, the parallel that the court seems to be drawing here is that, just as the Butler Act was motivated by a purpose that it would proscribe, so too with the 1973 act. Clearly, the *Daniel* court is also using the popular memory of the *Scopes* trial rather than looking to the precedent.³¹⁷ Finally, in *Aguillard v. Edwards*,³¹⁸ which involved a Louisiana anti-evolution act, the court cites to the *Scopes* appeal as the “celebrated *Scopes* trial in 1927” that sparked what the court calls “the fundamentalist fires.”³¹⁹

It appears from these cases that two sorts of meanings have become attached to the case: a formal legal meaning defined by the operation of the rules of legal precedent, and a meaning that is reflected in the way the *Scopes* trial is remembered by Justice Fortas and subsequent courts. This later meaning holds the case as a symbol of the incoherence of the fundamentalists’ position, but these latter uses of the case seem to have lost awareness that it was Darrow’s examination of Bryan and Bryan’s death that were the formative elements in the way that the case was popularly understood. Rather, the case becomes one in which science exposed the ignorance and bigotry of fundamentalism, although there is actually very little in the record that shows this.

IV. CONCLUSION

This Article has suggested that a more complete understanding of the historical background of the *Scopes* case and, in particular, the life and thought of William Jennings Bryan, provides deeper insight into the forces that shaped and gave rise to this milestone in American legal history. It has suggested that while Bryan, and other fundamentalists like him, raised little protest against evolutionary theory in the late nineteenth century, after the

³¹⁴ 515 F.2d 485 (1975).

³¹⁵ See *id.* at 486-88, 491-92.

³¹⁶ *Id.* at 487.

³¹⁷ See also *Americans United for Separation of Church and State v. Porter*, 485 F. Supp. 432, 433 (1980); *Akron Center for Reproductive Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1191 (1979).

³¹⁸ 765 F.2d 1251 (1985).

³¹⁹ *Id.* at 1253.

First World War they organized against it. Bryan saw the war, as did many of the survivors, as an indication that modernity and progressive aspirations were somehow fundamentally flawed. And, while Bryan would remain hopeful about the future, he came to see evolutionary theory as an impediment to social justice and peace. Spurred on by anti-German sentiments that followed the war, Bryan led a crusade against evolutionary theory, but he was motivated less by concern over inerrant literalism in reading the scripture than he was by the harsh affects that Social Darwinism and laissez-faire economics had had on labor, the poor, and the disadvantaged.

This study of *Scopes* suggests that the case offers a window on an interesting age in American law, which bears further study. During this crucial period of American legal history, the basis for much of our contemporary legal theory was being grounded. We see, for example, the beginnings of reactions against Legal Formalism, questions about the German idealism of Kant and Hegel, and the origins of broader awareness of the forces involved in legal disputes, which would eventually lead to Legal Realism. All of this suggests that further research in the period would provide deeper insight into our own time.

The case also suggests that understanding the religious history of the period will enhance understanding of the legal history. Though often confused and obscured in theological rhetoric, the statements of religious leaders of the time capture some of the frustrations, fears, hopes, and aspirations of the people. In the 1920s, this was particularly true for labor and the poor. This suggests that further research into the religious thought and history will add context and deepen the understanding of the nature of change in legal history. This is perhaps more true in the past than it is today. Nonetheless, it seems clear that a better understanding of religious thinking would yield insight into this period, which is formative for contemporary legal thought. Thus, we stand to gain a better understanding of our more secular age by better understanding the religious beliefs that contributed to contemporary thought.