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A COMMEMORATIVE CASE NOTE

SCOPES V. STATE*

HARRY KALVEN, JR.†

Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare Scopes v. State, 154 Tenn. 105, 289 S.W. 363.—JUSTICE FRANKFURTER, dissenting in Board of Education v. Barnette, 319 U.S. 624, 659 (1942).

There is grandeur in this view of life, with its several powers, having been originally breathed by the Creator into a few forms or into one; and that, while this planet has gone circling on according to the fixed law of gravity, from so simple a beginning endless forms most beautiful and most wonderful have been, and are being evolved.—CHARLES DARWIN, THE ORIGIN OF SPECIES.

Man's destiny is to be the sole agent for the future evolution of this planet.

...
It is only through possessing a mind that he has become the dominant portion of this planet and the agent responsible for its future evolution; and it will only be by the right use of that mind that he will be able to exercise that responsibility rightly. He could all too readily be a failure in the job; he will only succeed if he faces it consciously and if he uses all his mental resources—of knowledge and reason, of imagination, sensitivity, and moral effort.

And he must face it unaided by outside help. In the evolutionary pattern of thought there is no longer either need or room for the supernatural. The earth was not created; it evolved. So did all the animals and plants that inhabit it, including our human selves, mind and soul as well as brain and body. So did religion. Religions are organs of psychosocial man concerned with human destiny and with experiences of sacredness and transcendence. In their evolution, some (but by no means all) have given birth to the concept of gods as supernatural beings endowed with mental and spiritual properties and capable of intervening in the affairs of nature, including man. They are organizations of human thought in its interaction with the puzzling, complex world with which it has to contend—the outer world of nature and the inner world of man's own nature. In this, they resemble other early organizations of human thought confronted with nature, like the doctrine of the Four Ele-

* I am much indebted to my colleagues Hans Zeisel and Roger Cramton and to Howard Miller, editor of the *Review*, for the stimulus of their discussion of these issues; and of course, as always, I am in debt to my colleague Malcolm Sharp.

† Professor of Law, The University of Chicago Law School.

ments, Earth, Air, Fire and Water, or the eastern concept of rebirth and reincarnation. Like these, they are destined to disappear in competition with other, truer, and more embracing thought-organizations which are handling the same range of raw or processed experience.

Evolutionary man can no longer take refuge from his loneliness in the arms of a divinized father-figure whom he has himself created, nor escape from the responsibility of making decisions by sheltering under the umbrella of Divine Authority, nor absolve himself from the hard task of meeting his present problems and planning his future by relying on the will of an omniscient but unfortunately inscrutable Providence.

On the other hand, his loneliness is only apparent. He is not alone as a type. Thanks to the astronomers, he now knows that he is one among the many organisms that bear witness to the trend towards sentience, mind and richness of being, operating so widely but so sparsely in the cosmos. More important, thanks to Darwin, he now knows that he is not an isolated phenomenon, cut off from the rest of nature by his uniqueness. Not only is he made of the same matter and operated by the same energy as all the rest of the cosmos, but for all his distinctiveness, he is linked by genetic continuity with all the other living inhabitants of his planet. Animals, plants, and micro-organisms, they are all his cousins or remoter kin, all parts of one single evolving flow of metabolizing protoplasm.—SIR JULIAN HUXLEY, *An address delivered November 26, 1959, at the 284th convocation of the University of Chicago in Rockefeller Memorial Chapel in commemoration of the Centennial of the publication of Charles Darwin's The Origin of Species.*

I

IN THE centennial of the publication of Charles Darwin's *The Origin of Species* it is perhaps wryly appropriate that the law join in by observing the thirty-second anniversary of its most notable contact with Darwin's great book, "this bizarre case," *Scopes v. State*.¹ Along with the Sacco-Vanzetti case it was one of the law cases of this century that drew the attention of the world to America. The case is at once regarded as a milestone in the history of American freedom and as a case which made America ridiculous in the eyes of the civilized world. As the "Dayton Monkey Trial" it produced a human interest story of marvelous color with its two famous protagonists, William Jennings Bryan and Clarence Darrow, some of which was recaptured in the recent Broadway play *Inherit the Wind*.² It marked a great step in the develop-

¹ 154 Tenn. 105, 289 S.W. 363 (1927).

² Mencken's rating of it as a news story is indicated by the following. He is comparing it to the two great news stories of his youth, the Johnstown Flood and the March of Coxe's Army. "It was, in its way, the Twentieth Century's effort to match the Nineteenth's flood and march. As the reporters who had hands in it always agree when they meet, it had everything. . . ." H. L. MENCKEN, *HEATHEN DAYS 1890-1936*, 217 (2d ed. 1958).

A brief account suggestive of its flavor is found in HIBBEN, *THE PEERLESS LEADER WILLIAM JENNINGS BRYAN* 388-406 (1929). Additional background references are collected in 2 EMERSON & HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1045 (rev. ed. 1958).

ment of the American Civil Liberties Union. And, although it touched a great and serious issue, it was handled so as to realize H. L. Mencken's most extravagant expectations for "American boobery"—possibly not without some help from Mr. Mencken.

The case is worth revisiting too because although in legend a famous victory, the case was lost in the courts and the statute is still on the books in Tennessee.³ The *Scopes* case may provide the most interesting example on record of the power of ridicule as precedent and of the power of public opinion to nullify law.

It has been a proud boast of American legal scholars that under our law all great issues of the day are "justiciable"⁴ and that adjudication in the legal forum tends to focus the issues and to raise the level of public debate. The *Scopes* case may well be cited as a major exception. The litigation buried the issues and turned the controversy into a circus. Perhaps the chief reason for this lay in the personalities of the two adversaries—Darrow and Bryan—who as we shall see appear to have been the worst possible champions for their points of view, Bryan because of his excessive literalism in interpreting the Bible and religious doctrine,⁵ Darrow because of his militant atheism.

The case might be discussed from many angles, but we have invited Professors Sharp, Emerson and Haber to put themselves this question: Is it so obvious *today* that the Tennessee statute is unconstitutional? The question is so phrased because at first blush we react almost reflexively that, of course, it is unconstitutional. Only upon reflection does the novelty of the issue and the difficulties of resolving it emerge. It is not therefore surprising to find our commentators, especially Professors Emerson and Haber, pitching their answer to an evolution of constitutional doctrine which, if we read them aright, may have a little more evolving to do in order to catch up securely with the case.

The Tennessee Supreme Court by a hyper-technical maneuver reversed *Scopes'* conviction and invited a *nolle prosequi* by the prosecution which was quickly forthcoming, thus mooting the case and preventing an appeal to the United States Supreme Court.⁶ At the time, this must have seemed the loss

³ TENN. CODE § 49-1922 (1955). The statute is placed in a chapter on the curriculum, other provisions of which deal with a minimum elementary school curriculum, with courses in American history and government, and with training on the Tennessee Constitution, the American flag, traffic safety, and forestry.

⁴ PEKELIS, *LAW AND SOCIAL ACTION* (1950).

⁵ The case was tragic for Bryan. It began on the 29th anniversary of his "Cross of Gold" speech which had catapulted him to national fame and he was hopeful of using it as an occasion to recoup his sagging political fortunes. Instead he was the public victim of a savage and effective cross-examination by Darrow and died shortly after the trial finished, a broken man. See HIBBEN, *op. cit. supra* note 2.

⁶ There is some evidence that the case itself rested on a maneuver by the other side. It was clearly a test case with *Scopes* admitting he had violated the statute. One commentator has suggested that what *Scopes* taught really did *not* violate the statute: "A significant circum-

of a great chance to have so basic an issue decided. But in retrospect it appears providential. It is not impossible that the Court at that early stage of applying the first amendment to the states would have decided the case in favor of the statute, thus irreparably changing the course of American freedom.

As Professors Emerson and Haber suggest, the expansion of the government sphere of communication today gives new significance to the issues of the *Scopes* case. But quite apart from this it has continued vitality. There are good reasons for concluding that the issue on which it divided the country is not "a museum piece" but is smoldering. Or to put it more directly there is at best today a fragile treaty between science and religion. Only a few years ago, Professor Stouffer of Harvard made an important survey of American public opinion on the Communist issue.⁷ Among his battery of questions were three relating to the removal of a book by a Communist from a public library, the barring of a speech by a Communist, and the permitting a Communist to teach at the college level. Some 66 per cent of the American public favored removing the book, some 68 per cent favored barring the speech, and some 89 per cent favored not permitting the teaching. As a guide line, Professor Stouffer asked an exactly parallel set of questions about an *atheist*. And the responses were startling. Some 60 per cent would remove the atheist book and stop the atheist speech, and to come closer to the *Scopes* case, some 84 per cent would not favor permitting the atheist to teach at college.⁸ One does not have to equate science with atheism to see in these figures a deeply held American view against teaching doctrine which conflicts with conventional religion. From the other side, the speech of Sir Julian Huxley which climaxed the University of Chicago's celebration of the Darwin centennial and which was ironically de-

stance in the *Scopes* trial was the fact that the defendant and his attorneys made no *bona fide* defense upon the merits of the case, as they might easily have done, with fair prospect of success. The paragraphs in the school text-book, which it was charged that *Scopes* violated the law in teaching, were these: 'The development or evolution of plants and animals from simpler forms to the many and present complex forms of life have a practical bearing on the betterment of plants and animals, including man himself. The one name indelibly associated with the word evolution is that of Charles Darwin.' Then appeared a picture of Darwin, entitled 'The Grand Old Man of Biology,' with a sketch of his life, in which it was stated: 'His wonderful discovery of the doctrine of evolution gave to the world the proofs of the theory on which today we base the progress of the world.' It is difficult to see how these statements violate the statute, which forbids teaching any theory that contradicts the Bible account of man's creation. The first sentence quoted is a very vague and harmless generalization, and the second is not only a preposterous exaggeration but a falsehood on its face." Wooten, *The Scopes Case*, 1 NOTRE DAME LAW. 11, 20-21 (1925).

⁷ STOFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES (1955).

⁸ The Stouffer study and the significance of these figures for an understanding of the recent popular reaction to domestic communism are discussed in Blum and Kalven, *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science*, 24 U. CHI. L. REV. 1, 49-57 (1956).

livered in the University Chapel, was an eloquent and passionate statement of a perspective incompatible with religion.⁹

Again, there is the notably intense concern today with litigation on the issue of separation of church and state which, while it hardly is dictated by science pressure groups, is indicative of a widespread opinion in favor of keeping the hand of religion off American education. Thus it might not be difficult to spark again the flame that burned so curiously in the Scopes controversy,¹⁰ and we may not be as far removed as we would like to think from that prior generation which produced such quaint issues.

II

A resume of the case may prove useful for the comments that follow. What became world famous was the trial itself, not the appeal which reached the Tennessee Supreme Court almost two years later. The jury had returned a verdict of guilty and the trial judge had imposed a \$100 fine on Scopes for violating chapter 27 of the Acts of 1925. The court with one justice dissenting upheld the constitutionality of the statute, but reversed the conviction. Under the Tennessee Constitution a fine in excess of \$50 must be assessed by a jury and the \$100 fine of Scopes had been set by the trial judge. A reversal was therefore necessitated because the judge had no jurisdiction to impose the penalty. And it was on this tiny point of law that the great controversy was finally disposed of, the court concluding with a paragraph that reads like one long sigh of relief:

The court is informed that the plaintiff in error is no longer in the service of the State. We see nothing to be gained by prolonging the life of this bizarre case. On the contrary, we think the peace and dignity of the State which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a *nolle prosequi* herein. Such a course is suggested to the Attorney-General.¹¹

The statute passed March 13, 1925 is entitled:¹² "An Act prohibiting the teaching of the Evolution Theory in all the Universities, Normals and all other

⁹ It was so received by the church groups and the press. Two days later, Saturday, November 28th, 1959, the Chicago Tribune which had generously reported the speech ran a front page story under the headline "Huxley is Pitifully Mixed Up, Naive, Say Theologians. Views assailed by Leaders of all Faiths." And it added a brief editorial under the title "The Prime Mover" which said in part: "Sir Julian speaks as a long line of atheists, agnostics and free thinkers have spoken before him. He has a narrow view of spiritual values, and an absence of faith in any capacity of man to rise beyond the status of a biological organism."

¹⁰ The spark flared very recently in the State of Washington. The State supervisor of curriculum guides, John M. Howell announced: "Now, of course, no one really believes the Darwinian theory—If Darwinian evolution is true, then the Bible is untrue and I prefer to hold by the Old Book rather than to accept a worthless theory." The remark created a furor and Howell was removed from his job. As *Time* magazine put it "In Washington State's modern school system the missing link is now John M. Howell." *Time*, March 14, 1960, p. 68.

¹¹ 154 Tenn. 105, 121, 289 S.W. 363, 367 (1927).

¹² Tenn. Pub. Acts 1925, ch. 27.

public schools of Tennessee which are supported in whole or in part by the public school funds of the state, and to provide penalties for the violations thereof." It contains three sections the last of which merely provides that it is to be effective from passage and the second of which provides for penalty with a fine of not less than \$100 and not more than \$500 for each offense. In passing we might note that the trial judge in fining Scopes had imposed the statutory *minimum* which makes his abuse of jurisdiction here an even more ironic basis for protecting Scopes' rights in the controversy since a jury could not have fined him less. We might note also that it is only the title which refers to "Evolution Theory." Section 1 which is the substance of the law reads as follows:

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That it shall be unlawful for any teacher in any of the Universities, Normals, and all other public schools of this State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals.^{12a}

The court was not unanimous in upholding the statute. Justice McKinney dissented briefly on the ground that the statute was invalid for "uncertainty of meaning." Justice Chambliss concurred separately. Justice Swiggart did not participate.¹³ Hence of the five judge court only Justice Cook concurred in the majority opinion of Chief Justice Green. The majority opinion, although it reflects the constitutional concerns and idiom of its day, is still of interest.¹⁴

The first challenge to the statute with which the court deals is whether it is too vague. It will be noted that the statute covers two items: (1) teaching which denies the Biblical story of the Creation and of Man and (2) teaching that man has descended from the lower order of animals. Much of the argument had centered on taking the first as the key prohibition and then arguing that because of the diversity of interpretations of the Biblical story, it was an unconstitutionally vague definition for a crime.

The court avoided the delicate problem however of deciding which interpretation of the Bible story of Creation to read the statute against by concluding, as the wording of the statute seems to compel, that it was aimed at the teaching

^{12a} Tenn. Pub. Acts 1925, ch. 27, § 1. This section is now TENN. CODE ANN. § 49-122 (1956).

¹³ Judge Swiggart had replaced Judge Hall who had died subsequent to the argument of the case.

¹⁴ For the range of contemporary comment on the case see Wooten, *The Scopes Case*, 1 NOTRE DAME LAW. 11 (1925); Turck, *State Control of Public School Curriculum*, 15 KY. L.J. 277 (1927); Waller, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 YALE L.J. 191 (1925); Note, 22 ILL. L. REV. 86 (1927); Harper, *An Echo from the Scopes Trial*, 30 DICK. L. REV. 125 (1926); Colton, *Tennessee Evolution Case Decision*, 13 A.B.A.J. 110 (1927); Carpenter, *The Constitutionality of the Tennessee Anti-Evolution Law*, 6 ORE. L. REV. 130 (1927) Keebler, *Limitations upon the State's Control of Public Education: A Critical Analysis of State of Tennessee v. John Thomas Scopes*, 6 TENN. L. REV. 153 (1927). By no means all of the commentary was unfavorable to the statute.

of evolution, and that in the popular sense this meant teaching that man descended from animals, and that therefore the prohibition of the statute was "only intended to forbid teaching that man descended from a lower order of animals." It was thus only denying the Bible story *by teaching descent of man* that was prohibited and hence the statute was clear enough.

This did not satisfy Judge McKinney who dissented and who still found the prohibition void for uncertainty. Nor did it fully satisfy Judge Chambliss who in an interesting concurring opinion unearthed another ambiguity in his attempt to save the day by distinguishing between *theistic* evolution which leaves a place for the Divine Creation of man and *materialistic* evolution which does not. On his view the law was aimed only at the latter and as such did not require acceptance of the most literal reading of the Biblical story of creation in six ordinary days. He argued:

It is too well established for argument that "the story of the Divine creation of man as taught in the Bible" is accepted—not "denied"—by millions of men and women who do not interpret it as teaching instantaneous creation—who hold with the Psalmist that "a thousand years in thy sight are but as yesterday when it is past"—as but a day. It follows that to forbid the teaching of a denial of the biblical account of Divine creation does not, expressly or by fair implication, involve acceptance or approval of instantaneous creation held by some literalists. One is not prohibited from teaching, either that "days" as used in the book of Genesis means twenty-four hours or more as held by literalists so long as the teaching does not exclude God as the author of human life.¹⁵

Judge Chambliss went on to cite an impressive list of scientists who both espoused belief in God and belief in evolution. He was thus making a heroic effort to quiet the whole controversy by what he thought an appropriate interpretation both of the Bible and the theory of evolution, interpretations it might be noted which would have been acceptable neither to Mr. Bryan nor Mr. Darrow. He concluded: "In this view the constitutionality of the act is sustained, but the way is left open for such teaching of the pertinent sciences as is approved by the progressive God recognizing leaders of thought and life."¹⁶

The second challenge to the statute was on the grounds of substantive due process and it is here, as Professors Emerson and Haber suggest, that the opinion appears to be most dated. The court sees only the rights of the teacher as in issue and the logic is familiar. The act of the state is as a proprietor, not under the police power. "It is a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform."¹⁷ And again: "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 wise touched by this law."¹⁸ The court thus finds precisely in point cases involving regulation of the working hours or the qualifications for personnel on *public* works and upholds the act.

¹⁵ 154 Tenn. 105, 126-27, 289 S.W. 363, 369 (1927).

¹⁶ *Id.* at 129, 289 S.W. at 370.

¹⁷ *Id.* at 112, 289 S.W. at 365.

¹⁸ *Id.* at 111, 289 S.W. at 364.

The third challenge has more flavor since it turned on a special provision of the Tennessee Constitution which reads as though the draftsman had had the *Scopes* case in mind: "It shall be the duty of the General Assembly in all future periods of this government to cherish Literature and Science."¹⁹ The argument is that the theory of evolution is now established by the preponderance of scientific thought" and the prohibition of its teaching violates the duty "to cherish Science." The court does not question that the theory is accepted by scientific opinion nor does it deny that this is a poor way to cherish science. It decides rather that the constitutional provision is directory or hortatory only and is too vague to be enforced by a court. A private trust on such terms, the court argues, would fail for uncertainty and the same vice attends judicial administration of so vague a public trust. The court concludes this segment of the argument with the following observation:

If the Legislature thinks that by reason of popular prejudice, the cause of education and the study of Science generally will be promoted for forbidding the teaching of evolution in the schools of the State we can conceive of no ground to justify the courts' 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."²⁰

The last point urged against the statute had a more modern ring. The Tennessee Constitution provided "that no preference shall ever be given by law to any religious establishment or mode of worship."²¹ This was a point much urged at the time. The Bryan forces were committed to a fundamentalist literal interpretation of the Bible as history; other sects, as Judge Chambliss had pointed out, were of a different opinion. Hence the statute appeared to give a preference to the fundamentalist creed. But the court easily escapes the conclusion on the basis of its earlier construction of the statute. Since the key prohibition is against the descent of man and not against other denials of the Creation story, the court can find no religion which has as a characteristic a position on the descent of man. In fact in a neat use of the "multitude of resolutions, addresses, and communications from scientific bodies, religious factions, and individuals giving us the benefit of their views on the theory of evolution" which the court has received, it concludes that these show affirmatively there is no unanimity among religions on the topic. "Belief or unbelief in this theory of evolution," the court says, "is no more a characteristic of any religious establishment or mode of worship than is belief or unbelief in the wisdom of prohibition laws." Hence no religion is being preferred over any other. The court finds further comfort in the fact that the statute does not compel

¹⁹ TENN. CONST. art. 11, § 12. The full provision is an extensive statement of the importance of "knowledge, learning, and virtue" for "republican institutions". See discussion in Waller, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 YALE L.J. 191, 196 (1925).

²⁰ 154 Tenn. 105, 117-118, 289 S.W. 363, 366 (1927).

²¹ TENN. CONST. art 1 § 3.

the teaching of anything. Hence it gives no religion the special advantage of having its doctrines taught in the school. It is noteworthy that the court does not go to the basic issue of whether its constitution can be read as denying the state the power to prefer religion over nonreligion for the statute would seem to have given religion generically a preference over science in this controversy.²² It does however add an interesting further paragraph which opens a window on the judicial distaste for the forces that have precipitated so awkward an issue:

Our school authorities are, therefore, quite free to determine how they will act in this state of the law. Those in charge of the educational affairs of the State are men and women of discernment and culture. If they believe that the teaching of Science or Biology has been so hampered by Chapter 27 of the Acts of 1925 as to render such an effort no longer desirable, this course may be omitted entirely from the curriculum of our schools. If this be regarded as a misfortune, it must be charged to the Legislature.²³

III

As we turn to the merits in *Scopes* as they might be viewed today, we are struck first with the fact that the Tennessee case is still perhaps the precedent closest in point on the large issue of freedom of the curriculum which it raises. It is striking too that the opinion does not find it necessary to refer to the first amendment, although the *Gillow* case applying it to the states via the fourteenth was available.²⁴ The engaging novelty of the case for us today emerges if we set it against the first amendment. But before we do so there are one or two preliminaries to dispose of.

First, the sharpest precedents today for constitutional intervention into the curriculum—the flag salute cases, the Bible reading cases, etc.—all turn on doctrines about the separation of church and state. That was a great issue in the popular debate over the case at the time, and, as we have seen, it was raised explicitly for the Tennessee court by the special provision of the state constitution against religious preference. Are these then decisive precedents for the *Scopes* case today? The contemporary controversy is instructive since *both* sides claimed state neutrality in matters of religion as a premise. Those arguing against the statute²⁵ ably contended that since the Bible story of crea-

²² This precise issue under the first amendment is currently raised in *Torcaso v. Watkins* now being argued in the Court of Appeals of Maryland. A brief submitted by the American Jewish Congress explicitly argues that a state cannot give "preferential treatment of religious belief over non-belief" without violating the first amendment. The case arose when *Torcaso* refused to state his belief in the existence of God and was accordingly denied a notary's commission for which he had applied.

²³ 154 Tenn. 105, 120, 289 S.W. 363, 367 (1927).

²⁴ *Gitlow v. New York*, 268 U.S. 652 (1925).

²⁵ See *Turck, State Control of the Public School Curriculum*, 15 Ky. L.J. 277, 294 (1927).

tion could not be taught directly in the schools, it could not be used to measure indirectly the content of what could be taught. If, so the argument ran, the Bible could not be taught, then that which denied the Bible could not be prohibited solely on the grounds that it denied the Bible. For in the latter instance as well as the former, the Bible would be controlling the curriculum. But the religious groups had a formidable rejoinder.²⁶ Since, they argued, it was forbidden to teach religion in the curriculum, it was unfair to leave the field to science without any competition from religion. Hence the evolution statute as they saw it simply kept the state out of a delicate controversy. I would suggest that the case poses an issue on which the state in its public schools cannot be neutral between science and religion. The wall between church and state in this context may lead to a state sponsorship of scientific atheism against organized religion. This seems to me personally the less painful horn of the dilemma, but it serves to underscore, as Mr. Sharp points out, how awkward it is under modern views of church and state to deal fairly with the claims of religion in the "balanced presentation" of the curriculum which Messrs. Emerson and Haber want. It suggests too that the *Scopes* case is a more fundamental example of the church-state issue in education than the celebrated cases that have gone to the Supreme Court in recent years. Finally it suggests to me, as it did to Messrs. Emerson and Haber, that the church-state criterion is a poor one by which to resolve the controversy and that a broader principle less concerned with keeping religion out of education, would be more satisfactory especially since the issue posed could be raised by a subject which did not invite specific religious opposition.

The second point to square with modern precedent is: How crucial is it that the Tennessee statute is limited to the *public* schools only? As we have seen, it was a powerful consideration for the Tennessee court which saw only the freedom of the teacher as in issue and which saw the public school teacher as an employee of the state whose constitutional position was like that of the janitor. The idea that public employment, including public school teaching, is a privilege, subject without qualification to the regulation of the state as though the state were merely a private employer, is no longer prevailing doctrine;²⁷ and if the *Scopes* case were to arise today, the Court could not escape discussing the substantive merits of the controversy as easily as the Tennessee court did via this route. Furthermore it is probable that today a court would accept the point urged at the time by Professor Turck²⁸ that there are other parties in interest as well as the teacher—the child and his parents and that there is much to be said for recognizing the right of the child to a satisfactory education.

But the public-private school distinction still seems relevant. In the *Meyer*

²⁶ See Wooten, *The Scopes Case*, 1 NOTRE DAME LAW. 11, 15. (1925).

²⁷ *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) "To draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue."

²⁸ Turck, *supra* note 25, at 295.

case²⁹ which actually antedated *Scopes* by a year, the Court invalidated a Nebraska statute prohibiting the teaching of modern foreign languages in grammar schools throughout the state. The case misses being decisive for *Scopes* chiefly because the measure extended to private as well as public schools.³⁰ The Court could not therefore talk of the proprietary power and discretion of the state but had to find a rational basis for the regulation under the police power. This required consideration of the merits of the proposed ban which the court found wanting, noting the recent "unfortunate experiences" from World War I "and aversion toward every characteristic of truculent adversaries," and that language training to be successful must best begin when the child is young. Thus the case is a notable example of a court judicially reviewing the curriculum on the merits and finding the exclusion of a given subject matter unreasonable.

The *Pierce*³¹ case the following year imposed the decisive limit to the state's control of education. It involved an Oregon statute making public school compulsory for all children in the state. The Court found it unconstitutional, observing that there was no "general power in the State to standardize its children by forcing them to accept instruction from public teachers only." "The child," the Court added, "is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligation." The two cases read together suggest that the state cannot constitutionally extend its monopoly of education either by abolishing private schools or by dictating what will be taught in them. Hence it must be true that the state as the operator of the public school system may make many judgments as to curriculum and course of study which are in themselves necessary and unexceptionable but which it could not impose by law on the entire educational system in the state.

Thus we come full circle to the novelty of the issue put in *Scopes*. The state must have discretion to operate a school system since someone has to make decisions about curriculum, etc., and we cannot measure the propriety of these decisions without regard to the fact that they apply only to the schools furnished and run by the state. But we cannot on the other hand ignore the enormous reach of the public schools nor the practical matter that the state is deciding in fact nothing less than how this generation of children will be educated.

As we reach for the first amendment as a guide, we must note another limitation of the Tennessee statute. It did not apply to evolution anywhere but in the schools. Presumably anyone in Tennessee was free under the statute to buy a copy of the *Origin of Species* if he so wished. And presumably too the statute would have been clearly unconstitutional had it imposed its ban generally on the public forum. But our entire theory of free speech is keyed to analysis

²⁹ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³⁰ The Tennessee court cites the *Meyer* case but distinguishes it on this ground. 154 Tenn. 105, 115; 289 S.W. 363, 366 (1927).

³¹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

of the limits of state interference with the flow of ideas in the *public* forum. To state this another way, classic free speech theory is really a defense of the risk of permitting a *false* doctrine to circulate—it is, as we all now know, freedom for “the thought that we hate.” It is keyed not to judicial review of the truth or falsity of what is being said or to the competence or motives of the speaker. It is keyed, in the tradition-honored phrases of Milton, Mill, and Holmes, to confidence that truth will not be bested in a fair fight, to competition in the marketplace of ideas. These are noble and courageous sentiments when applied to the public forum, but they are out of place when applied to the school curriculum.³² Surely we cannot conclude that the state cannot bar from the curriculum anything it cannot bar from the public forum.³³

It is easy, as Professor Sharp has done, to put troublesome cases. Are astrology, psychoanalysis, and the biology of sex to be taught under constitutional protection at all levels of the curriculum? And if we say no, how do we distinguish the theory of evolution? The examples suggest a set of distinctions that may advance the analysis. There are two possible bases on which the state may wish to keep subjects out of the curriculum: 1) because they are thought to be false, and 2) because even though thought to be satisfactorily true, there are other reasons, such as economy or the maturity of the student, which make them inappropriate. If the state intervenes on the first grounds, there is a strong presumption against it. It is here that an echo of old notions of substantive due process is helpful. The state’s judgment must have some rational basis. It can properly bar doctrines such as astrology which no body of competent opinion regards, to use Mr. Sharp’s phrase, as a tolerable approximation of truth. If however it elects to bar evolution, it must abide the judgment of the scientific community. Admittedly in these cases the court is taking on the novel role of arbitrating the truth or falsity of doctrine, but unless it does, we must either hold that the state can never bar doctrine on the grounds of falsity, a conclusion which lets astrology back into the curriculum, or we must hold that the state can by legislative fiat label the true as false, a conclusion which permits it to knock evolution out of the curriculum. There is an additional objection to the state’s role here. If some legislators think evolution is false and pernicious, they may, of course, enter their views in the public forum.

³² Emerson and Haber well suggest that the question posed is, in free speech terms, like that of control of radio and television programs. Since, however, the existence of a private press reduces somewhat the significance of these media, we might come closer to the school issue if we imagine a community in which for technical reasons the states own the only newspaper. By what constitutional free speech formula would we then judge state editorial decisions as to the paper’s content?

³³ We assume, of course, the state can bar in the school forum any doctrine it can bar in the public forum. Many states have laws prohibiting the teaching of “subversive doctrine.” Reutter, *The Law and the Curriculum*, 20 LAW & CONTEMP. PROB. 91, 93 (1955).

However, it is remarkable that during the recent intense concern with Communism, there was no equivalent of the *Scopes* case centering on a ban of teaching Marx. In general the anti-subversive measures were all keyed to a concern with the loyalty of the teacher and not directly to content. Compare *Adler v. Board of Education*, 342 U.S. 485 (1952), and see materials in 2 EMERSON & HABER, *op. cit. supra* note 2.

But, if, as in Tennessee, they pass their statute with its strong note of public condemnation, they have affected not only the curriculum but the public forum as well. A doctrine which has been labeled criminal to teach in school does not compete on fair terms in the market place of ideas. In brief, a criminal statute is an unfair form of argument.

If the State acts on grounds other than falsity, the analysis is more complex. The case against teaching the facts of life in kindergarten is not, of course, that they are not facts, but that the immaturity of the children makes it arguably inappropriate. And if a state were so to decide, its judgment should be permitted to stand. We come closer to home if we now imagine that the Tennessee legislature reasoned thus—evolution may be an engaging scientific theory, but, if taught prior to university level, it tends regardless of the intention of the teacher to upset the young and to destroy their religious beliefs. In a religious community these are values entitled to consideration from the legislature, and it is on these grounds that the teaching of evolution is banned. This is no longer a primitive legislative effort to say that 2 plus 2 equals 5 but a sophisticated concern with student and parent welfare.

To apply then the formula implicit in what we have said to the *Scopes* case, we would conclude that the statute, as presented at the time, was unconstitutional since it was a legislative effort to prohibit as false that which the scientific community thought a decent approximation of truth. If, however, the Tennessee legislature had seriously and in good faith predicated the prohibition on the grounds that teaching evolution to the immature was too upsetting to religious beliefs, its judgment could not be easily upset. On this approach, however, it would be important whether the ban applied at all educational levels or not. The college or university student could not, on my view, rationally be brought within the protected category of audience.

What surprises me about this formulation is that it partakes so little of the idiom of the first amendment case and so much of substantive due process. It is all a matter of reasonableness. It is pertinent to recall that in the *Meyer* case it was Justice McReynolds who appeared on the side of the angels and struck down the invasion of freedom and it was Justice Holmes who dissented. This reversal is not so ironic if we place it in the historic conflict over the Court's role in using a standard like substantive due process.

Mr. Justice Holmes was, of course, disturbed by the undue freedom that so vague a standard gave the court to substitute its values for those of the legislature. Justice Frankfurter's dissent in *Barnette* is perhaps the heroic example of judicial self restraint in the face of what he thought unreasonable in the educational process. We come then to the point Mr. Sharp raises, whether judicial review is the most suitable method for protecting freedom of the curriculum. The spectacle of irate parents rushing to court to get an adjudication on the propriety of teaching *The Merchant of Venice* or *Oliver Twist*³⁴ should give

³⁴ *Rosenberg v. Board of Education of City of New York*, 92 N.Y.S. 2d 344, 196 Misc. 542 (1949).

us pause. But perhaps we are troubled by the same issues here that attend debate over judicial review of any legislation. And if one is willing—as I am—to favor it generally as an adjunct of democracy, one should be willing to make a place for the Court in the educational system.³⁵

This scheme of the true, the false, and the upsetting does not, it must be admitted, frame the problem without raising a formidable number of difficulties. First we have taken the distinction between the true and the false as readily apparent, once reference is made to the scientific community. But it is obvious that in most instances the doctrine will be the subject of scientific controversy. We have only to consider such topics as psychoanalysis, free market or Marxian or Keynesian economics, Kinsey on the sociology of sex, Crosskey on constitutional history and interpretation, extra-sensory perception, or krebiozen to indicate how limited a guide scientific opinion may be for the Court. Probably the safest rule here is to lend constitutional protection to a doctrine which does not have the preponderant opinion in its favor so long as some minority of responsible opinion will endorse it.

Second we should perhaps take a closer look at the college and university level. Here, we have suggested the audience is adult enough so that the state cannot legitimately seek to protect it from upset. Can the state then ever constitutionally bar any topic from the college curriculum? What about the unlikely case of astrology? The ideal is clearly that of the private university, the private community of scholars who should be totally free to study and teach whatever they think worthwhile. And we would like the publicly supported colleges to conform as closely to this model as possible. Since the college or university is itself a segment of the scientific community, we should let its judgment stand, and if a faculty member can persuade his colleagues of the virtues of teaching astrology, that should be good enough for the state. And equally so, if he cannot.

We are brought next to the question of how much of the difficulties turn on the fact that the state intervention is by way of a criminal statute.³⁶ Would the *Scopes* case look any different if the ban had been by the administrative

³⁵ The case for judicial review of school boards in contrast to reliance on political channels is discussed in Note, *School Boards, School Books and the Freedom to Learn*, 59 YALE L.J. 928, 952-3 (1950).

³⁶ We might note that the *exclusion* of material from the curriculum is harder to test legally than its *inclusion*. If some topic is simply not being taught in the public schools, it is not easy to see how a parent or child can challenge the omission in court. However, once there is a ban by statute or regulation, it can be tested by the teacher violating it and resisting either the criminal or administrative sanction or by suit to enjoin its enforcement. There have been numerous cases in which parents or taxpayers have sought unsuccessfully to challenge the inclusion of some item in the curriculum. Frequently though, the challenged items have been of limited interest for a free speech context such as courses in kindergarten, music, manual training, etc. See Note, *School Boards, Schoolbooks, and the Freedom to Learn*, 59 YALE L.J. 928 (1950); Reutter, *The Law and the Curriculum*, 20 LAW & CONTEMP. PROB. 91 (1955); Seitz, *Supervision of Public Elementary and Secondary School Pupils Through State Control over Curriculum and Textbook Selection*, 20 LAW & CONTEMP. PROB. 104 (1955).

regulation of the school board or one of Mr. Sharp's less visible sanctions such as scowling? We have already noted that the criminal statute is objectionable because it is a gesture of condemnation which carries over into the public forum. It is also objectionable because teaching is an odd predicate for a crime, and awakens old memories of tyranny. But in theory the problem is the same. We are testing the power of state action to control the curriculum. If the state cannot bar a doctrine emphatically by making it a crime to teach it, presumably it cannot bar it by less dramatic means either. The criminal statute raises another point. It suggests the gross intrusion of the legislature into the educational process, a process we would prefer to leave to the community of scholars. We might then be tempted to argue for academic freedom on the purely procedural basis of who makes the decisions. Should it mean simply the freedom of the school board from legislative interference or the freedom of the curriculum from school board interference? I do not think all problems would disappear if we postulate autonomy for school boards. The public school board, as I understand it, is not the analogue of the university faculty; it is rather an administrative agency directly empowered by the legislature.³⁷ Hence even a decision by the public school boards in Tennessee to ban evolution should be no less subject to challenge than the blunt legislative effort to do so by way of criminal statute.

Our formulation gives the state some privilege to exclude truth from the curriculum on grounds other than falsity. Is this perhaps too generous a concession? To what degree can the court second-guess the legislative determination that a given truth is inappropriate or prematurely taught? To what degree does this formulation require inquiry into that most delicate of all matters, the motives of the legislature? On our view, whatever the difficulties, the court must scrutinize the purpose of and the evidence supporting the legislative intervention. Otherwise purely formal expressions of concern over student upset would serve to legitimate any exclusions.

Again, we may ask whether it is permissible, as we have done, to recognize the upsetting of *religious* beliefs as a basis for state interference? Is this not letting religious criteria in through the backdoor? I would argue no. The criterion is not religious doctrine but compassion for the difficult position the young student is placed in, a compassion that appears to have moved the Court greatly in the flag salute cases.

If we change our example, the difficulties multiply. Suppose now a Southern state were to bar the teaching of racial equality on the grounds that it would be upsetting to the young and we were to believe it. Are there some forms of upset we think so desirable for the young that we must insist on their exposure to them? Is there a national stake in the education of the country's young which transcends the interests of region and family? The examples hardly do

³⁷ See Note, *School Boards, Schoolbooks, and the Freedom to Learn*, 59 YALE L.J. 928 (1950).

more than indicate how familiar issues are exacerbated by the need under a public school monopoly to define the appropriate content for a standard curriculum.

One more perplexity may be broached.³⁸ If the state is to exclude a topic because it is too upsetting, this would seem to call for exclusion of the topic in toto and not for the elimination merely of one view of it. And presumably in excluding sex education from kindergarten this formula is being followed. It is one thing not to tell the student the truth because he is too young to hear it and quite another to tell him something which is not true while we wait for him to grow old enough for the truth. Applied to the *Scopes* case the point would be that the schools should not teach biology in conflict with evolution to students who are too immature to handle evolution. But the full application of this to *Scopes* leaves us with dismay. The reach of evolution theory is so great that it is not clear what could be decently taught with evolution left out.

The fundamental issue posed is that of the norm regardless of who is to apply it. How much controversy do we desire in our educational scheme? How much should the school room be a miniature marketplace of ideas with the students free to choose? To what extent, that is, should the conditions of free debate which we regard as indispensable to the health of the public forum be carried over into the school? We spoke above of the state's legitimate interest in protecting students against unsettling influences. But it might well be argued that the very function of education is to unsettle old and half thought out beliefs, citing the example of Socrates and to avoid "the cloistered virtue," citing Milton. And it might be replied that Socrates unsettled only in order to settle more firmly.³⁹ And at this point we may conclude that the force of the *Scopes* case today is to remind us harshly of how imprecisely formulated our ideals of academic freedom really are. Competence which has no place as a criterion for entry into the public forum must be a criterion for the school system; and the healthy challenge arising from diversity of opinion cannot easily be duplicated in a forum where the state has a monopoly of the communication process.

One further reflection is invited. It is on the enormous importance of the Court's decision in *Pierce*. This emerges as the great case in American constitutional law as it affects education. First because as a matter of principle it denies the state the right to standardize its children. Second because as a matter of

³⁸ There are of course still other problems, but it would tax both the reader's patience and ours to expand on them. What, for example, does "teach" mean? Presumably much can be properly presented in the classroom without being "taught" in the sense of sponsored by the teacher. And it is in this sense that there is much to be said for the teaching of communism in the schools. The point was debated in the contemporary discussion of the *Scopes* case. See Wooten, *The Scopes Case*, 1 NOTRE DAME LAW. 11, 12-13 (1925).

³⁹ A strong case can be made that even religious beliefs are strengthened by exposure to counter-doctrine. The classic analysis is found in Mill's essay on Liberty where he defended freedom to argue against belief in Christian ethics and morality on these grounds. MILL, ON LIBERTY, ch. 2.

prudence it prevents the public school system from being torn apart by the pressures to accommodate diverse religious sects and minority groups. At least in the extreme cases there is a way out—the dissenters can, as they have, set up their own schools.⁴⁰

Scopes v. Tennessee is a case that deserves to be kept alive in law circles not as a joke but as a case touching profound issues about control of the schools in a democratic society. We should be grateful to it for its stimulus. And we should be grateful, too, that our history has, rather miraculously, produced only one such case.⁴¹

⁴⁰ Important as this gap in the state's monopoly is, it does not provide a solution for all problems. We cannot, that is, dismiss the issues raised by arguing that those who don't like what is being taught or not being taught in the public schools have a ready remedy—to set up agreeable private schools.

⁴¹ One cannot leave the Scopes battlefield without noting one final irony of the whole controversy. As we have seen the great issue was not the origin of the world but the origin of man. It was the descent of man that was the unacceptable part of evolution. From having been made in the image of God he was now to be relegated by science to the status of a slightly superior ape. And the popular tag "Monkey trial" caught the sore spot. Sir Julian Huxley might welcome "his cousins or remoter kin" among "the animals, plants and micro-organisms." The people of Tennessee did not. As the beneficiary of a recent reading of Sir Julian on the evolutionary perspective on man, I wish to add a postscript. In terms of evolution man is, to put it mildly, spectacular as a species. His intelligence has made him adaptable to his environment and his environment adaptable to him to a degree not remotely rivalled by any other animal. His cumulative tradition and cultural inheritance have accelerated his progress at an incredible rate. And although he is a speck of dust on a minor planet in a third rate galaxy who has over millions of years evolved from primitive forms of life, what is awe inspiring is that he has had the intelligence to piece together the clues as to his position in the universe. In brief, evolution properly understood communicates to modern man man's uniqueness and excellence—the gap between him and other animals—in the most objective and exhilarating terms. A humane view of evolution leaves man then not downgraded but emphatically and intelligibly, the "paragon of animals." To end, as we began, with Sir Julian Huxley: "In the perspective of biology, our business in the world is seen to be the imposition of the best and most enduring of the our human standards upon ourselves and our planet. The enjoyment of beauty and interest, the achievement of goodness and efficiency, the enhancement of life and its variety—these are the harvest which our human uniqueness should be called upon to yield." HUXLEY, *MAN IN THE MODERN WORLD* 28 (1955).