

THE *SCOPES* CASE IN MODERN DRESS

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VIEWS some three decades later the constitutional problems posed by the *Scopes* case appear in a somewhat different light than they did to the participants on the scene at the time. The Tennessee anti-evolution law represented a last-ditch effort in a head-on collision between fundamentalist religion and science. It was an attempt to employ governmental power directly to curb the teaching of a scientific theory. In our time a more sophisticated adjustment between religion and science almost universally prevails. It is unlikely that any religious group could muster political power for an outright suppression of the teaching of science. Current efforts by religious groups to use the power of state take a different form. Mostly they involve either efforts to secure fringe benefits for religious schools, such as free transportation, lunches, or school buildings; or to use the public school system for inculcation of religious values through purely religious activity, such as Bible reading, recital of the Lord's Prayer, or the display of religious symbols. Today it is doubtful that there would be much support for a frontal attack upon scientific theory, and the attitude of the courts would certainly reflect this atmosphere.

On the other hand, today most people would be far more concerned, and more divided, over the broader issue of the manner in which government should exercise control over education and the formation of public opinion generally. This issue was, of course, vigorously debated at the time of the *Scopes* trial. But the problem is now seen in a broader context and, the religion-science controversy apart, it is found much more complex and threatening. The penetration of government into more and more aspects of modern life, including the field of mass communication; the increasing dependence of higher education and scientific research upon government support; the many forms of pressure toward political, intellectual and social conformity—these and other factors raise grave issues as to the proper role of the government in controlling communication and molding thought and expression in a democratic society.

In short today the religious issue, in the form presented by the Tennessee statute, seems fairly clear cut, but many would be puzzled and doubtful over the constitutional lines to be drawn around the efforts of the state to control the flow of ideas in the educational system and through other channels of communication.

In addition today the constitutional tools for dealing with the issues of

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the *Scopes* case are in some respects changed, and to a great extent sharpened and refined. The only provision of the Federal Constitution called into play in the *Scopes* case was the due process clause of the fourteenth amendment. This was indeed the heyday of substantive due process. Present views, of course, are greatly altered: the doctrine has become severely limited in scope and the courts are reluctant to use it at all. On the other hand, the first amendment was not directly involved in the case, either in its religious or its free speech aspect. The very doctrine that the first amendment was applicable to the states through the fourteenth amendment had only been tentatively announced a few years before and was by no means settled law. Moreover, the major decisions of the United States Supreme Court interpreting the religious provisions of the first amendment had not been rendered. And, although the Court had dealt with a few issues under the free speech provisions of the first amendment, the great elaboration and refinement of these principles was still to come. Hence, so far as the Federal Constitution was concerned, the issues were formulated almost exclusively in now obsolete substantive due process terms, and the later developments of the first amendment were unavailable.

It is interesting and perhaps instructive to speculate, nevertheless, how modern constitutional theories relating to separation of church and state, substantive due process, and freedom of expression apply to the problems raised by the Tennessee anti-evolution act, as these problems are seen today.

SEPARATION OF CHURCH AND STATE

In the form in which the statute was passed we think there is little doubt that the Supreme Court today would hold that it violated the first amendment's prohibition against establishment of religion.¹ The act made it a crime "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." The meaning of the statute is by no means clear, and a majority of the judges on the Tennessee Supreme Court were unable to agree on any specific interpretation. But the essence of the law is to make it unlawful to teach certain facts to the extent that, and for the reason that, they are inconsistent with certain religious beliefs. The plain object was to prevent the presentation in the public schools of factual material because it denied the truth of the Divine Creation of man as taught in the Bible, a religious doctrine held by some religious groups. This was not only apparent on the face of the statute but was clear from all the surrounding circumstances. The legislative effort was thus to give state support for a particular religious belief, not to enact a measure dealing with any problem of secular education. The issue is the same as would

¹ As previously noted, the Tennessee Supreme Court did not consider the validity of the act under the first amendment (as incorporated in the fourteenth amendment). But it did deal with the religious issue under the provision of the Tennessee Constitution which declared "that no preference shall ever be given by law to any religious establishment or mode of worship." Art. 1, § 3.

arise if a state passed a law providing that no methods of birth control could be taught in state medical schools which were "inconsistent with the doctrines taught by the Roman Catholic Church concerning the prevention of conception." In both cases the statute is supporting a particular religion and the legislation would be unconstitutional upon any theory of the separation of church and state.

Yet, viewing the problem in broader perspective, the significance of the religious establishment clause of the first amendment seems to us a limited one here. The vice of the Tennessee statute as framed was that it measured the content of secular education by the test of a religious doctrine. But this is, to a considerable degree, a question of manner and form. Suppose the Tennessee act had simply forbidden the teaching of the theory of evolution, without any reference to the Biblical story, and had justified this on some ground relevant to the objectives of secular education.² The real purpose may have been the same, and the effect largely the same. The constitutional issue under the religious establishment clause, however, becomes much more difficult. Certainly the fact that a legislative restriction on the content of the curriculum coincides with a particular religious doctrine is not in itself sufficient to constitute support of religion. A court could probably find such support only by probing the true motive of the legislature, a course of action it is always, and for the most part properly so, reluctant to undertake. Hence by judicious drafting and some manipulation of the legislative history a legislature could regulate the curriculum, with the underlying purpose of supporting a religious doctrine, but without giving the courts any ready handle for invalidating the measure under the religious establishment clause.

For this reason other constitutional doctrines may be better adapted for dealing with the basic issues at stake.

DUE PROCESS

The major constitutional battle in the *Scopes* case was, as just stated, fought over the due process issue.³ In view of the high status accorded to substantive due process at the time this emphasis is scarcely surprising. Certainly a strong case could be made out that a prohibition against teaching the theory of evolution bore no reasonable relation to any legitimate educational purpose. The United States Supreme Court had not only been quite ready to find a number of state laws unreasonable but had specifically decided in the *Meyers*

² As a matter of fact, Judge Green of the Tennessee Supreme Court, in virtually ignoring the Divine Creation clause and construing the act as "only intended to forbid teaching that man descended from a lower order of animals," seems to have been attempting some such transformation of the legislation.

³ The defense put much stress, not only on substantive due process, but upon the due process doctrine of uncertainty and vagueness. This latter issue can be one of considerable significance, especially in areas of legislation that restrict individual liberties, but it raises essentially a problem in drafting. This gives it less permanent importance and we do not take the time and space necessary to discuss it here.

case, only a few years before, that a prohibition against the teaching of foreign languages in public and private elementary schools was an unreasonable restriction. The general confidence of the period in science and scientific progress, the obvious futility of attempting to suppress the Darwinian theory, the ridiculous position of the United States in the eyes of the world, and similar factors would probably have persuaded the Court, had it considered the case, to hold the restriction unreasonable.

As a matter of fact the Tennessee Supreme Court, apparently sensing this weakness, attempted to dodge the basic due process issue. It based its ruling upon the proposition that Scopes, being merely an employee of the state, was in the same position as the employee of a private enterprise and had no right to invoke due process against his employer. It seems doubtful that the United States Supreme Court would have been put off by this line of reasoning. In any event the Tennessee Court's holding would not have prevented a parent, or possibly other persons with standing, from raising the basic issue.

To speculate as to how the United States Supreme Court would decide the due process question today, we are inclined to believe that it would hold that statute invalid even under the watery version of substantive due process currently in vogue. The scientific method, while perhaps more frequently challenged as a complete answer to the world's problems, is certainly supreme in its own field and universally accepted as an essential part of secular education. The specific doctrine of evolution, at least in its general form, is now as thoroughly established in popular thinking as the Copernican theory of the solar system. It is indeed inconceivable that any state legislature today would attempt to prevent the teaching of the theory of evolution. If such legislation were passed it would undoubtedly be viewed as an extreme bit of irrationalism, and there would probably be enough blood left in the due process concept to invalidate such an aberration.

But the broader problems raised by government restrictions on the curriculum are not very satisfactorily answered by the doctrine of substantive due process. While we would consider the Tennessee anti-evolution act an extreme case today, there might be many other restrictions which would not be so considered and where the courts might find it difficult to hold there was no reasonable relation to a legitimate objective in secular education, especially giving presumptive validity to the legislative judgment. Moreover, the doctrine of due process, while it does not exclude, also does not focus upon a basic element in the problem, namely the issue of freedom of thought and expression in a democratic society. To give full weight to this consideration it is necessary to turn to concepts expressed more forcefully in the first amendment.

Furthermore, it is not even certain that the test of a "reasonable relation" would be applicable where the issue did not involve a criminal statute, or a statute governing both public and private schools as in *Meyers*, but where the controversy was over a legislatively or administratively imposed curriculum

which simply left out the teaching of evolution. Thus if the Superintendent of Schools, acting under a Board of Education regulation, was to blue pencil lesson plans of teachers which included material on evolution, and a teacher who nevertheless proceeded to teach the subject was discharged for insubordination, it is not clear that the "reasonable relation" formula would come into play. It could be argued that the court was not dealing here with a restriction or prohibition but with affirmative action by the state in selecting a curriculum. The state might not have to show that the failure to teach evolution bore a reasonable relation to a legislative objective. If it was required to show anything at all under due process it might be at most that the educational program could not be said to be wholly "non-educational." This indicates a further weakness in the use of substantive due process doctrine and points up the need for an enlightened reformulation of the first amendment to deal with these problems.

To us, therefore, the most fruitful constitutional doctrine becomes the free speech provisions of the first amendment.

FREEDOM OF EXPRESSION

Had the Tennessee anti-evolution act attempted to prevent the teaching of evolution outside the public schools—in private schools, by lecturers, by writers generally—there is no doubt that it would violate the first amendment's protection to freedom of expression. This would be true whether one applied a clear and present danger test, a balancing theory, or the Meiklejohn-Black-Douglas test of full protection. The difficulty arises because the restriction takes the form of a regulation of the curriculum in a public school system. This brings us to an area where there is little guidance in court precedents or scholarly discussions. But it is an area of great and unfolding importance.

The field with which we are dealing is delineated by two major characteristics. The first is that it involves a sector of communication which has many of the elements of a closed system. At the elementary and secondary school levels the government largely monopolizes the educational process. Furthermore, through most of that process attendance at school is compulsory. At the college and university level the government plays a major role, and one which is steadily expanding. It not only maintains and operates numerous state and municipal institutions but it now supplies a large share of the research funds, scholarships, and other requisites of higher education. Access to education is thus, for the overwhelming portion of the population, dependent upon governmental institutions or support. In some ways the situation is analogous to that in radio and television communication where the physical limitations on the number of wave lengths require government control over the right to broadcast. It may even be said that the increasing concentration of the press in the hands of fewer large enterprises poses a not dissimilar problem. Any such closed, or virtually closed, system of communication creates obvious issues for

a democratic society which are not comprehended within the traditional principles of free speech applicable to an open or free-for-all system.

The second major characteristic of the field is that the government is assuming an affirmative function in the system of communication through public education. It is not merely regulating the free play of private (non-governmental) communication or protecting the listening audience against disorder or dishonesty. The government itself determines what the content of the communication shall be throughout a major portion of our educational system. Again the current proposals for greater public control over the content of radio and television programs present a comparable problem. The government has, of course, always played an affirmative part in certain types of communication, not only through the public schools but through its public statements and in other ways. Our concern is greater now, however, because the extent and intensity of its domination over communication on public affairs is constantly increasing. And the opportunities for non-governmental communication to offset the governmental influence are constantly decreasing. This development presents one of the overriding issues of the times.

It seems to us that the principles of the first amendment must be made applicable to this broader situation. That the government take no action "abridging the freedom of speech" is as vital to the preservation of a democratic society when the government is affirmatively directing a closed system of communication as when it is attempting to regulate private communication in an open system. This means both that the objectives of the government activities, and the means taken to achieve those objectives, must be consistent with the principles of the first amendment.

Current thinking about the first amendment has hardly begun to work out the implications of this basic concept. No real elaboration of the issues can be undertaken here. But a few suggestions as to possible lines of development may be made.

Obviously the doctrines applicable to attempted restrictions upon non-governmental communication are not suitable to this phase of the problem of assuring free expression in a modern society. What is needed is a new theory of the requirements imposed by the first amendment. Possibly such a theory may be found in the concept of balanced presentation. Essentially the obligation of the government must be to present a fairly balanced exposition of various relevant theories and points of view, and of alternatives open for action. Only through enforcing a concept of this nature can individual members of society develop their full potential or exercise their sovereign right to govern themselves.

The concept of balanced presentation is, of course, an extremely broad and vague one. But more specific elements which would enter into the solution of particular problems in these terms could be developed and refined. Thus, one essential element of the general doctrine might be that views or theories within the area of recognized academic or scientific standards could not be

proscribed, and conversely views or theories outside such area could not be exclusively imposed. This requirement would in itself render the Tennessee anti-evolution act invalid. Another factor to be taken into account might be the extent to which opposing communication was available to combat the impact of the government's communication. Thus government reports or publicity, which could be offset more readily by communication through the press and other private sources, would not be subject to as strict a standard of balanced presentation as communications emanating from the public school system. Again, the application of the concept might differ when the communication is addressed to children, where immaturity and "shock" factors might be relevant, than when it is directed at adults. Some of the ideas which have been gathering around the principle of academic freedom might likewise be used in refining the basic theory.

The successful application of a theory of balanced presentation would also entail consideration of the role of the judiciary in relation to the other branches of government. A judicial standard which accepted the legislative or executive judgment where any possible basis for action existed, as under current due process standards, would probably not serve the purpose. One might well have to incorporate in the concept the principle of according freedom of expression a preferred status in our constitutional system. As a corollary, the doctrine of requiring the legislature or executive to choose alternative courses of action, which would accomplish the result sought with less injury to freedom of expression, might have to be broadened and strengthened.

It is in the exploration of these issues that one finds the challenging aspect of the *Scopes* case today. They were not touched upon by the Tennessee Supreme Court in that case. But as government occupies more and more of the field of communication the development of first amendment principles as a constitutional base for maintaining freedom of expression in our society becomes imperative.