

Supreme Court of the United States

In the Matter of:

	:	Docket No.	7
	:		
Susan Epperson and H. H. Blanchard,	:		
	:		
Appellants,	:		
	:		
v.	:		
	:		
State of Arkansas,	:		
	:		
Appellee.	:		
	:		

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Place Washington, D. C.

Date October 16, 1968

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the Appellants

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Don Langston, on behalf of the
Appellants

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

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Susan Epperson and H. H. Blanchard, :
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Appellants, :
:
v. : No.7
:
State of Arkansas, :
:
Appellee. :
:
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Washington, D. C.

Wednesday, October 16, 1968

The above-entitled matter came on for argument at
1:45 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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* * *

P R O C E E D I N G S

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: No. 7, Susan Epperson and H. H. Blanchard, Appellants, versus State of Arkansas, Appellee.

Mr. Warren?

ORAL ARGUMENT OF EUGENE R. WARREN

ON BEHALF OF APPELLANTS

MR. WARREN: Mr. Chief Justice, may it please the Court:

This case involves the constitutionality of the Arkansas Anti-Evolution Law. Mrs. Susan Epperson, a teacher and H. H. Blanchard, the father of two would-be learners, challenged the constitutionality of the initiated act No. 1-F-1926, which was the so-called Monkey Bill or the Anti-Evolution Law.

The challenge was based upon the contention that the act violated and colided with the first amendment freedoms, the freedom of speech, the freedom to speech and to learn, and the question of freedom of religion, the question of the establishment clause of the first amendment.

We have briefed these points as well as we possibly can. We have the benefit of supporting briefs of amicus to excellent briefs. I shall not burden or impose upon the time or the patience of this Court to argue to any great extent the question of the first amendment freedoms, but I would like to

1 discuss with emphasis, greater emphasis, than in our brief the
2 question of failure of the Act to meet the permissible statutory
3 vagueness of the new process clause.

4 From the time that this act was enacted or adopted,
5 teachers in Arkansas were and have been and are genuinely confused
6 and concerned, uncertain as to whether or not the language of the
7 act which forbids the teacher to teach the theory or doctrine
8 that man ascended or descended from a lower form of animal,
9 whether that language forbids the teacher to discuss the matter
10 or permit the theory or permit a classroom discussion of the
11 theory or whether the actual meaning of the act was that the
12 teacher could not teach, that the theory was or had been
13 established or it was true.

14 At the time of the trial of this case in the lower
15 court, the plaintiff, Mrs. Epperson, testified that she did not
16 wish to teach, that the theory was true, but simply to explain,
17 because contained in the chapter of the biology book that had
18 been furnished hereby the local school district.

19 As I understand it, there simply is no biology text-
20 book that simply doesn't have some reference or some explanation
21 of the theory of the evolution of man.

22 Judge Reed, the trial judge, commented on the question
23 of whether or not the language of the act permitted a discussion
24 of the act or whether it forbid the teaching that the theory was
25 true. We devoted 12 pages in our brief in the Arkansas Supreme

1 Court to a discussion of statutory vagueness under the due
2 process clause, yet the Supreme Court of Arkansas in a two-line
3 opinion, memorandum and opinion, held that this was a proper
4 exercise or a valid exercise, that this act was a valid
5 exercise of the power of the state to control the curriculum of
6 the schools.

7 Q Would you be taking the first position under the
8 first amendment?

9 A Yes.

10 Q If this statute, as I read it, says that it is unlaw-
11 ful to teach in any university, college, normal public school
12 and so forth. If it is said that it is unlawful to teach
13 children in primary grades one through six, would you take the
14 same position under the first amendment?

15 A I would take the same position, but not quite as
16 strongly.

17 Q I don't understand.

18 A I think the Bartels and Iowa case, the Iowa case,
19 the Nebraska case, the Meyer case, that those statutes pro-
20 hibiting the teaching of German only applied to the elementary
21 schools and this court in those two cases struck down those
22 acts under the due process clause.

23 Q Those were private schools?

24 A In the Meyer case, it was a public school.

25 Q You are familiar, I don't know that you cited, with

1 the decisions in the area of the Ginsburg Case in the last term,
2 the Bumper and Michigan and in those cases, at least in that
3 area has drawn some lines depending upon the ages of the children
4 or the activity there in volved.

5 A Yes, Justice Brennan.

6 Q You don't think that same kind of language is here?

7 A No. I take the position that the position of the
8 public schools, even in the elementary grade is not a matter
9 for ballot, but a matter for the proper education officers.

10 Q Suppose you had a statute that said it shall be
11 unlawful to teach in the grades one through six, that depending
12 upon the color of the skin, one race is inferior to another
13 race. Do you say that would be unconstitutional?

14 A Yes, sir, I think that would clearly be unconstitu-
15 tional.

16 Q So you don't think any lines can be drawn at all
17 depending upon the level of the education, primary versus high
18 school?

19 A I must say that I believe that these are matters for
20 educators and not for the ballot. But to go back, when this
21 case was decided by the Supreme Court of Arkansas, it made the
22 statement in the second line that we do not decide whether the
23 act forbids the discussion or explanation of the theory or
24 forbids whether the theory was true. This in itself condemns
25 the act.

1 It certainly makes it vague. The teacher should not
2 be required particularly where this is a penal act and where
3 conviction requires the dismissal of the teacher from the school
4 from her profession, from her job, the teacher shouldn't be
5 required to take this gamble.

6 Q It is also a fine?

7 A \$500 fine.

8 Q Has there been any prosecution under the statute?

9 A To my knowledge, there has not been. There have been
10 threats of prosecution. There have been some cases started but
11 I don't think they were ever concluded.

12 Q It is evident there is not much danger in the
13 convictions.

14 A I don't know, Mr. Justice Black. I can't say there
15 was any danger or not. There was a lot of uncertainty and a
16 lot of fright. I think the act was used for mostly bogeymen.
17 In a number of districts in Arkansas, the subject of biology
18 is not even taught. In other districts in Arkansas, because the
19 biology books do have chapters, when the teacher reaches that
20 chapter, the teacher simply skips it, unless the teacher happens
21 to be one of those ingenious people who wants to be sure that
22 the student actually reads it.

23 The teacher announces that the reading of this chapter is
24 illegal. I think the children probably run and read it and get
25 more from that chapter than any other chapter in the book.

1 The act also forbids the teacher to use a textbook
2 in which this theory is, as the act says a textbook which teaches
3 the theory or doctrine.

4 As I understand, the word use, if the teacher refers
5 a student to a particular book or a textbook, the teacher is
6 using that book; not only the student that actually consults
7 the book, but also the teacher by referring the student to it.

8 Webster's International Dictionary contains an
9 explanation. Webster's Collegiate Dictionary contains an
10 explanation. All the encyclopedias, the World Books and books
11 of knowledge, all the general reference books in every school's
12 library contains an explanation of this theory.

13 If the act has that sort of meaning, then that means
14 that every school has got to rid its library of all of these
15 books. That is just plain ridiculous. That is book burning at
16 its worse.

17 Q Has the statute been constituted to reach where the
18 teacher is referring?

19 A The statute has not been construed ---

20 Q It seems to reach only, or makes it unlawful for any
21 teacher to adopt or use in the institution.

22 A To use a teacher or a textbook commission to adopt.

23 Q Doesn't that mean ordinarily, aren't textbooks formally
24 adopted for use in a given class?

25 A A dictionary in Arkansas has been adopted as a textbook

1 and it is furnished under the textbook law so a teacher couldn't
2 refer under that construction of the act which is clearly vague,
3 a teacher couldn't refer a student to the dictionary for fear
4 that that student inadvertently might turn to the page that had
5 the explanation of the evolution on it and then the teacher is
6 subject to dismissal from her position.

7 We say that the act is clearly vague, clearly
8 unconstitutional.

9 Q Before you sit down, do you see any difference between
10 as a matter of law, this case and the other case?

11 A I see no difference, none whatsoever.

12 CHIEF JUSTICE WARREN: Mr. Langston?

13 ORAL ARGUMENT OF DON LANGSTON

14 ON BEHALF OF APPELLANTS

15 MR. LANGSTON: May it please the Court, I think it should
16 be noted to start off with that from the record in this case
17 this action was originated in 1965, prior to the administration
18 of the President and the attorney general and was defended by
19 him in the state courts.

20 The present administration took over the defense of
21 this lawsuit after it was decided by the Supreme Court of
22 Arkansas and was appealed to this court.

23 Q What was the significance of that?

24 A I was just giving you background, Your Honor.

25 Q I thought you were telling us your administration

1 doesn't like the statute.

2 A No, I am not here prepared to say that, Your Honor.

3 Q It might not be too late, you know.

4 A The reason the State of Arkansas is involved in this
5 lawsuit, as you will recall from the record, the plaintiff
6 pursued the Little Rock School District and its superintendent.
7 The reason the State of Arkansas intervened in the lawsuit is
8 that under our declaratory judgment act under which Mrs.
9 Epperson sought to declare this act unconstitutional, the
10 statute number is 34-2510 in our code. It is in our declaratory
11 act or declaratory judgment of acts of statutes that when a
12 declaratory relief is sought in a procedure seeking to have any
13 state statute declared unconstitutional, the attorney general of
14 the state shall be served with a copy of the proceeding and is
15 entitled to be heard. So that is the reason why the attorney
16 general's office is involved in this lawsuit at this stage.

17 We have always interpreted that to mean that we are
18 to defend the constitutionality of these statutes. I think it
19 should also be noted in the record that the Chancery Court of
20 Polasky County filed and rendered what I would call a rather
21 lengthy opinion for a trial court in Arkansas.

22 We have the benefit of its reasoning in this court.
23 However, the Supreme Court of Arkansas which ordinarily and in
24 almost all of its cases renders an opinion with reason to back
25 it up, has failed --- I shouldn't say failed to, but has not

1 filed an opinion which is usually written by one of its justices
2 with reasoning for its decision. They merely issued a per curiam
3 opinion in this case which they very rarely do.

4 I don't know why they didn't file a written opinion
5 with reasoning.

6 Q Maybe they couldn't.

7 A I have heard rumors to that effect.

8 Of course, the second sentence in the per curiam opinion
9 which one of the justices said he thought was irrelevant to the
10 decision of the case, if a case was brought to prosecute a
11 teacher under this action, I would say that the opinion of the
12 Supreme Court and the statute would be interpreted to mean that
13 to make a student aware of the theory, not to teach whether it
14 was true or untrue, but just to teach that there was such a
15 theory which would be the grounds for the prosecution under the
16 statute; and that the Supreme Court of Arkansas' opinion should
17 be interpreted in that manner.

18 Q Should be interpreted to the effect that it is a
19 criminal offense for a teacher to make a student aware that
20 there is such a theory?

21 A That is correct, Your Honor.

22 In our opinion teach means to make the student aware
23 that there is such a theory, not whether it is true or untrue.

24 Q So you think we should take the Arkansas statute as
25 meaning that?

1 A Yes, Your Honor, to mean that.

2 Q As meaning that it doesn't reach the teaching about
3 as well as affirmatively teaching the rightness of it?

4 It would cover a teacher telling about Darwin as well
5 as teaching the Darwin was right?

6 A That is correct. If Mrs. Epperson would tell her
7 students that, "Here is Darwin's Theory, that man ascended or
8 descended from a lower form of being," then I think she would
9 be under this statute liable for prosecution.

10 Q I have some trouble with that. You get that out of
11 this second sentence, "The Court expresses no opinion under
12 the question?"

13 A I am saying that I think that the lower courts of
14 Arkansas would hold that sentence irrelevant, Your Honor, and
15 say that, although the Supreme Court of Arkansas did not. I
16 think if the Supreme Court of Arkansas were presented with a
17 prosecution under this case, that they would disavow that
18 second sentence.

19 Q As has already been suggested, the problem I take it
20 is to decide the constitutional question on the basis of the
21 authoritative interpretation of the statute in a state court.

22 A Yes, Your Honor.

23 Q What are we to take to be the authoritative interpre-
24 tation of the statute by the Supreme Court of Arkansas State?

25 A I think the first sentence of the opinion.

1 Q That is that it is a valid exercise of the state's
2 power to specify the curriculum in the public schools?

3 A Yes, Your Honor. They have not decided the question
4 that I have said.

5 Q What concerns me, going back to the question I asked
6 earlier, are we to take this to mean that as much as they have
7 said is that this statute is valid as regards the curriculum in
8 the public schools meaning primary schools or does this mean
9 that it is valid as regards teaching in any university, college,
10 public school or other institution?

11 A I think any tax school in Arkansas would be covered.

12 Q So public school here covers colleges and graduate
13 schools?

14 A Yes.

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1 Q If that is the interpretation that we are contesting
2 the constitutionality of the First Amendment, do you see a differ-
3 ence when that kind of prohibition dealing with the universities,
4 colleges and public schools, and that kind of prohibition dealing
5 with children in the primary areas?

6 A No, sir, I don't.

7 Q You don't think Butler in Michigan has any analogy here
8 at all? You can't measure the reading of it by the standards of
9 what is fit for children to read?

10 A I guess what you are getting at is the impression of
11 younger children. I don't see any distinction in this. I think
12 that anyone from kindergarten on up is not supposed to be made
13 aware of this theory in Arkansas and that it makes no difference
14 how old the student is.

15 Q You are defending it on the ground that is constitu-
16 tional and you deny the teacher any right to teach this even in
17 college?

18 A Yes, sir, as to whether this statute is vague and uncer-
19 tain or not, of course we aluded to this in our brief and our
20 basis for argument on this is that our statute was passed with the
21 case of Scopes v. Tennessee in mind, wherein their statute was
22 held valid and met the requirements that it was not vague and
23 uncertain.

24 We think that our statute is even better worded than
25 theirs. So therefore, in the light of that decision and our

1 statute, we think that it meets the constitutional test of due
2 process.

3 Q What is the state interest you are protecting through
4 this statute?

5 A We feel that the state has a right to set the curricu-
6 lum in its schools. That is our main point, Your Honor, that
7 states can prescribe their curriculum in schools and not have
8 chaos whenever they teach its courses there.

9 Another point that could be made there is that we say
10 that this is a religious neutrality act here. It could keep the
11 discussion of the Darwin Case versus the Bible story out of the
12 teachings in the public schools and keep them outside that forum,
13 in private forums, and that could go to the orderly management
14 of the Arkansas schools.

15 Q Would you on the same grounds defend the statutes that
16 prohibited the teaching of the theory that some races are inferior
17 to others?

18 A I would think that that should be prohibited, yes, sir.

19 To be consistent with my argument, I would have to say
20 that because I think that the state in prescribing the courses in
21 the schools could say what theories can and cannot be taught
22 there.

23 Q On that theory, would you think that the state would
24 provide that within its mathematical courses that it would be
25 illegal to mention or teach geometry?

1 A Of course, there is going to have to be a line drawn
2 here somewhere.

3 Q That is our problem, too.

4 A I might say that I am glad that your problem is not
5 mine.

6 Q apparently the Supreme Court of Arkansas felt the same
7 way.

8 A That could be another rumor, Your Honor. The State of
9 Arkansas realizes that the trend in this Court and the lower
10 Federal Courts and to some extent in the State Courts is to strike
11 down legislation of this sort which infringes somewhat upon the
12 private rights. But here we think that we have reasonably done
13 it.

14 As to teaching of geometry or anything of that nature,
15 we may not reasonably do it. But here we think we have not been
16 unreasonable and that the judgment and opinion of the Supreme
17 Court of Arkansas should be affirmed.

18 Q Since your Supreme Court has disposed of the lower Court's
19 opinion in two sentences, would you object to us disposing of
20 that in one sentence?

21 A As I stated in my brief, it is a neutrality act and
22 keeps from discussing the Darwin Theory and its opposing theories
23 in the schools.

24 Q It doesn't say anything about opposing theory, does
25 it?

1 A No, it doesn't.

2 Q It simply forbids the teaching of the Darwin Theory,
3 doesn't it? Isn't this rather similar to the statute? What if
4 Arkansas would forbid the theory that the world is round?

5 A I would, first of all, hope that the Courts and the
6 people would think that that would be an unreasonable encroach-
7 ment.

8 Q Why should we get into the schools in this country on
9 that?

10 A Our position is that the Courts should restrain from
11 doing so as much as possible because it should be left up to the
12 local school boards and the local people as to how their schools
13 should be run.

14 Q And to what curriculum should be taught?

15 A Yes.

16 Q This isn't the kind of case that would be presented --
17 if Arkansas provided that all public schools teach American his-
18 tory or the history of Arkansas or teach mathematics or foreign
19 language -- this doesn't have to do with the subject to be taught.
20 This has to do with the particular theory that shall not be
21 taught?

22 A That is correct.

23 Q How about the sex? Does Arkansas has any prohibitions
24 on teaching in the field of sex?

25 A I have heard that, Your Honor. I don't know.

1 Q I appreciate your problem here. I appreciate the way
2 you have presented it to us. I wanted to ask you this one ques-
3 tion: Do you see any way in which this case could be distinguished
4 from Meyer against Nebraska that this Court decided in 1943?

5 A Is that the English language?

6 Q Yes.

7 A The only way I could do it, Your Honor, would be the
8 reasonableness and unreasonableness aspect of it. The teaching
9 of German or the teaching of English, I think, in the schools
10 could be held to be unreasonable, whereas, keeping the Darwin
11 Theory out of the schools could be reasonable, to keep from get-
12 ting into religious aspects of the theory.

13 Q I thought a few moments ago -- maybe I misunderstood
14 you -- you said that a reason for presenting the teaching of the
15 Darwin Theory was so that it would not collide what I think you
16 referred to as a Bible story.

17 I mean, you mean the literal reading of the Book of
18 Genesis. Does the state concede that that is the purpose of this
19 prohibition? If it does, you run right into the question of the
20 First Amendment, won't you?

21 A Yes, sir. Your Honor, we don't take that position.

22 Q You take the position that it has any purpose? If it
23 doesn't serve a religious purpose, what purpose does it serve?

24 A Of course, whenever I say "religious purpose," I mean
25 that it could keep the Bible story versus the Darwin Theory out

6
1 of the schools and in the private forms between science and --

2 Q So your Bible story could be discussed in the schools?

3 A I suppose.

4 Q In other words, as my brother steward, I think, sug-
5 gested, there is no general prohibition, is there, against dis-
6 cussing how a man came into being and there is no general prohi-
7 bition so that theories such as and including the Bible, the
8 literal reading of Genesis, could be discussed in the schools,
9 except for the Darwin Theory; is that right?

10 A Evidently.

11 Q In other words, out of that whole area of the origin
12 of man, Arkansas has excised only a segment, that segment being
13 the Darwin Theory; is that correct?

14 A That is correct.

15 Thank you.

16 (Whereupon, the above-entitled oral argument was concluded.)
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