Epperson v. Arkansas (1968) - Justice Fortas - 9/0.

Issue: Arkansas adopted an anti-evolution statute in 1928 to prohibit the teaching in public schools and universities of the theory that man evolved from apes. This statute was an adaptation of the famous Tennessee "monkey law" adopted in 1925 that was upheld in the celebrated *Scopes v State* decision of the Tennessee Supreme Court (see below). In 1965 the Little Rock School Board, on recommendation from their biology teachers, prescribed a textbook that taught Darwin's theory of evolution. Ms. Epperson faced a dilemma. If she taught this book, she risked criminal prosecution for violating the state law. If she did not, she risked being fired by the school board. [One cannot predict how a case will come to the Court!] She sought to void the state statute. The Tennessee Supreme Court upheld it in a two sentence opinion as an exercise of the State's power to specify the curriculum in public schools and did not address the competing constitutional questions at all.

Held: Tennessee Supreme Court reversed. Prohibiting the teaching of evolution is unconstitutional.

Reasoning: Government must be neutral in matters of religious theory. The overriding effect of the law is that it selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group. **The 1st Amendment does not permit the State to require that teaching and learning must be tailored to the principles of prohibitions of any religious sect or dogma. While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the 1st Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion.**

Black concurrence: He agrees the law is unconstitutional, but not on the grounds of the majority. He thought it was simply too vague to enforce. But, his rationale for not getting into unchartered waters is compelling. Is this Court's decision forbidding a State to exclude evolution an infringement upon the religious freedom of those who consider evolution an anti-religious doctrine? How can the State be bound by the Constitution to permit its teachers to advocate an anti-religious doctrine to school children? Since there is no indication that the Biblical doctrine of the origin of man is taught in Arkansas' schools, does not the removal of teaching evolution leave the State in the very neutral position the Constitution requires?

This case did not decide the issue of whether the Biblical origin of man concept could be taught. Rather, it simply held that evolution could not be prohibited from being taught. Is Justice Black right to foretell of future problems if both are not allowed? See *Edwards v. Aguillard* (Case 1A-R-27 on this website.) It is somewhat surprising that Justice Black, alone, raises this potential "free exercise" issue.

***Scopes v. State* (1927)** - Establishment - Justice Green - 3/1.

Issue: Scopes was convicted by a jury of violating a Tennessee statute that prohibited the teaching of Darwin's theory of evolution that man descended from apes and, thus, teaching a theory that denied the story of the divine creation of man. He challenged his conviction on 1st Amendment grounds.

Held: [By the Tennessee Supreme Court.] This law is constitutional.

Reasoning: The Tennessee Supreme Court really did not discuss the 1st Amendment except to say that when the State deals with its own employees and its own contracts for their employment, it is not hampered by 1st Amendment limitations. Because the teacher was an employee of the State and was under contract with the State, he had no right to serve the State except upon such terms as the State prescribed. "A case involving the same statute reached the U.S. Supreme Court and the statute was upheld. *Heim v McCall*...We are not able to see how the prohibition of teaching evolution gives preference to any religious establishment. So far as we know, there is no religious establishment that has as its creed any article denying or affirming such a theory. As the law thus stands, while the theory of evolution may not be taught, nothing contrary to that theory is required to be taught."

Clarence Darrow did not get a chance to appeal this to the U.S. Supreme Court because, although the statute was upheld, Scopes' conviction was fundamentally reduced to an acquittal for procedural reasons; thus, there was nothing, in theory, for Scopes to appeal. How about a brain teaser? Notice the *Epperson* Court does not say a State must teach evolution. It merely says when a School Board wants to teach it, a State statute that says it cannot be taught is unconstitutional. If it is taught and if the Biblical account of the creation of man cannot be constitutionally taught, are some students' rights to "free exercise" being undermined? Is this an "establishment of non-religion"? They would be taught something antithetical to their own faith. Or, are Protestants left with the same decision Catholics had to make when Protestants had political power in our early public schools? If the foregoing turns out to be the law, what is the Protestant option? More Protestant based schools? Are we then left with public schools attended solely by children of atheists and/or the apathetic and/or poor Protestants? See *Edwards v. Aguillard*. Things are heating up a bit, aren't they?