In the

# Supreme Court of Tennessee

At Nashville by Transfer from Knoxville.

September Term, 1925.

JOHN THOMAS SCOPES,
Plaintiff in Error.

vs.

STATE OF TENNESSEE,
Defendant in Error.

No. 2. Rhea County Criminal Docket.

# REPLY BRIEF AND ARGUMENT FOR THE STATE OF TENNESSEE

FRANK M. THOMPSON,
*Attorney-General.*
ED. T. SEAY,
K. T. McCONNICO,
*Special Counsel for State of Tennessee.*

WM. JENNINGS BRYAN, JR.,
CHARLES T. CATES, JR.,
SPEARE & SEAY,
FITTS, McCONNICO & HATCHER,
*Of Counsel.*

56 g

# INDEX.


| | PAGE |
|---|---|
| **PRELIMINARY STATEMENT** | 1-48 |
| (a) Act in Question *Quoted* | 2 |
| (b) The Indictment *Quoted* | 3 |
| (c) Former Proceedings in Trial and This Court | 3-6 |
| (d) Proper Construction of Act | 6-9 |
| (e) Construction of Act by Trial Judge | 9-12 |
| (f) Constitutional Questions Generally Stated | 13 |
| (g) Power of State to Legislate as to Public Schools | 14-17 |
| (h) The Police Power | 17-18 |
| (i) Religious Freedom | 18-23 |
| **Some Points Omitted and Some Conceded in Brief for Scopes** | 24-44 |
| (1) As to Power of Legislature Over Schools | 24-26 |
| (2) As to Alleged "Religious Preference" | 26-30 |
| (3) Dilemma of Attorneys for Scopes | 30-33 |
| (4) As to Right of Legislature to Pass the Act Under the Police Power | 33-40 |
| (5) This Is a Religious Nation and State | 40-41 |
| (6) Admissions of Adversaries as to Religious and Police Power Phase of the Case | 41-44 |
| **Reference to and Reliance Upon Matters Outside of Record by Adversary Counsel** | 44-48 |
| **BRIEF OF LEGAL PROPOSITIONS** | 49-90 |
| (1) The Indictment Is Sufficiently Particular—*Authorities Cited* | 49-50 |
| (2) Caption of Act Sufficiently States the Subject of the Law—*Authorities Cited* | 50-52 |
| (3) The Act Viewed as a Public School Regulation Belongs to Statutes of a "Special Class" Which Are Not Open to Judicial Review At All—*Authorities Cited* | 53-56 |
| (4) The Act Viewed Simply as a Police Power Statute Is Clearly Valid Under Our State Constitution—*Authorities Cited* | 56-57 |
| (5) The Act Viewed Simply as a Police Power Statute Does Not Violate Sec. 1 of the 14th Amendment of the Federal Constitution—*Authorities Cited and Quoted* | 57-62 |

PAGE

(6) The Act Does Not Give Any "Preference" to "Any Religious Establishment or Mode of Worship"—*Authorities Cited and Quoted* ..... 63-72

(7) Fact That "Religious Views" May Have Furnished "Motive" for the Passage of the Act Is Wholly Immaterial—*Authorities Cited* ..... 72-75

(8) Insistence that Act To Be Constitutional Would Have to Apply to all School Teachers in Private as well as Public Schools is Grossly Erroneous—*Authorities Cited* ..... 76-77

(9) The Fact that a Group of Self-styled "Intellectuals" calling Themselves "Scientists" Believe that a Certain Thing or Theory is True—In No Way Hampers the Legislature in the Exercise of the Police Power—*Authorities Cited* ..... 78-80

(10) The Act Is Not Invalid for any Alleged Ambiguity—*Authorities Cited* ..... 81-85

(11) Insistence that Trial Judge Erred in Excluding Alleged "Scientific" Testimony Is Without Merit or Substance—*Authorities Cited* ..... 85-90

**ARGUMENT** ..... 91

**Assignment of Error I:**

The Indictment Is Sufficient—*Authorities Fully Presented and Quoted* ..... 91-106

**Assignment of Error II:**

The Title of the Act Sufficiently Expresses the Subject of the Law—*Authorities Fully Noticed and Quoted* 107-114

**Assignments of Error III and IV:** 2 [115-123]

The Act Gives No "Preference" to Any One Religion Over Any Other ..... 223-294

(a) Provision of Art. I, Sec. 3, of State Constitution Relating to Religious Freedom—*Quoted* ..... 224-225

(b) Protection of "Religious Liberty" Is Left to the Respective States Under the Federal Constitution ..... 226-227

(c) No Religious "Preference" Is Made by the Act in Question ..... 227-229

(d) Neither the Divine Creation of Man Nor Any Other Part of the Bible Is Taught in Our Public Schools: Chap. 102 of Public Acts of Tennessee of 1915 Relating to Bible Reading in



PAGE

Public Schools Is Clearly Valid—*Authorities Quoted* ..... 230-240

(e) The Fact that "Religious" Views May Have Been the "Motive" for the Passage of the Act Is Immaterial and not Reviewable by the Court—*Authorities fully Noticed, Quoted and Differentiated* ..... 240-260

(f) This Is a "Religious" and a "Christian" State and Nation—*Decisions of this Court and Supreme Court of the United States fully Noticed and Quoted* ..... 260-294

**Assignment of Error V:**

The Act Does Not Violate Art. XI, Sec. 12 of Our State Constitution Making It "Directory" Duty of Legislature to "Cherish" Science—*Authorities Cited and Quoted* ..... 295-342

A Survey by Quiet Culture—Address of Prof. Paul Shorey of University of Chicago on Evils of Teaching "Prehistoric and Biological Origins"—*Fully Quoted* .. 307-318

Address of William J. Bryan Quoting Clarence Darrow's Speech in Leopold and Loeb Murder Case, in which Darrow Palliates Murder by University Undergraduates because They "Too Early" Became Saturated with Teachings of the Evolutionist and Atheist Nietzsche ..... 319-325

"A Little Learning Is a Dangerous Thing"—an Expose of the False and Unscholarly Pretensions to "Knowledge" by the Pseudo-Scientific and Propagandist "Cult" as to the Origin of Man ..... 326-342

"Distrust thy Father and Mother"—Final Doctrine Expressly Advocated by Bury, the Leading Atheist and Psuedo-Scientist Relied Upon by Attorneys for Scopes 336-342

**Assignments of Error VI and VII:**

The Act Does Not Violate Art. I, Sec. 8, nor Art. XI, Sec. 8, of State Constitution, nor Sec. 1 of 14th Amendment to Federal Constitution ..... 115-223

(1) Attacking Act for Violating above Provisions of State and Federal Constitutions Presents "Same Question" to be Decided by "Same Rules"—*Authorities Quoted* ..... 117-123

(2) The Act Viewed as a Public School Regulation Belongs to a "Special Class" of Statutes Not Open to Judicial Review—*This Primary and Conclusive Insistence Presented and Long Line of Controlling Authorities Fully Quoted* ..... 123-169

PAGE

(3) Viewing Act as Ordinary Police Power Statute It Is Clearly Valid and Court Will Not Examine De Novo "Reasonableness" of Its Regulations—*Authorities Fully Quoted* ..... 170-180

(4) Classifications Made in Police Power Statute Do Not Have to be Made with Nicety nor Include Every One Falling "Logically" in Same Category—*Authorities fully Quoted* ..... 180-190

(5) Whether Teaching the Thing Prohibited in the Specific Language of the Act Would Have "Tendency" to Incite a Disbelief in God or the Immortality of the Soul—Is Not Open to Judicial Inquiry—*Authorities fully Quoted*..... 191-200

(6) No Ambiguity or Uncertainty in the Word "Teach" as used in the Act..... 200-212

*Authorities Relied Upon in this Connection by Counsel for Scopes, Noticed and Differentiated*. 213-223

**Assignment of Error VIII:**

The Act Does Not Violate Art. I, Sec. 10, of the Federal Constitution by "Impairing the Obligation" of Any Contracts ..... 342-348

**Assignment of Error IX:**

No Error in Exclusion of So-Called "Scientific" Testimony. Such Alleged "Testimony" No Part of the Record nor Could any such Testimony Have Been Admissible in any Event—*Authorities fully Noticed and Quoted* ..... 349-360

**Assignment of Error X:**

This Assignment Stated on Page 15 of Brief for Scopes Presents Nothing, Is Void Under the Rule, and Is Ignored by Us .....

**"The Present Crisis in Evolutionary Thought":**

The "Crisis" in this Field of Pretended "Knowledge" Noticed. "The Case Against Evolution," by O'Toole—*Noticed and Quoted* ..... 360-377

**Conclusion:**

"Render Therefore Unto Caesar the Things Which Be Caesar's and Unto God the Things Which Be God's".. 377-382

## LIST OF CASES AND AUTHORITIES REFERRED TO.

PAGE

**Constitution of United States:**

Fourteenth Amendment .....13, 35, 38, 115, 116, 117, 169, 170, 174, 175, 180, 200, 205, 222, 223 226
First Amendment .....

**Constitution of Tennessee:**

Article I, Section 3.....63, 224, 225, 227, 229, 233, 235
Article I, Section 8..... 56, 115, 116, 117, 119, 122, 125, 170, 174, 175, 180, 200, 223
Article I, Section 9..... 48, 49, 116
Article II, Section 17..... 50, 108, 112
Article IX, Section 2.....34, 56, 59, 64, 191
Article XI, Section 8.....13, 35, 38, 58, 115, 116, 117, 119, 122, 125, 169, 170, 174, 175, 180, 200, 223, 224
Article XI, Section 12..... 53, 108, 116
Constitution, Annotated, p. 119, Note 23..... 94

**Acts of Tennessee:**

Anti-Evolution Act, Chap. 27, Pub. Acts of Tenn., 1925 (quoted)..... 2, 6, 107
Acts of Tenn., 1877, Chap. 23..... 95
Acts of Tenn., Chap. 102, Pub. Acts, 1915... .....29, 69, 71, 230, 231, 234
Code (Shannon), Secs. 7077, 7087, 7088 and Notes .....49, 93, 98, 99, 100
Code, Sec. 5117..... 96

**Tennessee Cases:**

Ashby v. State, 124 Tenn., 648..... 83
Atkins v. State, 119 Tenn. (11 Cates), 458, 472, 473 ..... 88
Brinkley v. State, 125 Tenn. (17 Cates), 371. 57
Breyer v. State, 102 Tenn. (18 Pick.), 103, 110 ..... 67
Bell v. State, 31 Tenn. (1 Swan), 41, 44, 46.. 67, 284
Bruce v. Beall, 99 Tenn. (15 Pick.), 302, 313, 314 ..... 88
Bejach v. Colby, 141 Tenn. (14 Thomp.), 686, 690, 691 ..... 89
Bilbo v. State, 7 Hum., 534..... 95
Barnes v. State, 5 Yerg., 186..... 105

PAGE

State v. Ladd, 2 Swan, 226, 228, 229..... 94
State v. Odam, 2 Lea, 220, 221..... 94, 95
State v. Swafford, 3 Lea, 162, 163, 164..... 94
State v. Morgan, 1 Cates, 66..... 94
State v. Smith, 11 Cates, 525,..... 94
State v. Ferriss, 3 Lea, 703..... 95
Sanders v. State (March, 1926)..... 97
State v. Pennington, 3 Head, 120..... 95
State v. Harris, 2 Sneed, 224..... 95
State v. Carter, 7 Hum., 158..... 96
State v. Eskridge, 1 Swan, 413..... 96
State v. Donaldson, 50 Tenn. (3 Heisk.), 48.. 100
State v. Bradt, 103 Tenn., 584..... 112
Smith v. State, 16 Pick., 505..... 174
State v. Knoxville, 115 Tenn., 186..... 296
Telegraph Co. v. Mill Co., 129 Tenn. (2 Thomp.), 374, 381, 382..... 87
Turner v. Eslick, 146 Tenn., 236..... 83
Temple v. State, 127 Tenn. (19 Cates), 429.. 89
Villines v. State (12 Pick), 143..... 94
Webster v. State, 110 Tenn. (2 Cates), 491.. 57
Williams v. Nashville, 89 Tenn. (5 Pick.), 487 496 ..... 73, 245
Wilcox v. State, 94 Tenn. (10 Pick.), 105, 112, 113,..... 87
Waterhouse v. Sterchi Bros. Furniture Co., 139 Tenn. (12 Thomp.), 117..... 89
Wedge v. State, 7 Lea, 688..... 94
Wilson v. State, 19 Pick., 87, 89..... 94

**Federal Authorities:**

Armour Packing Co. v. United States, 209 U. S., 56, 84..... 50, 101, 187
Atkin v. Kansas, 191 U. S., 207, 220, 224.54, 87,125,136, 142, 144, 154, 155, 156, 163, 171, 189
Armour & Co. v. No. Dakota, 240 U.S., 510, 517 ..... 77
Arkansas Natural Gas Co. v. Arkansas R. R. Commission, 261 U. S., 379, 67 L. Ed., 705 83
Allgeyer v. Louisiana, 165 U. S., 578..... 126
Adams v. Milwaukee, 228 U. S., 572..... 188
Abrams v. United States, 250 U. S., 616, 624, 63 L. Ed., 1173, 1177, 4 Sup. Ct. Rep., 17 196



PAGE

Am. Fur. Co. v. United States, 2 Pet., 358, 367, 214
American Seeding Machine Co. v. Commonwealth of Kentucky, 236 U. S., 660..... 218
Berea College v. Kentucky, 211 U. S., 45, 53, 58, 69..... 54, 161
Barbier v. Connolly, 113 U. S., 27, 28 L. Ed., 923 ..... 59
Brunswick-Balke Collander Co. v. Evans, 228 Fed., 991, 997, 998..... 69, 72, 227
Baker v. Druesedow, 263 U. S., 137, 68 L. Ed., 212..... 84
Butters v. City of Oakland, 263 U. S., 162, 68 L. Ed., 228..... 84
Bartels v. Iowa, 262 U. S., 404..... 164
Child Labor Tax Case, 259 U. S., 20, 39... 74, 75, 249
Central Lumber Co. v. So. Dakota, 226 U. S., 157, 160.....70, 178, 186, 187
Cudahy Packing Co. of Nebraska v. Parramore, 263 U. S., 418, 68 L. Ed., 366..... 84
Cochran et al. v. United States, 157 U. S., 286, 15 S. Ct., 628, 39 L. Ed., 704..... 101
Chicago, Milwaukee & St. Paul R. Co. v. Polt, 232 U. S., 165..... 215
Collins v. Commonwealth of Kentucky, 234 U. S., 634, 638..... 218
Davis v. Beason, 133 U. S., 333, 342.. 64, 293
Douglas v. Noble, 261 U. S., 165, 67 L. Ed., 590 ..... 84
Detroit M. Ry. Co. v. Fletcher Paper Co., 248 U. S., 30, 63 L. Ed., 107..... 84
Dig. U. S. Sup. Ct. Rep., Vol. 5, pp. 5362, 5363, Sec. 145 to 148..... 84
Dig. U. S. Sup. Ct. Rep., Vol. 1, p. 402, Sec. 2124 to 2135; 14 Fed. Rep. Dig., Title "Courts," key-number 366 (1)..... 85, 243
Ellis v. United States, 206 U. S., 246.....54, 77, 138, 182
Eubank v. Richmond, 226 U. S., 137, 142, 57 L. Ed., 156..... 59, 185
Farmers and Merchants Bank of Monroe, N. C., v. Federal Reserve Bank of Richmond, Va., 262 U. S., 649.....58, 77, 178, 188
Farnacomb v. City and County of Denver, 252 U. S., 7, 64 L. Ed., 424..... 84
Fed. Rep. Dig., Vol. 13, Title, "Courts," key-number 366 (1)..... 85
Fed. Rep. Dig., Vol. 12, Title, "Courts," key-number 366 (1)..... 85

PAGE

Fox v. Washington, 236 U. S., 277, 59 L. Ed., 575, 35 Sup. Ct. Rep., 383 . . . . . 196
Gitlow v. New York, U. S. Sup. Ct. Adv. Op.



PAGE

Ledbetter v. United States, 170 U. S., 606, 612 . . . . . 50, 102
La Costa v. Department of Conservation of the

PAGE

Pierce v. Society of Sisters of Holy Name, 268 U. S., 510 ..... 54, 165, 168, 338

Permoli v. First Municipality, 15 U. S. (Curtis),



PAGE

Waugh v. Mississippi, 237 U. S., 589, 597 . . 54, 79, 87, 147

Williams v. Fears, 179 U. S., 270 ..... 126

Yazoo & Mississippi R. R. Co. v. Jackson Vine-

216

PAGE

People ex rel., Warren v. Beck, 10 Misc., 77, 30 N. Y. Supp., 473, 47 L. R. A., 382... 55, 145
People v. Ruggles, 8 Johnson 290, 5 Am. Dec., 335 ..... 68
People v. Board of Education, 245 Ill., 334, 19 Anno. Cas., 220..... 69
People ex rel. Ring v. Board of Education, 245 Ill., 334, 29 L. R. A. (N. S.), 442..... 70
People v. Honeyman, 3 Denio, 121..... 105
Re: J. T. Dalton, 61 Kan. 257, 47 L. R. A., 380 ..... 55, 144
Ryan v. New York, 177 N. Y., 271, 69 N. E., 599 ..... 144
State ex rel. v. Haworth, 122 Ind., 462, 7 L. R. A., 240..... 55, 156, 157
Shover v. State, 10 Ark., 259..... 68
State v. Chandler, 2 Harrington (Del.), 553.. 68
State ex rel. Weiss v. District School Board, 76 Wis., 177, 7 L. R. A., 330, 20 Am. St. Rep., 21, 44 N. W., 967..... 70
State v. Goode, 24 Mo., 361..... 105
State v. Smith, 5 Harr., 490..... 105
State v. Warner, 4 Ind., 604..... 105
University of Mississippi v. Waugh, 105 Miss., 623, L. R. A. 1915 B, 588..... 55, 70
Updegraph v. Commonwealth, 11 Serg. & Rawls (Penn.), 394..... 68
Wilkerson v. Rome, 152 Ga., 762, 110 S. E., 895, 20 A. L. R., 1334..... 55, 70, 233
Wingard v. State, 13 Ga., 396..... 105
Zeisweiss v. James, 63 Pa. St., 465, 3 Am. Rep., 558..... 68, 281

**Text Authorities:**

Corpus Juris, Vol. 12, p. 991,992, Sec. 603.. 347
Corpus Juris, Vol. 22, p. 502, Sec. 597..... 88
Cooley Const. Lim. (5th Ed.), 179..... 112
Greenleaf on Evidence, Vol. 1, Secs., 5, 6 and notes ..... 70
Jones on Evidence (1913 Ed.), Vol. 2, Sec. 372, p. 909..... 88
Story, Commentaries on the Constitution, Sec. 1878 ..... 72



**Miscellaneous Books, etc.:**

PAGE

A Candid Examination of Theism, by George John Romanes..... 332
A History of Freedom of Thought, by J. B. Bury 337, 338
Beyond Good and Evil, by Nietzsche..... 319
Bryan's, William J., Address dealing with Clarence Darrow's Speech in Leopold and Loeb Murder Trial ..... 319, 324
Century Dictionary and Encyclopedia..... 205
Cyclopedia of Expression (1883)..... 206
Crime, Its Cause and Treatment, by Clarence Darrow ..... 335, 336
Funk & Wagnall's New Standard Dictionary.... 205
God or Gorilla (1921), by Alfred Watterson McCann ..... 21, 328
Handbook of All Religions..... 28, 63
James Harvey Robinson's Paper in "Science" of July 28, 1922..... 335
La Decadenza di una Teoria, 1908, p. 11.... 329
Origin of Species, by Charles Darwin..... 330
Religious Denominations of the World, by Vincent L. Milner ..... 28, 63
"Science" (Aug. 21, 1914), pp. 289-325.... 21
"Science" (July 28, 1922), p. 95..... 335
The Case Against Evolution (1926), by George Barry O'Toole, Ph.D., S.T.D....21, 370, 371, 328, 331
The Winston Hand-book (1920) ..... 206
The Holy Bible ..... 377
The New Decalogue of Science, by Albert Edward Wiggam ..... 333, 334
The Discipline of Culture and the College Curriculum, by Prof. Paul Shorey ..... 309, 316
Thoughts on Religion, by George John Romanes 332
Webster's New International Dictionary..... 205, 369
Webster's Unabridged Dictionary..... 206
World's Most Famous Court Trial..... 364
"Zarathustra," by Nietzsche ..... 333

No. [illegible]

# Supreme Court of Tennessee

At Nashville, by Transfer from Knoxville.

September Term, 1926.

JOHN T. SCOPES,
*Plaintiff in Error,*

vs.

STATE OF TENNESSEE,
*Defendant in Error.*

*Hon. S. D. Gordon, Criminal Judge.*

## REPLY BRIEF AND ARGUMENT FOR THE STATE OF TENNESSEE.

*Hon. H. Pharis Tate (Gen'l),*

### PRELIMINARY STATEMENT.

In keeping with the brief for the defendant in error, we will first dispose of the contention of the State—as well as the judge below)—under which the plaintiff in error seeks, for the second time, the extraordinary and time-honored remedy for authorities in error, we still maintain the proper authority of the State and the constitutional validity of the act in question. We now have significant notice to the defendant in error that he will argue at the oral argument, as was his custom in the court below.

(a)

## The Act in Question.

The Act, upon the constitutionality of which the conviction of the defendant Scopes depends, is Chapter 27 of the Public Acts of Tennessee for 1925; and is as follows:

> "AN ACT prohibiting the teaching of the Evolution Theory in all the Universities, Normals and all other 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 violation thereof.



(b)

## The Indictment.

The indictment—(omitting formal parts)—is in the following words:

> "That John Thomas Scopes heretofore on the 24th day of April, 1925, in the county aforesaid, then and there unlawfully did wilfully teach in the public schools of Rhea County, Tennessee, which said public schools are supported in part or in whole by the public school fund of the State, a certain theory and theories that deny the story of the Divine Creation of man, as taught in the Bible, and did teach instead thereof that man has descended from a lower order of

the court and a jury in the Circuit Court of Rhea County for violating the Act above quoted, and a fine of $100.00 was imposed upon him.

(Tr., Vol. 1, pp. 42, 43; 47, 48.)

A motion for a new trial was entered, and was overruled by the Trial Judge, and the defendant has appealed to this Court and assigned errors.

(Tr., Vol. 1, pp. 43, 46, 60.)

After indictment the defendant, on July 13, 1925, filed a motion to quash the indictment, alleging as grounds for this motion that the Act which was the basis of the indict



The technical record—(which is all that is now before the Court)—is contained in "Vol. No. 1 (Revised) Supplemental Transcript," consisting of 63 pages. It was necessary for the State, on permission of the Court, to file this revised Vol. 1 containing the entire technical record as the certificate of the Clerk thereto shows, because of omissions and errors contained in Volume 1 of the transcript as it was originally filed in this Court.

The other three large volumes of the transcript of alleged record, as originally filed—

quash, in overruling the defendant's demurrer to the indictment and in excluding certain alleged "scientific" testimony alleged to have been offered but which is not a part of the record at all. These questions arise wholly upon the technical record.

### (d)

### The Proper Construction of the Act.

As to the true meaning of the Act in regard to what is the particular "teaching" prohibited by it, a careful reading and analysis of it will convince this Court that the opinion of the



> tion of man as taught in the Bible, *and to teach instead that man has descended from a lower order of animals.*"

The concluding clause "to teach *instead* that man has descended from a lower order of animals" is the clarifying explanatory language of the Act that makes its meaning entirely clear, and specifically designates the *particular thing* that is alone and finally prohibited.

If the Act had made it unlawful "to teach any theory that denies the story of the Divine creation of man," and *stopped there*, then there

It may have been that, in the opinion of the Legislature, so to teach would be to deny "the story of the Divine creation of man as taught in the Bible," and this may have been the reason or the *motive* that lay behind the enactment of the law, and, indeed, if it were conceded that such were the directing or impelling motive that caused legislative action, it would be a matter of no concern to a Court in determining the validity of the Act. As is shown by overwhelming and undisputed authorities in a subsequent portion of this brief, the courts will not inquire into the *motive* which brought about legislative action, and determine the validity of the law accordingly as the Court might adjudge the motive to be good, or bad, wise, or unwise, tending toward the public good or mischievous in its tendencies, or enter upon a consideration or undertake a criticism or review of the motive which brought forth legislative action.

The Legislature *could* have provided in Section 1 of the Act that it should be unlawful for a teacher in a public school of Tennessee to teach "that man has descended from a lower order of animals" without any reference in the Act to the Bible, or the story of the Divine creation of man, and the result, the force, the effect and the construction of the Act would be just the same as they must be in regard to the challenged



Act. An Act so worded would have precisely the same meaning and be susceptible, and susceptible only, of the same construction as the Act in question. Every thing that is said in criticism of the Act under consideration could be said of such an Act. It could have been argued that there lay behind it a religious motive, or a motive to cripple or narrow the teaching of science. Nothing is said in the brief of our adversaries in criticism of the present Act that could not have been said with reference to such an Act.

It will be readily conceded that the Act could have been worded in a way that would not have subjected it to so much captious, and quibbling criticism, but worded as it is, its meaning is clear, and no mind that considers it with the single purpose of determining its true meaning and its proper construction can have a doubt about it after the Act is put to such a test.

### (e)

### Construction of the Act by the Trial Judge.

The Trial Judge, with obvious and absolute accuracy, ruled that by the plain language of the Act in question, the offense was clearly defined; and that what the Act prohibited, and all that it prohibited, was contained in the final clause of Section 1 of the Act, which made the offense consist alone of teaching in the public schools

of the State *"that man has descended from a lower order of animals."*

This construction of the Act, the Court will find, was not excepted to by the defendant in the Court below, nor challenged by the motion for a new trial. Neither has it been challenged specifically by any assignment of error in this Court.

The above ruling of the Trial Judge as to the meaning of the Act was entered at large upon the minutes and is in the technical record. (Tr., Vol. 1, pp. 36-41.) From this opinion and ruling of the Trial Judge, we quote the following:

> "In other words, the State insists that by a fair and reasonable construction of the statute, the real offense provided against in the Act is to teach that man descended from a lower order of animals, and that when this is accomplished by a fair interpretation and by a legal implication, the



> "To illustrate, when the legislature had provided that it shall be unlawful to teach a theory that denies the Divine story as taught in the Bible; and then by the second clause merely clarified their intention, and that the real intention as provided by the statute taken as a whole, was to make it unlawful to teach that man descended from a lower order of animals," etc.
>
> (Tr., Vol. 1, p. 39.)

That counsel for defendant clearly understood the ruling of the Trial Judge and what in his opinion was the proper construction and true meaning of the Act, appears from the printed brief filed in defendant's behalf, where they say, at page 89:

> "Under the construction of the Court below, the first clause was entirely excluded, the Court's view being that the only thing prohibited was to teach that man has descended from a lower order of animals and that the first part of the statute, referring

sound, the view and ruling of the Trial Judge as to the true meaning and proper construction of this Act. They present neither argument nor authority against this construction.

Glib and garrulous as they are in the mere use of words, and charmed as they frequently appear to be by the flow of their own discourse, the corps of counsel representing the defendant do not anywhere question in any legal way that the Trial Judge's construction of this Act was a sound one.

We here submit that even if there were ambiguity in the statute (which there is not), and even if the construction of the Act adopted by the Trial Judge were the least plausible construction, if it were necessary to conserve and save the validity of the statute, this construction would be the one adopted. This principle is ruled by the decisions of this Court, the Supreme Court of the United States and the other courts of last



(f)

**The Constitutional Questions Involved.**

The most persistent insistences made against the validity of the Act are that,—

1. It violates the "liberty," "equality" and "due process" provisions of Section 1 of the 14th Amendment to the Constitution of the United States, and the "law of the land" provisions of the constitution of Tennessee, namely, Section 8, Article 1 thereof.

2. It violates Section 3 of Article I of the Tennessee Constitution, which prohibits the giving of a preference "to any religious establishment or mode of worship."

3. The Act is violative of Section 8 of Article XI of the Tennessee Constitution, which among other things prohibits the passage of special laws and arbitrary "class legislation."

Other objections are made against the valid-

(g)

**The Power of the State to Legislate as to Its Public Schools.**

1. The basic principle of the Act, we submit, is the power of the legislature to subserve the general welfare of the people of the State by the creation and control of a public school system. Aside from there being no constitutional inhibition upon the legislature in this matter, Section 12 of Article XI of the Constitution of Tennessee plainly shows that it was contemplated that the legislature should create a system of public schools. The Act in question relates only to teaching in the public schools of the State, which are supported in whole or in part by the public school funds. It specifically provides that it shall be unlawful for any teacher in such public schools to teach "*that man has descended from a lower order of animals.*"

2. The public schools are created by legislative act, and having been so created, the legislature may, by law, provide for the government



3. The work of teaching in a public school supported by public funds provided by taxation is essentially work of a public character. It necessarily follows then that the statute in question, in its application to those who undertake this *public work*—(just as is now universally held as to all statutes regulating the manner of doing all *public work* at public expense)—does not infringe the "liberty" of any one. Whatever may have been the motive controlling the enactment of the statute, there is no possible ground to dispute the power of the State to declare that no teacher shall teach in its public schools "*that man has descended from a lower order of animals.*" Whether the legislature passed the law because such teaching in its opinion denied "*the story of the Divine creation of man as taught in the Bible,*" or whether some other reason motivated it, the result is the same. The legislature was acting within its own peculiar and exclusive sphere, and the motive that impelled it is not a matter for a court to consider or inquire into *at all.*

State, as the guardian and trustee for its people, and having control of its own affairs, may govern its public school system, and prescribe the duties and rights and powers of the teachers therein, and may control and direct what shall not be taught therein. Regulations or laws on these subjects suggest only considerations of public policy, and with these the courts have no concern. No court has authority to review the action of the legislature in these respects. Whether such legislation is helpful and wholesome, or is hurtful and mischievous in its tendencies, the responsibility therefor rests upon the legislature, and not upon the courts.

5. No teacher is entitled of absolute right to teach in the public schools of the State. It is not the part of any one's "liberty" to perform labor for the State. No teacher in a public school can excuse the violation of his agreement with the State by doing that which the statutes under which he proceeds, and which prescribe his duties, distinctly and lawfully forbid him to do.

6. If the legislature has the power to forbid a teacher in the public schools of the State to teach "*that man has descended from a lower order of animals*" (as we submit it undoubtedly has) it must follow that it has the power to require an observance of the law so forbidding, and



to provide, by penalty, for the enforcement of such a law.

7. In creating the public school system of the State and in providing for the employment of teachers in its schools, the State has surrendered no part of its sovereignty; neither has it surrendered its power to make laws and provide punishment for a violation of the same.

## (h)

## The Police Power.

We submit that the statute in question is not to be referred *alone* to the police power of the State unless the term be used in its broadest and most general sense. The Act in question is to be assigned, *primarily*, to the now well recognized special class of Acts regulating the manner of doing *public work* to be performed at public expense, as we have previously suggested and will later show in detail. But if the Act in question is to stand or fall under the "police power," as this expression is understood in its *broadest* legal sense, we confidently submit it will stand the test.

The proposition announced in behalf of the defendant Scopes that "The criminal law cannot apply to a particular class. The criminal law cannot apply only to the teachers in the pub-

lic schools of Tennessee" is inherently unsound for two reasons:

(1) The legislature has the right to prescribe the manner in which employes or agents of its creation shall perform the duties of their places or agencies; and if it has this power, then it must follow that it has the power to make its determination effective and provide by penalty for the enforcement of the law; and

(2) The rule of conduct prescribed by the statute in question, and its prohibitions, apply alike to all who contract or agree to work as teachers in the public schools, so that all who come within the statute have equal protection of the law, and no discrimination is made against any who are of the same class, and who are under like conditions and circumstances.

We will later deal with the proposition that this Act is clearly valid as an exercise by the legislature of the State's broadly possessed police power, and that it contains no regulation or classification which must not be sustained under that power.

(i)

**Religious Freedom.**



subject, "Religious Freedom." We shall make reply to this phase of the case at some length in a subsequent portion of this brief, but we shall do so with the distinct avowal and reservation that in our judgment there is no question of religious freedom or of religion in any aspect save an incidental one (which will be noticed hereinafter), involved in this controversy. To teach "that man has descended from a lower order of animals" is not to teach religion. Such teaching is entirely apart from religion and now finds its chief protagonists in the realm of the *pseudo*-scientist and the disbelievers in continuing organized government. Prohibiting such teaching merely protects and conserves all *religions* without giving any preference to any *one* religion over any other.

Our adversaries say, on page 55 of their brief:

> "According to *science*, man had his origin with the lower form of life."

At page 59, they say:

> "The legislature may undoubtedly, within reasonable bounds, prescribe what *sciences* shall be taught in the public schools; but under the constitution, with the solemn duty resting upon it to foster *science*, the legislature cannot prescribe

brief in this
ussion of the

geology, botany, or any other *science*, and then deliberately set aside the fundamental

A large portion of defendant's
Court has been devoted to a disc

principles of these *sciences* and set up theories of its own."

At page 60, they say:

"In the institutions of higher learning all scientific subjects should be taught, and the ultimate recesses of human knowledge should be explored, if *science* is to continue its earnest and ceaseless quest after truth."

At page 69, they say:

"Leaving out of consideration for a moment the primary schools and devoting ourselves to the State University, where medicine is taught, is it conceivable that medical students can become properly versed in the various *sciences* necessary to the learning of medicine without some knowledge of this scientific theory?" (Evolution)

At page 71, they say:

"How is it possible to teach medicine without at least teaching the theory of evolution?"

Early in their brief, on page 10, our adversaries say:

"Neither the story of creation" (of man) "in the first chapter of Genesis, nor the conflicting story of creation in the second chapter of Genesis is *accredited* by *science*, but the doctrine of organic evolution, including the ascent of man from a lower order of animals, is *universally* accepted by *scientists* at the present time." (*Italics ours.*)

That *scientists* or even *psuedo*-scientists "*universally* accept" this *undemonstrable* "theory" that man has descended from a lower order of



animals is simply an unwarranted statement, as this Court will judicially know as a matter of general history and current common knowledge. See:

"The Case Against Evolution"—(1926—Publishers: The MacMillan Co., New York—) by George Barry O'Toole, Ph.D., S.T.D.;

"God—or Gorilla"—(1921—Publishers: The Devin-Adair Co., New York)—by Alfred Watterson McCann.

"Melbourne and Sidney Addresses" of Dr. William Bateson, President of the British Association for the Advancement of Science in "Science" of August 28, 1914.

As the challenged Act prohibits nothing except the teaching in the public schools of Tennessee "*that man has descended from a lower order of animals*," it in no manner conflicts with the religious freedom clause of the Constitution of Tennessee. It will be conceded, we think, that there is no provision of the Federal Constitution relating in terms to religious freedom that has any application to state legislation. The only insistence made in defendant's behalf in this particular respect is that the Act violates that portion of Section 3 of Article I of the State Constitution which prohibits the giving of a preference "*to any religious establishment or mode of worship.*"

Certainly the Act does not prescribe or undertake to set up any "mode of worship."

Equally as untenable is the insistence that it gives a preference to a *"religious establishment."*

There is nothing in the Act that mentions any "religious establishment" by name. There is no "religious establishment" and for that matter no *religion* that makes a part of its tenets, creed or doctrine the teaching *"that man has descended from a lower order of animals."*

If there were such an establishment, it could not claim the right, under the Constitution of Tennessee, to have such doctrine, *preferred,* taught or promulgated in the public schools of the State. There is nothing in the Act that requires any teaching *at all* in the public schools as to the origin of man.

The argument is that *some* persons *believe* or *assert* that they and all other human beings have descended from a lower order of animals, and because they so believe, they insist that this thing *shall be taught* in the public schools of the State, and that a statute which prohibits such teaching denies them a constitutional right. We submit that a statement of the proposition carries its own refutation. Nevertheless, that is what the insistence of defendant comes to—so far as concerns defendant's contention that any question



of religious freedom is involved in the enforcement of this Act.

The propositions which we have so far submitted present the only real, substantial and fundamental questions involved in this case. As has been stated, there are other insistences made in behalf of the defendant which will be noticed in their proper order. We submit, however, that the propositions above stated are the controlling ones, and if the Court shall rule with the State of Tennessee on these, the defendant's insistences must fall to the ground.

The propositions which we have announced above are based upon distinct rulings in cases decided by the Supreme Court of Tennessee, the Supreme Court of the United States and the courts of last resort in other jurisdictions; and as will hereinafter appear from quotations from these authorities, in stating our foregoing basic propositions, we have in many instances used the exact language of the controlling decisions.

**SOME POINTS NOT DEALT WITH, AND SOME POINTS CONCEDED IN BRIEFS SUBMITTED IN DEFENDANT'S BEHALF.**

Even in this preliminary outline of the case which we are now making, we believe it will be helpful to the Court if we here and now briefly notice some fundamental things not dealt with, and some others conceded, in the brief of our adversaries.

**(1)**

**As to the Power of Legislature Over Schools:**

In regard to the broad and fundamental power of the legislature over our publicly maintained schools and institutions of learning, as ruled by the decision of this Court in *Leeper* v. *State*, 103 Tenn., 500, and the unquestioned line of authorities upon which this Court rested that decision, our adversaries are driven to make a concession which they wholly fail thereafter to reckon with, appreciate, weaken or overthrow.

For instance, from page 33 of the defendant's printed brief we quote the following:

> "We do not challenge the right of the legislature of Tennessee to control the public schools, to fix the curriculum, to forbid the teaching of biology or *anything else.*"

And from the the printed argument offered by the "Unitarian Laymen's League" as *amicus curiae*, we quote (p. 26) the following:



> "In Tennessee the Supreme Court, in *Leeper* v. *State*, 19 Pickle, 500 (1899), has declared *beyond question* the law of the State as to the power of the legislature to regulate and to provide a uniform series of textbooks. In all *frankness*, it should be said that there are expressions in the opinion of the Court in that case that might lead to the *affirmance* of the verdict in this case. One should not, however, fail to keep in mind the facts before the Court in the Leeper case and the facts before the Court in this case. It is *small wonder* that counsel for the State in this case should have mainly rested the case for the prosecution upon the declarations of this Court in the Leeper case, in so far as the constitutionality of the legislative Act in question rests. There can be little doubt that on this appeal the opinion in the Leeper case will be cited as controlling."

The above quoted concessions, in so far as concerns any possible assault upon the Act in question under the Federal or State Constitutions, present an insurmountable barrier to our adversaries in view of the well settled and really unchallenged right and power of the State to prescribe a curriculum and enforce proper discipline in its publicly maintained schools.

The State of Tennessee does rely in the pending case upon the opinion in the Leeper case as *controlling* upon the validity of this Act, viewed as a manifestation of the broad power possessed by our State legislature over our publicly main-

tained schools and institutions of learning. Our adversaries are really asking this Court to overrule the Leeper case and ignore the confirmatory authorities upon which that decision was grounded, and which abundantly exist throughout our country, all of which authorities will be hereinafter fully set forth.

(2)

**As to Any Alleged Religious "Preference":**

The corps of counsel for the defendant in their Brief (pp. 26-34; 51, 52) in insisting that this Act violates Article I, Section 3 of our State Constitution relating to the freedom of religious worship, make it very plain that their sole and entire insistence in this connection is that the Act violates the last clause of said Article and section which declares *"that no preference shall ever be given, by law, to any religious establishment or mode of worship."*

They then insist that this Act, which does nothing but prohibit the teaching in our public schools "that man has descended from a lower order of animals" prefers the Bible over "the Koran or the Book of Mormon" or the religious views of all other persons, except those whom they say take the view of the "literalist" or the "fundamentalist" in regard to a literal acceptance of the Bible; and they choose to call and



term the religious beliefs of those members of the various religious sects whom they term "literalists," and who are members of various churches and many of whom belong to no church at all, a "religious establishment," though the very definitions which they quote in their Brief (pp. 40-43) wholly fail to bear out and really refute any such conception of a "religious establishment."

But the trouble of our adversaries, when they undertake to insist that this Act, properly construed, gives a "preference" to any religion or religious establishment over any other, is very much more fundamental than any mere play upon words in which they seek to engage.

The Court will bear in mind that there is no religion, and in the history of the world there has never been any religion having any creed or tenet or doctrine undertaking to teach and inculcate as a religion or mode of worship "that man has descended from a lower order of animals."

No religion now extant, or of which there is any echo in the written records of humanity, has ever undertaken to have, teach or inculcate in its devotees any doctrine or tenet of religious belief to the effect "that man has descended from a lower order of animals." No religion of any

man, of any color, or of any time has ever held or taught any such religious precept, tenet or principle.

(See "Handbook of All Religions," published by John E. Potter & Co., Philadelphia; and also "Religious Denominations of the World," published by Bradley, Garretson & Co., of Philadelphia; and *any* and *all* Encyclopedias and Histories of *all* Religions.)

When, therefore, our adversaries insist that to forbid the teaching in our public schools "*that man has descended from a lower order of animals*" gives a preference to any "religious establishment" or mode of worship over any other, —they are met at the outset with the insuperable difficulty that no religion or religious establishment ever taught or sought to inculcate any such doctrine, tenet or belief.

The difficulty and *dilemma* of our adversaries lie even deeper, and this also they manifestly realize and adroitly seek to avoid. Let us see if this is so.

The Bible story of creation as set out and contained in either the first or second chapter of Genesis is not taught in the public schools and public institutions of learning in this State. Neither is any other portion or part of the Bible, consisting of both the Old and New Testaments,



taught in our public schools and State-supported educational institutions.

We have in this State a very carefully worded statute (Chapter 102 of the Public Acts of 1915) meagerly and imperfectly referred to in the brief for defendant (pp. 49, 50) regulating the reading of the Bible in the public schools of this State. This Act, by its preamble, shows that it was passed merely "in the interest of good moral training, of a life of honorable thought and good citizenship" and to the end that public school children should have lessons of "morality" brought to their attention during their school days. The Act provides for the reading of at least ten verses from the Bible at the opening of each and every public school, upon each and every day, by the teacher in charge. It further provides that this Bible reading shall be "without comment," and that the same chapter of the Bible shall not be read more than twice during the same session. It also contains a provision that pupils may be excused from the Bible reading upon the written request of the parents.

Such mere non-controversial and non-sectarian reading of the Bible in public schools "without comment" and for the limited purposes stated in the Act, has been generally held by the courts *throughout our nation*—(and the few cases to

the contrary are easily to be differentiated under the terms and provisions of the Tennessee statute)—*to be perfectly lawful.* And statutes providing for such mere non-controversial readings of the Bible "without comment" have been generally upheld as not giving any "preference" to any religion or mode of worship over any other.

**(3)**

**The Dilemma of Our Adversaries**

For the purpose of exposing the fatal dilemma in which our adversaries find themselves, we ask your Honors to bear in mind that no part of the Bible is taught as a religious book in the public schools of Tennessee. Neither is the Bible account of the story of creation there taught. The so-called religious "bigots" and "intolerants" of the State of Tennessee, to whom frequent reference is made by counsel for the defendant Scopes in their printed brief and argument, are not insisting on having *anything* taught to the school children of this State, and at public expense, in regard to any religion, or mode of worship, or in regard to the Divine origin of man, as set out in the Bible, or anything else in the Bible.

Those who are insisting that in the public schools of Tennessee something should be affirmatively taught and injected into a field prolific of controversy, are the discordant masses of



anarchists, left-wing socialists, atheists, agnostics, self-styled "intellectuals," and "scholarly Christians" as our adversaries refer to them. A peculiar and significant thing to be noticed in this connection is that those who *seem* most concerned and who are most active in the effort to overthrow the Act in question are those who reside beyond the limits of Tennessee, and can in no way be affected by the provisions of the law.

Our adversaries are not consistent. At one point they say the effect of the Act in question is to make the Holy Bible the "yardstick of learning."

At page 33 of defendant's printed brief this language is found:

> "We do not challenge the right of the Legislature of Tennessee to control the public schools, to fix the curriculum, to forbid the teaching of biology or *anything else.*"

At page 25 of said printed brief, speaking with reference to the Act in question, it is said:

> "Is it made unlawful to teach the theory of evolution? Oh, no. It is made unlawful to teach any theory that denies the story of the Divine Creation of man in the Bible and to teach instead that man has descended from lower order of animals."

To show further the logical inconsistency of the position which our adversaries take in this

regard, and by way of reducing their contentions to a plain and manifest *dilemma*—we submit:

(1) Teaching "that man has descended from a lower order of animals" is either a "religion," a "religious establishment" or a "mode of worship," or it is not such. This is necessarily true.

(2) If teaching "that man has descended from a lower order of animals" does not amount to a religion, a religious establishment or a mode of worship, then, of course, it is entirely outside of and has no relation to the clause of our State Constitution, Article I, Section 3, which declares that "no preference" shall ever be given, by law, to any religion or religious establishment over any other. In other words, if the contention "that man has descended from a lower order of animals" is not a religion or religious establishment, or mode of worship, then prohibiting the teaching of this does not give any "preference" to any religion over any other and to no degree discriminates against any religion. This is necessarily true.

(3) If the theory or hypothesis "that man has descended from a lower order of animals" is a religion or a religious establishment or mode of worship, then it cannot be constitutionally taught in the public schools of Tennessee, because the teaching of it would give a "prefer-



ence" to such religious view in violation of the very language of Article I, Sec. 3 of our State Constitution which our adversaries invoke against this Act. This is necessarily true.

Again, if teaching "that man has descended from a lower order of animals" is outside any religion, religious establishment or mode of worship, and such teaching only relates to science, then the legislature of the State is unhampered by any constitutional prohibition in determining what teaching relating only to science shall be done in the public schools of the State.

We submit that the foregoing really reduces to an absurdity, and discloses the fatal *dilemma* involved in the insistences of our adversaries that the challenged Act is in violation of Article I, Section 3 of the Tennessee Constitution relating to religious freedom.

(4)

**As to the Right of the Legislature to Pass This Act Under the Police Power.**

In this connection we first call sharply to the attention of the Court that the defendant's counsel have written their entire brief and argument in this case without mentioning the drastic and significant provision contained in Article IX,

Section 2 of the present Tennessee Constitution, which is as follows:

> "SEC. 2. *No atheist or disbeliever shall hold a civil office.*—No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State."

Formerly it was held, under the common law of this State, that persons disbelieving in God and a future state of rewards and punishments were not competent to testify as witnesses. It was only by the Act of 1895, Chapter 10, compiled in Shannon's Code, at Section 5593, that such unbelievers in God and the immortality of the soul were given the right to testify in court; and even then the Act expressly declared that such unbelief should go to the credibility of the witness. In some states in the Union such disbelief disqualifies entirely. In other states, the same rule obtains as in Tennessee.

Defendant's counsel, as before stated, write their entire brief and argument in this Court without so much as noticing the above quoted provision of our Constitution. In fact, the seemingly deliberate avoidance by our adversaries of making any reference thereto impresses us, and will no doubt impress the Court, as being *quite significant.*



With this provision of our State Constitution in the mind of the Court, it necessarily results that defendant's counsel have the burden of convincing this Court that the Tennessee legislature, in the passage of the law in question, acted, from its standpoint, not *bona fide*, but arbitrarily "beyond possible justice." That is, that the legislature could not possibly have reasonably concluded that teaching "that man has descended from a lower order of animals" had any tendency to produce in the minds of pupils of the public schools of the State, who were to be the future citizens and office-holders of the State, a disbelief in the being of God, and a future state of rewards and punishments, which disbelief would absolutely disqualify such future citizens from holding any civil office in the State.

In other words, in this preliminary view of the questions involved in this case, we wish thus early to remind the Court of its previous line of decisions regarding the validity of a police power statute, passed to conserve the public health, welfare or morals, when such statute is attacked as unconstitutional under Article I, Section 8 (the "law of the land" provision) or Article XI, Section 8 (the "class legislation" provision) of our State Constitution, or under the "equality," "liberty" or "due process" clauses of the

Fourteenth Amendment to the Federal Constitution.

On this question, the Supreme Court of Tennessee, in the case of *State* v. *McKay*, 137 Tenn., 280, at page 306, says:

> "With the legislative departments rests the consideration and determination of the reasonableness of regulations under the police power, and a court will not examine the question *de novo* and overrule such judgment by substituting its own, unless it clearly appears that those regulations are so 'beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power.' (*Lemieux* v. *Young*, *supra*), or is unmistakably and palpably in excess of the legislative power, or is arbitrary 'beyond possible justice,' bringing the case within 'the rare class' in which such legislation is declared void."

This ruling is in exact accord with the holdings of the Supreme Court of the United States. By this rule neither the Supreme Court of the United States, nor this Court, will examine *de novo* the question of the "reasonableness" of any regulations or classification contained in a police power statute passed by the State legislature.

The Court will understand that we are not now to be understood as insisting that the challenged Act must stand or fall *alone* as an *ordinary* police power statute. But we maintain, as we have said in an earlier portion of this brief, that the Act is primarily referable to that *special class* of statutes which represent the power of the State to legislate in regard to its public school system or any other *public work* and *service* to be done at *public expense*. We shall hereafter also fully discuss the Act, so far as the broad and general police power is concerned, and will show that the law considered as referable to such power is unquestionably a valid Act.



All courts recognize that the consideration and determination of the reasonableness of a police power regulation or classification *primarily* rests with the legislative department; and unless such regulations are beyond all "reasonable relation" to the subject to which they are applied, so as to amount to a "mere arbitrary usurpation of power," or are arbitrary "beyond possible justice," so that the Court must find that the legislature, in good faith, could not have concluded that there was any reasonable relation between the provisions of the Act, and the subject to which the Act applied,—the police power statute will be held valid under the well settled decisions of both this Court and the Supreme Court of the United States. We shall hereinafter present these decisions at some little length.

So, we submit, all this Court has to find in order to sustain this Act as a valid exercise of the police power by the State legislature is that, without being capricious and arbitrary, the legislature could reasonably have concluded that the teaching in our public schools "that man has descended from a lower order of animals" had some *tendency* to produce in the minds of the pupils in those schools a disbelief in the being of God, or the immortality of the soul, or a future state of rewards and punishments, which, if entertained by them, would absolutely disqualify them in the future from holding any civil office in Tennessee as we have seen, or, that for any other reason the legislature thought the public welfare would be subserved by the enactment of the law.

The burden and difficulty under which our adversaries must labor in seeking to have this Act viewed simply as a police power statute declared unconstitutional and void, as being in violation of the 14th Amendment to the Federal Constitution, or in violation of Article I, Section 8, or Article XI, Section 8 of the Tennessee Constitution are even *greater* and more *insuperable* than just above suggested.

It seems most manifest that the legislature, in passing this statute, cannot be held by this Court to have acted capriciously and arbitrarily "beyond possible justice" and by way of a "mere arbitrary usurpation of power"—in determining that the teaching in our public schools "that man has descended from a lower order of animals" would, in any event, *tend* to produce in the ranks of the pupils, or between the pupils and the teacher, or between the latter and the parents of the pupils, undesirable, distracting and disturbing discussion in respect of a matter trenching upon the religious views and convictions entertained in the minds and homes of some, and indeed, most of our people, and that this would be to the moral and educational *detriment* of our State and its people, and opposed to the general welfare of Tennessee.



We shall hereinafter present the decisions of the Supreme Court of the United States to the effect that any regulation, in a police power statute, representing the "prevailing morality" or strong and "preponderant opinion" as to what rules should be put forth in aid of the public morals and public welfare,—will be sustained as a valid exercise of police power by a State legislature. And all this our adversaries have apparently overlooked.

The matter, if possible, goes *yet deeper*. It is, of course, true, as declared by the Supreme Court of the United States, that the Federal Constitution makes no provision for protecting the

citizens of the respective states in their religious liberties; and that this is left entirely to state constitutions and laws; and that there is not any inhibition imposed by the Constitution of the United States in this respect on the states. Hence the only attack that the defendant can make under the Federal Constitution is not grounded upon anything in the Constitution of the United States in regard to religion, as such, but must be limited, and is limited by them to an attack under the "equality," "liberty" or the "due process" clauses of the 14th Amendment to the Federal Constitution, and it is only in *"rare cases"* that such an assault can be successfully made upon a police power statute of the State, as we have already seen, and will later show, with detail.

**(5)**

**A Religious Nation and State.**

In this connection we now call to the attention of the Court another matter which defendant's counsel have absolutely overlooked, and that is the fact that the Supreme Court of the United States has emphatically declared that this is a *religious Nation* and indeed a Christian Nation, and the Supreme Court of Tennessee has more than once declared that this is a *religious State* and indeed a Christian State. Both these Courts recognize and have declared that religion



underlies and upon it depends the *very structure* of this government, and *religion* is the most *valuable asset* of the morality, the law respecting habits of our citizenship, and the public welfare.

Of course, the Act in question was not passed for the purpose of preferring any religion or religious sect over any other, and it does not purport so to do. It may be that the purpose of its passage was to conserve *all religions*, and if so, such purpose is clearly legitimate, and in line with the wisest public policy and even the highest sense of duty on the part of our State legislature under the express decisions of both this Court and the Supreme Court of the United States—as we will later show with detail. Or it may be that for other reason or reasons the legislature thought it proper to enact the law and thereby promote the public welfare.

**(6)**

**Admissions of Our Adversaries as to Religion and Police Power Phase of the Case.**

We now desire sharply to challenge the attention of this Court to two clear, sweeping, and sound statements and admissions made in the printed argument filed on behalf of defendant Scopes by Charles H. Strong, counsel for the Unitarian Laymen's League, as *amicus curiae.*

By way of frankly admitting and conceding, in *effect*, that the teaching "that man has descended from a lower order of animals" in *any event*, from the standpoint of the *vast majority* of our citizens who accept orthodox Christianity, would tend to *undermine* the *basis* of their belief in the being of God and the immortality of the soul, a most significant statement appears on page 13 of said printed argument, as follows:

> "The account in Genesis of the creation of man is merely one explanation of a great biological fact, but it has come to be a religious tenet which has been made the BASIS, in ORTHODOX CHRISTIANITY, of the precious doctrine of IMMORTALITY. Other Christians share in the same faith in immortality, but find *another basis* for it." (Italics supplied.)

The legislature certainly cannot be held by your Honors to have acted arbitrarily and "beyond possible justice" in concluding that nothing should be taught in our public schools contrary to the very basis of the doctrine of immortality in the minds of most or even a substantial part of our people and citizens,—especially when such belief in immortality is a constitutional prerequisite for the holding of any civil office in this State.

And this same printed brief and argument submitted on behalf of defendant Scopes by this



*amicus curiae*, while it was evidently hurriedly prepared, and without the writer even having examined the technical record in this case, shows that the writer did at least remotely have in mind that our State Constitution affirmatively disqualifies any person from holding any civil office in this State who denies the being of God and a future state of rewards and punishments.

And this, coupled with the fact that the writer must have recalled something in regard to how far courts must go in sustaining the regulations and classifications contained in a police power statute,—no doubt prompted the admission and concession appearing on page 39 of this printed argument of this adversary counsel, as follows:

> "The Act in question *may*, and *should* be, *sustained* as a *valid exercise* of the *police power* vested in the General Assembly of Tennessee unless there are constitutional limitations so specific as to forbid it, or unless it is plain that it should be condemned and invalidated as an arbitrary, intolerant and capricious attempt to exercise the police power. If the exercise of the State's police power to regulate education is reasonable then due process is had. But if its exercise is unreasonable then due process is lacking."

In view of all the above, and regardless of the critical attitude of any of the attorneys of the defendant Scopes toward the Bible, and all religions, we cannot apprehend that this Court

can or will do otherwise than hold that, in passing this Act to prohibit merely the teaching in our *publicly* maintained schools and institutions of learning, "that man has descended from a lower order of animals," our lawmaking department was but validly exercising its clearly possessed power of control in respect of the government and discipline of our public schools and also enacting a clearly valid regulation if it be merely considered as having been passed under the broad police power of the State.

**REFERENCE TO AND RELIANCE UPON MATTERS OUTSIDE THE RECORD BY ADVERSARY COUNSEL.**

On October 24, 1925, this Court, upon preliminary motion of the State, ordered stricken from the record in this case, and the files of this Court, the entire alleged bill of exceptions, which included alleged testimony and statements offered by numerous alleged scientists.

> *Scopes* v. *State* (October 24, 1925), 278 S. W. (Adv. Pamph. No. 1 of February 3, 1926), 57, 59.

Notwithstanding this previous action of this Court in this case, counsel for the defendant, in their printed Brief and Argument, and in numerous connections therein, continue to refer to and quote this alleged "scientific evidence" from these alleged "scientific" witnesses. This



excluded part of the transcript, we submit, should not, and can not, be looked to by the Court for any purpose, for the reason that it is no part of the record in the case.

Counsel for defendant, in their printed brief, at pages 3, 4, say, that while all this alleged "scientific" testimony has been ordered stricken from the record by this Court so that same is "technically" no part of the present record, nevertheless they say there is thus presented a vast amount of "scientific knowledge" of which this Court must take judicial cognizance, and which the Court could "probably" find nowhere else in so convenient a form. They add that before the bill of exceptions was ordered stricken out, a large part of their said brief had been printed; and they then add that the Court will find in their said brief references to and quotations from this stricken out bill of exceptions.

They say they do not present these references and quotations as "part of the record," but have "retained" them in their brief because they feel they are "valuable in illustrating the argument"; and they ask this Court to take judicial notice of these alleged statements of these alleged scientists referred to in their brief in the same way that your Honors would take judicial notice of such statements if they appeared in "encyclopedias."

In their printed argument they make various and sundry references to and quotations from these stricken out statements of these alleged "scientists," all of which are not only no part of the record, but are also utterly immaterial and irrelevant to any consideration of this case under the manifestly sound and proper construction which the Trial Judge had placed upon the Act in question, and as to which construction they assign no error, submit no authority and make no criticising argument.

Not only do our adversaries thus improperly and repeatedly refer to the things contained in the stricken out bill of exceptions, but at page 34 of their brief they refer to what has been said about the questions involved in this case in "public discussion" and in the "newspapers" of the country; and at pages 51 and 52 they refer to what has been said about this case on the "street corners" and "in the churches at business and in prayer." Such are the very *unusual* and *peculiar* views of our adversaries as to the *proprieties* and the *record* in this case.

We submit the suggestion that this stricken out alleged "scientific" evidence from these alleged "eminent" scientists, concerning whose qualifications this Court knows nothing and can take no judicial cognizance, really differs somewhat from "encyclodepias" and even from



"newspapers" or "street corner" talk—though as to the latter the difference may not be *quite* so striking.

Another thing illustrative of the methods of counsel for Scopes appears on page 68 of their brief, with similar statements and references scattered through their brief in many connections. On page 68 of their brief, they say:

> "These statements" (of the alleged scientific witnesses contained in the stricken out bill of exceptions) "show that whether the subject is geography, geology, comparative anatomy, comparative embryology, paleontology, astronomy, physiology, chemistry, zoology, breeding, study of plants, or almost any other scientific subject, the facts of evolution and the theory deduced from those facts are a necessary study."

With this Act properly construed, as it was by the Trial Judge, to prohibit nothing but the teaching of one thing, that is "*that man has descended from a lower order of animals*"—it is, of course, true that the teachers in our public schools and institutions of learning are left perfectly free in the teaching of geography, geology, comparative anatomy, comparative embryology, paleontology, astronomy, physiology, chemistry, zoology, breeding, the study of plants, and every other scientific subject; the only prohibition of the Act being that they shall not teach to the future citizens of this State "that man has descended from a lower order of animals," and thus

attempt to give to their pupils as "accumulated and accepted knowledge" a mere *"hypothesis* —(unproven assumption)—which *invades* the controversial field of pure religion and which admittedly has a tendency to strike at the basis of the belief of most of our people in the being of God and the immortality of the soul, which belief must be accepted by all persons qualified to hold office in this State.

With this Act properly construed, as it was by the Trial Judge, the teaching of science is left *perfectly free* and all processes of evolution may be taught with the single exception of the one prohibition made and contained in the *body* of the Act in question.

But the evident desire of some of the defendant's counsel to continue the effort to convey the idea that *they* believe that our legislature represents a very backward people not possessing *their* very cultured, intellectual and "scientific" views— has prompted our adversaries to continue in their brief their unwarranted and baseless assertions that the enforcement of this Act, as properly construed by the Trial Judge, will hamper and throttle the teaching of *all* or *any* of the "sciences," and thus keep our State in a deplorably benighted plight and condition.

We will now proceed with the main body of our Brief and Argument.



## BRIEF OF LEGAL PROPOSITIONS.

We say there can be no legitimate controversy about the existence and accuracy of the fundamental legal propositions determinative of this case and next stated below.

### (1)

**The Indictment is Valid. It Charges the Offense in the Language of the Statute and with Sufficient Particularity Properly to Inform the Defendant of the Nature and Cause of the Accusation Against Him.**

Charging a statutory offense in the language of the statute is sufficient under our Tennessee statutes; and also under the previous decisions of this Court, the United States Circuit Court of Appeals of this Circuit and the Supreme Court of the United States.

Article I, Sec. 9, of Constitution of Tennessee.
Shannon's Code, Secs. 7077, 7087, 7088 and Notes.
*McWhite* v. *State* 143 Tenn., (16 Thomp.) 222;
*State* v. *Kelly*, 138 Tenn. (11 Thomp.), 84;
*State* v. *Green*, 129 Tenn., (2 Thomp.) 619-624;
*State* v. *Stephens*, 127 (19 Cates), 282;
*State* v. *Witherspoon*, 115 Tenn. (7 Cates), 138, 144, 146, 147.

*Smart & Carson* v. *State*, 112 Tenn. (4 Cates), 539;
*State* v. *Pearce*, 7 Tenn. (1 Peck), 65, 68, 69.
*Armour Packing Co.* v. *United States*, 209 U. S., 56, 84.
*Ledbetter* v. *United States*, 170 U. S., 606, 612.
*Miller* v. *United States*, (C. C. A., 6 Cir.), 300 Fed., 529.
*Huth* v. *United States*, (C. C. A., 6 Cir.), 295 Fed., 35.
*United States* v. *Olmstead*, 5 Fed., (2d) 712.

Our above insistence is amplified and other authorities are noticed in our later Argument.

(*Post*, pp. 91 to 107.)

(2)

**The Act Does Not Violate Article II, Sec. 17, of our State Constitution. The Caption Sufficiently States the Subject of the Law; and the Fact that the Caption is Broader Than the Body of the Act is Immaterial; and the Generality of the Caption is No Valid Objection to It.**

The caption of the Act declares that it is an Act to prohibit generally "the teaching of the Evolution Theory" etc.—while the body of the Act properly construed only prohibits the teaching—"that man has descended from a lower order of animals."



If the "Evolution Theory," generally referred to in the caption of the Act, *contains* and *includes* the theory or hypothesis "that man has descended from a lower order of animals"—it follows that there is presented merely the case of the caption being *general* and *broader* than the body of the Act, and this of course is not objectionable under our Constitution.

The attorneys for Scopes *really* understand and recognize this to be the rule administered by this Court in enforcing Art. II, Sec. 17 of the State Constitution,—because on page 120 of their printed Brief they say:

> "Unless descent from a lower order of animals is the theory of evolution, the Act is in conflict with the caption."

In defining the word "Evolution" with particular reference to the "Theory" of Evolution, Webster's New International Dictionary states:

> "This theory, which *involves* also the *descent of man from the lower animals*, is based on facts abundantly disclosed," etc.

And of course the very definitions of the "Theory" of Evolution quoted in the Brief of the attorneys for Scopes—(pp. 56-58)—disclose that the "Evolution Theory" mentioned in the caption of this Act does include and contain

the doctrine that man has descended from a lower order of animals.

> "A caption may be broader than the Act, without making the latter defective."
> *Nichols & Shepherd Co.* v. *Loyd*, 111 Tenn. (3 Cates), 145, 148.

To the same effect see:

> *House* v. *Creveling*, 147 Tenn. (20 Thomp.), 589, 597 to 599.
> *State* v. *Cumberland Club*, 136 Tenn (9 Thomp.), 84.
> *State, ex rel.* v. *Persica*, 130 Tenn. (3 Thomp.), 48, 55.
> *Knoxville* v. *Gass*, 119 Tenn. (11 Cates), 438, 451.
> *Dixon* v. *State*, 117 Tenn. (9 Cates), 81.
> *State ex rel.* v. *Hamby*, 114 Tenn. (6 Cates), 365.
> *Goodbar* v. *Memphis*, 113 Tenn. (5 Cates), 38
> *Powers* v. *McKenzie*, 90 Tenn. (6 Pickle), 167, 177, 178.
> *State ex rel.* v. *Schlitz Brewing Co.*, 104 Tenn. (20 Pick.), 715, 728-729.

Our insistence set out above is later dealt with in our printed Argument. (*Post*, pp. 107 to 115.)



**(3)**

**The Act in Question is Valid as the Exercise of the Broad Power and Duty of our State Legislature Over the Curriculum, Discipline and Government of our Public Schools and Public Institutions of Learning. Our Legislature Was Perfectly Free to Impose the Regulation Contained in this Statute, and Its Power to Do So is Not Open to Judicial Review at All.**

By the very nature of things our State law-making power has full and plenary control over our public schools and public institutions of learning. The power and the directory "duty of the General Assembly" in this respect are recognized by Art. XI, Sec. 12, of our State Constitution, and are of course *inherent* in the legislative department, and can exist in *no other* department.

While the power of the State, acting through the General Assembly, over our public schools and institutions of learning, in respect of providing and controlling the courses of study therein and the discipline and government thereof, is finally referable to the police power of the State as recognized and declared by this Court in *Leeper* v. *State*, 103 Tenn. (19 Pick.), 529-538 —it is also true that since by the Act in question the State was dealing *alone* with its *own public school system*, the validity of the regulation con-

tained in the Act is not open to judicial review at all.

To regulate its own public school system and provide *conditions* subject to which Scopes and all other teachers should perform their services the State passed the Act in question, which is a statute of a recognized *special class*. In passing this statute the State was acting in respect of *public* work and services to be performed at *public expense* and the *validity* of such regulations is not *open* to *judicial review* at all, as would be regulations imposed by the State in regard to work and the manner in which services should be performed by or for *private* individuals or corporations in the field of their *private* business affairs.

*Leeper* v. *State*, 103 Tenn. (19 Pick.), 500, 529 to 538,—and the many authorities therein cited;
*Waugh* v. *Mississippi University*, 237 U. S., 589-597;
*Atkin* v. *Kansas*, 191 U. S., 207, 220-224;
*Truax* v. *Raich*, 239 U. S., 33, 40;
*Heim* v. *McCall*, 239 U. S., 175;
*Ellis* v. *United States*, 206 U. S., 246;
*Berea College* v. *Kentucky*, 211 U. S., 45, 53 to 58, 69;
*Pierce* v. *Society of Sisters of Holy Name*, 268 U. S., 510;
*Meyer* v. *Nebraska*, 262 U. S., 390; 67 L. Ed., 1042; 29 O. L. R. A., 1446;



*State, ex rel.* v. *Haworth*, 122 Ind., 462, 7 L. R. A., 240, and the many authorities therein cited;
*Bopp* v. *Clark*, 147 N. W. (Ia.), 172, 52 L. R. A. (n. s.), 493;
*Re*: *J. T. Dalton*, 61 Kan., 257, 47 L. R. A., 380;
*People, ex rel. Warren* v. *Beck*, 10 Misc., 77, 30 N. Y. Supp., 473;
*Bradford* v. *Board of Education*, 18 Calif. App., 19, 121 Pac., 929;
*North* v. *University of Illinois*, 137 Ill., 296, 27 N. E., 54;
*Wilkerson* v. *Rome*, 152 Ga., 762, 110 S. E., 895, 20 A. L. R., 1334;
*University of Mississippi* v. *Waugh*, 105 Miss. 623; L. R. A. 1915D, 588;
*Voluminous Case Note* on subject of "Sectarianism in schools," 5 A. L. R., 866.

And the numerous authorities consisting of State decisions which appear cited immediately under the Case-Note last above referred to and in support of a preceding proposition in this Brief, and which relate to the general subject of lawful Bible reading in public schools, will be found to be relevant authorities to support the broad and plenary *power* of the State legislature over *public* schools and institutions of learning, which is of course fundamentally referable, in the broadest and most general sense, to the police power of the State.

In our later Argument we fully deal with our

above insistence, and there quote from many of the above cited authorities.

(*Post*, pp. 123 to 169.)

(4)

**The Act in Question, if Viewed Simply as an Act Passed Under the General Broad Police Power of the State, is Clearly Valid and Constitutional Under a Long Line of Previous Decisions of This Court.**

The regulations and classifications contained in a State statute passed under the police power of the State will not be held in violation of Art. I, Sec. 8,—(the "law of the land" provision)—or Art. XI, Sec. 8,—(the class legislation provision)—of our State Constitution unless same are found by the Court to have been arbitrary "mere arbitrary usurpation of power" by the legislative department. The Court will recognize that the making of such police power regulations and classifications is *primarily* for the *legislature*, and the Court will not examine the question *de novo* and undertake merely to substitute its *own* judgment for that of the legislature.

Const. of Tennessee, Art. IX, Sec. 2.
*State* v. *McKay*, 137 Tenn., (10 Thomp.) 280, 306, 307,—citing and quoting many decisions of the Supreme Court of the United States, and laying down the rule in this State.



*Leeper* v. *State*, 103 Tenn. (19 Pick.), 500, 530-532.
*Moyers* v. *Memphis*, 135 Tenn. (8 Thomp.), 263, 291, 292;
*State, ex rel.* v. *Persica*, 130 Tenn. (3 Thomp.), 48, 57, 58,—citing numerous cases decided by the Supreme Court of the United States and this Court.
*Nance* v. *Piano Co.*, 128 Tenn. (1 Thomp.), 1, 8;
*Kirk* v. *State*, 126 Tenn. (18 Cates), 7, 13, 14.
*Motlow* v. *State*, 125 Tenn. (17 Cates), 589.
*Brinkley* v. *State*, 125 Tenn. (17 Cates), 371.
*State* v. *Mill Co.*, 123 Tenn. (15 Cates), 399; Ann Cas., 1912C, 248.
*Webster* v. *State*, 110 Tenn. (2 Cates), 491.

Some of the above cited decisions of this Court will be later quoted in our Argument.

(*Post*, pp. 117 to 123; 170 to 200.)

(5)

**The Act in Question, if Viewed Simply as an Act Passed by Our Legislature Under the Police Power of the State, is Clearly Valid and Not in Violation of Either the "Equal Protection of the Law" Clause or the "Due Process of Law" Clause of the Fourteenth Amendment to the Constitution of the United States.**

The long line of decisions of the Supreme Court of the United States, in regard to when

that Court will declare an Act of a State legislature passed under the police power of a State to be in violation of any of the provisions of the Fourteenth Amendment to the Constitution of the United States, are *perfectly clear* upon the proposition that that Court will not undertake to review, *de novo*, the judgment and discretion exercised by the State legislature in passing such a statute; and will not declare such a statute to be in violation of the Fourteenth Amendment except where the provisions or classifications laid down in the statute can be said to represent "mere arbitrary usurpation of power" or are arbitrary "beyond possible justice," bringing the case within the "rare class" in which that Court will declare such legislation void.

*State* v. *McKay*, 137 Tenn. (10 Thomp.), 280, 306.
*Gitlow* v. *New York*, 268 U. S., 652;
*Radice* v. *People of State of New York*, 264 U. S., 292, 68 L. Ed., 690.
*LaCosta* v. *Department of Conservation of State of Louisiana*, 263 U. S., 545, 68 L. Ed., 437.
*Terrace* v. *Thompson*, 263 U. S., 197, 68 L. Ed., 255;
*Farmers & Merchants Bank of Monroe, N. C.* v. *Federal Reserve Bank of Richmond, Va.*, 262 U. S., 649.
*Heisler* v. *Thomas Colliery Co.*, 260 U. S., 245, 67 L. Ed., 237.
*Great Northern R. Co.* v. *Minnesota*, 246 U. S., 434, 439, 62 L. Ed., 817, 820.



*St. Louis, Etc., R. Co.* v. *Arkansas*, 240 U. S., 518, 60 L. Ed., 776.
*International Harvester Co.* v. *Missouri*, 234 U. S., 199, 58 L. Ed., 1276;
*Schmidinger* v. *Chicago*, 226 U. S., 578, 57 L. Ed., 364;
*Eubank* v. *Richmond*, 226 U. S., 137, 142, 57 L. Ed., 156;
*Mutual Loan Co.* v. *Martell*, 222 U. S., 225, 235;
*Noble State Bank* v. *Haskell*, 219 U. S., 104, 111;
*Griffith* v. *Connecticut*, 218 U. S., 563, 569, 54 L. Ed., 1151.
*Lemieux* v. *Young*, 211 U. S., 489, 53 L. Ed., 295;
*Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S., 338, 52 L. Ed., 236;
*Lochner* v. *New York*, 198 U. S., 45, 56-57.
*Jacobson* v. *Massachusetts*, 197 U. S., 11, 30, 31, 35, 37-39;
*Mugler* v. *Kansas*, 123 U. S., 623, 661, 31 L. Ed., 205, 210;
*Barbier* v. *Connolly*, 113 U. S., 27, 28 L. Ed., 923.
*Mobile County* v. *Kimball*, 102 U. S., 691, 26 L. Ed., 238.
Const. of Tennessee, Art. IX, Sec. 2.
*Leeper* v. *State*, 103 Tenn. (19 Pick.), 500, 530-532.

In the case of *Noble State Bank* v. *Haskell*, 219 U. S., 104, cited *supra* the Supreme Court of the United States, speaking through Mr. Justice *Holmes*, by way of defining the nature of the police power of a state, the exercise of which

would not be declared invalid as being opposed to anything in the Constitution of the United States, used the following significant language:

> "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S., 518. It may be put forth in aid of what is sanctioned by usage, or held by the *prevailing morality* or strong and *preponderant opinion* to be greatly and immediately necessary to the public welfare." (Italics ours.) (219 U. S., 111.)

In *Jacobson* v. *Massachusetts*, 197 U. S., 11, cited *supra*, the Supreme Court of the United States, speaking through Mr. Justice *Harlan*, in a case which involved the validity of a State statute enacted under the police power, quoted with approval the language of the Court of Appeals of New York, altogether similar to the language of the Court speaking through Mr. Justice *Holmes* last above quoted—as follows:

> " 'A *common belief*, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts.
>
> " 'The fact that the belief is *not universal* is not controlling, for there is scarcely any belief that is accepted by everyone. The *possibility* that the belief may be *wrong*, and that *science* may yet show it to be *wrong*, is not conclusive; for the legislature has the *right* to pass laws which, according



> to the *common belief* of the people, are adapted to prevent the spread of contagious diseases. In a *free country*, where the government is by the people, through their chosen representatives, *practical* legislation admits of no other *standard* of action; FOR WHAT THE PEOPLE BELIEVE IS FOR THE COMMON WELFARE MUST BE ACCEPTED AS TENDING TO PROMOTE THE COMMON WELFARE, WHETHER IT DOES IN FACT OR NOT. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the *common belief* of the people of the State, and with *this fact* as a *foundation* we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.' 72 N. E. Rep., 97." (197 U. S., 35.)

It is a little strange we submit, that the lawyers for Scopes who come out of New York would apparently overlook the above language of the Court of Appeals of that State quoted with approval by the Supreme Court of the United States. If the common belief of the people, expressed through their chosen representatives, is a sufficient justifying standard for valid police power legislation, even though such belief may be wrong, and even though "science may yet show it to be wrong," in respect of a health meas-

ure,—this same rule must necessarily apply to justify police power legislation to protect *all religion* by prohibiting the teaching at public expense of the theory "that man has descended from a lower order of animals," when the chosen representatives of the people have concluded this would have a tendency to undermine a belief in the being of God and the immortality of the soul upon the part of our future citizens who, unless they entertain such belief, are expressly disqualified by our State Constitution from holding civil office in this State.

And if police power legislation may be validly enacted in aid of what is sanctioned by usage, or "by the prevailing morality," or strong and "preponderant opinion"—as the Supreme Court of the United States has ruled is true—then the Act in question stands completely justified as a valid exercise of the police power of the State as well as a valid exercise of control over *public* schools and their discipline and welfare.

Our later Argument will amplify our above contentions, and quote from some of the above cited authorities.

(*Post*, pp. 117 to 123; 175 to 223.)



**(6)**

**The Act Does Not Give Any "Preference" to "Any Religious Establishment or Mode of Worship"—Nor Otherwise Violate Article I, Sec. 3, of our State Constitution.**

The Act prohibits nothing except the teaching, in our public schools and institutions of learning,—"that man has descended from a lower order of animals." No religion in the history of the world has ever held or taught any such tenet, precept or doctrine.

(See:
Handbook to all Religions (published by John E. Potter & Co., Philadelphia,) pp. 1 to 595.
Religious Denominations of the World, by Vincent L. Milner (published by Bradley, Garretson & Co., Philadelphia), pp. 1 to 547.
Any and *All* Histories and Encyclopedias of *all* Religions.)

The Act in question merely undertakes to protect and conserve all religion and religious beliefs, without preferring any one over any other; and this may be done as tending to encourage and nurture in this State a belief in the being of God and the immortality of the soul, in order that our citizens may not become disqualified from holding civil office in this State; and the necessity or propriety of the Act, passed by the

legislature upon its appreciation of the evil or detriment to be prevented or guarded against, is not open to judicial review.

Constitution of Tennessee, Art. IX, Sec. 2.

The Supreme Court of the United States and other courts, in the field of constitutional law in this country, have defined the term "religion" as follows:

> "The term 'religion' has reference to one's views of his *relations* to his *Creator*, and to the obligations they impose of *reverence* for his *being* and *character*, and of *obedience* to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter." (Italics ours.)
>
> *Davis* v. *Beason*, 133 U. S., 333, 342.

By the insistence that this Act, in prohibiting the teaching in our public schools "that man has descended from a lower order of animals"—violates Art. I, Sec. 3, of our State Constitution declaring "that no preference shall ever be given by law to any religious establishment or mode of worship"—the attorneys of Scopes are really in a logical *dilemma* completely destructive of any soundness or truth in such insistence.

*Ante*, pp. 30-33.
*Post*, pp. 280, 281.

This Act, passed for the purpose of conserving



all religions in their belief in the being of God and the doctrine of the immortality of the soul, gives no preference to any religion over any other; and the protection and encouragement of all religions are most legitimate and desirable things to be accomplished.

The Supreme Court of the United States, after quoting from the commission given by Ferdinand and Isabella, King and Queen of Castile, to Christopher Columbus, when he sailed westward, and also quoting from the various Colonial grants and charters issued by European sovereigns in respect of the planting of colonies in America, and also after quoting from the Declaration of Independence, and noticing the Federal Constitution, and referring to the Constitutions of the various States—(then 44 in number)—of this Nation,—then said:

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that *this is a religious nation*. These are not individual sayings, declarations of private persons; they are *organic utterances;* they *speak*, the *voice* of the *entire people*." (Italics Ours.)
>
> *Holy Trinity Church* v. *United States*, 143 U. S., 470.

We will hereinafter quote more extensively from the above case and the case next referred to, and other cases. *Post*, pp. 260 to 284.

In a very celebrated and earlier case, coming up from Pennsylvania, the Supreme Court of the United States made similar emphatic declarations, following the Pennsylvania decisions and after quoting from the Constitution of Pennsylvania, which is *identical* in language with Art. I, Sec. 3, of our present State Constitution; and in this case the Supreme Court of the United States said that the Court was compelled to admit that Christianity was a part of the common law of that State in a qualified sense and "that its Divine origin and truth are admitted," etc.

> *Vidal* v. *Girard's Executors*, 15 U. S., (Curtis) 61, 83-84, 2 How., 127, 198-199.

And then this Court, with the provisions contained in Art. I, Sec. 3, of our present Constitution, *identical* with a provision in the Constitution of Pennsylvania before the Supreme Court of the United States in the case last above cited, has more than once held that Christianity is a part of the common law of this State, and has used language perhaps the strongest ever used by the highest court of any State of our Nation, and equally as strong as the language of the Supreme Court of the United States in the case of *Holy Trinity Church* v. *United States*, *supra*, in declaring that religion and its protection and encouragement, were recognized by this Court as the real and chief foundation of good government, public morals, and law and order in this State.



> *Mayor, etc. of Nashville* v. *Linck*, 80 Tenn., (12 Lea) 499, 514-520;
> *Breyer* v. *State*, 102 Tenn., (18 Pick.) 103, 110;
> *Parker* v. *State*, 84 Tenn., (16 Lea) 476-481;
> *Bell* v. *State*, 31 Tenn., (1 Swan) 41, 44-46.

In our later Argument we will quote from some of the above decisions of this Court.

*Post*, pp. 284 to 294.

In the above cases this Court has not only held that this is a religious State but that Christianity is a part of the common law of this State, just as the highest court of Pennsylvania, which has a Constitutional provision identical with ours in regard to religious liberty, has ruled.

In *Mayor, etc. of Nashville* v. *Linck*, 80 Tenn., (12 Lea) 499, and particularly in the separate concurring opinion of Freeman, J., speaking for this Court in that case—(at pp. 510, 513, 516-519 of said report)—there is to be found one of the strongest detailed statements in all the books in regard to religion being the foundation of the very structure of our State government and

the thing, above everything else, and even more than criminal penalties and sanctions, which preserves and maintains all law and order.

In *Lawyer's Tax Cases*, 55 Tenn. (8 Heisk.), 649, this Court, speaking through *Turney*, J., accepted as a true premise for judicial reasoning —"the *revealed* account of the origin of man."

And numerous other State courts in our Nation have made declarations not only to the effect that such States were religious States but that Christianity was a part of the common law of such States, while all other religions were to enjoy, of course, equal and perfect freedom of worship.

*Shover* v. *State*, 10 Ark., 259;
*State* v. *Chandler*, 2 Harrington, (Del.) 553;
*People* v. *Ruggles*, 8 Johnson, 290; 5 Am. Dec., 335;
*Linden Muller* v. *People*, 33 Barber, 548;
*Bloom* v. *Richards*, 2 Ohio St., 387;
*Updegraph* v. *Commonwealth*, 11 Serg. and Rawls, (Penn), 394;
*Commonwealth* v. *Sigman*, 2 Clark, (Penn.) 36;
*Mohoney* v. *Cook*, 28 Pa. St., 342;
*City of Charleston* v. *Benjamin*, 2 Strob., (S. C.) 508; 49 Am. Dec. 609;
*Andrew* v. *N. Y. Etc. Society*, (4 Sanford) 6 N. Y. 156;
*Zeisweiss* v. *James*, 63 Pa. St., 465; 3 Am. Rep., 558;
*Ex Parte Delaney*, 43 Calif., 478.



And as to lawful Bible reading, and the validity of our Tennessee Statute, Chapter 102, Public Acts of 1915, providing for mere non-sectarian and non-controversial reading of the Bible in our Public Schools, and how such an Act has been sustained in many states; and *generally* as to the State's police power in connection with religious matters, see the following additional authorities:

*Hennington* v. *Georgia*, 163 U. S., 300;
*Mormon Church* v. *United States*, 136 U. S., 1;
*Murphy* v. *Arkansas*, 114 U. S., 15;
*Reynolds* v. *United States*, 98 U. S., 145, 164;
*Brunswick-Balke Collander Co.* v. *Evans*, 228 Fed., 991;
Voluminous and Exhaustive Case-Note on subject of "Sectarianism in Schools," 5 A. L. R., 866-908;
*Hackett* v. *Brooksville Graded School District, et al.*, 120 Ky., 608; 9 Ann. Cas., 36, With Case-Note at p. 42.
*O'Connor* v. *Hendrick*, 184 N. Y. 421, 6 Ann. Cas., 432 with Case-Note at p. 435;
*Billard* v. *Board of Education of City of Topeka*, 69 Kan., 53; 2 Ann. Cas., 521-522, with Case-Note at page 522-525;
*Commonwealth* v. *Herr, et al.*, 229 Pa. St., 132; 22 Ann. Cas., 422, 428, with Case-Note at p. 428;
*People* v. *Board of Education*, 245 Ill., 334; 19 Ann. Cas., 220; and see particularly dissenting opinion 225-234; and Case-Note at 234, 235;

*People, ex rel., Ring* v. *Board of Education*, 245 Ill., 334; 29 L. R. A. (N. S.) 442; and see particularly dissenting opinion at pp. 449 to 459;
*North* v. *University of Illinois*, 137 Ill., 296; 27 N. E. 54;
*University of Mississippi* v. *Waugh*, 105 Miss., 623; 62 So. 827, L. R. A., 1915D, 588;
*Wilkerson* v. *Rome*, 152 Ga., 762; 110 S. E., 895; 20 A. L. R., 1334;
*Bradford* v. *Board of Education*, 18 Calif. App., 19, 121 Pac. 929;
*State, ex rel., Weiss* v. *District School Board*, 76 Wis., 177, 7 L. R. A., 330; 20 Am. St. Rep., 21; 44 N. W., 967.

The Wisconsin case last above cited, holds the obviously sound proposition that Courts will take judicial notice of the contents of the Bible; and the fact that the religious world is divided into numerous sects; and of the general doctrines maintained in each sect, for these things pertain to general history, and may fairly be presumed to be subjects of common knowledge, —citing Greenleaf on Evidence, Vol. 1, Secs. 5, 6 and notes thereto.

That the Court will take judicial notice of a *common belief* in regard to a matter as to which there are opposing "theories" is also settled.

*Jacobson* v. *Massachusetts*, 197 U. S., 11, 30-31.

In the above cited decisions, and many more



which might be cited, and particularly in the numerous decisions cited, classified and analyzed in the voluminous Case-Note in 5 A. L. R., 866-908, will be found abundant authority, and the great weight if not practically all of the authorities, to establish the proposition that a statute like our Chap. 102 of the Public Acts of 1915, providing for the mere reading, "without comment," of the Bible in the public schools, for the mere purpose of the inculcation of sound morality, does not amount to any *teaching* of the Bible as a religious book, and does not give any preference to any religion or religious sect or denomination over any other.

The above decisions are also authorities upholding the right of the State, under its police power to legislate for the *protection* of *all* religion.

It has been settled by the Supreme Court of the United States, from a very early day, that the Federal Constitution makes no provision for the protection of the citizens of the respective States in their religious liberties; and that this is left to the State Constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect upon the States.

*Permoli* v. *First Municipality*, 15 U. S., (Curtis) 561, 563; 3 Howard 589, 609;
*Ex Parte Garland*, 44 U. S., (4 Wall.) 333, 397-398;
*Brunswick-Balke-Collander Co.* v. *Evans*, 228 Fed., 991, 997, 998;
Story, Commentaries on the Constitution, Sec. 1878.

It follows, therefore, that the only attack which the attorneys for Scopes can make (or attempt to make) on this Act, under the Federal Constitution, is made under the "equality" and the "due process" clauses of the Fourteenth Amendment to the Federal Constitution, just in the same way that any other police power statute of a state in regard to *any subject* might be attacked under said Fourteenth Amendment. This we deal with under another heading of this Brief.

All of our above insistences will be presented, with more detail, in our later Argument.

(*Post*, pp. 223 to 294.)

(7)

**The Insistence, if True, that Religious Views Might Have Been the "Motive" for the Passage of the Act in Question is Immaterial and Not Reviewable by the Court.**

The insistence, even if it be a true one, that the religious belief of the members of the legislature in the "story of the Divine Creation of Man as taught in the Bible" furnished the *motive* for the passage of this Act—is wholly immaterial.



Nothing is any better settled than that the motive which caused or inspired the passage of a statute is wholly immaterial and beyond the jurisdiction of any Court to question or inquire into at all. Whether the legislature possessed the constitutional *power* to pass any statute, and not the subjective reasons which might inspire or motivate the exercise of such power, is the only thing with which a Court can have any concern. The fact that a religious motive or sense of duty may have inspired the passage of a statute is wholly immaterial, and can furnish no valid objection to the Act, nor indeed be the subject-matter of any judicial inquiry upon the question of the validity of the Act.

*Hennington* v. *Georgia*, 163 U. S., 299, 304-307;
Quoting with approval:
*Hennington* v. *Georgia*, 90 Ga., 396, 397-399;
*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S., 146;
*Smith* v. *Kansas City Title & Trust Co.*, 255 U. S., 180;
*Motlow* v. *State*, 125 Tenn., (17 Cates) 547, 589-590;
*Williams* v. *Nashville*, 89 Tenn., (5 Pick.) 487, 496.

Neither the *Child Labor Tax Case*, 259 U. S., 20, cited by the attorneys for Scopes, nor the case of *Hammer* v. *Dagenhart*, 247 U. S., 251, tend to support any insistence that the *motives* of the legislative body may be inquired into by the Court. In fact, in the *Child Labor Tax Case*, 259 U. S., 20, 39, the Court, speaking through Mr. Chief Justice *Taft*, after referring to the *Dagenhart Case* (247 U. S., 251), wherein it was adjudged that Congress, by the means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, had in *effect* regulated the hours of labor of children in factories and mines within the State, which was purely a matter of State authority; and after saying that in the *Child Labor Tax Case*, then at bar, Congress in the name of a tax which it would ordinarily have the power to lay had in *effect* invaded this same field of purely State authority—then made it *perfectly clear* that the Court was not invading the field of "legislative motive" at all; and in this connection said:

> "The case before us can not be distinguished from that of *Hammer* v. *Dagenhart*, 247 U. S., 251. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case.



> This court held the law in that case to be void. It said:
>
> " 'In our view the necessary *effect* of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, *to regulate* the hours of labor of children in factories and mines within the States, a *purely state authority*.'
>
> "In the case at the bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.
>
> "The analogy of the *Dagenhart Case* is clear. The congressional *power* over interstate commerce is within its *proper scope*, just as complete and unlimited as the congressional power to tax, and the *legislative motive* in its exercise is just as *free* from *judicial suspicion and inquiry*." (Italics ours.) (259 U. S., 39.)

In each of the above cases the *effect* of the Act was such that it equaled and was necessarily the manifestation of a *power* which Congress did not possess *at all;* and this being so, any pretext or assigned or assignable *motive* would have to be disregarded as immaterial, and could not supply the lacking *power* which, in *effect*, had been sought to be exercised. In the case at bar the legislature had the *power* to do what the Act accomplishes and *effects*, and the *motive* for its passage, is of course, likewise immaterial.

All our above insistences are amplified in our later Argument. (*Post*, pp. 240 to 260.)

(8)

**The Insistence of the Counsel for Scopes that This Act is Unconstitutional Because It Does Not Apply Generally to All School Teachers Throughout the State, in Private Schools as well as in Public Schools, is Grossly Erroneous.**

It is entirely well settled that a police power statute does not have to be all-embracing; and that a State may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses; and it may do so none the less that the forbidden thing does not "differ in kind" from those that are allowed. If a class is deemed to present a "conspicuous example" of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with, although otherwise and "merely logically" not distinguishable from others not embraced in the law.

The above is the well settled rule as laid down by this Court in passing upon the validity of police power statutes under our State Constitution, and as laid down by the Supreme Court of the United States in passing upon the validity of such State statutes under the "equality" and the "due process" clauses of the Fourteenth Amendment to the Constitution of the United States.



*State* v. *McKay*, 137 Tenn., (10 Thomp.) 280, 290, 291, and especially 293;
*City of Memphis* v. *State*, 133 Tenn., (6 Thomp.) 83, 88;
*State, ex rel.* v. *Persica*, 130 Tenn., (3 Thomp.) 48, 59, reaffirming at p. 59 the ruling in *Motlow* v. *State*, 125 Tenn., (17 Cates) 547;
*Farmers & Merchants Bank of Monroe, N. C.* v. *Federal Reserve Bank of Richmond, Va.*, 262 U. S., 649, 67 L. Ed., 1157.
*Zucht* v. *King*, 260 U. S., 174; L. Ed., 194.
*Hall* v. *Geiger-Jones Co.*, 242 U. S., 539, 555, 556;
*Armour & Co.* v. *No. Dakota*, 240 U. S., 510, 517.
*Central Lumber Co.* v. *So. Dakota*, 226 U. S., 157, 160;
*Ellis* v. *United States*, 206 U. S., 246.

Many other cases announcing the same well settled rule might be cited.

We submit that it is a little *strange* that the corps of attorneys representing Scopes would undertake elaborately to present in their Brief—(pp. 92, 93 *et seq.*)—a contention and argument right in the *teeth* of the above well settled legal principle, while they completely ignore the almost endless line of decided cases by this Court and the Supreme Court of the United States settling such principle.

In our later Argument we will *quote* from

some of the almost endless line of these *controlling* decisions. (*Post*, pp. 180 to 191.)

(9)

**The Fact that a Group of Self-Styled "Intellectuals" Who Call Themselves "Scientists" Believe that a Certain Thing or Theory is True, and Even Advocate It as an Alleged Scientific "Hypothesis" or "Theory" Does Not to Any Degree Prevent the State Legislature, in the Exercise of the Police Power of the State, from Forbidding the Teaching or Practicing of Such Thing or Theory Which the Legislature May Conclude to Be Inimical to the Best Interests and Discipline of Our Schools or to the General Public Welfare. Any Contrary View Would Be Subversive of Public Decency and Established Government.**

The Supreme Court of the United States has directly passed upon the above proposition and announced the rule stated above. It is the proper function and power of the legislature to decide between the *conflicting ideas* of alleged scientists or *pseudo*-scientists *inter sese*, or between the conflicting ideas of such alleged scientists or *pseudo*-scientists on the *one hand*, and the common belief or preponderant opinion of the public on the *other hand;* and the legislature does not have to submit such questions about



which such alleged scientists and others may differ to the decision of a Court, but may decide and foreclose the question itself by the passage of police power legislation, and put its contrary decision beyond the power of a Court to review or the competency of expert or scientific testimony to assault or attack.

*Jacobsen* v. *Massachusetts*, 197 U. S., 11-39;
*Waugh* v. *Mississippi University*, 237 U. S., 589-597;
*Noble State Bank* v. *Haskell*, 219 U. S., 104, 110;
*Gitlow* v. *New York*, 268 U. S., 652, 666-671.

If the above stated principle were not the law, then so called "intellectuals" or "scientists" could agree among themselves in any field in which they claim to have specialized knowledge relating to political economy, or any other alleged "scientific" subject even though overlapping or trenching upon any subject involved in proper government; and could then go into Court and offer their expert "scientific" testimony relating to the "scientific" subject upon which they had agreed, and thereby overthrow any police power statute prescribing contrary regulations; and thus so called "intellectuals" or "scientists" would indirectly, but really, be permitted to *take over* and *dominate*, in the field of their claimed specialized learning relating to

the subject matter of their particular "science" —the *duties* and *powers* of the law making departmant of our government. To permit any such thing, of course, would be revolutionary and bring about *chaos* in respect of the *fundamentals* of government.

The doors can not be opened to *pseudo*-scientists and "scientific" *superficialists* and *intolerants* to "agree" among themselves upon the "accepted" verity of an alleged "scientific" *hypothesis* (unproven assumption), and under a *perhaps* soiled or even red banner of *alleged* "academic freedom" or "*scientific liberty*" foreclose the *police power* of the State's constitutionally chosen and elected *legislative* representatives as to what is required for the public welfare. If the advocates of any such view ever succeed in having it accepted by "boring from within" or otherwise, it will have to be through portals other than the Courts of our present *regnant system* of Constitutional government, which in turn *recognizes* and *depends* for its *very life* upon the "common" *religious feeling* of the great "mass" of our people without reference to particular *sects* or *cults*, as both this Court and the Supreme Court of the United States have ruled.

See the line of authorities cited under our preceding proposition (5). (*Ante*, pp. 57 to 72).



## (10)

**The Act in Question is Definite, Plain and Unambiguous in Its Terms and Provisions; but if This Were Not So and There Were Ambiguity in the Act, It Would Be the Duty of the Court to Construe and Enforce the Act According to Its Judicially Ascertainable and Ascertained Legislative Intent, and So as to Save Its Constitutionality.**

The construction of the Act adopted by the trial judge to the effect that all the Act prohibits is the teaching in our public schools and public institutions of learning "that man has descended from a lower order of animals," which construction was unexcepted to in the lower court and as to which no error is assigned in this Court,—is the obviously sound and correct construction of the Act.

There is no real ambiguity or uncertainty in the meaning of the word "teach" as used in the Act, and the case of *Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S., 216, and the other authorities cited in the Brief for Scopes (pp. 90-92) are *wholly irrelevant* to this plain and simple statute, as we will later show.

(Argument, Post, pp. 200-212; 213 to 223.)

What is meant by the word "teach" is plain enough when the context of the Act which re-

lates to school "teachers" is considered; and upon a trial of offenders against the Act it would merely be for the trial judge primarily to construe the Act in accordance with its plain terms and intent, and give to the jury proper instructions as was done in the *Gitlow Case*, where a New York statute was involved, making it unlawful, among other things, to advocate, advise, or "teach" to anyone anywhere a certain thing deemed by the State Legislature to be opposed to the public welfare.

*Gitlow* v. *New York*, 268 U. S., 652, 661.
*Gitlow* v *New York*, 195 App. Div., 773, 187 N. Y. Supp., 783; 234 N. Y., 132 and 539; 136 N. E., 317, 138 N. E., 438.

Even if there were ambiguity in the terms of the Act—(though there is not)—it would be the duty of the Court to construe the Act and settle the ambiguity in accordance with the ascertained legislative intent; and in doing this it would be the "duty" of the Court "if by any means it could be done" so to construe the Act as to save its constitutionality; and in doing this, if it were necessary to save the constitutionality of the Act, even the "least plausible" construction would be adopted.

The decisions of both this Court and the Supreme Court of the United States are clear in



regard to the above principles or canons of construction.

*Turner* v. *Eslick*, 146 Tenn., 236.
*Exum* v. *Griffis Newbern Co.*, 144 Tenn., 239.
*State* v. *Temple*, 142 Tenn., 466.
*Riggins* v. *Tyler*, 134 Tenn., 577.
*Palmer* v. *Southern Express Co.*, 129 Tenn., 116.
*Ashby* v. *State*, 124 Tenn., 684.
*Standard Oil Company* v. *State*, 117 Tenn. (9 Cates), 618.
*State* v. *Hayes*, 116 Tenn., 40, 43.
*State* v. *Schlitz Brewing Co.*, 104 Tenn., 715.
*Cole Mfg. Co.* v. *Falls*, 90 Tenn., 466.
*Horne* v. *Memphis, etc., R. Co.*, 41 Tenn., 73.
*Smith, et al.* v. *Lessee of Craig*, 2 Tenn., 287, 290, 291.
And see other authorities cited in 11 Encyc. Dig. of Tenn. Rep., p. 526.

The decisions of the Supreme Court of the United States are to the same effect:

*Panama R. Co.* v. *Johnson*, 264 U. S., 375; 68 L. Ed., 748.
*U. S.* v. *Walter*, 263 U. S., 15; 68 L. Ed., 137.
*Arkansas Natural Gas Co.* v. *Arkansas R. R. Commission*, 261 U. S., 379; 67 L. Ed., 705.
*Green* v. *Frazier*, 253 U. S., 233; 64 L. Ed., 878.
*U. S.* v. *Standard Brewery*, 251 U. S., 210; 64 L. Ed., 229.
*Hooper* v. *California*, 155 U. S., 648.
*U. S.* v. *Central P. R. Co.*, 118 U. S., 225.
*Presser* v. *Illinois*, 116 U. S., 252.

And see great line of authorities cited under 5 Dig. U. S. Sup. Ct. Rep., pp. 5362, 5363, Sec. 145 to 148.

Of course, the rule is well settled that the Supreme Court of the United States accepts as sound and *conclusive*, and does not review the *meaning* and *construction* of a State statute or Constitution as *determined* by the highest court of the State.

*Terrace* v. *Thompson*, 263 U. S., 197; 68 L. Ed., 255.
*Baker* v. *Druesedow*, 263 U. S., 137; 68 L. Ed., 212.
*Butters* v. *City of Oakland*, 263 U. S., 162; 68 L. Ed., 228.
*Lehmann* v. *State Board of Public Accountancy*, 263 U. S., 394; 68 L. Ed., 354.
*Cudahy Packing Co. of Nebraska* v. *Parramore*, 263 U. S., 418; 68 L. Ed., 366.
*Douglas* v. *Noble*, 261 U. S., 165; 67 L. Ed., 590.
*McGregor* v. *Hogan*, 263 U. S., 234; 68 L. Ed., 282.
*Farncomb* v. *City and County of Denver*, 252 U. S., 7; 64 L. Ed., 424.
*Detroit M. Ry. Co.* v. *Fletcher Paper Co.*, 248 U. S., 30; 63 L. Ed., 107.
*Smiley* v. *Kansas*, 196 U. S., 447.
*Manley* v. *Park*, 187 U. S., 547.
*Great Western Teleg. Co.* v. *Purdy*, 162 U. S., 329.

To same effect see long line of decisions of the Supreme Court of the United States cited in:



1 Dig. U. S. Sup. Ct. Reps., p. 402; Secs. 2124 to 2135, 14 Fed. Rep. Dig. Title "Courts," key-number, 366 (1).
13 Fed. Rep. Dig., Title "Courts," key-number, 366 (1).
12 Fed. Rep. Dig., Title "Courts," key-number, 366 (1).

**(11)**

**The Assignment of Error to the Effect that the Trial Court Erred in Excluding the Testimony of the Scientific Witnesses Offered by the Defendant is Without Any Sort of Merit or Substance.**

The Court rightfully construed the Act to mean that it did no more than prohibit the teaching in our public schools—"*that man has descended from a lower order of animals.*"

That *any teachings* in our public schools of *anything* which, in the opinion of the legislature, would have a *tendency* to produce in the minds of the pupils, who are the future citizens of this State, a disbelief in the being of God or the immortality of the soul, which disbelief, if entertained by them, would disqualify them from holding civil office in this State,—would constitute teachings which would "present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion" is perfectly *clear* and *manifest*.

The legislature having determined, in the constitutional exercise of its discretion, that utterances and teachings, by the teachers in our public schools which have *such tendency* involve such danger of substantive evil that they should be punished, the question whether the specific utterance and teaching "that man has descended from a lower order of animals" was likely, *in and of itself*, to bring about the substantive evil of creating in the minds of the pupils a disbelief in the being of God or the immortality of the soul is "not open to consideration" by the Court. This has been squarely ruled in the most recent holding of the Supreme Court of the United States in regard to such matter.

*Gitlow* v. *New York*, 268 U. S., 652, 667, 670, 671.

Under the above holding it is necessarily true that since the legislature, in the exercise of its discretion under the police power of the State, has determined that the *specific* utterance and *teaching* "that man has descended from a lower order of animals" was proper to be prohibited as tending to incite or encourage a disbelief in God or the immortality of the soul,—it is *perfectly clear* that no alleged "scientific" evidence for the purpose of endeavoring to fortify or justify any "theory" or hypothesis to the effect "that



man has descended from a lower order of animals" would be competent or relevant at all.

*Jacobson* v. *Massachusetts*, 197 U. S., 11; 30-39.
*Waugh* v. *Mississippi University*, 237 U. S., 589-597.
*Atkin* v. *Kansas*, 191 U. S., 207.

And see other authorities cited under our preceding main propositions (3), (4) and (5).

With the statute rightfully construed as prohibiting nothing except the teaching in our public schools "that man has descended from a lower order of animals," the question as to whether or not Scopes actually had taught such prohibited thing was the very question, and the only question, for the jury to decide, and was a simple question not involving any expert or scientific inquiry at all; and this being true no expert or alleged "scientific" testimony was admissible. Courts do not extend the rule as to the admissibility of expert testimony beyond the *necessities* of the case, nor does the rule in this State allow expert testimony in regard to the *very question* which the jury must determine.

*Wilcox* v. *State*, 94 Tenn. (10 Pick.), 105, 112, 113.
*Persons* v. *State*, 90 Tenn. (6 Pick.), 291, 296, 297.
*Telegraph Co.* v. *Mill Co.*, 129 Tenn. (2 Thomp.), 374; 381, 382.

*Atkins* v. *State*, 119 Tenn. (11 Cates), 458, 472, 473.
*Railroad Co.* v. *Brundige*, 114 Tenn. (6 Cates), 31, 35, 36.
*Cumberland Tel. & Tel. Co.* v. *Dooley*, 110 Tenn. (2 Cates), 104, 108, 109.
*Bruce* v. *Beall*, 99 Tenn. (15 Pick.), 302, 313, 314.
*Nashville & Chattanooga Railway* v. *Carroll*, 53 Tenn. (6 Heisk.), 347, 368.
*Jones* v. *Evidence* (1913 Ed.), Vol. 2, Sec. 372, p. 909.
22 Corpus Juris, p. 502, Sec. 597.

This excluded alleged "scientific" testimony is not in the record now before this Court; nor is any of the evidence upon which this conviction is predicated before the Court, since the entire bill of exceptions has been heretofore stricken from the record in this case and the files of this Court, upon preliminary motion of the State.

*Scopes* v. *State* (Oct. 24, 1925), 278 S. W. (Adv. Pamph. No. 1, Feb. 3, 1926), 57.

In the absence of any bill of exceptions, containing any part of the testimony as it was finally admitted by the Court for the consideration of the jury or containing the charge of the trial judge,—the conclusive presumption in this Court is that the verdict was *justified* by the evidence, and that all questions of law *arising upon the proof* were ruled with absolute correctness. Such is the presumption of absolute *verity*



attached to the record entry of the conviction of Scopes in the Court below (Trans., Vol. 1, pp. 42-46); and in the absence of the bill of exceptions containing the evidence and the charge of the Court, any alleged error in respect of the exclusion of evidence can have no possible substance or merit, for the conclusive presumption is that the conviction below was completely justified and that all legal questions in regard to rulings upon evidence were finally ruled correctly.

*Bejach* v. *Colby*, 141 Tenn. (14 Thomp.), 686, 690, 691.
*Jackson* v. *Bell*, 143 Tenn. (16 Thomp.), 452.
*State* v. *Colored Tenn. Industrial School*, 144 Tenn. (17 Thomp.), 182.
*Waterhouse* v. *Sterchi Bros. Furniture Co.*, 139 Tenn. (12 Thomp.), 117.
*Dennis* v. *State*, 137 Tenn. (10 Thomp.), 543.
*Temple* v. *State*, 127 Tenn. (19 Cates), 429.
*Dunn* v. *State*, 127 Tenn. (19 Cates), 267.
*Pelican Assur. Co.* v. *American Feed, etc., Co.*, 122 Tenn. (14 Cates), 652, 654.
*Nighbert* v. *Hornsby*, 100 Tenn. (16 Pick.), 82, 84.

And the reversal of this case on account of any alleged improper "rejection of evidence" is forbidden by Chap. 32 of our Public Acts of

1911, unless, in the opinion of the appellate court, after an examination of the entire record in the cause, "it shall *affirmatively appear* that the error complained of has *affected* the *result* of the trial."

Shannon's Annotated Code, Secs. 6351a1 and 6351.

With the merits and the guilt of the defendant absolutely settled by the conclusive presumption that the verdict and judgment below was fully justified by the evidence—(the bill of exceptions having been stricken out)—this Court, of course, cannot find that it "affirmatively appears" that any alleged error in regard to the rejection of evidence, affected the *result* of the *trial.*

In our later Argument we amplify some of our above insistences.

(*Post*, pp. 349 to 360).

We will now proceed, in the form of an Argument, to present the legal phases of this case with more detail for the purpose of showing the utter lack of any merit in any of the attacks made by the attorneys for Scopes in support of any of their Assignments of Error which undertake to challenge the validity of the Act in question or the sufficiency of the indictment of the defendant under said Act.



# ARGUMENT.

In the course of our following Argument we will sometimes group and consider together more than one of the Assignments of Error, because such grouped Assignments really point in the same direction and depend, for correct solution, on the same fundamental and underlying question.

We also believe it may be more logical and helpful, if, in our following Argument, we present and develop our ideas, in some instances, according to the order in which we think one branch or subject may lead into another, rather than in the numerical order in which counsel for defendant Scopes have seen fit to state their Assignments of Error.

## A.

## THE INDICTMENT IS SUFFICIENT.

Under this head we will answer Assignment of Error I, stated at page 5 and discussed at pages 16 and 21 of the printed brief for defendant Scopes.

This assignment raises the question as to the sufficiency of the indictment. It is insisted thereunder that the indictment is void because

the facts constituting the offense are not alleged with sufficient particularity, and that the indictment does not properly inform the defendant of the nature and cause of the accusation against him. This question was raised, both by a motion to quash, and a demurrer to the indictment.

The objections are thus stated in the argument in support of this Assignment of Error No. I on page 16 of the brief for the defendant:

> "There is not a word said as to where he taught, that is, in what school, or to whom he taught, nor does the indictment itself say what he taught."

And at page 19 of the said brief, it is said:

> "The indictment here states the names of no persons, nor what was said, nor has it any other distinctive earmark which would identify the occasion."

And further:

> "Is this indictment free from ambiquity? Does it describe the exact offense intended to be charged? If the defendant were again charged with teaching this doctrine in the public schools on the 24th day of April or on any other date, would he be able to set up a plea of former conviction? To whom did he teach? Who were the pupils? What did he say? What was the school? Where was the school, assuming that there is more than one in Rhea County?"



And at page 20 of said brief, it is said:

> "If the indictment charged that Scopes taught in a certain school, by number and district, he would have an answer if he was again charged with having done the same thing. And the same would apply if the indictment stated to whom he taught, or if it stated specifically what was taught."

And at page 21 of said brief further, it is said:

> "If, after this trial, Scopes is charged with exactly the same offense and in the same words, under an indictment worded exactly the same way, the judgment of conviction in this action would not for a moment answer the new charge."

An examination of the brief for the defendant will show that under this assignment not a single Tennessee Statute or decision is cited. So far as appears, the brief was prepared without any examination having been made as to the rule under Tennessee statutes and decisions as to the precision with which indictments charging misdemeanors or statutory offenses should be drawn.

The Code of Tennessee (Shannon), Section 7077, provides:

> "The statement of the facts constituting the offense, in an indictment, shall be in ordinary and concise language, without prolixity or repetition."

The Supreme Court of Tennessee has repeatedly held that the description of a statutory offense in the words of the statute is sufficient, and indeed the safest and preferable mode of description, and renders the indictment sufficiently certain, if it gives to the defendant notice of the nature of the charge against him.

*State* v. *Pearce*, Peck, 66, 67.
*Peek* v. *State*, 2 Hum., 78, 85.
*State* v. *Ladd*, 2 Swan, 226, 228, 229.
*Harrison* v. *State*, 2 Cold., 232, 234.
*Hall* v. *State*, 3 Cold., 125, 129.
*Riddle* v. *State*, 3 Heisk., 404, 405, 406.
*Jones* v. *State*, 3 Heisk., 448, 449.
*Pardue* v. *State*, 4 Bax., 10.
*State* v. *Odam*, 2 Lea, 220, 221.
*State* v. *Swafford*, 3 Lea, 162, 163, 164.
*Wedge* v. *State*, 7 Lea, 688.
*Clemons* v. *State*, 8 Pickle, 286.
*Villines* v. *State*, 12 Pickle, 143.
*Wilson* v. *State*, 19 Pickle, 87, 89.
*Griffin* v. *State*, 1 Cates, 17, 21 (headnote 1).
*State* v. *Morgan*, 1 Cates, 166 (headnote 9).
*State* v. *Witherspoon*, 7 Cates, 143.
*State* v. *Smith*, 11 Cates, 525.
See also: Anno. Const. of Tennessee, p. 119, note 23.

If the words used in the indictment are equivalent to or include the words of the statute, it is sufficient.

*Peek* v. *State*, 2 Hum., 78, 85.
*Riddle* v. *State*, 3 Heisk., 406.



*McTigue* v. *State*, 4 Bax., 313, 314, 315.
*Logan* v. *State*, 2 Lea, 223.
*Harris* v. *State*, 3 Lea, 327.
*State* v. *Ferriss*, 3 Lea, 703.

As illustrating the rule in Tennessee upon this question, particular attention is called to the case of *State* v. *Odam*, 70 Tenn., (2 Lea), 220. In this case, the opinion of the Court is as follows:

> "The defendant was presented by the grand jury for selling an intoxicating beverage within four miles of an incorporated institution of learning, under the Act of 1877, Ch. 23, following the exact language of the statute. The court, upon motion of the defendant, quashed the presentment, and the State appealed.
>
> "The objection urged against the presentment is, that it fails to state the particular institution of learning referred to, and the beverage sold. The settled rule in this State is, that in the case of a misdemeanor, a substantial description of the offense is all that is required in the indictment. *Bilbo* v. *State*, 7 Hum., 534; *State* v. *Pennington*, 3 Head, 120. *And when a statute creates a new offense, a charge in the words of the statute is, usually, sufficient, and the better course.* (Italics ours.) *Hall* v. *State*, 3 Cold., 125; *State* v. *Pearce*, Peck, 66. It is the selling of the intoxicating beverage within the prohibition of the statute that constitutes the offense, and the burden is on the State to make out the charge. *State* v. *Harris*, 2 Sneed, 224;

*State* v. *Carter*, 7 Hum., 158. These last cases illustrate the rule of certainty required in analagous cases. It was well said by the court at an early day, that the degree of precision in the description of an offense cannot be given in an indictment so as to distinguish it *per se* from all other cases of a similar nature; such a discrimination amounting to identification must rest in averment, and its absence in description can be no test of the certainty required, either for defense against the presentment or protection against a future prosecution for the same matter. *State* v. *Pearce*, Peck, 66."

Attention is further called to the language of the Court in *Harris* v. *State*, 71 Tenn. (3 Lea), 324, in which case, at pages 326, 327, it is said:

"When an indictment for selling liquor on Sunday stated the date of the offense on a day of the month which was not Sunday, the averment was treated as surplusage. *State* v. *Eskridge*, 1 Swan, 413. No doubt everything which goes to constitute the offense charged, even if it purport to be the words of a statute, must be sustained, for otherwise the defendant might be charged with one offense and convicted of another. But when the offense is correctly set forth according to the statute, and the statute itself otherwise identified, a variance between the date of the act as charged and its real date, may well be considered as technical. A conviction or acquital would certainly be conclusive in defense of any other indictment for the same offense. By the Code, Sec. 5117, only such degree of certainty is required in an indictment as will enable the court to pronounce judgment upon a conviction according to the right of the case. *Less strictness, it has always been held in this State, is required in indictments for misdemeanors than for felonies.* A mere clerical error in the date of a statute, where it is obvious the defendant could not be prejudiced thereby ought not to vitiate an indictment for a misdemeanor." (Italics ours.)



The most recent holding of this Court upon the question as to the sufficiency of the indictment in a misdemeanor case appears from the opinion for publication in the case of *Sanders* v. *State*, decided March, 1926.

This case was an appeal from a conviction for unlawfully possessing and transporting intoxicating liquor. In the court below there was a motion to quash the indictment for the reason that it failed to charge from what point to what point in Rutherford County the liquor was transported, or that this was unknown to the grand jury.

Says the Court, in this opinion:

"Nor are we of opinion that error was committed in failing to quash for lack of a more particular description of the offense alleged, on the ground only that the indictment did not state from what place to what point the transportation was being made.

The common law requirement that the indictment should allege the place of the commission of the offense, has been superceded by our statute, Shannon's Code, Sec. 7088, which expressly provides that 'it is not necessary for the indictment to allege where the offense was committed.'

"*Pope* v. *The State*, 149 Tenn., 176, is relied on for the defendant, but that case is to be distinguished in several particulars. It was not therein held that it is necessary to the validity of an indictment for the transportation of liquor that the places of origin and terminus should be specifically charged, or in the alternative, that these facts were unknown to the grand jury. In that case this Court, speaking through Mr. Justice McKinney, said:

" 'It was held by this court, in *Kizer* v. *State*, *supra*, that the designation of the places of origin and termination of the illegal transportation is a matter of description and not a matter vital to the accusation; also that it is proper for the grand jurors to state in the indictment that the place of origin of the transportation was unknown to them.

" 'The proposition that transportation from one place to another, denounced by the statute, means transportation from one premises to another, is a result of construction, not an express statutory declaration, and need not be pleaded.'

"While it is thus indicated that it is *proper* for the grand jurors to state that



the place of origin of the transportation was unknown to them, whenever this is the case, it was not held that an indictment would be fatally defective if it failed to contain a recitation of the places of origin and destination, or that this was unknown to the grand jurors. As therein held, this 'is a matter of description and not a matter vital to the accusation.' "

The Code (Shannon), Section 7078, provides that words not essential to constitute the offense are neither necessary nor proper in an indictment.

By Section 7080 of the Code (Shannon), it is provided:

> "The act or omission charged as the offense shall be stated with such degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

By Section 7087, it is provided:

> "The time at which the offense was committed need not be stated in the indictment, but the offense may be alleged to have been committed on any day before the finding thereof, or generally before the finding of the indictment, unless the time is a material ingredient in the offense."

The Code (Shannon), Sec. 7088, says:

> "It is not necessary for the indictment to allege where the offense was committed, but the proof shall show a state of facts

bringing the offense within the jurisdiction of the county in which the indictment was preferred."

In the case of *State* v. *Donaldson* (3 Heisk.), 50 Tenn., 48, it is held that the time and place of committing the offense need not be stated in an indictment unless they are material ingredients of the offense.

In the above case there was an indictment for a felony. At pages 50, 51, it is said:

> "In this case, the offense might have been committed on one day as well as another, and the time or day of its commission is not of the essence of the offense; and according to the above quoted section of the Code, it was not necessary to allege any day certain, as the day upon which the offense was committed. By the rules of the common law, the indictment should also allege the place of the commission of the offense charged. But this requirement of the common law has been dispensed with by Section 5125 of the Code," (1858) carried into Shannon's compilation at Section 7088.

The construction which the highest court of a State places upon its own Constitution and statutes is not subject, of course, to any review by the Supreme Court of the United States. The readiness of adversary counsel to make insistences without much seeming investigation is again illustrated here, however, by the fact that the Federal rule upon which they seem to rely



is not really much different from our State rule on the point under discussion.

In the case of *United States* v. *Olmstead*, 5 Federal Reporter (2d.), 712, the defendant was indicted upon a charge of conspiracy to violate the national prohibition Act.

Says the Court, at page 714, column 2:

> "The true test of the sufficiency of the allegations of an indictment is not whether it might have been made more certain, but whether it contains every element of the offense and sufficiently apprises the defendant of the charge to be met; whether it shows with accuracy *to what extent* the defendant may plead a former acquittal or conviction (*Cochran, et al.* v. *U. S.*, 157 U. S., 286, 15 S. Ct., 628, 39 L. Ed., 704; *Armour Packing Co.* v. *U. S.*, 209 U. S., 83, 28 S. Ct., 428, 52 L. Ed., 681; *Jones* v. *U. S.*, *supra*), and a judgment is a bar to subsequent prosecution for any offense which *could have been proved* under the indictment (*Miller* v. *U. S.*, C. C. A., 300 F., 529)." (Italics ours.)

The above quoted case, *Miller* v. *U. S.*, 300 Fed., 529, was before the Circuit Court of Appeals of the 6th Circuit at Cincinnati. Speaking with reference to the indictment in that case, which was attacked as insufficient, the Court says:

> "A judgment on such an indictment is a bar to subsequent prosecution for any of-

fense which could have been proved under the indictment, *and the very generality of its terms, therefore, makes it the more ample protection.*" (Italics ours.) "The objection that such general statements do not give defendant sufficient knowledge to enable him to prepare for trial is no longer of its former importance, since most defects of this character—certainly any appearing in this indictment—can now be cured by obtaining a bill of particulars."

See also: *Huth* v. *U. S.*, 295 Fed., 35 (C. C. A., 6th Circut.)

In the case of *Armour Packing Company* v. *United States*, 209 U. S., 56, it is held that an indictment which clearly and distinctly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient (p. 84).

In the case of *Ledbetter* v. *United States*, 170 U. S., 606, the defendant was convicted upon the first count in an indictment which reads as follows:

"The grand jurors of the United States of America duly empanelled, sworn and charged to inquire in and for the body of said Southern District of Iowa, at a term of the United States District Court begun and held at Keokuk, in said district, on the 14th day of April, A.D., 1896, in the name and by the authority of the United States of America, upon their oaths do find and present that Lewis Ledbetter, late of said district, heretofore, to-wit, on the —— day of April, A. D., 1896, in the county of Appanoose, in the Southern District of Iowa, and within the jurisdiction of this court, did then and there wilfully, unlawfully and feloniously carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America."



After conviction, the defendant moved in arrest of judgment upon the ground that the indictment did not state facts constituting an offense, because, among other reasons, the defendant was not informed with sufficient particularity as to the time and place and means so as to apprise him of the crime of which he was charged.

Says the Court, at page 612:

"Where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient, though that offense be more fully defined in some other section. (Citing authorities) . . . . The general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission *from the statute* of some element of the offense. Where the statute completely covers the offense, the indict-

ment need not be made more complete by specifying particulars elsewhere obtained." (Italics ours.)

Speaking with reference to the particularity as to the averment of place in the commission of a crime, the Court, at page 613, says:

"Properly speaking, the indictment should state not only the county, but the township, city or other municipality within which the crime is alleged to have been committed. But the authorities in this particular are much less rigid than formerly. Under the early English law, where the jurymen were also witnesses and were summoned from the vicinage, it was necessary that the locality of the crime should be stated with great particularity in order that the sheriff might be informed from what vicinage he should summon the jury. But this requirement was long since abolished in England by statute, and it is not now necessary there 'to state any venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment.' I Bish. Crim. Procedure, Sec. 368.

"While in this country it is usual to state the town as well as the county, it has not been generally deemed necessary to do so, and most of the authorities assume that an allegation is sufficient after verdict which shows it to have been done within the jurisdiction of the court. *Heikes* v. *Commonwealth*, 26 Penn. St., 513; *United States* v. *Wilson*, Baldwin, 78; *Carlisle* v. *State*, 32 Indiana, 55; *State* v. *Goode*, 24 Missouri, 361; *State* v. *Smith*, 5 Harr., 490; *Barnes* v. *State*, 5 Yerg., 186; *Covy* v. *State*, 4 Port., 186; *Wingard* v. *State*, 13 Georgia, 396; *State* v. *Warner*, 4 Indiana, 604. Indeed, an indictment charging the offense to have been committed in one town is supported by proof that it was committed in a different town within the same county, and within the jurisdiction of the court. *Commonwealth* v. *Tolliver*, 8 Gray, 386; *Commonwealth* v. *Creed*, 8 Gray, 387; *Carlisle* v. *State*, 32 Indiana, 55; *Commonwealth* v. *Lavery*, 101 Mass., 207; *People* v. *Honeyman*, 3 Denio, 121.



"We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient."

What is said by the Court in the concluding part of the opinion just above cited as to sufficiency of averment of time and place would have no application to an indictment under a Tennessee statute by reason of the statutory provisions doing away with the necessity for averment as to time and place in indictments. These Tennessee statutes have been set forth hereinabove.

Tested by the foregoing authorities, we submit that there is no merit in defendant's As-

signment of Error No. I, questioning the sufficiency of the indictment. Indeed, we do not see how the indictment could have been more specific without being prolix.

The day on which the offense was committed is alleged in the indictment as having been the 24th day of April, 1925. Notwithstanding this allegation, the offense could have been shown by the proof to have been committed on any other day within a period of twelve months before the finding of the indictment.

The offense is alleged to have been committed in Rhea County, Tennessee, and in the public schools of Rhea County, the defendant being, at the time the offense was committed, or prior thereto, a teacher in the public schools of Rhea County.

It is averred that these public schools were supported in whole or in part by the public school fund of the State.

The actual offense committed was stated in words, as follows:

> "That the defendant did wilfully teach in the public schools of Rhea County . . . a certain theory and theories that deny the story of the divine creation of man as taught in the Bible, and did teach instead thereof that man has descended from a lower order of animals."



The allegations of the indictment as to the substantive offense committed are almost verbatim in the language of the statute, Chapter 27 of the Public Acts of 1925. Certainly every element and ingredient of the offense are stated in the indictment.

Neither Amendment VI to the Federal Constitution providing that the accused shall be informed of the nature and cause of the accusation, nor any of the first ten Amendments to the Federal Constitution, extend to the States at all.

*Livingston* v. *Moore*, 7 Pet., 469.

The defendant in this case is hard-pressed when he says this indictment is not sufficient to give him information as to the place where the offense was committed, nor the time thereof. The indictment was much more specific than the statutes and decisions in Tennessee require it to have been. We therefore submit that this assignment of error should be overruled.

We pass to our next head of discussion.

## B.

## THE TITLE OF THE ACT SUFFICIENTLY EXPRESSES THE SUBJECT OF THE LAW.

Under this head we will answer Assignment of Error II, stated on page 6 and discussed at

pages 22 to 25 of the printed brief for defendant Scopes.

By this assignment the defendant raises the question that the challenged Act is unconstitutional because its title does not express the subject of the law as required by Article II, Sec. 17, of the Tennessee Constitution.

A careful reading of the printed brief of our adversaries shows that they throw consistency to the winds. Making one insistence under one assignment of error, and another under a different assignment of error, seemingly causes them not the least embarrassment.

For instance, in discussing this Assignment of Error No. II, they say, at pages 23 and 24, of their printed brief:

> "It is essential that the caption of the act and the body shall be germane one to the other. It is necessary that the caption of the Act state enough to put the legislature on notice as to what the law is. The body of the Act refers to a particular theory, i.e., that man is descended from a lower order of animals—not *to the evolution theory.*" (Italics ours.)

In the discussion of defendant's Assignment of Error No. V. to the effect that the Act in question is violative of Article XI, Sec. 12, of the Constitution of Tennessee, which provides that it



shall be the duty of the General Assembly to cherish literature and science, at page 55 of the printed brief, our adversaries say:

> "According to science, man had his origin with the lower forms of life and has been ascending through the ages in his physical, mental and moral attributes."

And at page 56, they say:

> "On the other hand, is there any agreement among the scientists of today on the subject of evolution? Does science believe in evolution? The general acceptance of this doctrine is so pronounced *that the evolution of man 'from a lower order of animals' is no longer regarded as a theory but as a fact.*" (Italics ours.)

Early in their brief on page 10, they say:

> "Neither the story of creation" (of man) "in the first chapter of Genesis, nor the conflicting story of creation in the second chapter of Genesis is *accredited* by *science*, but the doctrine or organic evolution, *including* the ascent of man *from a lower order of animals*, is *universally* accepted by scientists at the present time." (Italics ours.)

And at page 57, they quote from the 1924 edition of Webster's New International Dictionary, defining evolution, and among other things, the following:

> "This theory (evolution) which involves also the descent of man from the lower animals, is based on facts abundantly disclosed in every branch of biological study."

At page 59, they say:

> "After reciting in detail the evidences from comparative anatomy and paleontology of the evolution of man, Mr. Drummond says:
>
> " 'Take away the theory that man has evolved from a lower animal condition, and there is no explanation whatever of any of these phenomena.' "

At page 66, in discussing assignments of error VI and VII, to the effect that the Act is unconstitutional in that it violates the Fourteenth Amendment of the Constitution of the United States, our adversaries say:

> "The Act, by making it criminal for Scopes to *teach evolution*, is depriving him of his liberty, and the right properly to practice his profession."

At page 87, they say:

> "It would be one thing to have forbidden *the teaching of the evolutionary theory* as the only theory in the mind of the teacher which had any basis in truth. It is quite another to forbid, as does the Tennessee statute, the mere explaining, expounding, or elucidating *the evolutionary theory* as one of several theories, including the Biblical theory."

At page 120 of said printed brief, they say:

> "Unless descent from a lower order of animals is the theory of evolution, the Act is in conflict with the caption."



From the foregoing it is difficult to understand which horn of the dilemma our adversaries lay hold on. We find them, in order to sustain the defendant's Assignment of Error No. II, making the insistence that teaching "that man has descended from a lower order of animals," as prohibited in the body of the Act, does not involve the teaching of the evolution theory, as set forth in the caption of the Act, and at the same time in the discussion of the other questions made in the brief submitted in defendant's behalf they say that by prohibiting in the body of the Act the teaching "*that man has descended from a lower order of animals*," it has been made a criminal act in Tennessee to teach in the public schools of the State the evolution theory, as is mentioned in the caption of the Act.

At page 23 of their printed brief, our adversaries say:

> "It is not contended that this statute is unconstitutional because the caption is broader than the Act, which is an obvious fact."

While they make this express disavowal, they proceed, nevertheless, to make the contention, in the face of the repeated holdings of the Supreme Court of Tennessee, to the effect that the fact that the caption of an Act is broader than the body of the Act does not affect its validity.

In the case of *State ex rel.* v. *Schlitz Brewing Co.*, 104 Tenn., 715, at page 728, it is said:

"The title of a legislative bill may be either narrow and restricted or broad and general, as the members of the General Assembly may prefer, and, whether it be in the one form or the other in a given instance, all legislation that is germane to the subject as expressed in the title is within the title and permissible under it; but of course much that might be germane under the latter class of title could not be so under the former.

"If the title adopted be narrow and restricted, carving out for treatment only a part of a general subject, the legislation under it must be confined within the same limits (*State* v. *Bradt*, 103 Tenn., 584; *Hyman* v. *State*, 87 Tenn., 109, 113; *Hyman* v. *State*, 87 Tenn., 109, 113; Cooley Const. Lim. (5th Ed.), 179); if it be broad and general, the legislation under it may have a like scope.

"In every instance the enactment must come within the title, but in no case is it required to cover the whole domain within the title. The Constitution forbids that an enactment shall go beyond the limits of its title, but there is no requirement that it shall completely fill it. Our statute books afford numerous instances of somewhat meager enactments under ample titles, and there are perhaps but few of those with broad and general titles that would not admit of some additional provision."



In the case of *Power* v. *McKenzie*, 90 Tenn., 167, at page 177, it is said:

"Article II, Section 17, of the Constitution, among other things, provides that 'no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.'

"We are aware of no adjudicated case, and it is believed that none can be found, that holds an Act of the Legislature obnoxious to this section of the Constitution simply on the ground that the provisions of the Act do not embrace or cover the full scope of appropriate legislation admissible under its title. The intent of this provision of our organic law was to secure, in a legislative sense, unity of subject expressed in its title in each legislative Act; and this for the protection of the legislative body as well as its constituency.

"The cases, as well as sound reason, in the exposition of this and similar provisions of written constitutions, condemn Acts because their terms and legal import go beyond the scope of their titles, and not because they keep well within them."

In the case of *Knoxville* v. *Gass*, 119 Tenn., 438, at page 451, it is said:

"As stated by this Court in *State ex rel.* v. *Hamby*, 114 Tenn., 364, 84 S. W., 622:

" 'The constitutional provision invoked does not apply to the title, but to the body of the bill, the effective, operative part of the

statute, the law that is made. It is no objection to a bill that the caption is broader than the enacting part, or covers, or can be construed to cover, other subjects, so that the real subject of legislation is therein expressed and not obscured by foreign matters.' "

In *State* v. *Hayes*, 116 Tenn., 40, there was merely presented a clear case of the *body* being *broader* than the *title*.

The caption of the Act prohibits "*the teaching of the evolution theory*" in the public schools of the State. The body of the Act makes it unlawful to teach "*that man has descended from a lower order of animals.*"

Would any unbiased or unprejudiced man who reads this caption and then reads the body of the Act say that the enactment did not come within the scope of the title? While the caption of the Act refers to the "evolution theory," the body of the Act does not undertake to cover "the whole domain within the title," but it does cover one subject embraced within the evolution theory, and it therefore must be held that the "real subject of legislation" is expressed in the title.

We respectfully submit that it cannot be maintained that the terms and legal import of the body of the Act go beyond the scope of its title, and it must be admitted, we think, that the body of the Act keeps well within the scope of the



title. These things being true, it results that the contention of our adversaries with reference to the invalidity of the Act, so far as its title and body are concerned, is without merit and should not be sustained; and that defendant's Assignment of Error II should be overruled.

The above brings us to our next head of discussion.

## C.

## THE ACT IN QUESTION DOES NOT VIOLATE ARTICLE I, SECTION 8, NOR ARTICLE XI, SECTION 8, OF THE CONSTITUTION OF TENNESSEE, NOR AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES.

Under the general head, and the several following sub-heads thereof, we will reply to Assignments of Error VI and VII, which are stated at pages 11, 12 and 13, and elaborately presented at pages 62 to 107 of the printed Brief for defendant Scopes; and also that portion of Assignment IV (defendant's Brief, p. 8) which questions said Act under Art. XI, Sec. 8, of our State Constitution.

At pages 62 to 107 of their printed Brief, counsel for appellant Scopes present all their contentions to the effect that the Act in question violates Art. I, Sec. 8, and Art. XI, Sec. 8, of our

State Constitution, and Amendment XIV to the Federal Constitution; and we will follow this same method.

It is true that at the beginning of their argument in support of Assignments VI and VII, at page 63 of their Brief, our adversaies say they will also consider, in that same connection, Art. XI, Sec. 12, of the Constitution of the State relating to the directory duty of the General Assembly to "cherish" literature and science, and also the provision of Art. I, Sec. 9, of our State Constitution declaring that in criminal prosecutions the accused has the right to demand the nature and cause of the accusation against him.

We have already presented under our preceding head "A" our separate answer to the insistence that this Act violates Art. I, Sec. 9, of our State Constitution; and will hereinafter, under a following head "—," present our separate answer to the insistence that this Act violates Art. XI, Sec. 12, of our State Constitution.

As above stated under this general head, with its following sub-heads, we will present our answer to defendant's insistences, made under Assignments of Error VI and VII, that the Act in question violates Art. I, Sec. 8, and Art. XI, Sec. 8, of our State Constitution, and Amendment XIV to the Federal Constitution.



It was logical for counsel for defendant to group and consider together, as they have, their two Assignments VI and VII, and we will follow that same course, because, as we will presently show, this Court has repeatedly held a thing which is necessarily true, that is, that when a police power statute of our State is assailed as being in violation of the "law of the land" provision of Art. I, Sec. 8, and the "class legislation" provision of Art. XI, Sec. 8, of our State Constitution, and also the "equality" and the "due process" clauses of the Fourteenth Amendment to the Federal Constitution, the "same question" is presented.

That this is true we will next present below.

**(1)**

**The "Same Question" is Presented and the "Same Rules Apply" When a Police Power Statute is Assailed as in Violation of Art. I, Sec. 8, Art. XI, Sec. 8, and the "Equality" and "Due Process" Clauses of the Fourteenth Amendment to the Federal Constitution.**

For the convenience of your Honors, we will now cite and quote excerpts from decisions of this Court which will be found to establish our above proposition.

**Motlow v. State, 125 Tenn. (17 Cates), 547.**

In the course of the opinion in the above case this Court, referring to the large discretion of

the legislature in passing police power statutes, and the very limited scope within which courts would attempt to invalidate such statutes, and noticing the fact that in considering the validity of such statutes the *same question* was presented under Art. I, Sec. 8, and Art. XI, Sec. 8, of our State Constitution and the Fourteenth Amendment to the Federal Constitution,—in the course of the opinion said:

> "Was the creation of such a class an arbitrary act, or is there any reason by which it can be justified? The principles on which the inquiry should be conducted are those laid down in a very recent opinion of the Supreme Court of the United States, in *Lindsey* v. *Natural Carbonic Gas Co.*, 220 U. S., 61, 31 Sup. Ct., 337, 55 L. Ed., 369: '(1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is within any reasonable basis, and therefore it is purely arbirtary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a



> law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *The same rules must apply* in disposing of a question arising under Article I, Section 8, of our Constitution of 1870, embracing the 'law of the land' clause, because its provisions are in this regard, taken in connection with the first clause of Section 8, of Article XI, *substantially the same* as those contained in the second clause of the first section of the Fourteenth Amendment to the Federal Constitution."
>
> 125 Tenn., 559-561.

**City of Memphis, et al. v. State ex rel., 133 Tenn. (6 Thomp.), 83, 88, 89.**

In the above case this Court was dealing with the same proposition, that is, the large amount of unreviewable discretion possessed by the State legislature in the passage of an Act under the police power, and how the same rules, in this regard apply, whether the attempted assault on the Act be made under Art. I, Sec. 8, or Art. XI, Sec. 8 of our State Constitution, or the Fourteenth Amendment to the Federal Constitution; and in this connection this Court said:

> "Under the provisions of the State and National Constitutions, above referred to, the *same rules are applied* as to the validity of classifications made in legislative enactments. When an effort is thus made to distinguish and classify as between citizens,

the basis therefor must be natural and not arbitrary or capricious. The classification must rest on some substantial difference between the situation of the class created and other persons to whom it does not apply. *State ex rel.* v. *Schlitz Brewing Co.*, 104 Tenn., 730, 59 S. W., 1033, 78 Am. St. Rep., 941, and cases cited.

"However, classification for such purposes is not invalid because not depending on scientific or marked differences in things and persons, or in their relations. It suffices if it is *practical*, and it is not reviewable unless *palpably arbitrary*. *Orient Ins. Co.* v. *Daggs*, 172 U. S., 562, 19 Sup. Ct., 281, 43 L. Ed., 552, cited with approval in *State ex rel.* v. *Schlitz Brewing Co., supra.*

"When the classification in such a law is called in question, if any state of facts reasonably *can be conceived* that would sustain it, the existence of that state of facts at the time the law was enacted *must be assumed.* One who assails the classification in such a law must carry the burden of showing that it does not rest upon *any* reasonable basis, but is *essentially arbitrary. Motlow* v *State*, 125 Tenn., 547, 145 S. W., 177, following *Lindsey* v. *National Carbonic Gas Co.*, 220 U. S., 61, 31 Sup. Ct., 337, 55 L. Ed., 369, Ann. Cas. 1912C, 160."

133 Tenn., 88-89.



**State v. McKay, 137 Tenn. (10 Thomp.), 280, 290.**

In the above case this Court, having to deal with the same propositions, in the course of the opinion, said:

"We need not go into rules that this Court has prescribed as tests of arbitrary classification, in view of the fact that the principles touching the range of discretion of the legislature were elaborated in *Motlow* v. *State*, 125 Tenn., 547, 145 S. W., 177, and in the very recent case of *City of Memphis* v. *State ex rel.*, 133 Tenn., 83, 179 S. W., 631, L. R. A. 1916B, 1151.

"A comprehensive review of the decisions of the Supreme Court of the United States on that subject may be found in *International Harvester Co.* v. *Missouri*, 234 U. S., 199, 34 Sup. Ct., 859, 58 L. Ed., 1276, 52 L. R. A. (N.S.), 525.

"We shall refer to some of the decisions of that tribunal which touch the validity of the segregation of a class of dealers or one business from others for regulations under the police power. The principles enunciated in each may find application in the pending case."

137 Tenn., 290.

And later in the opinion, this Court laid down the rule in regard to the very limited extent to which the Court would go in attempting to review the discretion of the legislature in the

passage of a police power statute, and after quoting from numerous decisions of the Supreme Court of the United States, this Court in unmistakable language then laid down the rule to be applied in this State in adjudging the validity of such statutes under both said provisions of our State Constitution and the Fourteenth Amendment to the Federal Constitution —the quotations therein occurring being from decisions of the Supreme Court of the United States, as follows:

> "With the legislative departments rests the consideration and determination of the reasonableness of regulations under the police power, and a court will not examine the question *de novo* and overrule such judgment by substituting its own, unless it clearly appears that those regulations are so 'beyond all reasonable relation to the subject to which they are applied as to amount to mere *arbitrary* usurpation of power' (*Lemieux* v. *Young*, *supra*) or is unmistakably and *palpably* in excess of the legislative power, or is arbitrary 'beyond *possible justice*,' bringing the case within 'the *rare class*' in which such legislation is declared void." (Italics Ours).
>
> (137 Tenn., 306.)

The above quoted decisions of this Court not only plainly show that the "same question" is presented and the "same rules apply" when a police power statute is assailed as being in violation of Art. I, Sec. 8, and Art. XI, Sec. 8, of our



State Constitution, and also the "Equality" and "Due Process" clauses of the Fourteenth Amendment, but they also show, and particularly the quotation last above made from the opinion in *State* v. *McKay*, 137 Tenn., 280, 306, within what very *narrow* and *constricted limits* a court will undertake to *review* and declare invalid the regulations and classifications contained in such police power statute when assailed under any of these constitutional provisions. As to just how *narrow* and *constricted* are these limits—we will later show with considerable detail.

**VIEWING ACT IN QUESTION AS A PUBLIC SCHOOL REGULATION, AND AS ALL OTHER STATE STATUTES REGULATING MANNER OF DOING PUBLIC WORK MUST BE VIEWED.**

Before considering the Act in question as the *ordinary* police power statute must be viewed when constitutionally assaulted, we will next present our insistence that the Act in question belongs to a *special class* of police power statutes which prescribe rules and regulations enacted by a State, in respect to the *way* and *manner* to perform, and the *conditions* subject to which there shall be performed, any *public work* and service *voluntarily* entered upon by a State and which is to be paid for at *public expense*.

State statutes of this *special class* represent, as is now well settled, *legislation* in respect of which the State practically has a *free hand*—as we will next proceed to show.

This proposition, which we present under our next following head, really furnishes a sufficient and conclusive answer, *without more*, to defendant's Assignments of Error VI and VII.

We accordingly say—

**(2)**

**In the Enactment of State Statutes Prescribing Conditions and Regulations in Regard to the Way and Manner in Which Public Work and Services Shall Be Performed by Persons to Be Employed by the State and Receive Payment for Their Services Out of the Public Funds—The State Has an Absolute Free-Hand; and Such Statutory Regulations Present No Question Which is Open to Judicial Review at All.**

It is entirely well settled that a statute, and even a penal criminal statute, whereby a State merely undertakes to restrict and regulate the character of persons it will employ to do any *public* work to be paid for out of its *public* funds, or to provide *restrictions* and *conditions* subject to which such *public service* shall be performed for it—is a law as to the enactment of which the



State has an absolutely *free hand*, and same is not within the *scope* and *purview* of the Fourteenth Amendment to the Federal Constitution or Art. I, Sec. 8, and Art. XI, Sec. 8, of our State Constitution *at all;* and such regulation in respect of *public* work and services to be rendered to, and paid for, by the State *itself*—simply presents *no question* that is *subject* to *judicial review* to any degree.

The surprising thing is that adversary counsel have apparently overlooked this controlling line of decisions by the Supreme Court of the United States, which we will now proceed to present.

**Atkin v. Kansas, 191 U. S., 207.**

In the above case a contractor for work upon a municipal boulevard was sentenced to a fine under a statute of the State of Kansas providing that eight hours should constitute a day's work for all laborers employed by or on behalf of the State or any of its municipalities, and making it unlawful for anyone thereafter contracting to do any public work to require or permit any laborer to work longer than eight hours per day except under certain specified conditions, and requiring such contractors to pay the full current rate of daily wages.

It appeared, without dispute, that the current rate of daily wages was for ten hours work each day, and that the work, in connection with which defendant had been fined, was to no degree injurious or hurtful to the laborer employed, who desired and was willing to work for longer than eight hours per day.

In the course of the opinion in the above case, the Court, speaking through Mr. Justice *Harlan*, said:

> "Assuming that the statute has application only to labor or work performed by or on behalf of the State, or by or on behalf of a municipal corporation, the defendant contends that it is in conflict with the Fourteenth Amendment. He insists that the Amendment guarantees to him the right to pursue any lawful calling, and enter into all contracts that are proper, necessary or essential to the prosecution of such calling; and that the statute of Kansas unreasonably interferes with the exercise of that right, thereby denying to him the *equal protection of the laws*. *Allgeyer* v. *Louisiana*, 165 U. S., 578; *Williams* v. *Fears*, 179 U. S., 270." (Italics ours.)
>
> (191 U. S., 219-220.)

(NOTE.—The above is the exact fundamental contention made for Scopes at page 66 of his Brief where he insists that this Act is unconstitutional because it deprives him "of his liberty, and the right properly to practice his profession," and also deprives parents and pupils, as well as teachers, of their "liberty," and cites (p. 67) among other cases, the very case of *Allgeyer* v. *Louisiana*, 165 U. S., 578, cited and relied on by the contractor in the above case.)



In the opinion in the above case the Court further stated the insistences of counsel for the contractor made in that case, and said of these insistences as follows:

> " 'If a statute,' counsel observes, 'such as the one under consideration is justifiable, should it not apply to *all persons* and to *all vocations* whatsoever? Why should such a law be limited to contractors with the State and its municipalities? . . . Why should the law allow a contractor to agree with a laborer to shovel dirt for *ten hours* a day in performance of a private contact, and make *exactly the same act* under similar conditions a *misdemeanor* when done in the performance of a contract for the construction of a public improvement? Why is the *liberty* with reference to contracting restricted in the *one case* and not in the other?' "

(NOTE.—The above are similar and are indeed the *identical insistences* made by our adversaries in the case at bar.)

The Court then declared:

> "These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a State and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. . . . What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They

may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the legislature;" etc.

(191 U. S., 220-221.)

Later, in this same opinion, the Court said:

"If, then, the work upon which the defendant employed Reese was of a *public character*, it *necessarily* follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the State, does not infringe the *personal liberty* of any one. It may be that the State, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; *for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State* to declare that no one undertaking work *for it or for one of its municipal agencies*, shall permit or require an employe on such work to labor in excess of eight hours



each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the *liberty* of any contractor that *he* be allowed to do *public work* in any mode *he may choose to adopt*, without regard to the wishes of the State. On the contrary, it *belongs to the State*, as the guardian and trustee for its people, and having control of its affairs, *to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.* NO COURT HAS AUTHORITY TO REVIEW ITS ACTION IN THAT RESPECT. REGULATIONS ON THIS SUBJECT SUGGEST ONLY CONSIDERATIONS OF PUBLIC POLICY. AND WITH SUCH CONSIDERATIONS THE COURTS HAVE NO CONCERN.

"If it be contended to be the right of *every one* to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a *criminal offense* for a contractor for public work to permit or require his employe to perform labor upon that work in excess of eight hours each day, is in *derogation* of the *liberty* both of employes and employer, IT IS SUFFICIENT TO ANSWER THAT NO EMPLOYE IS ENTITLED, OF ABSOLUTE RIGHT AND AS A PART OF HIS LIBERTY, TO PERFORM LABOR FOR THE STATE; and *no contractor* for public work *can excuse a violation of his agreement* with the State by doing that which the statute under which he proceeds *distinctly* and *lawfully forbids him to do.*

"So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that *the responsibility therefor rests upon legislators, not upon the courts.*" (Italics ours.)

(191 U. S., 222-223.)

Still later in the same opinion, the Court said:

"Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employe the *equal protection of the laws.* The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the State or of its municipal subdivisions, and alike to all employed to perform labor on such work.

"Some stress is laid on the fact, stipulated by the parties for the purpose of this case, that the work performed by defendant's employe is *not dangerous* to life, limb or health, and that daily labor on it for ten hours would *not be injurious* to him in any way. In the view we take of this case, such considerations are not controlling. WE REST OUR DECISION UPON THE BROAD GROUND THAT THE WORK BEING OF A PUBLIC CHARACTER, ABSOLUTELY UNDER THE CONTROL OF THE STATE and its municipal agents acting by its authority, IT IS FOR THE STATE TO PRESCRIBE THE CONDITIONS UNDER WHICH IT WILL PERMIT WORK OF THIS KIND TO BE DONE. ITS ACTION TOUCHING SUCH A MATTER IS FINAL SO LONG AS IT DOES NOT, BY ITS REGULATIONS,



INFRINGE THE PERSONAL RIGHTS OF OTHERS; AND THAT HAS NOT BEEN DONE."

(191 U. S., 224.)

In other words, the above is a square ruling by the Supreme Court of the United States that no one has any personal or natural right or "*liberty*" to perform public work or service for the State or its municipality; and the State, by penal statute, may impose any regulation or restriction in respect of the persons who will be permitted to do such work or the manner in which they must do it; and a person who *voluntarily* hires or employs himself to the State to perform any such *public* work or service could have refrained from doing so if he chose, and if he desires to do such work and voluntarily undertakes it he must do it absolutely *subject* to the rules, regulations, restrictions and conditions which the State has a free hand to prescribe as it pleases; and the constitutional provisions under discussion *have no relevancy* to such case at all, nor does such case present any question within the power of a court to review.

We respectfully submit that the above decision of the Supreme Court of the United States is absolutely conclusive against the insistence of defendant that the Act in question violates any of

the State or Federal constitutional provisions under discussion. We next present in this connection—

**Truax v. Raich, 239 U. S., 33.**

In the above case the Supreme Court of the United States, speaking through Mr. Justice *Hughes*, held unconstitutional a statute of the State of Arizona which undertook to provide, under a criminal penalty, that any company, corporation, etc., or individual, who was, or might thereafter become an employer of more than five workers at any one time, should not employ less than 80 per cent qualified electors or native-born citizens of the United States or some subdivision thereof.

It will be noted that this statute of Arizona did *not* relate to *public* work or services to be performed and paid for by the State, or one of its municipalities, but it related alone to work and services to be performed for *private* corporations or individuals; and in holding that said Act presented an unconstitutional discrimination under the Fourteenth Amendment, the Court was very careful to say—

> "and it should be added that the Act is not *limited* to persons who are engaged on *public work* or receive the benefit of *public moneys*. The discrimination here involved



> is imposed upon the conduct of ordinary *private* enterprise." (Italics ours.)
> (239 U. S., 40.)

It will be observed that adversary counsel in their Brief (p. 66), actually cite and rely upon this case of *Truax* v. *Raich*, quoted *supra*—without ever having noticed, *apparently*, that the case is expressly to be differentiated from one in which the statute is limited to persons "who are engaged on *public* work or receive the benefit of *public* moneys."

A still more remarkable thing is that the counsel for defendant have overlooked a case reported in this same volume (239 U. S.) which squarely reaffirms the rule and doctrine that as to work and services to be performed by anyone for the State, or one of its municipalities, and paid for out of the *public funds*, the State has a free hand to pass a statute imposing any restrictions and regulations it may please in respect of the doing of such work, and such statute is not open to judicial review at all—a rule which is determinative of this case, of course, against any and all questions sought to be made by the counsel for defendant under the Fourteenth Amendment to the Federal Constitution and the corresponding provisions of our State Constitution now under discussion.

Said case is—

**Heim v. McCall, 239 U. S., 175.**

In the above case the Supreme Court of the United States, speaking through Mr. Justice *McKenna,* held to be constitutional the provisions in Sec. 14 of the Labor Law of 1909 of New York, providing that only *citizens* of the United States shall be employed on *public* works and that *preference* shall be given to citizens of *that State;* and held that such statute was not unconstitutional under the "privilege and immunity" clause of the Constitution of the United States, nor in conflict with the "equality" or "due process" clauses of the Fourteenth Amendment thereof.

In fact, in the above case, the Court reaffirmed the rule laid down in *Atkin* v. *Kansas,* 191 U. S., 207, which we have hereinbefore quoted; and ruled that this statute of New York, relating as it did to the performance of work and services for a municipality of the State, to be paid out of the *public* moneys, was a statute in enactment of which, and as to the regulations and conditions imposed by it, the State had a free hand, and the same were not within the purview of the Fourteenth Federal Amendment at all.

This case of *Heim* v. *McCall* was a great case, wherein a taxpayer sought to enjoin the cancellation of a contract for the construction of a por-



tion of the subway in New York, which was to cost $235,000,000, and its equipment $44,000,000; and the Court in said case held that it could assert jurisdiction at the suit of the taxpayer, but held further that the law attacked, relating to the doing of public work and the performance of public service, was simply not within the purview of the Fourteenth Amendment to the Federal Constitution at all.

In the course of the opinion in the above case the Court, at page 188 of the opinion, said:

> "The fundamental proposition of plaintiff in error Heim is that, assuming that Sec. 14 applies to the subway construction contracts in question, it (the law) contravenes the provisions of the Constitution of the United States (a) in that it violates the corporate rights of the city and the rights of its residents and taxpayers, (b) the rights of the various subway contractors with the city, (c) the rights of aliens and citizens of other States resident in New York, and (d) it is in violation of treaty rights."

And a little later in the same opinion, at page 189 thereof, the Court said:

> "To sustain the charge of unconstitutionality the Fourteenth Amendment is adduced, and the specification is that the law abridges the privileges and immunities of the contractors and those of their alien employes in depriving them of their *right of*

*contracting for labor* and that the State of New York, by enacting and enforcing the law, deprives employers and employes of *liberty* and property *without due process of law* and denies to both the *equal protection of the law.*

"The treaty that it is urged to be violated is that with Italy, which, it is contended, 'put aliens within the State of New York upon an equality with citizens of the State with respect to the right to labor upon public works;' and that Congress has fortified the treaty by Section 1977 of the Revised Statutes—(a part of the Civil Rights legislation)." (Italics Ours).

And then later in the opinion, at page 191, the Court reaffirmed the rule laid down in *Atkin* v. *Kansas*, and in this connection said:

"The contentions of plaintiffs in error under the Constitution of the United States and the arguments advanced to support them WERE AT ONE TIME formidable in discussion and decision. We can now answer them by authority. They were considered in *Atkin* v. *Kansas*, 191 U. S., 207, 222, 223. It was there declared, and it was the principle of the decision, that 'it *belongs to the State*, as guardian and trustee for its people, and having *control of its affairs*, to *prescribe the conditions* upon which it will permit *public work* to be done on its behalf, or on behalf of its municipalities.' And it was said, 'NO COURT HAS AUTHORITY TO REVIEW ITS ACTION IN THAT RESPECT. REGULATIONS ON THIS



SUBJECT SUGGEST ONLY CONSIDERATIONS OF PUBLIC POLICY. AND WITH SUCH CONSIDERATIONS THE COURTS HAVE NO CONCERN.'"

In regard to the insistence made that the statute of New York violated the treaty with Italy, the Court held the plaintiff in error was in no better condition then as to his insistences attempted to be made under the Fourteenth Amendment to the Federal Constitution, and for the same reasons.

The above quoted decision, we respectfully submit, is absolutely *conclusive* against all insistences of the counsel for defendant that the Act in question in the case at bar can be held invalid under, or even within the *purview*, of the Fourteenth Amendment to the Federal Constitution or the corresponding provisions of our State Constitution; and said decision is a square authority for the proposition that the Act in question does not present any question open to review by the Court at all—simply because the State of Tennessee has a free hand in regard to the imposition of any regulations and conditions subject to which it may please to employ and pay for the services of any person in the doing of any public work for the State as an employer.

**Ellis v. United States, 206 U. S., 246.**

In the above case the Court, speaking through Mr. Justice *Holmes*, upheld as valid and constitutional the provisions of the Act of Congress of August 1, 1892, limiting the hours of work of laborers and mechanics employed by the United States or any contractor or sub-contractor upon any of the *public works* of the United States to eight hours per day, except in cases of extraordinary emergency, and imposed penalties for the violation thereof.

The opinion in the above case cites and reaffirms the rule announced in *Atkin* v. *Kansas*, 191 U. S., which we have hereinbefore quoted; but we now want to get before your Honors how exactly the opinion in this *Ellis Case* meets and overthrows perhaps the most positive and emphatic contention of the counsel for defendant in the case at bar.

At pages 94-95 of the defendant's printed Brief, it is said:

> "The assumption of the prosecution is that the one who pays has a right to regulate. But that is quite a different proposition from saying that the one who pays can make it a crime for its employes to behave in a certain way, whereas, it is no crime for others to behave in that same way. There is no attempt here to prescribe the school law or course of study. A violator



> is a ciminal if he teaches the theory of evolution in the public schools. Therefore, teaching the theory of evolution must be a criminal act. If it is a criminal act, it is because such teaching is contrary to public morals. If so, it must apply generally, not only to some teachers, but to all teachers, and possibly not only to teachers, but to writers as well. It must apply to books as well as to the spoken word, and possibly not only to books and teaching but to any utterance on the subject anywhere, any place, in private schools and public schools, on the platform, in conversation, to oral, written or printed statements, in newspapers, magazines or books, to statements, direct and indirect. Things that are so bad as to necessitate prohibition by criminal law must be prohibited all over the State and wherever the law has jurisdiction. The criminal law cannot apply to a particular class, the criminal law cannot apply only to the teachers in *the public schools* of Tennessee. Discrimination always renders a law unconstitutional, but it is particularly obnoxious to the equality-of-laws provision 'in the administration of criminal justice.' "

Now, we ask your Honors to consider the insistence we have above quoted from the Brief of adversary counsel, in the light of the opinion of the Supreme Court of the United States in the above *Ellis Case*, in which opinion—(206 U. S., at p. 255)—it is said:

> "It would be a strong thing to say that a legislature that had power to forbid or to authorize and enforce a contract had not also the power to make a *breach of it crimi-*

*nal*, but however that may be, Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out *only in a way consistent with its views of public policy, and may punish a departure from that way.* . . .

"One other argument is put forward, but it hardly needs an answer. A ruling was asked in Ellis's case, and is attempted to be sustained, to the effect that the Government waived its sovereignty by making a contract, and that even if the Act of 1892 were read into the contract, a breach of its requirements would be only a breach of contract and *could not be made a crime.* This is a mere confusion of ideas. The Government purely as contractor, in the absence of special laws, may stand like a private person, but by making a contract it does not give up its power to make a law, and it may make a law like the present for *the reasons* that we have stated. We are of opinion that the Act is not contrary to the Constitution of the United States." (Italics Ours).
(206 U. S., 255-256.)

The "reasons" which the Supreme Court of the United States had stated for its holding that said Act of Congress was valid and constitutional, had been stated on the preceding page (255) of the opinion as follows:

"The contention that the Act is unconstitutional is not frivolous, since it may be argued that there are relevant distinctions between the power of the United States and that of a State. But the arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions, and are answered, *so far as a State is concerned*, by *Atkin* v. *Kansas*, 191 U. S., 207. In that case a contractor for work upon a municipal boulevard was sentenced to a fine under a similar law of Kansas, and the statute was upheld. We see no reason to deny to the United States THE POWER THUS ESTABLISHED FOR THE STATE. Like the States, it may sanction the requirements made of contractors employed upon its public works *by penalties* in case those requirements are not fulfilled." (Italics Ours.) (206 U. S., 255.)



To the extent that the decision in *Marshall & Bruce* v. *Nashville*, 109 Tenn. (1 Cates), 495, may be in conflict with the *later* great line of controlling decisions of the Supreme Court of the United States above reviewed, this earlier Tennessee case is no longer the law.

Further answering the contention of counsel for defendant that the Act in question interferes with his "liberty" by depriving him of it without due process of law, and by denying to him the equal protection of the laws, and the *strange* insistence to the effect that criminal laws must apply alike to all school teachers throughout the State, in both private as well as public schools, in order to be upheld—we will now present still other decided cases in the numerous and entirely well settled line of authorities we have just been presenting.

**Bopp v. Clark, 147 N. W. (Ia.), 172; 52 L. R. A. (N. S.), 493.**

The above case involved the constitutionality of the Iowa statute prescribing the "Minimum Wage for Teachers in *Public* Schools."

For any school officer to employ any such teacher at less than the prescribed minimum wage was made a criminal offense punishable by a fine of not less than $25.00 nor more than $100, and suspension of the offending school officer from office.

The plaintiff in the above case was a defendant in a criminal case, and was being held in custody by a sheriff under a warrant charging him, as a school officer, with having employed a teacher at less than the minimum wage prescribed by said Act; and the indicted school official sued out a writ of *habeas corpus* and challenged the validity of his arrest, and of all other proceedings in said criminal case, upon the ground that they were based upon an unconstitutional statute.

The Court held the Act constitutional upon the authority of *Atkin* v. *Kansas*, 191 U. S., 207, hereinbefore quoted by us; and in the course of the opinion, among other things, said:

"Counsel for appellant has been unable to



cite any pertinent authorities in support of his contention. His argument is brief and is based wholly upon analogy. . . . The school district is a creation of the legislature. Its powers and the method of their exercise are all defined by legislative act. . . . If the legislature was within its authority in conferring such power upon school officers, it necessarily had the same authority to enlarge or to abridge the same. Appellant's counsel concedes that the legislature would have had authority to fix a maximum wage. Accepting this concession, it would seem to follow of logical necessity that it had equal authority to fix a minimum wage. The argument at this point is that the statute in question interferes with the *right of the particular teacher to accept such wages as he will*, whether below the statutory schedule or not. . . . That the rights of individual teachers are not invaded by such legislation is well settled by the decisions of many eminent courts. It will be sufficient to cite *Atkin* v. *Kansas*, 191 U. S., 207, 48 L. Ed., 148, 24 Sup. Ct. Rep., 124, and the cases therein cited."

(52 L. R. A. (N.S.), 495.)

It thus appears that the Court, in the above case, while declaring that its holding was settled by the decisions of many eminent courts, said that it would be sufficient merely to cite the case of *Atkin* v. *Kansas*, 191 U. S., 207, and the cases therein cited. Among the eminent authorities referred to by the Court, but all of which it did

not deem it necessary to cite, are those which were cited in the Brief of the Attorney General of the State of Iowa in said case, from which we quote the following:

> "A crime or a misdemeanor is an act committed or omitted in violation of public law either forbidding or commanding it. 4 Bl. Com., 15, 8 Am. & Eng. Enc. Law, 248.
>
> "The legislature has the right to prescribe the manner in which officers of its creation shall perform the duties of their offices. *Clinton* v. *Cedar Rapids & M. River R. Co.*, 24 Iowa, 455; *Atkin* v. *Kansas*, 191 U. S., 207, 48 L. Ed., 148, 24 Sup. Ct. Rep., 124; *Clark* v. *State*, 142 N. Y., 101, 36 N. E., 817; *Ryan* v. *New York*, 177 N. Y., 271, 69 N. E., 599; *Re Dalton*, 61 Kan., 257, 47 L. R. A., 380, 59 Pac., 336.
>
> (52 L. R. A. (N.S.), 494.)

From among the cases cited in the above quoted excerpt from the Brief of the Attorney General of Iowa in the above case, we call your Honors' attention to the case of—

**Re: J. T. Dalton, 61 Kan., 257; 47 L. R. A., 380.**

In the above case Dalton was under arrest for violating a statute of Kansas providing that eight hours should constitute a day's work for all persons employed by or on behalf of the State of Kansas, or any county, city or township, or other municipality of that State.



The plaintiff Dalton sued out a writ of *habeas corpus* challenging the constitutionality of said Act which imposed criminal penalties.

The Supreme Court of Kansas held the Act to be constitutional, and in the course of the opinion quoted from *Peoples ex rel. Warren* v. *Beck*, 10 Misc., 77, 30 N. Y. Supp., 473, as follows:

> "If the Government has the power of determination in this regard, then it must follow that it has also the power to make its determination effective, and provide by penalty the enforcement of the law. This is the ordinary and frequent exercise of governmental power. Does this in any wise interfere with the laborer? Is his right above the conceded power of government in this respect? His right is the right to offer his labor in the market equally with every other laborer of his class, and no more. If he offer it to the Government, he knows what terms the Government has prescribed; and if he is not willing to accede to its terms, he may not be compelled thereto. . . . *There can be no compulsion of a contractor to bid upon public work, nor is the laborer bound to take employment from a person having such contract.* If the terms relating to the hours of labor do not suit either the contractor or the employe, there is no compulsion upon either the one or the other to take the contract, or to perform any labor for the State. The terms of employment are, by this statute, publicly proclaimed; and, if a person insists upon working more than eight hours a day, he must seek other employment. *His liberty of choice is not*

*interfered with, nor his right to labor infringed."* (47 L. R. A., 382.)

The numerous above quoted decisions of the Supreme Court of the United States, and of States, including the State of *New York*, surely ought to have been *known to*, or in any event, were *ascertainable* by even a *little* investigation upon the part of some of defendant's numerous counsel.

We have already presented the well-settled proposition that when a statute is attacked under Art. I, Sec. 8, or Art. XI, Sec. 8 of our State Constitution or Sec. 1 of the 14th Amendment of the Federal Constitution—the "same question" is presented and the "same rules" apply. (*Ante*, pp. 117-123).

Surely all of the authorities we have quoted under this head of this Brief, including the line of controlling decisions of the Supreme Court of the United States, as well as the State decisions last above quoted, will be sufficient to establish that the Act in question, which merely represents our State's legislative enactment imposing a regulation to be followed by *public* school teachers to be employed by the State in its own *public* schools and at the *public* expense—is not open to any assault under the "equality" or "due process" clauses of the Fourteenth Amendment to the Federal Constitution, or the corresponding provisions of Art. I, Sec. 8, and Art. XI, Sec. 8,



of our State Constitution. Such an Act, as we have seen, is entirely beyond the purview of said constitutional provisions, and does not present any regulation or classification within the power of a court to review.

And some of the cases establishing this to be the law, and which we have just above quoted, relate to criminal statutes imposing criminal penalties for the violation of the regulations therein prescribed for the government of the State's public schools and the service of school teachers therein.

All the above is in accord with a decision of the Supreme Court of the United States and a decision of this Court in cases presenting the question of the constitutionality of statutes relating to the discipline or government of the States *public* institutions of learning and the control of the State over its *public* schools; and these two decisions we next present:

**Waugh v. Mississippi University, 237 U. S., 589, 593, 597.**

In the above case a statute of Mississippi had been passed abolishing and prohibiting to exist all secret orders including college "fraternities" in the University of Mississippi "and in all other educational institutions, supported in *whole* or in *part*, by the State."

Plaintiff in error Waugh, after the highest court of Mississippi had held said Act constitutional against his assault thereon, carried his contention that said Act violated the Fourteenth Amendment to the Federal Constitution before the Supreme Court of the United States for review in the above case. In stating the questions made by Waugh against the validity of this statute of Mississippi, the Supreme Court of the United States, in its opinion in the above case, said:

> "The statute is charged to be in certain particulars in violation of the Constitution of Mississippi. It is also charged to be in violation of the Fourteenth Amendment of the Constitution of the United States because it *without reason*, deprives the complainant of his property and property right, *liberty* and his harmless pursuit of happiness and *denies* to the complainant the *equal protection of the law* of the State of Mississippi.' " (Italics ours.)
>
> (237 U. S., 593.)

And then after disposing of certain other contentions made by the complainant Waugh against the validity of said Mississippi statute as being void under the Fourteenth Amendment to the Federal Constitution, the Supreme Court of the United States emphatically recognized that the legislature of Mississippi was in *full* and *complete control* of the State's educational



institutions maintained in whole or in part by said State, and that the Court had no power to review and dictate to the legislature in respect of any regulation which the legislature itself thought proper to impose in the matter of the proper government of and discipline to be maintained in its own educational institutions; and in this connection the Supreme Court of the United States used language which, we submit, absolutely ends this case against the contentions of the attorneys for Scopes—as follows:

> "The next contention of complainant has various elements. It assails the statute as an obstruction to his pursuit of happiness, a deprivation of his property and property rights and of the privileges and immunities guaranteed by the Constitution of the United States. Counsel have considered these elements separately and built upon them *elaborate* and *somewhat fervid arguments*, but, after all, they depend upon one proposition: whether the right to attend the University of Mississippi is an *absolute* or *conditional* right. It may be put more narrowly—whether under the Constitution and laws of Mississippi the public educational institutions of the State are so far under the *control* of the *legislature* that it may impose what the Supreme Court of the State calls 'disciplinary regulations.'
>
> "To this proposition we are confined and we are not concerned in its consideration with what the laws of other States permit or prohibit. Its solution might be rested

upon the decision of the Supreme Court of the State. That Court said: 'The legislature is in *control* of the colleges and universities of the State, and has a right to legislate for their welfare, and to enact measures for their discipline and to impose the duty upon the trustees of each of these institutions to see that the *requirements of the legislature are enforced;* and when the legislature has done this, IT IS NOT SUBJECT TO ANY CONTROL BY THE COURTS.'

"This being the power of the legislature under the Constitution and laws of the State over its institutions maintained by public funds, what is urged against its exercise to which the Constitution of the Uniter States gives its sanction and supports by its prohibition?

"It is said that the fraternity to which complainant belongs is a *moral* and of itself a *disciplinary force.* This need not be denied. But whether such membership makes against discipline *was for the State of Mississippi to determine.* It has to be remembered that the University was established by the State and is under the *control* of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in *opposition* to the *views* of the *State* and annul its regulations upon disputable considerations of their *wisdom* or *necessity.* Nor can we



accommodate the regulations to the assertion of a special purpose by the applying student, varying perhaps with each one and dependent alone upon his promise.

"This being our view of the power of the legislature, we do not *enter* upon a *consideration* of the *elements* of complainant's contention. It is very *trite* to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the State *considers* inimical to *discipline,* finds *no prohibition* in the Fourteenth Amendment." (Italics ours.)

(237 U. S., 595-597.)

In other words, the Supreme Court of the United States in the above case held that since the highest Court of Mississippi had ruled that under the Constitution of that State the legislature was *in control* of the *public* educational institutions of said State, any regulation which the State legislature deemed proper to impose relating to the government or proper discipline to prevail in such public institutions of learning was absolutely within the power of the State, and beyond the power of the Supreme Court of the United States to review at all, because such

State legislation, in respect of its own public institutions of learning—

> "finds no prohibition in the Fourteenth Amendment."

Why does not the above decision of the highest Court of our nation absolutely end the attenuated and fanciful contentions of the attorneys for defendant in the case at bar?

In the above quoted opinion of the Supreme Court it appeared that complainant Waugh had alleged in his bill, to which a demurrer had been sustained, that what he desired to do, and had been prohibited from doing by the Mississippi statute was very "moral" and was really beneficial as a "disciplinary force" in the affairs of said State public institution of learning, just as the attorneys for defendant in the instant case are insisting that teaching "that man has descended from a lower order of animals" is entirely "moral" and not "irreligious" but is really in line with the accepted "scientific theory" in respect of the origin of man; but, as we have seen, the Supreme Court of the United States, in the above case, held it would not attempt to exercise any power of review *whatever* in regard to any regulation which the State legislature deems it proper to impose in respect of the control and proper discipline of the State's own institutions of learning.



In any event, it follows that your Honors have absolutely no power, just as the Supreme Court of the United States ruled it absolutely had no power, to review the discretion of the State legislature in respect of any regulation which it thought was necessary for the proper government of, or discipline in, the State's own public schools and institutions of learning; and whether it be true or false, right or wrong, moral or immoral, religious or irreligious, to teach "that man has descended from a lower order of animals"—can this Court say, any more than the Supreme Court of the United States in the above case could say, that is—that the State legislature had the *right* and *power* to pass the Act in question for the purpose of providing what it deemed to be proper school government and discipline in our public schools and institutions of learning?

In any event, the legislature has determined that the teaching in our public schools "that man has descended from a lower order of animals" invades the field of religious views and convictions entertained by most of our people, and that it is opposed to the best interest and welfare of our public schools to have such distracting and disturbing thing taught in such institutions.

Is it for this Court or the legislature to settle and determine such question?

We have burdened your Honors, under this head of our Argument, by making many quotations from numerous cases decided by the Supreme Court of the United States, as well as by the highest courts of States, for the purpose of demonstrating in what entire harmony with the established rule is the previous holding of the Supreme Court of Tennessee in the case next to be noticed.

**Leeper v. State, 103 Tenn. (19 Pick.), 500.**

In the above case there was presented to this Court the validity of the "Uniform Text-Book Act," for a violation of which Leeper, a public school teacher, had been indicted and convicted. The constitutionality of said Act, which applied to all public schools and public school teachers in this State, was attacked upon many grounds.

It is interesting to note that this *Leeper Case* was decided by this Court in 1899, four years before the Supreme Court of the United States decided *Atkin* v. *Kansas*, 191 U. S., 207, which laid down the *broad* rule, as we have seen, that penal regulations imposed by a State statute in regard to the way and manner that *public* work and services to be paid for by the State should be performed, were matters as to which the State legislature had a free hand, because they were



regulations which suggested only "considerations of public policy," with which considerations "the courts have no concern." This *broad rule* laid down in this *broad way* by the Supreme Court of the United States, and which has been consistently followed by that Court ever since, as we have seen, had never been thus clearly and broadly stated until *Atkin* v. *Kansas* was decided in 1903.

That such rule then laid down and thoroughly established was regarded as in debatable territory prior to that decision was commented upon by the Supreme Court of the United States as late as in the case of *Heim* v. *McCall*, 239 U. S., 175, from which we have hereinbefore quoted, and in which the Supreme Court of the United States, speaking through Mr. Justice *McKenna*, said that arguments made by the plaintiffs in that case, and which were in conflict with this broad rule "were *at one time* formidable in discussion and decision" but had been answered by the authority of *Atkin* v. *Kansas*, 191 U. S., 207, 222, 223.

We thus recall to your Honors how, until the decision of *Atkin* v. *Kansas*, decided by the Supreme Court of the United States in 1903, the broad rule therein announced, and which is fatal to the contentions of defendant in the case at bar,

had been regarded as debatable and presenting questions "formidable in discussion."

Notwithstanding the above, when this Court, speaking through Judge Wilkes, decided the *Leeper Case* in 1899, four years before *Atkin* v. *Kansas* was decided by the Supreme Court of the United States, this Court adopted as "satisfactory and conclusive" the reasoning of *State* v. *Haworth*, 122 Ind., 462 (7 L. R. A., 240), which was a case relating to the State's power and control over its public schools; and this Court then arrived at the same conclusion which, four years later, was broadly laid down by the Supreme Court of the United States in *Atkin* v. *Kansas*, and consistently followed since that time.

And so it is, we find that this Court, in the *Leeper Case*, after citing numerous authorities, near the close of the opinion, said:

> "The reasoning of the Court in the principal case of *State* v. *Haworth* is so *satisfactory* and *conclusive* that we can not, perhaps, do better than give a synopsis of it. It was held that such an Act does not infringe in the slightest degree upon the right of local self-government; that essentially and intrinsically the schools in which are educated and trained children who are to become rulers of the Commonwealth are matters of State, and not local, jurisdiction; that in such matters the State is a unit, and the legislature the *source of power;* that the *establishment* and *control* of public schools is a *function of the General Assembly*, both under the Constitution and because it is a matter of *State concern*. Being a matter of *legislative control*, the legislature may abandon one plan and try another if it see proper, *and the Court can not interfere*. It is further pertinently said that it is *impossible* to *conceive* of the existence of a uniform system of public schools without *power* lodged *somewhere* to make it uniform, and, in the absence of express constitutional provisions, that power must *necessarily* reside in the *legislature*, and hence it has the *power* to prescribe the *course of study* as well as the books to be used, and how they shall be obtained and distributed, AND ITS DISCRETION AS TO METHODS CANNOT BE CONTROLLED BY THE COURTS;" etc.
>
> 103 Tenn., 533-534.



And still later in its opinion in this *Leeper Case*, this Court, quoting with approval the language of the opinion in *State* v. *Haworth*, 122 Ind., 462, said:

> " 'We can find neither reason nor authority that suggests a *doubt* as to the *power* of the legislature to require a designated series of books to be used in the schools, and to require that the books selected shall be obtained from the person to whom the contract for supplying them may be awarded. It is to be remembered that the statute does not command that *every person* shall buy the book; it confines the requirement to those who receive the benefit of the *public*

*schools.* These schools are *owned* and *maintained* by the State, and the State may prescribe the *terms and conditions* upon which pupils may enter them, except that it can not disregard the constitutional injunction, 'tuition shall be without charge and equally open to all.' It may, as we have seen, prescribe the *course of study* that shall be pursued, and the *system of instruction* that shall be adopted, and to protect and complete *its control* it must have the power to prescribe the books that shall be used and the mode in which the books shall be obtained; the legislature *simply commands* that those who enjoy the benefits of the schools which it maintains shall secure such books as it deems best and in the mode it regards as expedient. POWER THUS ASSERTED IS EXERCISED IN A MATTER WHICH IS NOT OF COMMON RIGHT, BUT WHICH CONCERNS INSTITUTIONS FOUNDED AND FOSTERED BY THE STATE. The regulation, in its entire scope, relates *exclusively* to the enjoyment of the *privilege* afforded by a system of education *created* and *maintained* by the State for the general good, and it must follow that the State does have power to make the regulations effective by describing the *method* which shall be pursued by those who seek to enjoy the privilege it has created. *Certainly no one will deny the existence of such a right, and if it does exist,* IT MUST RESIDE IN THE LAW-MAKING POWER OF THE STATE.'" (Italics Ours.)

(103 Tenn., 535-536.)



We submit with very great confidence to your Honors that the above is absolutely controlling and conclusive against the contentions made by counsel for defendant in the case at bar.

The defendant Scopes was a teacher in the public schools of this State. These schools were owned by the State and his services were employed and paid for by the State out of the public funds.

As suggested by this Court in the above quoted *Leeper Case*, certainly no one will deny the existence of a right and power to regulate and control the conduct and services to be rendered by a public school teacher, and if such right and power do exist they "must reside in the law-making power of the State."

And under the long line of decisions of the Supreme Court of the United States as well as the State decisions hereinbefore quoted under this head of our Argument, including the above quoted language of this Court in the *Leeper Case*—it simply stands established that the penal regulations imposed by the Act in question upon Scopes and all other public school teachers in this State were clearly within the power of our State legislature to prescribe, and such power could reside nowhere else. In regard to such regulations *of public* work and service to be per-

formed for the State itself, and paid for out of the *public* funds, the State has a free hand, and can enact such provisions and conditions as its legislature may deem warranted and best for the public welfare; and such discretion and determination of the law-making power of the State in regard to such matter is a thing with which the courts have no concern, and is beyond their power to review.

We repeat, and we submit with great confidence to your Honors, that the authorities cited and quoted under this head of this Argument, aside from any and every thing else involved in this case, are absolutely conclusive upon the proposition that the Act in question must be held to be constitutional as a public school regulation laid down by our legislature, and beyond the power of this or any other Court to invalidate or review. If this were not true we would have this Court and the Supreme Court of the United States undertaking to provide the rules and regulations for the management and government of our State public schools and the conduct and services to be performed by the teachers therein. Such a thing, of course, is impossible under our form of government and would be intolerable to the Courts.

Really, it was this same well settled funda-



mental principle by which the law-making power of the State has a free hand and unreviewable discretion in prescribing and regulating conditions, in obedience to which its own public work and institutions are to be governed, that underlies the case of

**Berea College v. Commonwealth of Kentucky, 211 U. S., 45.**

In the above case there was presented the constitutionality of a statute of Kentcky prohibiting persons and *corporations* from maintaining schools for both white persons and negroes. The Supreme Court of the United States, speaking through Mr. Justice *Brewer*, in that case, held the Kentucky statute separable; and held that the provisions of the statute prohibiting schools for both white persons and negroes to be maintained by *corporations*, as distinguished from natural persons, was clearly *valid*, because the legislature of the State had a free hand in the granting of *corporate powers*, so that the granting, withholding or conditioning of the powers to be exercised by corporations chartered under a State statute rest "entirely in the discretion of the State." (211 U. S., 54.)

Of course, the public schools and public institutions of learning of a State cannot be distin-

guished from, and in every substantial and fundamental sense are *corporations* created by the State, with the State statutes relating to the government of such public schools and public institutions of learning constituting the charter powers thereof.

In his dissent in this *Berea College case*, Mr. Justice *Harlan* had this same fundamental principle in mind, because in his dissenting opinion he was careful to carve out and not question the well settled fundamental principle under which the State must have a free hand in the control of its own *public* schools and public institutions of learning; and, as demonstrating this, we call your Honors' attention to explicit language in this dissenting opinion in this *Berea College case*, as follows:

> "Of course, what I have said has no reference to *regulations* prescribed for *public schools*, established at the *pleasure* of the State and maintained at the *public expense*. No such question is here presented and it need not be now discussed. My observations have reference to the case before the Court and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same *private* institution of learning." (Italics ours.)
>
> (211 U. S., 69.)



It was Mr. Justice *Harlan* who had previously delivered the opinion in *Atkin* v. *Kansas*, 191 U. S., 207, which has been ever since followed and never since questioned by any Court.

This same well settled fundamental principle, by which the broad power of the State legislature to govern and control the public schools of the State must be conceded, was clearly and expressly recognized and left unquestioned in the two cases next noticed below.

**Meyer v. Nebraska, 262 U. S., 390.**

In the above case there was presented the constitutionality of a statute of Nebraska which, under prescribed penalties of fine and imprisonment, undertook to enact that no person, "individually" or as a "teacher," should, "in any *private*, denominational, parochial or *public* school," teach any subject to any person in any language other than the English language, with a provision that languages, other than the English language, might be taught "as languages" only after a pupil should have attained and successfully passed the Eighth Grade, as evidenced by a certificate of graduation issued by the County Superintendent of the County in which the child resides.

It will be observed that said statute of Neb-

raska related to *private* as well as public schools, and forbade any person, "individually" or as a "teacher," to teach any subject to any person in any language other than the English language.

In the opinion of the Court, speaking through Mr. Justice *McReynolds*, holding said statute of Nebraska to be unconstitutional, there is to be found, in regard to the recognized power of the State over its *own* public institutions, the following careful and explicit statement:

> "The power of the State to compel attendance at *some* school and to make reasonable regulations for *all schools*, including a requirement that they shall give instructions in English, is not questioned. Nor has *challenge* been made of the *State's power* to prescribe a *curriculum* for institutions *which it supports*. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams* v. *Tanner*, *supra*, p. 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its *abolition*, although regulation may be entirely proper." (Italics ours.)
>
> (262 U. S., 402, 403.)

And in the companion decision reported under the style of *Bartels* v. *Iowa*, 262 U. S., 404, in the same volume of reports, and immediately following the report of the case of *Meyer* v. *Nebraska*, *supra*, the statutes of Ohio and Iowa



which were held to be invalid and unconstitutional, were statutes which, just like the Nebraska statute in the Nebraska case, were leveled against teaching any language other than the English language in *private* and *parochial*, as well as in *public* schools.

When all the numerous counsel for defendant Scopes have *apparently* overlooked the case of *Atkin* v. *Kansas*, supra, and the long line of following and concurrent holdings—their strange error in relying on the decision last above quoted becomes *partially* understandable.

**Pierce v. Society of Sisters of Holy Names, 268 U. S., 510.**

In the above case there was presented the question of the constitutionality of a statute of the State of Oregon, which undertook to forbid and make it unlawful for any parent or guardian in the State of Oregon, having control or charge of any child under sixteen years of age, and of the age of eight years or over, to fail or neglect or refuse to send such child to a *public school* for the period of time a public school should be held during the current year in the district in which the child resides—with certain added conditions and exceptions.

In the above case the Supreme Court of the United States, speaking through Mr. Justice McReynolds, held this statute of Oregon to be unconstitutional and void.

In the opinion, however, the power of the State to regulate "*all* schools"—(private as well as public)—was recognized; and in this connection (Op., p. 69), the Court said:

> "No question is raised concerning the power of the State reasonably to regulate *all schools*, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend *some* school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."

And to make it plain that the opinion and holding of the Court was leveled merely against the proposition that children were not subject to be "standardized" by the State, and the liberty and duty of parents over their children destroyed, by a requirement forcing children to accept instructions "from *public* teachers *only*"—appears from the following language at page 691 of the opinion in this case.

> "Under the doctrine of *Meyer* v. *Nebraska*, 262 U. S., 390, 67 L. Ed., 1042, 29



> A. L. R., 1446, 43 Sup. Ct. Rep., 625, we think it entirely plain that the Act of 1922 unreasonably interferes with the *liberty* of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any *general power* of the State to standardize its children by forcing them to accept instructions FROM PUBLIC TEACHERS ONLY. The child 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 obligations." (Italics ours.)

Parents who *choose* to send their children to our *public* schools perform and can *only* perform their "high duty" through their elected legislative representatives, and Courts are not elected and have no power to control such matters.

A careful reading of the opinion in the above case will demonstrate that the Supreme Court of the United States was condemning as invalid and unconstitutional a State statute which undertook to compel all children to attend the *public* schools and accept instructions from *public* teachers *only*. Such a statute, it was held, was an

unconstitutional denial of "liberty" to the parents of the pupils, and operated, in the case then before the Court, to deprive the complaining *private* and *parochial* school of its property, and property rights, in said school which would have been destroyed by such statute.

It will even be seen that the Supreme Court of the United States, in the above *Pierce* case, held that the rights of the complaining *private* school were "within the rule" approved in *Truax* v. *Raich*, 239 U. S., 33, in which last mentioned case, hereinbefore cited and quoted by us, the rule announced by the Court, speaking through Mr. Justice Hughes, was very carefully *restricted* by express language of the opinion in said case of *Truax* v. *Raich*, as follows:

> "and it should be added that the Act is not limited to persons who are engaged on *public work* or receive the benefit of *public moneys*. The discrimination here involved is imposed upon the conduct of ordinary *private* enterprise." (Italics ours.)
>
> (239 U. S., 40.)

It is, therefore, manifest, we submit, that counsel for Scopes, by undertaking to cite and rely upon the *Myer* case (262 U. S., 390), and the *Pierce* case (268 U. S., 510) have wholly misconceived the plain scope and language of the opinions of the Supreme Court of the United



States in said two cases, which are in entire accord with, and expressly leave untouched, the general well settled principle that in the management and control of her purely *public* schools and *public* institutions of learning, just as in employing labor and services of persons in any other *public work* which the State voluntarily undertakes to have performed and paid for out of the *public funds*—the State has a free hand, so that regulations prescribed by the State legislature in regard to the *way* and *manner* in which persons in the employ of the State shall perform their *public* work and services for the State, do not present any questions for judicial review at all, and are beyond the power of any court to inquire into, revise or invalidate.

The above well settled principle of law, we submit, is conclusive against any and all of the contentions made by counsel for Scopes to the effect that this simple *public* school regulation is in violation of any provision of our State Constitution, or of the Fourteenth Amendment to the Federal Constitution; and it follows that Assignments VI and VII, and that portion of Assignment IV which questions said Act as violating Art. XI, Sec. 8, of our State Constitution—are without any *semblance* or *shadow* of *merit* and must be overruled.

We will next proceed to consider

**THE ACT VIEWED AS AN ORDINARY STATE STATUTE PASSED UNDER THE STATE'S BROAD AND GENERAL POLICE POWER.**

In presenting their insistences made under defendant's Assignments of Error VI and VII, and a portion of Assignment of Error IV—to the effect that the Act in question violates Art. I, Sec. 8, and Art. XI, Sec. 8, of our State Constitution, and Sec. 1 of the Fourteenth Amendment to the Federal Constitution, our adversaries, as we have stated, strangely omit the *entire line* of well settled authorities which we have presented with so much detail under our preceding head of discussion, and which we say are simply, and without more, *conclusive* upon the proposition that there is no merit in these Assignments.

By their said Assignments of Error VI and VII counsel for the defendant Scopes, in their argument supporting said two Assignments, only treat the Act in question as one outside of the *special class* of State statutes which merely regulate the manner of performing any public work at public expense, and undertake simply to assault the Act as they would any other Act passed by the State generally under its broad



police power. Even when so considered the Act will be found to be clearly valid and constitutional, we submit, and as will hereinafter proceed to show.

In our foregoing discussion we have quoted from the decision of this Court in *Leeper* v. *State*, 103 Tenn., (19 Pick) 500, 533-538, showing how this Court in that case—(decided before the Supreme Court of the United States, had delivered the line of opinions beginning with *Atkin* v. *Kansas*, 191 U. S., 207)— had reached the *same conclusion* later announced by the Supreme Court of the United States in said line of cases dealing with State statutes regulating services to be performed and work to be done for the State at public expense as statutes of a *special class* beyond the *scope* and *purview* of the Fourteenth Amendment to the Federal Constitution.

In *Leeper* v. *State*, 103 Tenn., 500, this Court also recognized that the Act then before the Court might also be viewed and was to be sustained like any other Act generally passed under the broad police power of the State, just as the Act involved in the case at bar is to be sustained, we submit, when so viewed.

That this Court in the *Leeper Case* did recognize that the Act then before the Court was

sustainable generally as a police power statute, as well as a statute of the *special class* mentioned, we will next show.

**Leeper v. State, 103 Tenn. (19 Pick.), 500, 530-532.**

In the course of the opinion in the above case —after noticing previous statutes of the State relating to the public school funds, and quoting the provision of Art. XI, Sec. 12, of our Constitution relating to the directory duty of the General Assembly to cherish literature and art and the preservation of the common school fund— this Court then proceeded to declare that the legislature, under the broad police power of the State, had the right to pass laws not only to establish a uniform system of schools but also to provide for the "uniform administration" of them; and in this connection this Court said:

> "We are of opinion that the Legislature, under the constitutional provision, may as well establish a uniform system of schools and a *uniform administration* of them as it may establish a uniform system of *criminal laws* and of courts to execute them.
>
> "The object of the criminal laws is by punishment to deter others from the commission of crime, and thus preserve the peace, morals, good order, and well being



> of society, and the object of the public school system is to *prevent crime* by educating the people, and thus, by providing and securing a higher state of intelligence and morals, conserve the peace, good order and well-being of society.
>
> "The prevention of crime and preservation of good order and peace is the *highest exercise* of the *police power* of the State, whether done by *punishing offenders* or *educating the children.* What is the scope and meaning of the term 'police power' has never been defined. The Supreme Court of the United States has expressly declined to define its limits. *Stone* v. *Mississippi*, 101 U, S., 814.
>
> "In *Mayor of New York* v. *Miln*, 11 Pet. (U. S.), 139, it is said: 'It embraces every law which concerns the welfare of the whole people of the State or any individual within it, whether it relates to their rights or duties, whether it respects them as men or citizens of the State, whether in their public or private relations, whether it relates to the rights of persons or property of the whole people of the State, or of any individual within it and upon the persons and things within it.'
>
> "In *Hannibal R. R. Co.* v. *Husen*, 95 U. S., 465, it is said: 'The police power of a State extends to the protection of the lives, limbs, health, comfort, and *quiet* of all persons, and to the protection of all property within the State, and hence to the making of all regulations promotive of domestic order, morals, health, and safety.'

"In *Smith* v. *The State*, 16 Pickle, 505, it is said, in substance, that it extends to all questions of health, morals, safety, order, comfort, and well-being of the public, and that this enumeration does not make the list complete.

"Similar language has but recently been used in the case of *Harbison* v. *The Knoxville Iron Co.*, (Ante. p. 421), and this is no new doctrine, either in this State or in the United States."

(103 Tenn., 530-532.)

And the Court then proceeded to review other authorities, leading into its consideration and recognition, *in effect*, of the Act then before the Court as one of the *special class* as hereinbefore noticed.

We will now proceed to show that the Act in question in the case at bar, when viewed generally as an Act merely referable to the broad police power of the State is clearly to be sustained as valid and constitutional; and in this connection we will see how far afield our adversaries really are when they attempt—(by defendant's Assignments of Error VI and VII, and for any of the reasons stated in support thereof)—to assault this Act, even when viewed generally as a police power statute, as being in violation of Art. I, Sec. 8, or Art. XI, Sec. 8, of our State Constitution, or of Sec. 1 of the Fourteenth Amendment to the Federal Constitution.



As will appear under our next head, our adversaries *approach* the question of testing the constitutionality of this Act viewed as a police power statute from an erroneous viewpoint, we submit.

**(3)**

**Neither This Court Nor the Supreme Court of the United States Will Examine De Novo Regulations and Classifications Contained in a Police Power Statute for the Purpose of Holding Such Act Unconstitutional.**

It will be noted that in the last paragraph on page 66 of the Brief for defendant it is stated that unless the legislation in question "can be *justified* as *necessary*" to promote the health, safety or morals of the community, it is in violation of Art. I, Sec. 8 and Art. XI, Sec. 8 of our State Constitution and Amendment XIV, Sec. 1, of the Federal Constitution.

On page 72 of said Brief it is stated that the question is whether this Act "*promotes* public health, safety or morals, or, tersely stated, whether the Act is *reasonable*."

At other places the idea is expressed by the counsel for defendant that they think it to be the rule that this Court, under said provisions of our State Constitution and the Fourteenth Federal

Amendment, will declare the regulation or classification contained in a police power statute to be void, unless the Court can *plainly* or *manifestly* see that same are *reasonable* and tend to promote public welfare, safety or morals—in the *opinion of the Court.*

This, of course, represents a total misconception and a grossly erroneous idea of the true rule.

As we have already seen in the language hereinbefore quoted from the decision of this Court in *State* v. *McKay*, 137 Tenn., 280, 306, this Court after reviewing many decisions of the Supreme Court of the United States, laid down the rule to be followed; and in laying down said rule this Court adopted and strung together quoted language from several decisions of the Supreme Court of the United States; and the rule declared was that it rested *primarily* with the *legislative department* to consider and determine the *reasonableness* of regulations under the police power, and the Court will not examine the question *de novo* and overrule such legislative judgment by substituting *its own*, unless it clearly appears that the regulations are so "beyond all reasonable relation" to the subject to which they are applied as to amount to "mere *arbitrary usurpation* of power;" or are "unmistakably and palpably" in *excess* of the *legislative*



*power*, or are *arbitrary* "beyond *possible* justice," bringing the case within "the *rare class*" in which such legislation is declared void (137 Tenn., 306).

Without encumbering this brief with too many quotations in this connection, an examination of the following cases decided by this Court and the Supreme Court of the United States will show that the above is the true rule, and will demonstrate how very *limited* and *constricted* is the scope within which a Court will undertake to review the regulation and classification contained in a police power statute.

The courts will never undertake to review the reasonableness of these matters *de novo*, and will never declare same unconstitutional except where the Court can see that the legislature, from *its standpoint*, could not with any "*possible justice*" have determined, that there was any possible relation between the evil sought to be remedied by the Act and the regulations contained in the statute.

*Motlow* v. *State*, 125 Tenn. (17 Cates), 547, 559-561.
*State, ex rel.* v. *Persica*, 130 Tenn. (3 Thomp.), 48, 57.
*City of Memphis et al.* v. *State ex rel.*, 133 Tenn. (6 Thomp.), 83, 88, 89.
*Moyers* v. *Memphis*, 135 Tenn., 263, 291, 292.

*Jacobson* v. *Massachusetts*, 197 U. S., 11, 34, 35.
*Nobel State Bank* v. *Haskell*, 219 U. S., 104, 111.
*Central Lumber Co.* v. *South Dakota*, 226 U. S., 159, 160, 161.
*Hall* v. *Geiger-Jones Co.*, 242 U. S., 539, 550, 551, 556, 557.
*Farmers' Bank* v. *Fed. Reserve Bank*, 262 U. S., 649, 661, 662.
*Gitlow* v. *New York*, 268 U. S., 652, 668 *et seq.*

We will hereinafter present the authorities, including the decisions of this Court and the Supreme Court of the United States, to the effect that courts are not concerned and do not attempt ever to review and declare invalid any such statute on account of the *motives* prompting its passage or on account of any alleged *impolicy*, lack of *wisdom*, want of *justice* or the *hardship* imposed.

(*Post*, pp. 240 to 260).

As illustrating how far the courts must go to sustain any such statute when assailed under the provisions of our State and Federal Constitutions now under discussion, and the very limited extent to which the Court will ever undertake to review the regulation and classification made by the legislature, and never upon the ground of any "appreciation of the consequences" of the evil sought to be regulated—



we quote the following from the opinion of the Supreme Court of the United States in *Hall* v. *Geiger-Jones Co.*, 242 U. S., 550, 551:

> "Even if the descriptions"—(of the things prohibited by the police power statute)—"be regarded as rhetorical, the existence of *evil* is *indicated*, and a *belief* of its *detriment*; and we shall not pause to do more than state that the prevention of deception is within the *competency* of government and that the *appreciation of the consequences of it is not open for our review.* The *Trading Stamp Cases*, 240 U. S., 342, 391." (Italics ours.)
>
> (242 U. S., 550, 551.)

All the above will demonstrate, we submit, how grossly erroneous is the view of the adversary counsel when they suggest that there is in this case any mere question before this Court, for it to decide *de novo*, as to whether it is plain or manifest, in the *opinion* of *this Court*, that this Act is unreasonable or unjust or has a tendency to encourage a disbelief in God and the immortality of the soul. Such questions are primarily for the legislature, and are not reviewed *de novo* by a court at all, and never except when the classification or regulation contained in the statute is "beyond possible justice" or such as the Court must hold unmistakably shows that there is no *possible rela-*

*tion* between the evil sought to be safeguarded and the regulations contained in the Act.

That this Act merely undertaking to regulate, under penal restrictions, the government, curriculum and discipline to be applied to the "uniform administration" of our public schools, may be generally referred to the broad police power of the State is perfectly clear from the express language of this Court in *Leeper* v. *State*, 103 Tenn. (19 Pick.), 500, 531-538, hereinabove quoted.

(*Ante*, pp. 172-174.)

Viewing the Act in question as such mere police power statute, we next say:

**(4)**

**Classifications Made in a Police Power Statute Do Not Have to Be Made With Nicety, Nor According to Logic, Nor Be All-Embracing So As to Include Every One Guilty of the Same or Similar Conduct As That Prohibited By the Statute.**

At page 93 and succeeding pages of their brief, and in other connections therein, counsel for defendant take the position that this Act violates Art. I, Sec. 8, and Art. XI, Sec. 8, of our State Constitution and the Fourteenth



Amendment to the Federal Constitution, because it does not prohibit, under the penalties prescribed by the Act, *all* school teachers, in private as well as in public schools, from teaching "that man has descended from a lower order of animals."

For instance, on page 93 of their brief, counsel for defendant Scopes say:

> "This law makes it criminal for teachers in *public* schools to do what teachers in *private* and *other* schools can do quite lawfully. It is contended that there is a distinction between the classes because the State supports the public schools and the teachers in the State. This argument might be applicable had it to do with school regulations and did the law not make those acts a crime. If an act is *criminal*, it is criminal *everywhere* within the State and it is criminal when performed by any person."

And then, through many following pages of the brief it is sought to assert and emphasize the above quoted patently *erroneous* and universally *discredited* insistence.

The strange thing about the above insistence is that our adversaries *solemnly* advance it when it is right *contrary* to a very *elementary* and well established principle of constitutional law universally applied, under the decisions of this Court and of the Supreme Court of the

United States, in passing upon the validity of police power statutes, and more especially the validity of statutes regulating work of public character. Indeed, as we have seen under our preceding head of discussion, the State, in respect of the conduct and services of persons employed by it and to be paid for out of the *public* funds, has a free hand in imposing regulations, conditions and restrictions according to which the persons so employed shall render and perform such public service. In that connection we have seen that the Supreme Court of the United States has directly ruled the proposition that persons so employed by the State to perform *public* work and service for it, may by statute be made guilty of *criminal offenses* for the violation of the restrictions imposed upon them and which define how they shall perform their *public* work and service—though no such criminal penalties have been enacted, or *could* constitutionally be enacted to apply to persons performing the same kind of services in purely private work, and as employes of private persons or private concerns. We have hereinbefore, under a previous head, cited and quoted the case of *Ellis* v. *The United States*, 206 U. S., 246, 255, 256, and other cases making this square declaration and ruling. (*Ante*, pp. 137-141.)



It is also generally true, in regard to *any* and *all* police power statutes, that the classifications made by such statute, imposing regulations on the conduct of persons coming within the provided class, do not have to be made with nicety; nor according to mere logic; nor does such classification have to be *all-embracing* so as to include all persons guilty of the same or similar conduct as that regulated or prohibited by the police power statute, but such a statute is valid if it embraces and applies to *all of a class* who are under like condition and circumstances.

In other words, the legislature, in passing a police power statute, and designating the particular class to which the regulations of the statutes are to apply, only has to be *practical* in making such classification, and may restrict such legislation to what the legislature regards as presenting the "most flagrant example" of the abuse or misconduct to be safeguarded. Such police power statutes do not have to be logical in the classification made, nor be *all-embracing* as adversary counsel seem so strangely to think and insist in the face of the many decided cases to the contrary.

For the convenience of the Court we will now proceed to notice and quote from merely some of the previous decisions of this Court and of the

Supreme Court of the United States in support of the propositions we have just above announced.

**State v. McKay, 137 Tenn. (10 Thomp.), 280, 290, 291-293.**

In the above case this Court reviewed the decisions of the Supreme Court of the United States in regard to the great liberality allowed State legislatures in formulating regulations and classifications under the police power of the State, and how it was recognized by that Court, and this Court, that such regulations and classifications did not have to be made with nicety, and need not be so broad as to extend to all supposed evils of the same class and kind as those against which the statute was expressly leveled.

In the course of the opinion this Court, quoting as controlling and confirmatory authority the holding of the Supreme Court of the United States in this regard, said:

> " 'Classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.' *Mobile County* v. *Kimball*, 102 U. S., 691, 26 L. Ed., 238. And this necessarily on account of the complex problems which are presented to government. *Evils* must be *met* as they *arise* and according to



> the *manner* in which *they arise*. The right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, exact wisdom, and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the *crudeness* nor the *impolicy* nor even the *injustice* of State laws redressed by it . . . ."
>
> " 'This record certainly does not present any data to make it *certain* that the discretion was *arbitrarily* exercised. Legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable.' " (Italics Ours). (137 Tenn., 290, 291.)

In the same opinion, dealing with the same matter, this Court, still quoting as controlling and confirmatory authority the then most recent rulings of the Supreme Court of the United States, said:

> " 'It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but *obstacles* to a greater public welfare.
>
> *Eubank* v. *Richmond*, 226 U. S., 137, 142, 33 Sup. Ct., 76, 57 L. Ed., 156, 42 L. R. A. (N. S.), 1123, Ann. Cas. 1914B, 192.'
>
> "In perhaps the latest reported case on the point (*St. Louis, etc., R. Co.* v. *Arkansas*, 240 U. S., 518, 36 Sup. Ct., 443, 60 L. Ed., 776) it was said:

" 'We have recognized the impossibility of legislation being *all comprehensive*, and that there may be *practical* groupings of objects which will, as a whole, fairly present a class of itself, although there may be *exceptions* in which the evil aimed at is *deemed not so flagrant.*' " (Italics Ours.)
(137 Tenn., 292, 293.)

**Central Lumber Co. v. South Dakota, 226 U. S., 158, 160, 161.**

In the above case the Supreme Court of the United States, by way of declaring the large measure of unreviewable discretion possessed by a State legislature in the passage of a police power statute, either civil or penal, and how the classification made by the statute need not be all-embracing, but might be limited to what the legislature regarded as the most "conspicuous example" of the evil to be discouraged, even though the class selected and regulated by the State statute could not be differentiated from others "merely logically"—in the course of its opinion said:

"The Fourteenth Amendment does not prohibit legislation special in character. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., 283, 294. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. *Orient Insurance Co.* v. *Daggs*, 172 U. S., 557, 562. *Quong*



*Wing* v. *Kirkendall*, 223 U. S., 59, 62. If a class is *deemed* to present a *conspicuous example* of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although *otherwise* and *merely logically* not distinguishable from others not embraced in the law."
(Italics Ours). (226 U. S., 160, 161.)

**Hall v. Geiger-Jones Co., 242 U. S., 539, 556, 557.**

In the course of the opinion in the above case the Supreme Court of the United States said:

"We cannot give separate attention to the asserted discriminations. It is enough to say that they are within the power of classification which a State has. A State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less the forbidden act does not differ in kind from those that are allowed . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.' *Central Lumber Co.* v. *South Dakota*, 226 U. S., 157, 160. The cases were cited from which those propositions were deduced. To the same effect is *Armour & Company* v. *North Dakota*, 240 U. S., 510, 517." (242 U. S., 556, 557.)

**Zucht v. King, 260 U. S., 174-176, 177.**

In the above case the Supreme Court of the United States, by way of recognizing this well-settled rule of law, in the course of its opinion, said:

> "A long line of decisions by this Court had also settled that in the exercise of the police power, reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not *all-embracing*. *Adams* v. *Milwaukee*, 228 U. S., 572. *Miller* v. *Wilson*, 236 U. S., 373, 384."
> (260 U. S., 176, 177.)

**Farmers Bank v. Fed. Reserve Bank, 262 U. S., 649, 661, 662.**

In the course of the opinion in the above case, the Court, dealing with this same principle, said:

> "Third. It is contended that the statute is obnoxious to the equal protection clause. The argument is that the Federal Reserve Bank of Richmond is obliged to accept payment in exchange drafts, whereas other banks with whom it might conceivably compete may demand cash, except in those cases where they present the check through an express company or the postoffice. It is well settled that the legislature of a State may (in the absence of other controlling provisions) direct its police regulations against what it deems an *existing evil*, without covering the *whole field* of possible



> abuses. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S., 61, 81; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S., 205. If the legislature finds that a particular instrument of trade war is being used against a policy which it deems wise to adopt, it may direct its legislation specifically and solely against that instrument. *Central Lumber Co.* v. *South Dakota*, *supra*, p. 160. If it finds that the instrument is used only under certain conditions, or by a particular class of concerns, it may limit its prohibition to the *conditions* and the *concerns* which it concludes alone *menace* what it deems the public welfare." (262 U. S., 661, 662.)

If there were any doubt upon this proposition, after considering the authorities above mentioned, it is put to rest by the language of the Court in

**Atkin v. Kansas, 191 U. S., 207.**

At page 224 of the opinion in the above case it is said:

> "Equally without foundation upon which to rest is the proposition that the Kansas statute (prohibiting the working of laborers on public work longer than eight hours per day and providing a penalty for its violation) denied to the defendant, or to his employe the equal protection of the laws. The rule of conduct prescribed by it applies alike *to all who contract to do work on behalf either of the State or of its municipal*

*subdivisions, and alike to all who perform labor on such work.*" (Italics ours.)

Surely the above quoted decisions of this Court and of the Supreme Court of the United States belonging to a class from which many other similar decisions might be quoted, will be sufficient to show how far afield are the counsel for defendant in making their strange insistence that this Act is unconstitutional because it is not made applicable to all teachers in all schools throughout the State, public as well as private, and even to *all* utterances on the platform, in conversation, as well as to oral, written or printed statements, in newspapers, etc. (Scopes' Brief, p. 94.)

Such insistence made and repeated in the brief of counsel for defendant indicates that they *really* have not *examined* the authorities and are *not advised* in regard to the state of the law relating to these very *fundamental* principles applicable to the validity of classifications made in police power statutes.

Still viewing the Act in question as a mere police power statute, we next say that—



**(5)**

**Whether the Teaching By Public School Teachers of the Thing Defined and Prohibited in the Specific Language of the Act in Question, Would Have Any "Tendency" to Encourage or Incite a Disbelief in God, a Future State of Rewards and Punishments, or the Immortality of the Soul—Is Not Open to Judicial Inquiry by the Courts.**

As we have hereinbefore frequently pointed out, our State Constitution, by Art. IX, Sec. 2, declares that no person who denies the being of God or a future state of rewards and punishments can hold any civil office in this State. This provision of the Constitution of Tennessee, it is suggested, may have been the cause, or in part the cause, that led to the enactment of the statute in question.

If this be true, it necessarily follows that prohibiting any teaching in our public schools, which, in the *opinion* of the *legislature*, would tend to incite or encourage a *disbelief* in the being of God, or a *disbelief* in a future state of rewards and punishments, would present a sufficient danger of substantive evil to bring the punishment of such *teaching* "within the range of legislative discretion."

The above being necessarily a sound proposition, it is the law that when the legislature by

the Act in question undertook to prohibit a certain teaching which, in the opinion of the legislature, would or might be provocative of the substantive evil in the field and range of this legislative discretion to guard against, and then went *further* and *defined* the *very language* of the *teaching* which it thought and determined would have the inimical effect of *tending* to produce the substantive evil to be guarded against —the question whether the specific utterance or teaching defined in *language* by the Act would be likely, "in and of itself," to bring about the substantive evil to be guarded against, "is not open to consideration" at all by this or any other Court.

The Supreme Court of the United States has made this last mentioned *pointed ruling* in its most recent decision in this field of the law; and this recent decision we next present below. It is the case of—

**Gitlow v. New York, 268 U. S., 652.**

In the above case Gitlow had been indicted and convicted for violating a certain statute of the State of New York which provided, among other things, that any person should be guilty of a felony who by word of mouth or writing "advocates, advises or *teaches* the duty, necessity or propriety of overthrowing or overturning organized government by force or violence"; and the conviction of Gitlow had been affirmed by the highest court of New York.



The opinion in the above case is by Mr. Justice Sanford, and is very able and exhaustive.

In the course of the opinion in the above case, leading up to the sharp proposition now under discussion, there was quoted from a previous opinion of the Supreme Court of the United State the following:

> "In *Toledo Newspaper Co.* v. *United States*, 247 U. S., 402, 419, 62 L. Ed., 1186, 1193, 38 Sup. Ct. Rep., 560, it was said: 'The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions.'"
>
> (268 U. S., 668.)

(NOTE: In the case at bar there is involved the safeguarding and fructification of that provision of our State Constitution which declares incompetent to hold office in this State all persons denying a belief in the being of God and a future state of rewards and punishments, that is, the immortality of the soul.)

In the opinion in this *Gitlow case*, still leading up to the proposition we are now presenting, the Court, by way of announcing the great liberality of discretion possessed by a State legislature in the passing of a police power statute, said:

> "By enacting the present statute *the state has determined*, through the *legislative body*, that *utterances* advocating the overthrow of organized government by force, violence, and unlawful means, are so *inimical* to the general welfare, and involve such danger of *substantive evil*, that they may be *penalized* in the exercise of the police power. *That determination must be given great weight.* Every *presumption* is to be indulged in favor of the validity of the statute. *Mugler* v. *Kansas*, 123 U. S., 623, 661, 31 L. Ed., 205, 210, 8 Sup. Ct. Rep., 273. And the case is to be considered 'in the light of the principle that the state is *primarily* the *judge* of regulations required in the interest of public safety and welfare' and that its police 'statutes may *only* be declared unconstitutional where they are *arbitrary* or unreasonable attempts to exercise authority vested in the state in the public interest. *Great Northern R. Co.* v. *Minnesota*, 246 U. S., 434, 439, 62 L. Ed., 817, 820, 38 Sup. Ct. Rep., 346." Italics ours.)
> (268 U. S., 668.)

The Court then still approaching the sharp point we now have under discussion, declared that "utterances" inciting to the overthrow of organized government by unlawful means pre-



sented a "sufficient danger" of substantive evil to bring within the range of legislative discretion the general subject of penalizing utterances within that class—and then said:

> "That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state."
> (268 U. S., 669.)

On the *sharp point* we are now presenting, the Court held that the Act in question was not in violation of the Fourteenth Amendment, and since the Act was passed to prohibit teachings or utterances in *language* specifically described in the Act itself, and this related to an evil of a general kind and class which it was legitimate for the State legislature to provide against, the question as to whether the utterance or teaching specifically defined in *language* by the legislature was likely, *in and of itself*, to bring about the general substantive evil which the legislature had the power to guard against, was not *open* to *judicial* review by the Court at all. In this connection the language of the opinion is most clear and explicit, and is as follows:

> "We cannot hold that the present statute is an arbitrary or unreasonable exercise of

the police power of the state, unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

"This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in *Fox.* v. *Washington*, 236 U. S., 277, 59 L. Ed., 575, 35 Sup. Ct. Rep., 383; *Abrams* v. *United States*, 250 U. S., 616, 624, 63 L. Ed., 1173, 1177, 40 Sup. Ct. Rep., 17; *Schaefer* v. *United States*, 251 U. S., 479, 480, 64 L. Ed., 365, 366, 40 Sup. Ct. Rep., 259; *Pierce* v. *United States*, 252 U. S., 239, 250, 251, 64 L. Ed., 542, 548, 549, 40 Sup. Ct. Rep., 205; and *Gilbert* v. *Minnesota*, 254 U. S., p. 333, 65 L. Ed., 290, 41 Sup. Ct. Rep., 125. In other words, when the legislative body has determined *generally*, in the constitutional exercise of its discretion, that utterances of a *certain kind* involve such danger of substantive evil that they may be punished, the question whether any *specific utterance* coming within the prohibited class is likely, *in and of itself*, to bring about the substantive evil, *is not open to consideration.* It is sufficient that the statute itself be constitutional, and that the use of the *language* comes within its prohibition." (Italics ours.) (268 U. S., 670.)

The Court made the matter *still clearer* by reviewing some of its previous decisions, where the statute had merely prohibited certain acts in-



volving the danger of substantive evil "without any reference to language itself." The Court further said that one of its previous decisions of this latter class, upon which great reliance had been placed by Gitlow's counsel—

> "was manifestly intended, as shown by the context, to apply only to cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from *utterances* of a *specified character.*"

So, we say the above recent opinion of the Supreme Court of the United States holding as we have quoted above with such detail, is absolutely conclusive and determinative of this phase of the case at bar.

It will have to be granted, we submit, that our State legislature was acting within the Constitution if it undertook to legislate against any teaching in our public schools that would tend, in *its opinion*, to weaken or becloud a belief in the being of God, and the immortality of the soul, because disbelief in these would make the pupils, who are our future citizens, incompetent to hold civil office in this State. In addition, to this, the legislature might have thought such teaching subversive of *all religion* underlies the very structure and foundation of our government as

its greatest moral asset and sanction for the preservation of law and order. In other words, any teachings in our public schools tending, in legislative opinion, to incite or encourage a disbelief in God, or the immortality of the soul, or that would tend to undermine *all religion*, would present a sufficient danger of substantive evil to bring their punishment "within the range of legislative discretion."

This being true, when the legislature enacts a statute within this permissible range of legislative discretion, and the statute goes to the point of actually describing in *language* the particular *teaching* which the legislature has determined would tend to have such effect or result—the question whether the specifically defined teaching "coming within the prohibited class is likely, *in and of itself*, to bring about the substantive evil, is not *open* to *consideration*" by the Court.

We submit that the above, in effect, is the direct recent ruling of the Supreme Court of the United States in the *Gitlow Case*, and is conclusive against the contention of our adversaries in the case at bar, provided your Honors merely find—(a thing which seems to us inevitable)—that the legislature was not acting "arbitrarily" or "beyond possible justice" if it prohibited the



teaching in our public schools of anything which it, with "*possible* justice" thought might tend to incite disbelief in God and the immortality of the soul.

In entire accord with these principles announced in the *Gitlow case*, is the previous and comparatively recent decision of the Supreme Court of the United States, in the case of—

**Hall v. Geiger-Jones Co., 242 U. S., 539, 550, 551.**

In the above case the Court announced the same rule applied in the recent *Gitlow Case*, when it said:

> "Even if the descriptions" (contained in a police power statute prohibiting specific things deemed detrimental by the State legislature) "be regarded as rhetorical, the *existence* of *evil* is *indicated*, and a *belief* of its *detriment;* and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the *appreciation of the consequences* of it *is not open for our review*. The Trading Stamp Cases, 240 U. S., 342, 391." (Italics ours.)
>
> (242 U. S., 550, 551.)

The above quoted decisions, we submit, are conclusive against the soundness of the insistences urged by counsel for defendant to the effect that the Act in question, as a police power

statute, to any degree violates Art. I, Sec. 8, or Art. XI, Sec. 8, of our State Constitution, or the "liberty," "equality" or "due process" clauses of the Fourteenth Amendment to the Federal Constitution.

As we have seen from the decisions last above quoted, since the legislature clearly possessed the discretion to provide against a substantive evil; and since the legislature, by the Act in question, went further and defined the specific language of the teaching which it concluded might have such inimical effect or tendency, the question as to whether such specific utterance and teaching would be likely, in and of itself, to bring about the substantive evil sought to be safeguarded—"is not open to consideration" by this Court or the Supreme Court of the United States, as the latter Court has very certainly and specifically declared and ruled.

**(6)**

**There Is No Insoluble Ambiguity or Uncertainty in the Meaning of the Word "Teach" As Used in the Prohibitory Language of the Act; and Any Insistence that This Act Is Invalid for Any Such Reason Is Unsound and Grossly Erroneous.**

Under this head we will answer the contention of our adversaries made at pages 86 to 92



of defendant's brief in support of the said two Assignments of Error VI and VII.

Counsel for defendant have a very strange and peculiar idea as to the fundamental *duties* and *functions* of a public "school teacher." Their ideas in regard to this, we submit, are altogether fallacious, chaotic, iconoclastic, and even anarchistic.

For instance, on page 39 of their brief, by way of insisting that for this Act to prohibit the teaching in our public schools of the thing therein forbidden is "un-American"—(whatever they may mean by that)—counsel for defendant say:

> "But to make him"—(the pupil in the public school)—"acquainted with the theory of evolution—basic in the study of biology—is a different matter. The teacher should be *free* to acquaint his class with *all* important theories and hypotheses. Acceptance or rejection is *for the student.*" (Italics ours.)

And then, to make their *strange idea* in regard to the duty and function of the public school teacher still plainer, and clear beyond all peradventure, adversary counsel, at page 96 of their brief, say:

> "A *conscientious* teacher refrains from injecting his own *private convictions*—reli-

gious OR OTHERS—into his subject. He says in effect, 'Here is a body of data and inferences, CONCEIVABLY ERRONEOUS, but WIDELY PREVALENT, with which an *educated person* in *this generation* should be familiar. MAKE WHAT YOU WILL OF IT.' " (Italics ours.)

In other words, it appears to be *actually* the *idea* and *concept* of the counsel for defendant, as shown in the above quotations from their brief, that a public school teacher has no function to impress his own private convictions of the *truth* about any matter upon the immature minds of the future citizens of this State.

They seem to *have* the *idea* and definitely *present* the *contention* that any "body of data and inferences," "conceivably erroneous but widely *prevalent*" among the members of any self-constituted group or bunch of self-styled "intellectuals" must be stated and expounded by the teacher in the presence and hearing of his pupils.

They say that the pupils must be told that as "educated persons" they should be *familiar* with such *doctrine*, and that each pupil should be told to listen to it, consider it, and "make what you will of it."

They say that the law-making power of the State,—(which is of course in absolute control over our State public schools with full power to prescribe the curriculum and course of study to



be pursued therein for the public welfare)—must be ruled by this Court to be *impotent* and *helpless* to protect the school children and future citizens of this State against having expounded in their presence and injected or *sewered* into their immature minds any and every theory and "body of data and inferences," *conceivably erroneous*, "but widely prevalent" in the opinion or judgment of any school teacher. SUCH IS THEIR INSISTENCE.

That is what the counsel for defendant are insisting and contending for in this case, as shown by their above quoted language. The fact that some of them really believe that the bridle should be taken off of school teachers so that they can expound to their pupils any "body of data and inferences, conceivably erroneous, but widely prevalent"—is really what is fundamentally objectionable *to them* in this statute.

In this *sharp connection* we now ask your Honors, at this point, to stop and turn forward and read what we have said about and *quoted from* the repulsive and perverted, "A History of Freedom of Thought" which is perhaps the leading authority relied upon by our adversaries on *academic freedom*. (*Post*, pp. 336 to 342.)

If defendant's counsel are right in this insistence, then the doctrine of communism, of the "left wing" of socialism, of Bolshevism, of

"Free Love" or "Free Thought" or "Free Property"—(any or all of which might present a "body of data and inferences, conceivably erroneous but widely prevalent" in the opinion of the school teacher)—must be *expounded* and *explained* in our public schools and each pupil then told—"make what you will of it."

Our State, we submit, is to be congratulated upon the fact that such ideas and concepts in respect of the true duties and functions of a school teacher in our public schools and public institutions of learning, do not prevail among the people of this State, and are to no degree reflected in the provisions of our Constitution or our statutes, and are really *repulsive* to the rank and file of our citizenship and to the strong and preponderant opinion of practically all our *unperverted* citizenship which is almost or practically ALL our people.

"Academic freedom" is a right which the teacher jealously guards, zealously asserts, and never yields without a struggle to the finish. It is a right, however, that has its limitations. A teacher is not free to teach what he pleases even in privately conducted schools. The State can make reasonable regulations for *all* schools (*Meyer* v. *Nebraska*, 262 U. S., 402).

It is the above strange and peculiar concept of the counsel for defendant in regard to the true



duty and function of the "conscientious teacher" in our public schools and public institutions of learning, which is wholly responsible, we submit, for their insistence elaborately made at pages 86 to 92 of their brief, that the word "teach" as used in the prohibitory provision of the Act in question is so "indefinite" as to make this statute void and in violation of the "due process" clause of the Fourteenth Amendment to the Federal Constitution.

We submit that when this Act plainly declares that it shall be unlawful for any teacher in our public schools to "teach" that "man has descended from a lower order of animals" there is not presented any insoluble ambiguity and indefiniteness in the meaning of the word "teach" as so used.

Counsel for defendant, at pages 86 and 87 of their brief, deal with the word "teach" as defined in Funk & Wagnalls' New Standard Dictionary and in Webster's New International Dictionary; and with such definition, dealing with the different phases of meaning to be given to the transitive verb "teach," accordingly as it may be used in different connections and contexts—we have no criticism or quarrel. An examination of all other well known and reliable dictionaries of the English language will be found, of course, to be in line in giving a defini-

tion of the meaning of the verb "teach." For instance, the Century Dictionary and Encyclopedia, Webster's Unabridged Dictionary (1859), The Winston Hand-book (1920), the Cyclopedia of Expression (1883) are all in line with the two dictionaries cited by counsel for Scopes in regard to the definition and meaning of this verb "teach," and from the newest dictionary to those going back a century and more, there will be found no material difference in the meaning of this plain and fundamental English verb.

It unquestionably, according to all authorities, means to "instruct," "to tell," to "make to known," to "inform," to "impart knowledge." These are the meanings ordinarily and usually given to the word "teach," and the legislature must be presumed to have used it in its ordinary sense, and the Courts should and will give it its ordinary meaning.

So when this Act prohibits teachers in our public schools to *teach* "that man has descended from a lower order of animals" the Act obviously means that the teacher is prohibited from 'instructing" or "telling" or "making known" or "informing" or "imparting knowledge" to the pupil that "man has descended from a lower order of animals."

Surely it is not putting any appreciable hard-



ship or risk upon a school teacher, in Tennessee, to leave him or her to *determine* what this Act means by the prohibition that the teacher is not to "teach" that man has descended from a lower order of animals. Any teacher ought to know what the word "teach" means. He or she ought to be able to understand a word of so uniform meaning, in so universal use.

And in any particular case, just as is true in any and every criminal trial, it will be left to the jury, under proper instruction by the trial judge, and under the facts revealed by the proof, to decide whether such teacher has *taught* to the pupils "that man has descended from a lower order of animals."

Such was the way and manner in which the trial court in the recent *Gitlow case* dealt with the language of the statute of New York involved in that case. The words "advocates, advises, *or* teaches" were all used in that statute, and were given their ordinary meaning by the Court.

The statute of New York involved in this *Gitlow case* provided a criminal penalty to be imposed upon any person who, anywhere in the State, by word of mouth or writing "advocates, advises *or teaches* the duty, necessity or propriety" of overthrowing or overturning organized

government by force, etc., or any unlawful means.

Suppose the Act of the State of New York involved in the *Gitlow case* had only been leveled against "*teaching*" such doctrine by a public school teacher to the pupils in the public schools of New York! Is it conceivable that the legislature would have done more than to prohibit the "teaching" of such doctrine under such circumstances? What the school teacher does is to "teach," to "impart knowledge," to "instruct," to "make known," this, that, or the other thing about which the pupil is to be taught.

In the *Gitlow case*, where the prohibition was against the *utterance* of the doctrine prohibited to anybody, anywhere, by word of mouth or writing, which might be read or heard by any and all classes of people, the well informed or the uninformed—the legislature, under such circumstances, saw fit to level the penalty of the statute against any person who "advocates, advises or *teaches* the duty, necessity or propriety" of overthrowing the government by unlawful means, and it will be observed that the word "teaches" was used as the last alternative or explanatory word following the words "advocates" or "advises." This statute involved in the *Gitlow case* was passed for the purpose of protecting the continued lawful life and existence of constituted government against the desires and conduct of any person who wanted to accomplish its overthrow.



In the case at bar, whether the Act be viewed as having been passed to protect the minds and convictions of our future citizens against embracing a denial of the being of God and a future state of rewards and punishments, or to prevent the discrediting of the Bible, or to prevent a blow at all religions, or to protect the discipline of our public schools against the *teaching* of any fact or doctrine therein which, in the opinion of the legislature, would, in any event, be inimical to quiet, peaceful and effective discipline—whether *any* or *all* of these things were in the legislative mind is now of no concern to the Court.

That our adversaries at one place in their brief seem to realize the true meaning of the word "teach" as used in this statute, appears on page 71 of their brief, where, after pointing out that other State statutes (for instance, the Florida statute) on this same subject makes it unlawful to "teach" as a "fact" that man has descended from a lower order of animals, they say of the Tennessee Act—

"but this law goes so far as to prohibit

the *teaching* of the theory" (that man has descended from a lower order of animals).

What did counsel for Scopes mean by this word "teaching" in their above quoted language? They meant the same thing that our legislature meant when it prohibited, by this Act, any school teacher to "teach" the forbidden thing.

In the *Gitlow case*, the trial judge, as is the duty of the judge in every criminal case, construed the statute, and gave to the jury proper instructions to apply to the evidence in that case, for the purpose of finding the defendant guilty or not guilty. Gitlow had printed or disseminated the "Left Wing Manifesto"; and the question was whether such action of Gitlow violated the New York statute.

In the course of its opinion in that case, the Supreme Court of the United States, in speaking of instructions which the trial judge had given to the jury, said:

> "The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose, and fair meaning of the Manifesto; that its words must be taken in their *ordinary meaning* as they would be understood by people whom it *might reach;* that a mere *statement* or *analysis* of *social* and *economic facts* and *historical incidents*, in the nature of an *essay*, accompanied by *prophecy* as to the *future course of events*, but with no *teaching*, *advice*, or *advocacy* of *action* would not constitute the advocacy, advice, or teaching of a doctrine for the overthrow of the statute; that a mere statement that *unlawful acts might accomplish* such a *purpose* would be insufficient, unless there was a teaching, advising, and advocacy of employing such unlawful acts for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did *teach*, advocate, or advise the duty, necessity, or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal."
>
> (*Gitlow* v. *New York*, 268 U. S., 661.)



Gitlow's counsel, the leading one of whom was Mr. Walter H. Pollak, who is now recently joined up as one of the attorneys on the brief for Scopes in the case at bar, requested additional instructions which the trial judge denied. As to this the Supreme Court of the United States found no error.

Just so in the case at bar, any trial judge would construe the Act, and the meaning of the word "teach" as used therein, and give the jury appropriate instructions to apply to the facts in any case wherein the State insisted that a public school teacher, in the performance of his duties as such, had violated the command of the statute.

Our adversaries seem to lay great stress upon the acquisition of *knowledge*. This, of course, is a *desirable* thing. But let us direct the attention of the Court to the language of the opinion by Mr. Justice McReynolds in *Meyer* v. *Nebrask*, 262 U. S., at page 400, as follows:

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787, declares: RELIGION, *morality and knowledge being necessary to good government, and the happiness of mankind, schools and the means of education shall forever be encouraged.*" (Italics ours.)

We are aware that there are those who care little for morality, and nothing at all for religion in any system of education of a people, and who exalt their idea of "knowledge" as the only end to be attained by education. But this is not the generally accepted or the unperverted idea, or the "preponderant opinion" in this great nation where it is generally accepted that with knowledge must go morality and religion, if education is to be worth while in the making of the best citizens, or even a continuing reign of law, order and established representative constitutional government.



**Authorities Misconceived by Defendant's Counsel.**

In their overwhelming desire to find something, however attenuated, to urge against the validity of the Act in question, counsel for defendant, after seeking to dissect and ascribe various *possible* meanings to the elementary transitive verb "teach" when used as descriptive of the conduct and duty of a school teacher, at pages 90 to 92 of their printed brief, cite and quote numerous cases of the class of *Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S., 216, and fragments from opinions in other cases not in such class at all.

They urge such rulings to support their insistence that there is insoluble difficulty in arriving at the meaning of the word "teach" as used in the statute in question, and no possible definiteness in that word when used to describe a prohibition placed upon a school teacher to forbid him or her to "teach" a certain thing clearly defined by the very language of the Act.

None of the cases cited and relied upon by counsel for defendant in their brief, in this connection, are relevant or possess any *possible application* to the plain words and meaning of the Act in the case at bar.

For instance, at page 91 of their brief, counsel for defendant purport to quote as a completed thought and utterance from the opinion in *United States* v. *Lacher*, 134 U. S., 624, 628, the following fragment of language:

> "Before a man can be punished his case must be plainly and unmistakably within the statute."

Something of the incomplete and *peculiar methods* followed in the preparation of the brief for defendant will be made clear to your Honors, when we point out that the fragment above quoted, and which is set out in their brief as a complete thought, is really a fragment of a sentence of one paragraph in the opinion in that case, and modified by what comes after it. Said completed paragraph, in which the above quoted fragment is found, is as follows:

> "As contended on behalf of the defendant, there can be no *constructive* offences, and before a man can be punished, his case must be plainly and unmistakably within the statute. But though penal laws are to be construed *strictly*, yet the *intention* of the legislature *must govern* in the construction of *penal* as well as other statutes, and they are not to be construed so *strictly* as to *defeat* the *obvious intention* of the legislature. *United States* v. *Wiltberger*, 5 Wheat., 76; *United States* v. *Morris*, 14 Pet., 464; *Am. Fur. Co.* v. *United States*, 2 Pet., 358, 367." (Italics ours.)
>
> (134 U. S., 628.)



No question of constitutionality was involved in the above case from which counsel for Scopes quote a *mutilated* fragment—as we have just shown.

And again another one of these cases, cited with a quoted fragment of the opinion, at page 91 of the brief of counsel for defendant, is the case of *Chicago, Milwaukee & St. Paul* v. *Polt*, 232 U. S., 165.

The statute of South Dakota, declared unconstitutional by the Court in that case, was Chap. 215 of the Acts of South Dakota of 1907, which made railroad companies liable for "double damage" in case of failure to pay a claim or "to offer a sum equal to what the jury finds the claimant entitled to."

As to this indefensible Act the Court, speaking through Mr. Justice *Holmes*, wrote an opinion one page in length, and from this our adversaries quote an incomplete fragment on page 91 of the brief for Scopes. The completed paragraph of the opinion, from which the fragment is quoted, is as fallows:

> "The defendant in error presented no argument, probably because he realized that under the recent decisions of this court the judgment could not be sustained. No doubt the States have a large latitude in the policy that they will pursue and enforce, but the

rudiments of fair play required by the Fourteenth Amendment are wanting when a defendent is required to *guess rightly* what a jury will find, or *pay double* if that body sees fit to add *one cent* to the amount that was tendered, although the *tender* was obviously *futile* because of an *excessive demand.* The case is covered by *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne,* 224 U. S., 354. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.,* 226 U. S., 217." (Italics ours.) (232 U. S., 167, 168.)

And the superficial and incomplete method followed by the brief for defendant, in this connection, is further illustrated by a three-line fragment quoted at the bottom of page 90 of said brief from the opinion in the case of *United States* v. *Brewer,* 139 U. S., 278, as follows:

> "The laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

There was no question of the constitutionality or validity of the statute involved in the above case at all. There had been an indictment against three persons under Section 5515 of the Revised Statutes of the United States for violation of certain provisions relating to the holding of elections. As to certain questions or points in re-



gard to the sustaining of a demurrer to the indictment the Circuit Judge and the District Judge were divided in opinion. These points of difference were certified to the Supreme Court of the United States, under permission of statute, for decision by that Court. The validity of the *indictment* under the Revised Statutes of the United States also turned upon the proper construction of certain election law statutes of the State of Tennessee bearing upon the points upon which the District Judge and the Circuit Judge had disagreed below.

The Court, in answering these questions, which presented merely questions of statutory construction, and did not involve the constitutionality of any Act or statute at all, answered certain of the certified questions in the negative. In that connection there occurs the paragraph from which counsel for defendant quoted. The whole paragraph, in which the language they quote occurred, is as follows:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Sharp,* Pet. C. C., 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States* v. *Lacher,* 134 U. S., 624, 628. We are of opinion, therefore, that questions 3, 4, 5, 6 and 7 must be answered in the negative, no fraud

being averred in the indictment, and no intent to affect the election or its result, and there being no allegation that the election or its result was affected."

(139. U. S., 288.)

Counsel for defendant, in this same connection in their brief, similarly refer to and quote merely short and disjointed fragments from the opinions in two of three cases which they cite, and which went before the Supreme Court of the United States upon the question of the constitutionality of certain provisions of the anti-trust statutes of Kentucky. These three cases, with two of them quoted, on page 90 of the brief for defendant, are as follows:

*Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S., 216, 221, 223.
*Collins* v. *Commonwealth of Kentucky*, 234 U. S., 634, 638.
*American Seeding Machine Co.* v. *Commonwealth of Kentucky*, 236 U. S., 660.

It will not be necessary to load this argument down with any detailed notice and analysis of the opinions of the Court in the above three cases. The highest Court of Kentucky had so construed, in connection with each other, several different anti-trust statutes of that State which had been passed at different times, as to require of persons, under criminal penalties, that they correctly guess (at their peril) what



the product of the indicted corporation or individuals, parties to the combination, *would* have sold for if the combination *had not existed*, and nothing *else* violently affecting *values* had *occurred.*

One paragraph from the opinion of one of these three cases—(all three of them related to the validity of the same statutory provisions)—will be sufficient to show your Honors how utterly irrelevant are these cases to any insistence of counsel for defendant that they furnish any authority to establish the invalidity of the Tennessee Act challenged here, on account of any alleged insoluble ambiguity in the simple transitive verb "teach." This single enlightening paragraph from *International Harvester Co.* v. *Kentucky, supra*, is as follows:

"The plaintiff in error contends that the law as construed offers no *standard of conduct* that it is *possible to know.* To meet this, in the present and earlier cases the real value is declared to be 'its market value under fair competition, and under normal market conditions.' 147 Kentucky, 566. *Commonwealth* v. *International Harvester Co. of America*, 131 Kentucky, 551, 576; *International Harvester Co. of America* v. *Commonwealth*, 137 Kentucky, 668, 677, 678. We have to consider whether in application this is more than an *illusory form of words*, when *nine years* after it was incorporated, a combination invited by the

law is *required* to *guess* at its peril what its product *would have sold for* if the combination *had not existed* and nothing else violently affecting *values* had *occurred.*" (Italics ours.) (234 U. S., 221, 222.)

As demonstrating the total irrelevancy of these decisions, all three of which involved the constitutionality, under the Fourteenth Amendment to the Federal Constitution, of the same anti-trust provision of certain co-ordinated Kentucky statutes as construed by the highest court of that State; and as showing how the Supreme Court of the United States expressly carved out and declared unsound any rule like that relied upon by counsel for defendant, we quote from the same opinion its concluding paragraph, showing that the decision made was consistent with the previous ruling of the Supreme Court of the United States in *Nash* v. *United States*, 229 U. S., 373, 377—(which latter case is fatal to the insistence of counsel for Scopes now under discussion)—as follows:

"We regard this decision as consistent with *Nash* v. *United States*, 229 U. S., 373, 377, in which it was held that a *criminal law* is not unconstitutional merely because it throws upon men the *risk* of *rightly estimating* a matter of *degree*—what is an *undue* restraint of trade. That deals with the *actual*, not with an *imaginary* condition other than the facts. It goes no further than recognize that, as with *negligence*, between the two extremes of the obviously



illegal and the plainly lawful there is a *gradual approach* and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to *guess* on peril of indictment what the community *would have given* for them if the continually changing conditions were *other than they are*, to an *uncertain* extent; to divine *prophetically* what the reaction of only *partially* determinate facts would be upon the *imagination* and *desires* of purchasers, is to exact gifts that mankind does not possess." (Italics ours.)

(234 U. S., 223, 224.)

It will be observed that the fragment quoted from this opinion on page 90 of the brief for defendant is five lines, with stars to show omissions, from the *last sentence* of the above quoted complete paragraph.

Of course, if counsel for defendant had merely quoted in its entirety the *completed paragraph* from this opinion such *simple act* on their part would have destroyed the very superficial and attenuated insistence they are now urging against the Tennessee Act in the case at bar, and would have shown that the Supreme Court

of the United States reaffirmed its holding in *Nash* v. *United States*, 229 U. S., 373, 377, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—for instance, what is "undue" restraint of trade.

Counsel for defendant are actually urging that the Act involved in the case at bar is in conflict with the Fourteenth Amendment to the Federal Constitution because it puts upon a school *teacher* the great (?) "risk" of deciding what is meant by the simple transitive verb "teach" as used in a statute prohibiting a school teacher in a public school from *teaching* that "man has descended from a lower order of animals."

If counsel for defendant should have reason for an insistence that the word "undue" as used in a statute penalizing an "undue restraint" upon trade was insolubly ambiguous—we have no sort of doubt that they could have been very much more impressive and plausible than in making their present insistence as to the easily understood word "teach."

But, as we have seen, in *Nash* v. *United States*, 229 U. S., 373, 377—it was held:

> "That a criminal law is not unconstitutional merely because it throws upon men the *risk* of rightly *estimating* a matter of degree—what is an *undue* restraint of trade."



We, therefore, confidently submit that there is no merit in the contentions of adversary counsel as to there being any ambiguity or uncertainty fatal, insoluble or otherwise, in the meaning of the simple verb "teach" as used in the challenged act.

For all the reasons we have shown, from our preceding page 115 of this argument down to this point—we respectfully submit the Act in question in no way violates Article I, Section 8 or Article XI, Section 8 of our State Constitution nor the Fourteenth Amendment to the Federal Constitution, and that Assignments of Error VI and VII and the portion of Assignment of Error IV hereinbefore referred to—must be overruled.

We pass to the next general head of argument—

## D.

## THE ACT GIVES NO "PREFERENCE" TO ANY ONE RELIGION OVER ANY OTHER RELIGION.

Under this general head with its following sub-heads we will answer Assignments of Error III and IV.

These Assignments are stated at pages 7 and 8, and elaborately and very confusingly discussed at pages 26 to 52 of the printed brief for defendant Scopes.

While at these last mentioned pages of their brief our adversaries announce that they are undertaking to discuss both Assignments III and IV, they there make no separate discussion of Assignment IV in so far as it relates to the sufficiency of the indictment, and they really postpone any material discussion of that portion of their Assignment IV which undertakes to insist that this Act violates Art. XI, Sec. 8 of our State Constitution until a later stage of their argument.

Therefore, under this general head, and the following subdivisions thereof, we will merely present the proposition that the Act in question does not violate our constitutional guaranty in regard to freedom of worship or religious equality.

**(a)**

**"Religious Freedom" Provision of Our State Constitution.**

Under Assignment III the attorneys for defendant insist that the Act in question is unconstitutional because in violation of Art. I, Sec. 3, of our State Constitution, which is as follows:



> "*Sec. 3. Right of worship free.* That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; and that no man can of right, be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship."

Counsel for defendant in their brief (pp. 26-34; 31, 52) in insisting that this Act violates the above quoted Art. I, Sec. 3, of our State Constitution, make it very plain that their sole and entire insistence, in this connection, is that the Act violates the *last clause* of said Article and section, which declares that—

> "no preference shall ever be given, by law, to any religious establishment or mode of worship."

It is true that in their brief counsel for defendant, in various connections, throw in some general and loose expressions to the effect that religious equality is one of the fundamentals of "American institutions" (p. 26); and that no one familiar with the history of religious freedom in the United States can question but that this Act is contrary to the "fundamental principles of our government and its bill of rights"

(p. 41); and a lot of other similar loose expressions, which separately considered, are without any particular legal significance.

(b)

**Protection of "Religious Liberty" Is Left to the Respective States Under the Federal Constitution.**

It has been settled from an early day that so far as concerns the Constitution of the United States, all that document does is to provide by the first amendment thereto, that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; and that the Federal Constitution makes no provision for the protection of the citizens of the respective States in their religious liberties; and that this is left to the State Constitutions and laws.

In *Permoli* v. *First Municipality*, 44 U. S. (3 How.), 589, 609, the Supreme Court of the United States, speaking through *Catron*, J., in the course of the opinion said:

> "The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the States." (3 How., 609.)



The above statement of the law has been later cited and quoted with approval in *ex parte* Garland, 44 U. S., 333, 397, 398, and in *Brunswick-Balke-Collander Co.* v. *Evans*, 228 Fed., 991, 997, 998, and other decisions.

And so it is that our adversaries must and really do limit their attack upon the Act in question, so far as concerns any alleged violation of the Federal Constitution, to an insistence that it violates the Fourteenth Amendment to the Federal Constitution; and this last mentioned contention we have already dealt with under a former head of this argument.

(c)

**No Religious "Preference" Is Made by the Act in Question.**

In our preceding preliminary statement of the only real questions involved in this case, we have already shown with detail that this Act, under its proper and unchallenged construction by the Trial Judge, in no way violates the above quoted provision of Art. I, Sec. 3, of our State Constitution, which declares:

> "That no preference shall ever be given, by law, to any religious establishment or mode of worship."
>
> (*Ante*, pp. 26 to 33.)

Early in this brief, and at the above cited preceding pages of it, we have already shown:

(1) As defined by the Supreme Court of the United States in regard to its use in the field of constitutional law in this country, the term "religion" has reference to one's views of his *relations* to his *Creator*, and to the *obligations* they impose of *reverence* for His being and character and of *obedience* to His will; and the general term "religion" is not to be confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter;

(2) Under this Act, properly construed to prohibit nothing but the teaching in our public schools "that man has descended from a lower order of animals"—no *religion* is favored or preferred over any other religion, because *no religion* of any man, in all of the annals of the human race, has ever undertaken to hold or teach any such religious precept, tenet or principle;

(3) Neither the account of the Divine creation of man as given in the first or the second chapters of Genesis, nor any other part or portion of the Bible consisting of both the Old and New Testaments, is *taught* in our public schools *at all;* and it is our adversaries, and not any religious "bigots" and "intolerants" of this State, who are insisting that something *affirmative*



should be taught in our public schools in regard to the *origin* of man; and they are insisting that it should be taught in our said schools "that man has descended from a lower order of animals," so that an Act *forbidding* the teaching of *this thing*, they say, is unconstitutional and void; and

(4) When the counsel for defendant insist that this Act which does nothing except to prohibit the teaching in our public schools "that man has descended from a lower order of animals" violates that clause of Art. I, Sec. 3, of our State Constitution which declares "that no preference shall ever be given, by law, to any religious establishment or mode of worship"—they are really in an absurd and hopeless *dilemna* which destroys the validity and soundness of any such contention, and, logically, demonstrates the unsoundness of any such insistence.

(*Ante*, pp. 30-33.)

All the above, as we have already pointed out in our preliminary statement made at the beginning of this brief, will establish, we submit, that it cannot be said that this Act gives any preference to any religion, religious establishment or mode of worship, over any other.

(*Ante*, pp. 26-33.)

(d)

**Neither the Divine Creation of Man Nor Any Other Part of the Bible Is Taught in Our Public Schools.**

At pages 48 and 49 of the brief of counsel for defendant the suggestion is made that because we have a statute in this State providing for the *reading* of the Bible in our public schools, this, viewed in connection with the Act in question which prohibits the teaching "that man has descended from a lower order of animals," operates to give a *preference* "to the religious establishment which is based upon the inerrancy of the Bible."

While the attorneys for defendant, in this connection, make no express claim that the Bible is *taught* in our public schools as any religious book, they make a meager and incomplete quotation from Chapter 102 of our Public Acts of 1915 providing for the reading of the Bible in our public schools; and then say that the authorities are in conflict as to the constitutionality of laws providing for the *reading* of the Bible in public schools; and they then say that the child "hears" the Bible read and "learns" the theory of creation in the Bible; and then they say that when the Act in question prohibits the "teaching" that man has descended from a lower order



of animals, a religious "preference" is thus brought about.

It will be observed that our adversaries make no insistence that our carefully guarded and worded Act, which is Chapter 102 of the Acts of 1915, is unconstitutional; and their statement that the authorities are in conflict as to the constitutionality of laws providing for the "reading" of the Bible in the public schools, followed by the citation of five cases, on page 49 of the brief for Scopes, is hardly a fair statement, if it be intended to suggest that there is any material conflict in the authorities upon the proposition that an Act like our Chapter 102 of the Acts of 1915 is a constitutional and valid Act.

Said Chapter 102 of the Public Acts of 1915 declares that it was passed merely in the interest of good "moral training," of a life of "honorable thought" and "good citizenship," and to the end that public school children should have lessons of "morality" brought to their attention during their school days; and this Act only provides for the reading of at least ten verses from the Bible at the opening of each and every public school, upon each and every day, by the teacher in charge; but the Act provides that this Bible reading shall be "without comment"; and also provides that the same chapter of the Bible shall

not be read more than twice during the same session; and contains the further provision that pupils may be excused from the Bible reading upon the written consent of the parents.

Such mere non-religious and *non-sectarian* reading of the Bible in public schools "without comment" and subject to the other conditions stated in said Act, has been generally held in *many States* throughout our nation to be perfectly lawful, and not only not giving any preference to any religion, but also that such Bible reading "without comment" has no tendency to violate a constitutional clause prohibiting the teaching of any "sectarian" book or doctrine in the public schools. By the overwhelming weight of authority, and practically all of the numerous decided cases upon this subject, the Bible is held not to be a "sectarian" book, and the mere reading of it, without comment, for the purpose of impressing lessons of morality and good citizenship, does not amount to any "teaching" of the Bible as a religious work at all. We will quote merely typical expressions from a few of the many decided cases which establish the above proposition.



**Wilkerson v. Rome, 152 Ga., 762, 110 S. E. 895, 20 A. L. R. 1334.**

In the above case a constitutional attack was made upon an ordinance enacted by the City Commission of Rome, Ga., requiring "some portion of the *King James* version of the Bible of either the Old or New Testament to be read and *prayer* offered to God in the hearing of the pupils daily during the regular sessions of the school."

The clauses contained in the Constitution of Georgia, which Wilkerson insisted were violated by this ordinance, are quoted at the beginning of the opinion, and are as sweeping, and in some respects more pointed, than the provision contained in Art. I, Sec. 3, of our Constitution.

Indeed Art. I, Sec. 1, of the Constitution of Georgia contained an additional provision declaring that:

> "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or any sectarian institution."

In a very fine and exhaustive opinion, the Georgia Supreme Court, speaking through *Gilbert*, J., noticed, reviewed and classified the numerous decisions in other States, and held that the ordinance in question was perfectly valid.

When your Honors have read this exhaustive opinion by the Supreme Court of Georgia it will be found amply to establish that our Chapter 102 of our Public Acts of 1915 is clearly valid and beyond successful assault as even our adversaries apparently realize. In the course of the opinion in this Georgia case, the Court, among many other things, said:

> "The mere reading of extracts from the New Testament or the Bible in the public schools cannot, in any legitimate sense, be considered as an appropriation of public moneys to the support or establishment of a system of religion or a sectarian institution. It is true that the teachers of the public schools are paid from the proceeds of public taxation, and that an insignificant fraction of their time would be consumed in the reading. If the theory contended for could once be established, it might easily be carried to an *absurd extent*. For instance, it might, as an inference from such a ruling, be contended that the inclusion in the school curriculum of books containing *denials* of the teachings of *Darwin*, Brahma, Buddha, or Confucious, and the like, would be teaching secrtarian doctrines, and therefore, in conflict with the Constitution of Georgia."
> (20 A. L. R., 1345.)

**Hackett v. Brooksville Graded School District, 120 Ky., 608, 9 Ann. Cas., 36.**

In the above case an exhaustive opinion, by *O'Rear*, J., reviewing numerous cases decided in



other States, and by the Supreme Court of the United States, was delivered on behalf of the Court of Appeals of Kentucky.

In the above case it appeared that in the public school in question a short prayer, at the beginning of every day, was offered to God and the things prayed for were asked "for Christ's sake"; and also portions of the *King James* translation of the Bible were read "without comment" daily in this school.

The Constitution of Kentucky contained a provision in almost identical language with the clause in Art. I, Sec. 3, of our Tennessee Constitution to the effect that "no human authority shall, in any case whatever, control or interfere with the rights of conscience," and specifically declaring that "no *preference* shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity," etc.

In the exhaustive opinion delivered by Judge O'Rear in the above case, and after reviewing *many authorities*, it was held that none of the provisions of the Kentucky Constitution had been violated; and in the course of the opinion, it is, among other sound and relevant things, said:

"The main question we conceive to be, is

the King James translation of the Bible, or, for that matter, any edition of the Bible, a sectarian book? There is, perhaps, no book that is so widely used and so highly respected as the Bible; no other that has been translated into as many tongues; no other that has had such marked influence upon the habits and life of the world. It is not the least of its marvelous attributes that it is so catholic that every seeming phase of belief finds comfort in its comprehensive precepts. Many translations of it, and of parts of it, have been made from time to time, since two or three centuries before the beginning of the Christian era. And since the discovery of the art of printing and the manufacture of paper in the sixteenth century, a great many editions of it have been printed. There is controversy over the authenticity of some parts of some of the editions. And there are some people who do not believe that any of it is the inspired or revealed word of God. Yet it remains that civilized mankind generally accord to it a reverential regard, while all who study its sublime sentiments and consider its great moral influence must admit that it is, from any point of view, one of the most important of books. That it has drawn to its careful study and research into its history and translations so many profound scholars of history, is not to be wondered at. The result has been that, while many editions of the several translations have been made, those based upon the revision compiled under the reign of King James I, 1607-1611, and very generally used by Protestants, and the one compiled by Douay some time previous, and



which was later adopted by the Roman Catholic Church as the only authentic version, are the most commonly used in this country. That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents, that give it its character. Appellant's view seems to be that the church is the custodian and interpreter of the Bible as God's word. From that it is supposed that any Bible not put forth by authority of a church claiming that prerogative is sectarian. The question is not whether the version used is canonical or apochryphal. That question does not at all enter into the matter. Otherwise it would inevitably lead to the state that any book not favored by some church authority, or which may be supposed by it to be hostile to its teachings, would be sectarian. (9 Ann. Cas., 37, 38.)

And if your Honors, after reading the exhaustive opinions in the Georgia and Kentucky cases from which we have quoted above deem it necessary to pursue this matter any further, then the long line of cases which we have here-

inbefore cited in our brief, with the voluminous case-notes thereto as these cases appear in the secondary reports, will be found abundantly to establish that our Chap. 102 of the Public Acts of 1915 cannot be construed to amount to providing for the "teaching" of the Bible as any religious or sectarian work, and is of undoubted constitutionality.

(*Ante*, pp. 69-71.)

We particularly call your Honors' attention, in this connection, to the very able and exhaustive case-note appearing in 5 A. L. R., at pp. 866 to 908 upon the subject of "Sectarianism in Schools." Early in that note numerous authorities are assembled and their results stated in the following language:

"b. *Mere Reading of Bible.*

"It has been held that the mere reading of selections from the Bible, in the King James version thereof, in schools, without comment by the teachers, does not of itself violate any constitutional prohibition of sectarianism or interference with religious freedom. *Hackett* v. *Brooksville Graded School Dist.* (1905), 120 Ky., 608, 69 L. R. A., 592, 117 Am. St. Rep., 599, 87 S. W., 792, 9 Ann. Cas., 36; *Donahue* v. *Richards*, (1854), 38 Me., 379, 61 Am. Dec., 256; *State, ex rel. Freeman* v. *Scheve* (1902), 65 Neb., 853, 59 L. R. A., 927, 91 N. W., 846, motion for rehearing overruled in



(1903) 65 Neb., 876, 59 L. R. A., 932, 93 N. W., 169; *Curran* v. *White* (1898) 22 Pa. Co. Ct., 201; *Hart* v. *School Dist.* (1885) 2 Lanc. Law Rev. (Pa.), 346; *Stevenson* v. *Hanyon* (1898) 7 Pa. Dist. R., 585. See also *Moore* v. *Monroe* (1884), 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W., 475, reviewed infra, II. e."

(5. A. L. R., 867.)

In view of all the above, we say that from the authorities it is not a debatable, but is a clearly established proposition, that our Chap. 102 of the Public Acts of 1915 providing for a mere non-sectarian reading of the Bible "without comment" in our public schools and subject to the other conditions and provisions stated in said Act, is to no degree susceptible of any construction that would render said Act invalid as giving any religious "preference" to any religious establishment or mode of worship over any other; and the mere reading of the Bible "without comment" and subject to the other conditions of said Act can not be said to amount to any "teaching" of the Bible as any religious work or doctrine.

It follows from all the above that the story of the "Divine creation of man" as set out in the Bible is not "taught" in our public schools, nor is any other portion of the Bible "taught" therein as any religious doctrine or tenet; and no

other religion or religious belief of any variety is *taught* in the public schools of Tennessee.

We pass to the next proposition involved in our answer to defendant's Assignments of Error III and IV which claim that the Act in question violates our constitutional provision forbidding the giving, by law, of any "preference" to any religious establishment or mode of worship.

**(e)**

**The Insistence, If True, that Religious Views May Have Been the "Motive" for the Passage of the Act in Question is Immaterial and Not Reviewable by the Court.**

At pages 34-36 of the Brief for Scopes there is presented the idea that a religious question lies at the "basis" of this Act.

By this it can only be meant that the religious belief of members of the legislature in the account of the "Divine creation of man," as recorded in the Holy Bible, furnished the "motive" for the passage of the Act, which does nothing except to prohibit the *teaching* "that man has descended from a lower order of animals."

If the above be true, it is wholly immaterial, for the motives of the members of our legislature inducing them to pass this Act are immaterial and unreviewable under both the decisions of this Court and the Supreme Court of the United States. We will next present a few quotations from such decided cases.



**Hennington v. Georgia, 163 U. S., 299, 304-307.**

In the above case, the Supreme Court of the United States, speaking through Mr. Justice *Harlan*, was dealing with the constitutionality of a provision of the Code of Georgia prohibiting the running of freight trains on Sunday in that State. The Court sustained the statute, even though it incidentally entered the field of interstate commerce; and in regard to the insistence that there were *religious motives* behind the passage of the Act, the Supreme Court of the United States in the course of its opinion said:

> "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty."
> . . (163 U. S., 304.)

And later in the same opinion the Court said:

> "The whole theory of our government, Federal and State, is hostile to the idea that questions of legislative authority may depend upon *expediency*, or upon *opinions* of *judges* as to the *wisdom* or *want* of wisdom in the enactment of laws under *powers clearly conferred* upon the legislature. The legislature of Georgia *no doubt* acted upon

the view that the keeping of one day in seven for rest and relaxation was 'of *admirable service* to a State considered *merely* as a *civil institution.*' " (Italics ours.)
(163 U. S., 304.)

And still later in the same opinion the Supreme Court of the United States quoted with approval the language which the Supreme Court of Georgia had used in sustaining the validity of said Act, as follows:

" 'With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, *religious views* and *feelings* may have had a *controlling influence.* We doubt not that they *did have;* and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart *any day* whatever as a day of enforced rest. But neither of these considerations is destructive of the *police nature* and *character* of the statute. If good and sufficient *police reasons* underlie it, and substantial *police purposes* are involved in its provisions, these reasons and purposes constitute its *civil* and *legal justification,* whether they were or not the direct and immediate *motives* which induced its passage, and have for so long a time kept it in force. Courts are not concerned with the mere *beliefs* and *sentiments* of legislators, or with the *motives* which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposedly *religious* obligation; nor is the statute vitiated, or in any wise weakened, by the chance, or even the *certainty,* that in passing it the legislative mind was swayed by the *religious* rather than by the *civil* aspect of the measure.' " (Italics ours.) (163 U. S., 306, 307.)



And if your Honors desire to examine any further into the authorities upon the proposition that the Supreme Court of the United States, from every angle and in every aspect, has ruled that the Court cannot inquire into the "motives" inducing or prompting the passage of a statute, nor have any concern with the *impolicy,* the *lack of wisdom* or even the *hardship* imposed by statute, we cite the Court to the digests of the decisions of the Supreme Court of the United States where long lines of decisions by that court, too numerous for citation here, may be found in—

4 Ency. of U. S. Sup. Ct. Rep.—"Motives of Legislature Not Subject to Judicial Review," pp. 269, 270; *Idem* on proposition that the Fourteenth Amendment "has no concern with the impolicy or injustice of legislation," at pp. 357, 358.

14 Fed. Rep. Digest, dealing with the decisions of the Supreme Court of the United States, reported in 260-265 U. S.,—title "Constitutional Law," key-number 70 (3), relating to "Inquiry into Motive, Policy, Wisdom, or Justice of Legislation."

And upon the general well-settled proposition that a court cannot inquire into the legislative *motive* at all, we will notice one or two of the previous decisions of this Court.

**Motlow v. State, 125 Tenn. (17 Cates), 547, 589, 590.**

In the above case this Court, speaking through Mr. Justice *Neil*, reviewed at great length the previous decisions of this Court and of the Supreme Court of the United States, in regard to the *limitations* upon the *power* of courts to hold a *police power statute* invalid as being in violation of Art. I, Sec. 8, or Art. XI, Sec. 8, of our State Constitution, or the "Equality" or "Due Process" clauses of the Fourteenth Amendment to the Federal Constitution—(all necessarily presenting the *same question* as we have seen)—and in the course of the opinion it is said:

> "The police power is a necessary one, inhering in every sovereignty, for the preservation of the public safety, the public health, and the public morals. It is of vast and undefined extent, expanding and enlarging in the multiplicity of its activities as exigencies demanding its service arise in the development of our complex civilization. It is a function of government *solely* within the domain of the *legislature* to declare when this power shall be brought into operation, for the protection or advancement of the public welfare. It is said that



> the courts have the right to determine whether such law is *reasonable*. By this expression, however, it is *not* meant that they have power to pass upon the Act with a view to determining whether it was dictated by a *wise* or a *foolish policy*, or whether it will ultimately redound to the *public good, or* whether it is contrary to *natural justice* and *equity*. These are considerations *solely* for the *legislature*. In determining whether such Act is reasonable, the courts decide merely whether it has any *real tendency* to carry into *effect* the *purposes designed*—that is, the protection of the public safety, the public health, or the public morals—and whether that is *really the end had in view*, and whether the interests of the public generally, as distinguished from those of a particular class, require such interference, and whether the Act in question violates any provision of the State or Federal Constitution." (Italics ours.) (125 Tenn., 589, 590.)

**Williams v. Nashville, 89 Tenn. (5 Pick.), 487, 496.**

This Court, speaking through *Caldwell, J.*, in the above case, concluded its opinion by announcing the fundamental principles so often applied by this Court in these words:

> "The Courts have nothing to do with the *policy* of legislation, nor the *motives* with which it is made. *Lynn* v. *Polk*, 8 Lea, 229; 15 Lea, 634."
>
> (89 Tenn., 496.)

**A Class of Cases to Be Differentiated.**

The *Child Labor Tax Case* (259 U. S., 20), cited in the Brief for defendant Scopes, and any other cases of that class, are to be clearly differentiated from the endless line of decisions settling the familiar principle that the motives of the legislative body prompting its members to exercise a *possessed* power cannot be inquired into by a court in any case. This will be made clear by an examination of the two Child Labor decisions of the Supreme Court of the United States which we will next briefly notice.

**Hammer v. Dagenhart, 247 U. S., 251.**

In the above case the Court, speaking through Mr. Justice *Day*, held unconstitutional the Act of Congress of September 1, 1916, which had prohibited transportation in interstate commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under the age of 14 years had been employed or permitted to work, or children between the ages of 14 and 16 years had been employed to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 p.m., or before the hour of 6 a.m.

The Court held said Act unconstitutional as



*exceeding* the "commerce *power*" of Congress and *invading* the "*powers* reserved to the States."

In the course of the opinion, which reviewed many previous decisions of the Court, the exact ruling of the Court, and the ground upon which it was rested, were made perfectly clear. In speaking of the thing actually *accomplished* by the Act of Congress there in question, and how the Act really and *in effect* invaded the field of the powers reserved to the States, the Court said:

> "The thing intended to be accomplished by this statute is the *denial* of the *facilities* of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in *its effect* does *not* regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be *freely shipped* after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the *mere fact* that they were *intended* for interstate commerce transportation does not make their production subject to federal *control* under the commerce power." (Italics ours).
>
> (247 U. S., 271-272).

And later in the same opinion the Court said:

> "The grant of *power* to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it *authority* to *control* the States in their exercise of the *police power* over local trade and manufacture.
>
> "The grant of *authority* over a purely *federal* matter was not intended to *destroy* the *local power* always existing and carefully reserved to the States in the Tenth Amendment to the Constitution." (Italics ours). (247 U. S., 274).

Still later, in the same opinion, the Court said:

> "A statute must be *judged* by its *natural* and *reasonable* EFFECT. *Collins* v. *New Hampshire*, 171 U. S., 30, 33, 34."
> (247 U. S., 275).

Still later, and before concluding its opinion in the above case, the Court expressly declared that it had neither the authority nor the disposition to question the motives of the law making department in enacting legislation; and as to this the Court pointedly said:

> "We have neither *authority* nor *disposition* to question the *motives* of Congress in enacting this legislation. The purposes intended must be attained *consistently* with constitutional limitations and not by an invasion of the *powers* of the *States*."
> (247 U. S., 276).

The *motives* of the legislative body inspiring



it to pass a given Act are *intensive* and *subjective things* and cannot be inquired into by the Court at all.

The *effect* of an Act is *objective* and the Court can only pass upon the question of the possessed *power* of the legislative body to pass the Act, the provisions of which have the *revealed* and *disclosed* objective *effect* of accomplishment.

This is also made perfectly clear by the Child Labor case which we will next notice.

**Child Labor Tax Case, 259 U. S., 20.**

In the above case the Supreme Court of the United States, speaking through Mr. Chief Justice *Taft*, held unconstitutional the portion of the Revenue Act of February 24, 1919, which provided that any person (a) operating any mine or quarry in which children under the age of 16 years have been employed or permitted to work during any portion of the taxable year, or (b) any mill, cannery, workshop or factory in which children under the age of 14 years have been employed or permitted to work, or children between the ages of 14 and 16 have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after seven o'clock p.m. or before six o'clock a.m., during any portion of the taxable

year, shall pay for such taxable year an excise equivalent to 10 per cent, of the entire net profits received or accrued for such year from the sale or disposition of the product of his said mine or other establishment, etc.

By way of making it perfectly clear that the Act before the Court in the above case would have to be held invalid upon the same general principle which had constrained the Court to hold invalid the Act before the Court in the preceding case of *Hammer* v. *Dagenhart*, 247 U. S., 251; and also by way of making it perfectly clear that in neither said former case nor the *Child Labor Tax Case* then before the Court, was the Court undertaking to any degree to inquire into the *motives* inspiring the passage of a legislative Act—the Court, in the course of the opinion, said:

> "The case before us can not be distinguished from that of *Hammer* v. *Dagenhart*, 247 U. S., 251. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:
>
> " 'In our view the necessary *effect* of this act is, by means of a prohibition against the movement in interstate commerce of



> ordinary commercial commodities, *to regulate* the hours of labor of children in factories and mines within the States, a purely state *authority*.'
>
> "In the case at the bar, Congress in the *name of a tax* which on the face of the act is a penalty seeks to do the *same thing*, and the effort must be equally futile.
>
> "The analogy of the *Dagenhart Case* is clear. The congressional *power* over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the *legislative motive* in its exercise *is just as free from judicial suspicion and inquiry*. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of *transportation*, and to deny the same to the people of a State in order to *coerce* them into compliance with Congress' regulation of *state concerns*, the court said this was not *in fact* regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the *business* of the *state government* under the Federal Constitution. This case requires as did the *Dagenhart Case* the application of the principle announced by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat., 316, 423, in a much quoted passage:
>
> "Should Congress, in the execution of its powers, adopt measures which are *prohibited* by the Constitution; or should Congress, under the *pretext* of executing *its powers*,

> pass laws for the accomplishment of *objects* not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." (Italics ours).
>
> (259 U. S., 39-40).

In each of the above cases the *effect* of the Act of Congress was such that it equalled and necessarily presented the manifestation of a *power* which Congress did not *possess* at all; and this being so any *pretext* or *assigned* or *assignable* motive for the passage of the Act would have to be disregarded as immaterial and could not be considered to justify or supply the *lack of power* to pass the Act considering it from the standpoint of its necessary *effect*, as the Court had to consider it—because the Acts involved in the two cases each presented a clear *invasion* of the "*powers* reserved to the States."

In the case at bar the legislature *possessed* the *power* to pass the Act in question—whether it be viewed as an exercise by the legislature of its power over our public schools and so belonging to a special class of Acts regulating the way and manner of the performance of any work to be done for the public and at public expense, or whether the Act be viewed merely as one generally referable to the broad police power of the State.



Since the Act in question in the case at bar, in its objective *effect* brings about no *result* which was beyond the *power* of the legislature to consummate—the *motives* of the members of the legislative body which inspired them to pass the Act, whether such motives be sought to be gathered from the face of the Act or from matters *in pais*, are wholly immaterial and beyond the power of any Court to consider or to inquire into at all.

But since the Act in question prefers no religion over any other religion, as we have hereinbefore clearly shown, and since the affirmative protection and conservation of *all religions* have been held by both this Court and the Supreme Court of the United States to be the most desired and essential thing if our governments, State and National, are to stand and law and order are to remain enthroned—this Act, when considered from the standpoint of either its *motive* or its *effect* would in no sense violate the provision of Art. I, Sec. 3, of our State Constitution, which merely declares that "no *preference* shall ever be given, by law, to any religious establishment or mode of worship."

The Act, neither from the standpoint of its objective *effect* nor from the viewpoint of trying to ascertain its subjective *motive* (with respect to which the Court has no concern) presents any question within the scope or purview

of said provision of Art. I, Sec. 3, of our State Constitution.

It is conceivable, and indeed might be conceded, that the legislature passed the Act in question because its members believed that to teach "that man has descended from a lower order of animals" would be equivalent to teaching a "theory that denies the story of the Divine creation of man as taught in the Bible," and that this idea caused the use of the word "instead" in the next to the last line of Sec. 1 of the Act—and still the Act in question would in no sense be invalid as being in violation of Art. I, Sec. 3, of our State Constitution.

All the members of both branches of the Tennessee legislature might have been agnostics who reject any affirmative belief in the truth of the Bible, or even *pseudo*-scientists who were themselves radical believers in the idea that they and all the rest of mankind had descended from a lower order of animals—and such members with such views and with all legislative wisdom, might nevertheless have enacted the Act in question, in the very words in which it was passed, for the betterment of effective school discipline and the quiet and educational welfare of our State.



We have hereinbefore seen (*Ante*, pp. 60, 61) that in the case of *Jacobson* v. *Massachusetts*, 197 U. S., 11, 36, the Supreme Court of the United States has expressly ruled that "a common belief," like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts; and the fact that the "common belief" is not universal and that some laymen and scientists may oppose the common belief accepted by the "mass of the people" (197 U. S., 34, 35) does not alter this rule.

The members of our State legislature therefore must be held to have known, just like this Court may and must judicially know, that the "mass" of the people of this State, and indeed practically all of them, regardless of differing creeds and sects, have a deep and religious respect and reverence for the Holy Bible; and that the great "mass" of our people believe "the story of the Divine creation of man as taught in the Bible;" and, in their *own minds*, make such belief the basis of the doctrine of immortality; and also that the great "mass" of our people believe, whether it be true in the opinion of some others or not, that the idea "that man has descended from a lower order of animals" is inconsistent with the story of the Divine creation of man as taught in either the first or second

Chapter of Genesis. We say that the members of the Tennessee Legislature knew, just as the members of this Court may and must judicially know, that the great "mass" of our people, and practically all of them as a matter of fact, have the religious *beliefs* and *concepts* just stated—whether some others may think these beliefs are sound and true or not.

Therefore, we say, that the members of the legislature who passed the Act in question, knowing just as this Court may and must know the *common belief* of the great "mass" of our people about these things—no doubt would and did see the legislative wisdom and the sound public policy of passing the Act in question, even though all these legislators had themselves been agnostics or *pseudo*-scientific protagonists and advocates of the idea that man has descended from a lower order of animals.

These legislators, regardless of their own individual religious or *pseudo*-scientific beliefs would *only* have had to *possess* a *knowledge* of the holdings and declarations of this Court and of the Supreme Court of the United States in regard to the overwhelming importance of nurturing *religion*, as then embraced and existing in the *minds* and *hearts* of the *people*, furnishing the greatest safeguard of law and order and the continued existence of established government;



and in addition would *only* have had to *possess* a sympathetic *respect* for and *belief* in the *regnant system* of constitutional government in this State and Nation—to have prompted them to vote for this Act in the very words and terms in which it was written *regardless* of their individually entertained religious or *pseudo*-scientific views or vagaries.

In other words, the members of our Tennessee legislature—(even if all of them had been agnostics or disbelievers in the Bible, and themselves had been advocates of the *pseudo*-scientific doctrine that man has descended from a lower order of animals)—might well and no doubt *would* have voted for this Act if they had possessed legislative wisdom and a wholesome and sympathetic respect for established constitutional government.

The Supreme Court of the United States, quoting the Supreme Court of New York, has expressly declared, as we have hereinbefore seen (*Ante*, p. 61)—

> "In a *free country*, where the government is by the people, through their chosen representatives, *practical legislation* admits of no other standard of action; for what the people *believe* is for the common welfare must be *accepted* as *tending* to *promote* the common welfare, whether it does in fact or not.
>
> "Any other basis would conflict with the spirit of the Constitution, and would sanc-

tion measures opposed to a republican form of government." (197 U. S., 35.)

So, we submit that this Court, without any power to probe and search into the subjective ideas and mental operations of the legislature which passed this Act, must reason about the matter, just as did the Supreme Court of the United States in *Hennington* v. *Georgia*, 163 U. S., 299, 304, and say that our legislature, in passing the Act in question, "no doubt acted upon the view" that the prohibition against teaching in our public schools "that man has descended from a lower order of animals"—was "of *admirable service* to the State considered merely as a *civil* institution."

Regardless of the individual religious or *pseudo*-scientific views of its members—(as to which this Court can know nothing)—if its members merely had a wise and wholesome respect and sympathy for established constitutional government,—the legislature "no doubt" thought and concluded that the common religious beliefs of the great "mass" of our people *were such* that teaching in our public schools or to undergraduates in our higher State institutions of learning, "that man has descended from a lower order of animals," would tend to inject *disturbing*, *painful* and uselessly *distracting* thought and discussion among the pupils and



students, or between them on the one hand and the teacher on the other, or between the teacher on the one hand and the parents on the other—to the great *detriment* of proper school discipline and the educational welfare of our people.

Before concluding this general head of our Argument in answer to Assignments III and IV, we will proceed to notice at some length the previous decisions of this Court and the Supreme Court of the United States establishing the proposition that the legislature was clearly acting within its constitutional power, and in support of the recognized foundation and *basis* of all *law*, *order* and *government* if and when it passed the Act in question for the purpose of protecting *all religions* and preferring no one denomination, creed or sect over any other.

The fact that the Supreme Court of the United States, this Court, and the highest Court in Pennsylvania—(which has a constitutional provision identical with Art. I, Sec. 3 of our own Constitution)—the highest Courts in New York and of numerous other States, have all declared in the most *emphatic language* that *religion* lies at the very foundation and base of all established government in our country, and is to be protected and safeguarded accordingly—is a thing which counsel for defendant seem not to understand *at all*, or if they do understand this

there is nothing in their Brief to show that they *appreciate* it to any degree.

Under our next head we will therefore proceed to notice and quote some of the significant declarations, particularly of this Court and the Supreme Court of the United States, in this field of this case.

(f)

**This is a "Religious State" and This is a "Religious Nation."**

To us it seems very significant that the counsel for defendant have not deemed it necessary or desirable, or, in any event, discreet, from their viewpont, for them to make any sort of *reference* to certain great and positive declarations in previous decisions of this Court and the Supreme Court of the United States which stand out as great *landmarks* in our law. We will now notice just *a few* of the declarations contained in these decisions which will show how important, in the view of our Courts, is the preservation and encouragement of *all religions.*

**Vidal v. Girard's Executors, 43 U. S. (2 How.), 127, 197, 199; 11 L. Ed., 205.**

The opinion of the Supreme Court of the United States in the above case was written by no



less a personage than Mr. Justice *Story;* and so great a lawyer as Daniel Webster, who was of counsel and lost his contention in said case, was unable to persuade the Court to make any different ruling.

In this case there was involved the validity of the will of Stephen Girard, which undertook to leave a large bequest to found an institution of learning, and who had declared in his said will that all ecclesiastics, missionaries, and ministers of any sect, should be excluded from holding and exercising any station or duty in the college so founded, or even visiting the same.

The validity of the will was attacked upon the ground that the foundation of the college, upon such principle of exclusion, was *derogatory* and *hostile* to the Christian religion, and so was void, as being against the common law and public policy of Pennsylvania. Such was the insistence of Daniel Webster and his associate counsel, who attacked the validity of the will of Stephen Girard in this famous case. The Supreme Court of the United States sustained the will, but upon the declared principles and for the declared reasons shown in the opinion of the Court, which we now quote as follows:

> "This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is deroga-

tory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college or even visiting the same; and secondly, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety and industry, thereby excluding, by implication, all instruction in the Christian religion.

"In considering this objection, the courts are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator, (of which indeed we can know nothing), nor to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its Constitution and laws and judicial decisions make known to us. The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; above all, when that topic is connected with religious polity, in a country



composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examinations, beyond what the State Constitutions, and laws, and decisions necessarily bring before us.

"It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its Constitution of government. The Constitution of 1790 (and the like provision will, in substance, be found in the Constitution of 1776, and in the existing Constitution of 1838) expressly declares: 'That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship.' "

(43 U. S. (2 How.), 197-198.)

(NOTE.—The above provision of the Constitution of Pennsylvania is identical with Art. I, Sec. 3, of the present Constitution of Tennessee, except in our Constitution the expression "religious establishments" and the expression "modes of worship" are stated in the singular and not in the plural form, which are differences that make absolutely no change in the sense of the provision.)

After quoting the above provision from the Constitution of Pennsylvania, the opinion of the Supreme Court of the United States in this great case then proceeds—

> "Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although *Christianity* be a part of the common law of the State, yet it is so in this qualified sense, that *its divine origin and truth are admitted*, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff* v. *The Commonwealth*, 11 Serg. & Rawls, 394.
>
> "It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of *infidelity*. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear and indisputable proof. *Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught, but that it is to be impugned or repudiated.*" (Italics ours.)
>
> (43 U. S. (2 How.), 198-199.)



The Court sustained the will for the reason, as it declared, that the provision of the will excluding ecclesiastics, ministers, etc., did not *prevent* instruction by *laymen* in the general principles of Christianity nor the reading of the Bible, and especially the New Testament, "without note or comment."

And it was only by ruling that laymen might instruct in the college in the general principles of Christianity, and by ruling that the Bible and especially the New Testament might be read in the college, "without note or comment," that this will was sustained against the assault that it was derogatory and hostile to the Christian religion, and therefore void, as being against the common law and public policy of Pennsylvania.

It appears from the above quoted excerpt from this opinion that the highest court of Pennsylvania had ruled—(just as this Court has ruled in regard to our State and under a clause of our Constitution identical with that of the State of Pennsylvania)—that Christianity was a part of the common law of that State; and that "its divine origin and truth are admitted"; and in the above quoted opinion, the Supreme Court of the United States, of language identical

with Art. I, Sec. 3, of the Constitution of Tennessee, said:

> "Nothing more comprehensive for the *complete protection* of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels."
>
> (43 U. S., (2 How.), 198.)

Our point, in this connection, is that the Supreme Court of the United States, in the above great case, recognized and declared that the language of an identical provision to that contained in Art. I, Sec. 3, of the Tennessee Constitution, in regard to the freedom of religious worship, and in regard to no preference being given, by law, to any religious establishment or mode of worship, was as comprehensive as could be used "for the complete *protection*" of every variety of *religious opinion.*

We next call the particular attention of your Honors to the case of—

**Holy Trinity Church v. United States, 143 U. S., 457, 465-471.**

In the above case it appeared that the Act of Congress of February 26, 1885, categorically prohibited the importation and migration of foreigners and aliens under contract or agreement "to perform labor or *service* of *any kind* in the United States, its territories, or the District of Columbia."



The Holy Trinity Church of the City of New York had made a contract with the Rev. E. Walpolé Warren, by which he was to remove to the City of New York and enter into its service as rector and pastor; and said minister was an alien residing in England at the time said contract was made; and he did remove, under said contract, from England to the United States and entered into the service of said church as rector and pastor; and the question presented was whether the contract of said church with this minister would be construed to be void because in violation of said Act of Congress.

Though said contract was within the letter of said Act of Congress, the Supreme Court of the United States held that it was not a void contract as being in violation of said Act of Congress, for the reason that said Act, in the opinion of the Court, was not intended to apply to such a contract for *religious* services.

As showing how important, in the opinion of the Supreme Court of the United States, is the protection and conservation of religion, and how religion must be considered as underlying the very structure and foundation of all government, Federal and State, we quote the following

from the opinion of the Supreme Court of the United States, speaking through Mr. Justice *Brewer*, in the above case:

"But beyond all these matters no purpose of action *against religion* can be imputed to any legislation, state or national, because *this is a religious people.* This is *historically* true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from 'Ferdinand and Isabella, by the grace of God, King and Queen of Castile,' etc., and recites that 'it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered,' etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from 'Elizabeth, by the grace of God, of England, France and Ireland, queene, defender of the faith,' etc.; and the grant authorizing him to enact statutes for the government of the proposed colony provided that 'they be not against the true Christian faith nowe professed in the Church of England.' The first charter of Virginia, granted by King James I in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: 'We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government; DO, by these our Letters-Patents, graciously accept of, and agree to, their humble and well-intended Desires.'



"Language of similar import may be found in the subsequent charters of that colony, from the same king, in 1609 and 1611; and the same is true of the various charters granted to the other colonies. In language more or less emphatic is the establishment of the Christian religion declared to be one of the purposes of the grant. The celebrated compact made by the Pilgrims in the Mayflower, 1620, recites: 'Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid.'

"The fundamental orders of Connecticut, under which a provisional government was instituted, in 1638-1639, commence with this declaration: 'Forasmuch as it hath pleased the Allmighty God by the wise disposition of his diuyne pruidence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and upon the River Conectecotte and the Lands thereunto adioyneing; And well knowing where a people are gathered togather the word of God requires that

to mayntayne the peace and Union of such a people there should be an orderly and decent Government established according to God, to order and dispose of the affayres of the people at all seasons as occation shall require; doe therefore assotiate and conioyne our selves to be as one Publike State or Comonwelth; to doe, for our selues and our Successors and such as shall be adioyned to us att any tyme hereafter, enter into Combination and Confederation togather, to mayntayne and presearve the liberty and purity of the gospell of our Lord Jesus wch we now prfesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practised amongst us.'

"In the charter of privileges granted by William Penn to the province of Pennsylvania, in 1701, it is recited: 'Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare,' etc.

"Coming nearer to the present time, the Declaration of Independence recognizes the presence of the Divine in human affairs in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among



these are Life, Liberty and the pursuit of Happiness.' 'We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name and by Authority of the good People of these Colonies, solemnly publish and declare,' etc.; 'And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our Sacred Honor.'

"If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: 'We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations,' etc.

"It may be only in the familiar requisition that all officers shall take an oath closing with the declaration 'so help me God.' It may be in clauses like that of the constitution of Indiana, 1816, Art. XI, Sec. 4: 'The manner of administering an oath or

affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed the most solemn appeal to God.' Or in provisions such as are found in Articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, 1867: 'That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace and safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief: Provided, He believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or in the world to come. That no religious test ought ever to be required as a qualification for any office of profit or trust in this State other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed by this constitution.' Or like that in Articles 2 and 3, of Part 1st, of the Constitution of Massachusetts, 1780: 'It



is the right as well as the duty of all men in society publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. . . .

As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instruction in piety, religion and morality: Therefore, to promote the happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily.' Or as in sections 5 and 14 of Article 7, of the constitution of Mississippi, 1832: 'No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State. . . . Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education, shall forever be encouraged in this State.' Or by Article 22 of the Constitution of Delaware, 1776, which required all officers, besides an oath of allegiance, to make

and subscribe the following declaration: 'I, A. B., do profess Faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.'

"Even the constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all States as follows: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' etc. And also provides in Article 1, section 7, (a provision common to many constitutions,) that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill.

"There is no *dissonance* in these declarations. There is a *universal language* pervading them *all*, having one meaning; they *affirm and reaffirm* that THIS IS A RELIGIOUS NATION. These are not individual sayings, declarations of private persons: they are *organic utterances;* they speak the voice of the *entire people.* While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraff* v. *The Commonwealth*, 11 S. & R., 394, 400, it was decided that, 'Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established Church, and tithes, and spiritual courts; but Christianity with liberty of



conscience to all men.' And in *The People* v. *Ruggles*, 8 Johns., 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: 'The people of this State, in common with the people of this country, profess the general doctrines, of Christianity as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order . . The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the Constitution as *some have strangely supposed*, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of *Mahomet* or of the Grand Lama; and for this *plain reason*, that the case assumes that we are a *Christian people*, and the *morality* of the country is *deeply ingrafted upon Christianity*, and not upon the doctrines or worship of *those imposters.*' And in the famous case of *Vidal* v. *Girard's Executors*, 2 How., 127, 198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed: 'It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania.'

"If we pass beyond these matters to a view of American life as expressed by its *laws*, its *business*, its *customs* and its *society*, we find everywhere a clear recognition of the *same truth*. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, 'In the name of God, amen;' the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that THIS IS A CHRISTIAN NATION. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation." (Italics ours.)

(143 U. S., 465-571.)

We have burdened the Court with the above quoted long extract from this opinion in order to show how carefully and impressively the Supreme Court of the United States had therein reviewed and referred to all the historic writings, grants, constitutions and statutes, which the Court termed "organic utterances" that spoke the voice of the entire people of our Nation and the different States thereof—as the *basis* for the ruling and declaration of the Court that "this is a religious nation" and that "this is a Christian nation"; and also for the purpose of showing how the Supreme Court of the United States would recognize and not review, of course, the decisions of the highest court of Pennsylvania which had declared that "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men"; and how this declaration of the highest court of Pennsylvania, recognized and quoted by the Supreme Court of the United States, was made under a constitutional provision *identical* in language and meaning with Art. I. Sec. 3, of our Tennessee Constitution.



It will be noted that the Supreme Court of the United States, in its above quoted opinion, quotes with approval the language of Chancellor Kent, then speaking for the highest court in the State of New York, in the case of *People* v. *Ruggles*,

8 Johns., 290, 294, 295, to the effect that the people of New York, in common with the people of this country, profess the general doctrines of Christianity as the rule of their *faith* and *practice;* and that while free, equal and undisturbed enjoyment of religious opinion, whatever it may be, was the rule, the State was not bound by any *expression* in its Constitution as some had "strangely supposed" either not to punish at all, or to punish indiscriminately, malicious and blasphemous attacks upon the religion of "Mahomet" or the "Grand Lama"; and for the plain reason that it is to be *assumed*—

> "that we are a *Christian people*, and the *morality* of the country is deeply ingrafted *upon Christianity*, and not upon the *doctrines* or *worship* of those *imposters*."

We recommend the above language to the very careful consideration and scrutiny of all those lawyers for defendant who live and practice in the State of New York, and who have exhibited such concern for the Koran of Mahomet and the Book of Mormon as actually to begin their statement of the "Position of Defense" in their Brief (p. 31) with the statement that this Act "prefers the Bible to the Koran or the Book of Mormon." If they feel the call and urge seriously to make any effort in this nation, and in the legislation of the various States thereof, to have the Koran and the Book of Mormon, and Buddhism, etc.,



absolutely equalized with the Holy Bible in the laws of this country, they might with more consistency launch this fight in their home State of New York, wherein the incomparable Kent, the greatest law-writer and judge ever produced by that State, speaking for the highest Court of that State, in language which has been quoted with approval by the Supreme Court of the United States, has made the judicial ruling, utterance and declaration last quoted above, which must be quite as repulsive and obnoxious to their sensibilities and high regard for "civil liberties" as anything contained in the challenged Act could be.

As we have already stated, there is no religion that exists now or that ever has existed in this world that teaches "that man has descended from a lower order of animals." As to the "Koran," over which our adversaries say this Act prefers the Bible, a very cursory and superficial examination of the religion of Mohammedanism would have informed our adversaries that even Mahomet accepted Adam and Moses and Jesus Christ as great and divinely inspired prophets, and the Koran, no more than any other known religion, undertakes to teach "that man has descended from a lower order of animals." A similar cursory and superficial examination of Book of Mormon would have furnished our adversaries with the same information as to

that religion. If they can point this Court to any religion that ever has taught "that man has descended from a lower order of animals"—then they might, from their own fallacious viewpoint, be able to assert that for this Act to prohibit the teaching in our public schools "that man has descended from a lower order of animals" would prefer some religion over some other. But they cannot and have not attempted to point your Honors to any such religion.

As we have hereinbefore shown the Court, counsel for defendant are really in an absurd and fatal *dilemma* when they make any insistence that for this Act to prohibt the teaching in our public schools "that man has descended from a lower order of animals" is in violation of the last clause of Art. I, Sec. 3 of our State Constitution, which merely declares—"that no preference shall ever be given, by law, to any religious establishment or mode of worship." The *dilemma* in which counsel for Scopes find themselves in respect of any contention that the Act in question violates this clause of Art. I, Sec. 3, of our State Constitution, is simply this:

The theory or hypothesis "that man has descended from a lower order of animals" is either a religion, a religious establishment or a mode of worship, or it *is not such*. If it is *not* such



then it has no relation to and is entirely outside the scope of the provisions of Art. I., Sec. 3, of our State Constitution; and if it *is* a *religion*, then to prohibit the *teaching* of it in our public schools is in strict compliance with this provision of our Constitution, because affirmatively to teach it—(if it were a *religion*)—would give it a "preference" in violation of the very clause of our Constitution under which the counsel for Scopes attempt to level their attack on this simple statute.

Before noticing some of the decisions and declarations of this Court in regard to the importance of the inculcation and protection of the religious beliefs of the people of this State, we desire to call the Court's attention to one more case from Pennsylvania, because the constitutional provision of that State in regard to the freedom of religious worship is identical with our own, as we have seen. This additional case is—

**Zeisweiss v. James, 63 Penn. St., 465; 3 Am. Rep., 558.**

In the above case there was involved the interpretation of a will made by Levi Nice, of Philadelphia, who left certain property for life to relatives, with a provision that immediately after their death said property should go to and be

held by the "Infidel Society in Philadelphia, hereafter to be incorporated," and be held and disposed of by them for the purpose of building a hall "for the free discussion of religion, politics," etc.

The Court, speaking through so great a jurist as *Sharswood*, J., held that since the will provided for the property to be held by the "Infidel Society in Philadelphia" as trustee, and that Society had not yet been incorporated, the devise of the remainder, after the death of the life tenants, was void; and then the Court added—

> "In placing the decision on this ground, however, it must not be understood that I mean to concede that a devise for such a purpose as was evidently contemplated by this testator, even if a competent trustee had been named, would be sustained as a valid, charitable use in this State. These endowments originated in England, at a period when the religious sentiment was strong, and their tendency was to run into superstition. In modern times the danger is of the opposite extreme of licentiousness. It is necessary that they should be carefully guarded from either, and preserved in that happy mean between both, which will most conduce to the true interests of society. Established principles will enable the courts to accomplish this. Charity is love to God and love to our neighbor; the fulfillment of the two great commandments upon which hang all the law and the prophets. The most invaluable possession of man are



faith, hope, charity, these three; but the greatest of these is charity. Love worketh no ill to his neighbor; therefore love is the fulfilling of the law. It is the fountain and source whence flow all good works beneficial to the souls or bodies of men. It is not easy to see how these are to be promoted by the dissemination of infidelity, which robs men of faith and hope, if not of charity also. It is unnecessary here to discuss the question under what limitations the principle is to be admitted that Christianity is part of the common law of Pennsylvania. By the third section of the ninth article of the Constitution it is indeed declared 'that all men have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences; that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship.' It is in entire consistency with this sacred guarantee of the rights of conscience and religious liberty to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace. *The laws and institutions of this State are built on the foundation of reverence for Christianity.* To this extent, at least, it must certainly be considered as well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or

blasphemed, to the annoyance of sincere believers who compose the great mass of the good people of the commonwealth. *Updegraph* v. *The Commonwealth*, 11 S. & R., 394; *Vidal* v. *Girard's Executors*, 2 How. (U. S.) 198. I can conceive of nothing so likely—so sure, indeed, to produce these consequences, as a hall desecrated in perpetuity for the free discussion of religion, politics, *et cetera*, under the direction and administration of a society of infidels. Indeed, I would go further, and adopt the sentiment and language of Mr. Justice Duncan in the case just referred to: 'It would prove a *nursery of vice*, a school of preparation to qualify young men for the *gallows* and young women for the *brothel*, and there is not a sceptic of *decent manners* and *good morals* who would not consider such a debating club as a common nuisance and *disgrace* to the city.' Judgment affirmed." (Italics ours.) (3 Am. Rep., 563, 564.)

We will next proceed to notice some of the utterances of this Court in the past.

**Bell v. The State, 31 Tenn. (1 Swan), 41-48.**

In the above case Bell had been indicted and convicted for the utterance of grossly obscene language. In the course of the opinion this Court, speaking through *McKinney*, J., among other things said:

"The distinguished commentator of the laws of England informs us that upon the *foundations* of the law of nature and the



*law of revelation* all human laws *depend*. 1 Bla. Com., 42. The municipal law looks to something more than merely the protection of the lives, the liberty, and the property of the people. *Regarding Christianity as part of the law of the land*, it respects and protects its institutions, and assumes likewise to regulate the public morals and decency of the community." (Italics ours.) (31 Tenn., 44.)

**Parker v. The State, 84 Tenn. (16 Lea), 476.**

In the above case Parker had been convicted for following his avocation of a blacksmith on Sunday; and he offered as a defense that he belonged to a religious sect who kept the seventh instead of the first day of the week as Sunday. In the course of the opinion, *Deaderick*, C. J., speaking for this Court, among other things, said:

"Judge McKinney says, in a case where a defendant had been indicted and convicted for the utterance of obscence words in public, and quoting from Blackstone's Commentaries, page 42, that the municipal law looks to *more* than the protection of the *lives*, *liberty* and *property* of the people. *Regarding Christianity as part of the law of the land*, it respects and *protects its institutions*, and assumes, likewise, to regulate the public morals and decency of the community. The same enlightened author distinguishes between the absolute and relative duties of individuals as members of society." (Italics ours.) (84 Tenn., 477-478.)

**Mayor, etc., of Nashville v. Linck, 80 Tenn. (12 Lea), 499, 514, 516-519.**

In the above case, Linck violated a city ordinance of the City of Nashville, which contained a provision against any person, etc., engaged in business and selling or trafficking or trading in any products, etc., keeping his place of business open upon the Sabbath day; and the ordinance contained certain provisos that allowed certain places of business to be kept open during certain hours on the Sabbath. The Court below had held the ordinance invalid, and this Court reversed that holding and sustained the validity of the ordinance.

*Cooke*, Special Judge, delivered one opinion in the case for this Court, and another *separate concurring* opinion, by *Freeman*, J., was also delivered in the case. From this last mentioned opinion we quote the following:

> "Far back in the life and law of the people from whom we derive our descent, whose usages and traditions have been handed down to us as our own, we have everywhere, for a thousand years and more, a recognition of the Christian Sunday as one of the institutions as characteristic of our social organism as is the marriage institution, and that to a single wife. That the peculiar view of the sanctity of the day characterizing the opinions of many have been carried to extreme lengths, and embodied a spirit



> of fanatical zeal for the day simply, may be conceded. In this, such persons have forgotten, perhaps, or failed to appreciate the view of the great founder of Christianity, when replying to religious formalists and zealots of his time as to the true meaning of the Jewish Sabbath—'that the Sabbath was made for man, not man for the Sabbath.' " (80 Tenn., 514.)

A little later in the same opinion it is said:

> "But there is another view of this question which I wish to present. It is well known, as any other universally seen fact, that on Sunday our people in the main habitually attend some one of the many Christian churches in country or town, which make up another well-known feature of the great civilization of which we are a part. That in these churches there is carried on in some one or other of the forms recognized by these various churches public services, in which the leading elements are worship of the one God of Christendom; and also, there is from some authorized agency, known as a minister, delivered a sermon or lecture, in which the tenets of his church may be the subject, but in all of which there is either directly, or as an undertone to all that is said and done, earnest and persistent enforcement of the eternal obligation of duty and a sound morality as binding and imperative upon the conscience of all, enforced by what are deemed sanctions appealing to the highest hopes and fears that are found in the bosom of our common humanity. Who can estimate lightly (as we some times hear all this spoken of) the im-

mense influence of all this moral and religious teaching upon the life of our people? Who would be willing, be he Christian or skeptic, to have all these churches closed, these worships dispensed with, these sermons unheard, crude though many of them may be in thought—yet all bearing with more or less weight on the moral life of the hearers. That a sound morality is essential to the higher life of every community is conceded by us. That to conserve and strengthen such morality is as a matter of public policy one of the most, if not the supremely desirable, end of social regulation, would not be hard to demonstrate. Without the sense of moral obligation making obedience to law a duty, and duty a 'categorical imperative,' so that the words 'I ought' shall compel the action of a majority, law is an useless and idle utterance, for all know that if no one in a community, or a majority, did not deem law sacred, obedience could or would not be enforced. All agreeing to let it remain a dead letter on the statute book, crime and vice would soon reign supreme in our land. The peace and safety of our people is preserved far more by the conscientious sense of duty than by the penal sanctions of our law. It being clear that the moral culture of our people as a mass is almost entirely derived, either directly or indirectly from the influence brought to bear on the public conscience, through the agency of the religious institutions for worship and teaching, which do their work on Sunday, it follows that any regulation tending to increase the efficiency of these agencies is one of vital public concern, and demanded by the best interest



of society. If all the occupations of a great city, or even a village, were permitted to be carried on as usual on this the day consecrated to worship and moral teaching, then it needs no argument to show that such interruptions to such exercises would continually occur, such prevention of attendance on the part of thousands who would otherwise attend, that this mighty source of moral influence would be weakened and greatly enfeebled in its beneficient work. *No community can afford to permit any burden on the religious instruction and moral life of its people without an injury and deterioration that will tend to increase crime and give vice dominance unless it will follow the path that leads toward destruction to all the highest and most sacred interests for which society is organized.*" (Italics ours.)

(80 Tenn., 516-519.)

Regardless of what may be the contention of counsel for defendant and any critical attitude or viewpoint by any of them in respect of the unimportance of the *nurturing* and *protection* of *religion*—we submit that the foregoing decisions and utterances of this Court, of the highest court of Pennsylvania, with its identical constitutional provision in regard to the freedom of religious worship, and of the Supreme Court of the United States, will furnish the true and really sound constitutional and legal *background* and *perspective* upon which this Court will judge of the constitutionality of the Act in question,

construed, as properly it is to be construed, to do nothing except prohibit the teaching in our public schools "that man has descended from a lower order of animals."

This theory and doctrine our adversaries frankly say at the top of page 10 of the Brief for defendant is in direct conflict with the theory in regard to the divine creation of man that is taught in the Holy Bible. At this point in their Brief the attorneys for defendant call the theory or hypothesis of evolution the "doctrine" of evolution, but on the sharp point in respect of the divine origin of man being in conflict with the theory of evolution as to man's origin "from a lower order of animals"—our adversaries say:

> "*Neither* the story of creation in the *first* chapter of Genesis, nor the conflicting story of creation in the *second* chapter of Genesis is *accredited* by *science*, but the doctrine of organic evolution, including the ascent of man 'from a lower order of animals,' is *universally accepted* by *scientists* at the present time." (Italics ours.)
>
> (Brief for Scopes, p. 10.)

To sustain the above proposition that the theory that man has descended "from a lower order of animals," which they admit discredits the story of divine origin of man as taught in the Bible, is "universally accepted by scientists" at the present time, the attorneys for defendant



cite the Encyclopedias Britannica, New International and The Americana.

The statement that the theory "that man has descended from a lower order of animals" is "universally accepted by scientists" is not a correct or true statement. This Court will judicially know, as a matter of current recorded knowledge and general history, that such statement is not correct or true.

Even if it were a true statement it does not follow by any means that the legislature of Tennessee cannot pass a statute—to protect and conserve all religions in this State—forbidding the teaching in our public schools and at public expense that "man has descended from a lower order of animals," when such thing is not now and never has been taught by any religion of any race of people in the known history of the world, and when teaching such thing would, in any event, enter the field of controversial religion and tend to produce undesirable and disturbing discussion of a purely religious matter to the detriment of school discipline; and which also might tend, in the opinion of the legislature, to strike at the "basis" of the doctrine of immortality of the soul, a disbelief in which would render any person incompetent to hold civil office in Tennessee.

Our adversaries seem to lose sight of the fact entirely that constitutional guaranties and limitations in respect of religious establishments or religion or religious liberty have been universally construed only to relate to legislative power in regard to mere religious "opinions" and "beliefs" while the legislature continues free to reach "actions" which are subversive or inimical to social duty or good order.

The provision of the Constitution of the United States is that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"—and yet the Supreme Court of the United States has repeatedly held, particularly in the cases where Congress had passed penal acts directed against Mormonism, that the effect of the above quoted provision of the Federal Constitution was merely to deprive Congress of all legislative power over "mere opinion," and that Congress was left free to reach "actions" which were in violation of "social duties" or subversive of "good order."

In other words, constitutional provisions against religious discriminations in legislation and guaranteeing equal freedom of worship to all, recognize the folly and the injustice of trying in any way "to control the *mental* operations of persons, and enforce an outward conformity



to a prescribed standard" in regard to religious *beliefs* and modes of *worship*.

> *Reynolds* v. *United States*, 98 U. S., 145, 164.
> *Davis* v. *Beason*, 133 U. S., 333, 342;
> *Mormon Church* v. *United States*, 136 U. S., 1.

It was in the case of *Davis* v. *Beason*, 133 U. S., 333, 342, cited *supra*, that the Supreme Court of the United States undertook to define the meaning of the term "religion" as used in the field of constitutional provisions and limitations, and in declaring what the term "religion" would be construed to refer to, the Court, speaking through Mr. Justice *Field* said—

> "The term 'religion' has reference to one's views of his *relations* to *his Creator*, and to the *obligations* they impose of *reverence* for his being, and character, and of *obedience* to his will. It is often confounded with the *cultus* or form of worship of a particular sect, *but is dintinguishable from the latter*." (Italics ours.)
> (133 U. S., 342).

We have hereinbefore quoted the frank admission and concession contained in the Brief of the Unitarian Laymen's League, filed as *amicus curiae*, but on behalf defendant Scopes—to the effect that so far as concerns "*orthodox* Christianity," which this Court knows to be the prevailing religion of practically all of the people

of this State, the theory "that man has descended from a lower order of animals" would strike at the "basis" of the "precious doctrine of *immortality*."

(*Ante*, pp. 41, 42).

This being true, it follows, of course, that the legislature, without preferring any religion over any other, could pass the Act in question to prohibit the teaching "that man has descended from a lower order of animals" for the protection and conservation of all religion, which this Court has declared to lie at the very *foundation* of the *structure of* our government and of more importance than any mere legal or *penal* sanctions to preserve the spirit of obedience to law.

For all the reasons hereinbefore stated under this main head of our Argument beginning on preceding page 223 hereof, and also stated and shown in presenting our Proposition of Law (6)—(*Ante*, pp. 63-72) we submit there is no sort of merit in Assignments of Error III and IV and that said Assignments should be overruled.



## E.

## THE ACT IS NOT INVALID BECAUSE OF ITS FAILURE TO "CHERISH" SCIENCE.

Under this main head, with its later subheads, of our Argument we will answer Assignment of Error V, which is stated at page 9, and fallaciously and confusingly discussed at pages 53 to 61 of the printed brief of the defendant Scopes.

By Assignment V the defendant insists that the Act in question is unconstitutional in that it violates Article XI, Section 12 of the Tennessee Constitution, which provides, among other things, that,—

> "It shall be the duty of the General Assembly * * * to cherish literature and science."

The applicable part of this section of the Constitution is as follows:

> "Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government to cherish literature and science."

This same section then proceeds to make cer-

tain provisions with reference to common schools and common school funds of the State of Tennessee.

It has been expressly ruled by the Supreme Court of Tennessee that the public school system of Tennessee was established in furtherance of this provision of the Constitution.

In the case of *State* v. *Knoxville*, 115 Tennessee, 175, at page 186, it is said:

> "The constitution of the State, recognizing that 'knowledge, learning, and virtue are essential to the preservation of republican institutions,' and that the diffusion of the opportunities and advantages of education throughout the different portions of the State would be highly conducive to the promotion of this end, imposed as an express duty upon the general assembly the encouragement of literature and science. As one of the chief means of accomplishing this most important purpose the constitution contemplated the establishment of a common-school system in the State, and provided that the fund, then 'known as the common-school fund . . . heretofore by law appropriated . . . for the use of common schools, and all such as may hereafter be appropriated, shall remain a perpetual fund for the maintenance of the common schools of the State.' Art. II, Sec. 12.
>
> "From time to time, both before the adoption of the constitution of 1870, and since, various acts have been passed by the legislature to enforce the efficiency of the common schools."



As early as 1844, in the case of *Green* v. *Allen*, 5 Humph., 169, at page 214, is found this language:

> "Letters promote civilization, and, when connected with the Christian religion in all its unapproachable beauty and grandeur, the result is the highest and most perfect state of human society. According to Lord Coke, in *Porter's Case*, 1 Coke, part 1, p. 24, there was no time so barbarous as to abolish learning and knowledge; much more in this enlightened day do they demand encouragement and support from every virtuous citizen."
>
> "We need not go back to a remote antiquity for authority upon this subject, for we find these principles incorporated into our fundamental laws. So strongly impressed were the framers of the amended Constitution of Tennessee with the importance of these objects, that, by an express provision, they made it 'the duty of the general assembly, in all future periods of this government, to cherish literature and science.' See Art. II, Sec. 10. This to be sure is merely a direction to the legislature, but it nevertheless indicates the popular feeling and the public policy upon this great question."

The language just above quoted was in a dissenting opinion of one of the members of the Court in that case, but in saying that this provision of the constitution was merely directory,

the justice delivering the dissenting opinion announced a ruling as to which there has never been any dissent by the Bar or the Courts in Tennessee. The part of the Constitution quoted in that case was from the Constitution of 1834, but as will be seen by comparison, it is in the exact words of the constitution of 1870, the present constitution of Tennessee. The provision in the constitution of 1834 was Sec. 10 of Art. XI, while the same words appear in the constitution of 1870, in Sec. 12, of Art. XI.

In the cases of *State* v. *University*, 87 Tenn. (3 Pick.), 233, 239, and *Ward Seminary* v. *Mayor and City Council of Nashville*, 129 Tenn. (2 Thomp.), 412, 418—this Court has said the above constitutional provision was but

> —"*declaratory* of the *sense* of the constitutional convention on the subject of education, and the duty of subsequent legislatures to *cherish it.*"

Indeed, our adversaries do not insist that this provision of the Tennessee Constitution is, or was intended to be, *mandatory*.

At page 53 of defendant's printed brief, in discussing this assignment of error, our adversaries say:

> "*Granted* that the legislature *may refuse* to establish schools 'to cherish science.' *Granted* that there is no overshadowing



> power to *compel* it. Still, if the legislature does establish schools for the teaching of science, does it not become mandatory upon the legislature to cherish *science* and not *heresy?*"

Even under the above view—we ask who is to decide what is "*science*" and what is "*heresy*"? Is this to be decided by the constitutional legislative representatives of the people of Tennessee, or by the attorneys for Scopes or the Civil Liberties Union, or the individual school teachers of the State?

Pages 54-64 of the defendant's printed brief contain the major portion of the discussion of this assignment and are devoted to a rather crude and uncritical catch-phrase discussion of their concept of "Evolution," and its truth or falsity, according to "science";—a matter with which this Court, in the consideration of the pending case, has no concern.

What the legislature has done by the challenged Act is simply to prohibit a teacher in the public schools of the State from teaching "*that man has descended from a lower order of animals.*" Whether this is science or whether it is heresy, is not within the purview of the courts to say. Whether science teaches one thing on the question, and the Bible teaches another, or whether science and religion conflict, or whether, rightly

interpreted, and rightly understood, they are in entire accord, are questions which this Court will not undertake to decide.

The validity of this Act in no manner depends upon what view the five men who constitute the present Supreme Court of Tennessee may have upon subjects of this character. It is the insistence of the State of Tennessee that what subjects shall be taught in the public schools of Tennessee, and more particularly what shall not be there taught, are matters entirely within the control and keeping of the legislature of the State. The position of our adversaries, followed to its logical conclusion, would lead to most absurd results.

Our adversaries say further, at page 59 of their printed brief:

> "The legislature may undoubtedly, within reasonable bounds, prescribe what sciences shall be taught in the public schools; but under the Constitution, with the solemn duty resting upon it to foster science, the legislature cannot prescribe for the public schools, courses in biology, geology, botany or any other science and then deliberately set aside the fundamental principles of these sciences and set up theories of its own."

The legislature, they say, may prescribe, but must stay "within reasonable bounds." Who is



to determine the bounds, and what bounds are reasonable? Whose schools are the public schools of Tennessee, anyway? What power or control have the courts of Tennessee over their curricula, the discipline of pupils or of teachers therein? Who determines what is for the general welfare of the people of the State so far as its public school system is concerned?

It is the position of our adversaries that if there is a difference of opinion upon any subject, and some think one way, and some another, as to what is for the general welfare, then the courts must undertake to determine according to the views of the particular individuals who happen to occupy position on the bench.

This whole theory as to the power of the legislature, and the function of the courts, in dealing with the acts of a legislature for the public welfare was exploded by the Supreme Court of the United Sates by the decision in the case of—

**Jacobson v. Massachusetts, 197 U. S., 11.**

The above case involved the constitutionality of certain provisions in the statutes of Massachusetts relating to vaccination. The defendant violated the law by refusing or neglecting to comply with its requirements. He assailed the validity of the law as in violation of the Fourteenth Amendment to the Constitution of the

United States. The defendant sought to introduce the testimony of himself and of certain medical experts who did not believe in vaccination, and who regarded it as dangerous, ineffective and unwise.

With reference to this, the Court, in its opinion, at page 30, says:

> "Looking at the propositions embodied in the defendant's rejected offers of proof it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body."

And further:

> "It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain."

And at page 34, it is said:

> "The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good.
>
> "It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox."



And at page 35, it is said:

> "The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the COMMON BELIEF OF THE PEOPLE, are adapted to prevent the spread of contagious diseases."

These things the Court has said in discussing primarily the police power of a State. How much less is it the function of the courts to interfere when the State is exercising its sovereign authority over its public schools or any other public work which the State may undertake.

As before stated, almost the entire argument of our adversaries in the discussion of this Assignment of Error No. V, is devoted to a loose discussion of the general and *variegated* subject of evolution. The truth or falsity of "Evolution," how far it is a theory, how much a hypothesis or how great a guess, how much or how little of fact is involved in the question, or wherein or whether it does or does not conflict with religion, are not matters which are in issue here.

The pertinency of the discussion is very well illustrated by the language appearing on page 60 of defendant's brief, as follows:

> "Can the legislature by its own fiat create a new heaven and a new earth? Can it reverse natural law, change the tides and seasons, formulate new rules of mathematics and new postulates of science?"

If it is intended for the State of Tennessee to answer these inquiries, we unhesitatingly say "No."

We can put to our adversaries inquiries just as pertinent, as follows:

> "Canst thou draw out leviathan with an hook? or his tongue with a cord which thou lettest down?
>
> "Canst thou put an hook into his nose? or bore his jaw through with a thorn?" (Job 41: 1-2.)

On page 72 of defendant's brief, it is further said:

> "We are informed that, *even in Tennessee today*, there are religious sects which reject medicine, claiming it is the invention of the Devil."

Can it be possible? Is the information of our adversaries as to the existence of such a sect or sects limited to the State of Tennessee?

Are there none of such a sect or sects in New York or Illinois or even Massachusetts? Have



our adversaries ever had information that the "Mother Church" of what is perhaps the most numerous of the "religious sects which reject medicine" exists in the City of Boston, and that the largest number of this sect proportional to population exists there? This city,—the so-called "Hub,"—the alleged seat of the mighty among the learned, the intellectual, the scholarly and the cultured. This sect call themselves "Christian Scientists."

Could not our adversaries as truly have said that "even" in Boston, "even" in Massachusetts, "even" in New York, "even" in Chicago, or "even" most any other place of any considerable population in this country, there are religious sects which reject medicine?

Does it not about come to this, with our adversaries,—that if you believe in that theory of evolution that teaches "that man has descended from a lower order of animals," you can belong to most any sort of religious sect you please, and whether you accept medicine or reject medicine, you are still to be accounted a highly intelligent, intellectual and "scholarly" Christian. If you do not accept this theory, whatever else may be the accomplishments of an individual, he is to be committed to the civil junk pile, so far as intelligence or intellectuality goes, and he must live

and move and have his being in a land of *pseudo*-scientific superficial chattering, where, spiritually and therefore *really*, only darkness exists and light never comes.

At page 71 of defendant's brief, it is further said:

> "To teach that man has these vestigial members, which have no use today but which functioned during the progress of the race, might lead a student to believe that there is some evidence that man was descended from a lower order of animals. Has a teacher, under such circumstances, merely by teaching the facts, violated the statute? Is it reasonable to inhibit a teacher from stating to the students the theories which scientists deduce from the facts? It is safe to say that, in the event that these scientific facts cannot be taught in a medical school in Tennessee, either the students of Tennessee must go elsewhere for their medical education or the doctors of Tennessee must be had from other states."

Our adversaries, we think, in the next line of their brief, answer this insistence, when they say:

> "If it be claimed that this particular Act is *too limited* to have those *consequences*, we should answer that the *principle* involved in this Act would lead to the inhibition of the teaching of various phases of medical science, if such phases are contrary to the Bible."



The "principle" involved in the Act is that, without hampering any *science* to any *degree*, the Act protects school discipline against unscholarly disturbance and intrusion, protects and conserves *all religions*, according to the "*common belief*" of the "great mass" of our people; and thereby tends to perpetuate our established constitutional institutions against subversive propaganda.

It is most apparent, we submit, that the chief aim which those who are most active in undertaking to discredit and invalidate the Act in question is to discredit the Bible and to overturn religion. From whatever angle they approach the subject, they come out with an assault on the Bible. Far-fetched and unwarranted is the criticism in every instance. In each instance, a straw man is set up to be gleefully demolished by windy wordiness.

To talk about the challenged Act preventing the teaching of real Biology or any other "science" in Tennessee is *puerile*.

### A Survey by Quiet Culture.

Let us take a little journey into an atmosphere of real scholarship and respect for real quiet and culture.

Vanderbilt University, at Nashville, Tennessee, in the month of October, 1925, held a Semi-

Centennial. In attendance upon the Semi-Centennial exercises were delegates from eight foreign universities and colleges, one hundred sixty-eight American universities and colleges, and twenty-six foundations and societies. Among the universities represented by delegates were the University of Oxford, England; Universite de Grenoble, France; University of Toronto, Canada; Kyushu Imperial University, Fukuoka, Japan; Kwansei Gakuin University, Kobe, Japan; Universite Catholique, Louvain, Belgium; Universidad Nacional de Mexico, Mexico City, Mexico; Peking Union Medical College, China; Harvard; Yale; Columbia; Brown; Rutgers; Dartmouth; Emery; Duke; Northwestern; Richester; Cornell; Vassar; Lehigh; Boston. Among the foundations and societies represented by the delegates were the American Academy of Arts and Letters, American Association for the Advancement of Science, American Medical Association; Botanical Society of America, Carnegie Corporation of New York, Geological Society of America, National Academy of Science, and Rockefeller Institute of Medical Research. These are just a few of the many of the universities and societies represented in this outstanding gathering of men prominent in university and college life in America. They are mentioned to show the character of those in attendance.



Among the addresses delivered at this Semi-Centennial was an address of Professor Paul Shorey, of the University of Chicago, on the subject,—

"The Discipline of Culture and the College Curriculum."

Professor Shorey in this address, stood for putting to the forefront the cultural and classical studies in the college curriculum rather than putting the emphasis on the vocational or utilitarian.

Among other things, he said:

> "However it may have been in the past and with allowance for individual exceptions, the extremists today are the advocates of more vocational and less cultural studies in the college curriculum. No reasonable classicist, to take our example from the right wing of the partisans of culture, is opposed to either the theory or practice of the party that insists that education should prepare for life. We only ask a little consideration for Ruskin's monition that there may be an education which is itself an advancement in life. We admit that mental and manual training and useful work may for some students and to some extent be advantageously combined. We only query whether the process may not be carried too far, and whether in such contacts the more fragile vessels may not be broken and the precious contents spilled and wasted. We concede a certain measure of cultural and

disciplinary value even to the most lowly and utilitarian pursuits. We grant that the ambition and the interest of many boys cannot be kindled by abstract disciplinary or literary studies, and that for such, perhaps, after a fair trial, something more obviously related to practical life should be the staple of education."

And again he says:

"Three ideas may help to define the conception of a liberal education: culture, disinterestedness, discipline. * * *

"Most of us know well enough what culture is if we are not required to define it. And the ironical demand for a definition is usually only a debater's point. When not engaged in controversy, all thoughtful Americans are aware that our university faculties are now filling up with specialists who are not men of culture, not quite educated men."

Professor Shorey further says:

"I have no desire to stir the embers of smoldering controversy, but the course of the argument compels me to remind you that the outrageous affirmation that psychology has disproved mental discipline and discredited the testimony of common sense and experience, that some studies can impart more of it than others, was only a hastily snatched weapon of debate which wounded the hands that grasped it. The more intelligent psychologists are a little ashamed of the whole business."



He further says:

"I intended to keep the King Charles head of *pseudo*-science out of this paper. It cannot be done. The invidious designation is of no moment. But no serious discussion of college education is possible that does not weigh the claims of the studies that profess or prophesy the application of the methods of the physical sciences to the study of mind and the products of mind; the Geisteswissenchaften—spook sciences, I am tempted to mistranslate—*including prehistoric origins from metaphysical biology to anthropology, comparative religion, the psychologies of the laboratory, sociology*, and that quaint pudding-stone mixture of them all, the science of education.

"It is the *preposterous intrusion* of these studies that crowds the undergraduate curriculum and keeps alive the obsolete quarrel between classics and science, which else would have no meaning. Students well trained in either science or sober, critical, linguistic, historical, and literary studies will, with a few temperamental exceptions, do well in the other field. *The hard surface varnish* and the *false conceit of knowledge* imparted by the *pseudo*-sciences render youthful precocity *recalcitrant to the discipline* and *impervious to the methods of either science or sound criticism.*

"The representatives of the *true sciences* will in time realize this. Meanwhile the usurpation of the name and the *parody of the methods* of physical science win their careless approval and expose the humanistic critic to the charge of obscurantist hostility to all science and progress. It is in the

twilight zone of metaphysical biology, that *parasite upon real biology*, that the *equivocation begins* and the *confusion is deepest.* The red excesses of Mr. Bryan's followers have provoked a sort of white terror in our colleges. So that my scientific colleagues eye me askance if I venture to say that, while I believe in teaching to *biologists* all that *science* can find out about *evolution*, I do not believe in teaching Wiggam or Westermarch or Prof. James Harvey Robinson or Mr. H. G. Wells to *undergraduate classes* in ethics, philosophy, or religion.

"But I have neither the time nor the knowledge to criticize biology, which has only a left-wing or bar-sinister connection with the *pseudo*-sciences, and I mention it only for completeness of enumeration."

(Italics ours.)

Listen to the following from Professor Shorey, and remember to whom, and in whose presence, it was said:

"Criticism of the *present mania* for the *conjectural reconstruction* of *prehistoric origins* is still more exposed to misconception. I have never met an academic personage who would admit that he saw any point in my objection to Westermarck 'on the origin of the moral ideas' as an undergraduate textbook. And yet some of them must know who the writers are that by preference quote Westermarck, for *what purposes* of propaganda, and what the natural effect of his *generalizations* on the *adolescent mind* must be. But the suspicion that I am blaspheming the *Holy Ghost of Evolution* or have sinister designs upon *academic freedom* of teaching closes the door to all other interpretations.



"A prominent professor of education testified not long ago that it is *impossible* to teach human institutions and similar subjects without teaching *evolution*, by which, *perhaps*, he meant some *equivocal amorphous hybrid* of the introduction to H. G. Wells' history and what is called the 'historical method.' But *whatever* he meant, the fact is that the *overemphasis* on *evolution*, which Lord Bryce, as well as Ruskin, Carlyle, and Matthew Arnold, deprecated, and the *preoccupation* with the *hypothetical* reconstruction of *origins*, is the *main delusion* that threatens the *critical scholarly spirit with extinction*, and is hopelessly muddling all the Geisteswissenchaften today. The evidence for this is *overwhelming*. I cannot give it here, but am prepared on any definite challenge to produce enough of it to make up an issue. THE MAJORITY OF THE BOOKS THAT STRESS PREHISTORIC AND BIOLOGICAL ORIGINS IN CONNECTION WITH THESE STUDIES ARE UNCRITICAL AND UNSCHOLARLY IN METHODS AND INFORMED WITH THE PURPOSE OF SUBVERSIVE PROPAGANDA. It is not I who say this. The *purpose is avowed.* Professor Dewey *admits it in terms*, as do Westermarck, Bertrand Russell, James Harvey Robinson, many of Professor Boas' disciples, Mrs. Elsie Clew Parsons, Professor Gilbert Murray, and numerous others."

(Italics ours.)

"Herbert Spencer says that savages and semi-civilized tribes teach us more than the

Greeks and Romans and civilized nations. Huxley says that we ought to rescue the survivals of primitive ideas and superstitions in the Bible from their relatively unimportant surroundings. Miss Harrison says that Fraser's 'Psyche' showed us how our most cherished institutions, private property, the inviolability of human life, the sanctity of marriage, had arisen out of unreasoning prejudice. *And I find ten copies of 'Psyche' on the undergraduate reference shelf of a great American university.* Bertrand Russell says that the study of uncivilized nations makes it clear beyond question that the *customary beliefs* of *nations* are almost *universally false.*

"How much more would it be needful to quote in order to make a *prima facie case* for the opinion that THESE STUDIES ARE NOT SUITABLE FOR UNDERGRADUATES?" (Italics ours.)

"But all this only concerns their *moral influence*, and science, it will be said, has nothing to do with the alleged *consequences* of *its teaching*. 'The truth shall make you free.'

"Well, my own *personal faith* in the sovereignty of *civilized ethics* and *essential religion* is as fixed as that of Plato, Schleiermacher, Emerson, and Matthew Arnold, and is not more likely to be disturbed by the *new sophistry* than Plato's was by the old. It is the *defiance* of all *rational logic* and *criticism* in these books and the *bewilderment* that they have produced in the minds of students to whom I was trying to teach



Greek philosophy and ethics that first provoked in me this reaction against them."
(Italics ours.)

Again Professor Shorey says:

"To return finally to what through all the wanderings of the argument has been its goal, the preservation of the American college, there are, as we have already hinted, two other considerations besides that of its purely *intellectual efficiency* that should have weight with us. I am not more likely than another to underestimate that side of the college, for it is the only one with which I am personally concerned. I never played football or sang college songs, or belonged to a Greek-letter society. But I might be tempted to think of the college only as a scholastic machine; so it would be my economic interest to open our gates to the flood of *unselected immigration* in order that I might afford to keep a cook in my declining years. But our judgments of American policies need not be wholly determined by temperamental tastes or economic interests. In the last few years especially the life-long unconscious love of America has been kindled into a conscious passion that threatens to swallow up all other feelings. It is the persistence of the war psychology, if we are to believe our radical and *pseudo*-scientific friends. And the perhaps too positive tone of this paper may be due quite as much to that sentiment as to *prejudice* against *pseudo*-science. This mood resents the assumption of the European peoples that America is not an entity, but a geographical expression, a void domain, wide

open to every kind of colonization, penetrating assimilation, and mining from without—a milch cow to be drained dry, a treasury of natural resources to be distributed. And it is still more impatient of the school of American (they call themselves 'American') critics who may profess a constructive purpose, but in practice use 'American' as an adjective of vituperation, and tells us, as they actually do, that America has no universities, no cluture, no literature, no art, no *scholarship*, no traditions worth preserving, and add for good measure that the conditions of American life are *incompatible with these things*, that Switzerland and Denmark each produces more good novels annually than the United States in a decade, and *that the government of the United States in the last few years is the worst known in recorded time.*" (Italics ours.)

This last quotation is for the comfort and consolation of "benighted" Tennesseans, as our adversaries imply them to be, and for the thoughtful consideration of our adversaries that just beyond their limited horizon of thought, and across the way from them, are thousands who are talking and thinking of America and American institutions in the same strain and with the same line of thought as our adversaries are talking and thinking of Tennessee and its people.

Note the direct charge made by Professor Shorey when he says:

"The majority of the books that stress



*prehistoric* and *biological origins* in connection with these studies are *uncritical* and *unscholarly* in methods and informed with the purpose of *subversive propaganda.*"

And again his statement:

"How much more would it be needful to quote in order to make a *prima facie* case, for the opinion that these studies *are not suitable for undergraduates?*"

And his reference to—

"The suspicion that I am blaspheming the *Holy Ghost of Evolution* or have sinister designs upon *academic freedom* of *teaching.*"

And then further:

"It is in the twilight zone of metaphysical biology, *that parasite upon real biology*, that the equivocation begins and the confusion is deepest." (Italics ours.)

And how in reply to the suggestion that—

"All this only concerns their moral influence, and science, it will be said, has nothing to do with the alleged consequences of its teaching. 'The truth shall make you free' "—

—he expresses his own *personal faith* in the *sovereignty* of *civilized ethics* and *essential religion.*

Professor Shorey certainly suggests and points the way to the danger that lies in the in-

discriminate teaching of "*pseudo*-science" and "metaphysical biology." Remember finally his statement that,—

> "The majority of the books that stress prehistoric and biological origins in connection with these studies are *uncritical* and *unscholarly* in methods *and informed with the purpose of subversive propaganda.*"

The foregoing quotations from Professor Shorey are reported in the proceedings of the Semi-Centennial of Vanderbilt University, published under the auspices of that University, and can now be had in book form. This address of Professor Shorey can be found on pages 95 to 126, inclusive.

If the "unenlightened" members of the legislature of Tennessee, in the passing of the Act in question, scented something of the same danger and had a suggestion of the breakers ahead, this will be sufficient to sustain the validity of the Act, whether based upon the particular power of the legislature to direct and control its public school system or the police power of the State.

Perhaps we can quote from an author that will be more authoritative, from the standpoint of our adversaries, upon the general question as to the effect of doctrines taught to students, and that there is a time "too early" in the student's life for certain doctrines to be taught.



We wish to direct the Court's attention to an excerpt from the proposed address of Honorable Wm. J. Bryan on the trial of the pending case in the court below. The address was not delivered on account of the turn the case took in its last hours, but has been widely read and published. The excerpt is as follows:

> "Do bad doctrines corrupt the morals of students? We have a case in point. Mr. Darrow" (referring to Mr. Clarence Darrow, one of the counsel in the pending case), "one of the most distinguished criminal lawyers in our land, was engaged about a year ago in defending two rich men's sons who were on trial for as dastardly a murder as was ever committed. The older one, 'Babe' Leopold, was a brilliant student, 19 years old. He was an evolutionist and an atheist. He was also a follower of Nietzsche, whose books he had devoured and whose philosophy he had adopted. Mr. Darrow made a plea for him, based upon the influence that Nietzsche's philosophy had exerted upon the boy's mind. Here are extracts from his speech:
>
> " 'Babe took to philosophy, . . . He grew up in this way; he became enamoured of the philosophy of Nietzsche. Your Honor, I have read almost everything that Nietzsche ever wrote. A man of wonderful intellect; the most original philosopher of the last century. A man who made a deeper imprint on philosophy than any other man within a hundred years, whether right or wrong. More books have been written about him than probably all the rest of the

philosophers in a hundred years. More college professors have talked about him. In a way, he has reached more people, and still he has been a philosopher of what we might call the intellectual cult.

" 'He wrote one book called 'Beyond the Good and Evil,' which was a criticism of all moral precepts, as we understand them, and a treatise that the intelligent man was beyond good and evil, that the laws for good and the laws for evil did not apply to anybody who approached the superman. He wrote on the will to power.

" 'I have just made a few short extracts from Nietzsche that show the things that he (Leopold) has read, and these are short and almost taken at random. It is not how this would affect you. It is not how it would affect me. The question is how it would affect the impressionable, visionary, dreamy mind of a boy—A BOY WHO SHOULD NEVER HAVE SEEN IT—TOO EARLY FOR HIM.'

"Quotations from Nietzsche: 'Why so soft, oh, my brethren? Why so soft, so unresisting and yielding? Why is there so much disavowal and abnegation in your hearts? Why is there so little fate in your looks? For all creators are hard and it must seem blessedness unto you to press your hand upon millenniums and upon wax. This new table, oh, my brethren, I put over you: Become hard. To be obsessed by moral consideration presupposes a very low grade of intellect. We should substitute for morality the will to our own end, and consequently to the means to accomplish that. A great man, a man whom nature has built



up and invented in a grand style, is colder, harder, less cautious and more free from the fear of public opinion. He does not possess the virtues which are compatible with respectability, with being respected, nor any of those things which are counted among the virtues of the herd.'

"Mr. Darrow says, that the superman, a creation of Nietzsche, has permeated every college and university in the civilized world.

" 'There is not any university in the world where the professor is not familiar with Nietzsche, not one. . . . Some believe it and some do not believe it. Some read it as I do and take it as a theory, a dream, a vision, mixed with good and bad, but not in any way related to human life. Some take it seriously. . . . There is not a university in the world of any high standing where the professors do not tell you about Nietzsche and discuss him, or where the books are not there.

" 'If this boy is to blame for this, where did he get it? Is there any blame attached because somebody took Nietzsche's philosophy seriously and fashioned his life upon it? And there is no question in this case but what that is true. Then who is to blame? The university would be more to blame than he is; the scholars of the world would be more to blame than he is. The publishers of the world . . . are more to blame than he is. Your Honor, it is hardly fair to hang a nineteen-year-old boy for the philosophy that was taught him at the university. It does not meet my ideas of justice and fair-

ness to visit upon his head the philosophy that has been taught by university men for twenty-five years.'

"In fairness to Mr. Darrow, I think I ought to quote two more paragraphs. After this bold attempt to excuse the student on the ground that he was transformed from a well-meaning youth into a murderer by the philosophy of an atheist, and on the further ground that this philosophy was in the libraries of all the colleges and discussed by the professors—some adopting the philosophy and some rejecting it—on these two grounds he denies that the boy should be held responsible for the taking of human life. He charges that the scholars in the universities were more responsible than the boy, because they furnished such books to the students, and then he proceeds to exonerate the universities and the scholars, leaving nobody responsible. Here is Mr. Darrow's language:

" 'Now, I do not want to be misunderstood about this. Even for the sake of saving the lives of my clients, I do not want to be dishonest and tell the court something that I do not honestly think is the case. I do not think that the universities are to blame. I do not think they should be held responsible. I do think, however, they are too large, and that they should keep a closer watch, if possible, upon the individual.

" 'But you cannot destroy thought because, forsooth, some brain may be deranged by thought. It is the duty of the university, as I conceive it, to be the great storehouse of the wisdom of the ages, and to have its students come there and learn and



choose. I have no doubt but what it has meant the death of many; but that we cannot help.'

"This is a damnable philosophy, and yet it is the flower that blooms on the stalk of evolution. Mr. Darrow thinks the universities are in duty bound to feed out this poisonous stuff to their students, and when the students become stupified by it and commit murder, neither they nor the universities are to blame. I am sure, your Honor and gentlemen of the jury, that you agree with me when I protest against the adoption of any such philosophy in the State of Tennessee. A criminal is not relieved from responsibility merely because he found Nietzsche's philosophy in a library which ought not to contain it. Neither is the university guiltless if it permits such corrupting nourishment to be fed to the souls that are entrusted to its care. But, go a step farther, would the State be blameless if it permitted the universities under its control to be turned into training schools for murderers? When you get back to the root of this question, you will find that the legislature not only had a right to protect the students from the evolutionary hypothesis but was in duty bound to do so.

"While on this subject, let me call your attention to another proposition embodied in Mr. Darrow's speech. He said that Dickey Loeb, the younger boy, had read trashy novels, of the blood and thunder sort. He even went so far as to commend an Illinois statute which forbids minors reading stories of crime. Here is what Mr. Darrow said: 'We have a statute in this State, pass-

ed only last year, if I recall it, which forbids minors reading stories of crime. Why? There is only one reason; because the legislature in its wisdom thought it would have a tendency to produce these thoughts and this life in the boys who read them.'

"If Illinois can protect her boys, why cannot this State protect the boys of Tennessee? Are the boys of Illinois any more precious than yours?

"But to return to philosophy of an evolutionist. Mr. Darrow said: 'I say to you seriously that the parents of Dickey Loeb are more responsible than he, and yet few boys had better parents.' . . . Again, he says, 'I know that one of two things happened to this boy; that this terrible crime was inherent in his organism, and came from some ancestor, or that it came through his education and his training after he was born.' He thinks the boy was not responsible for anything; his guilt was due, according to his philosophy, either to heredity or to environment.

"But let me complete Mr. Darrow's philosophy based on evolution. He says: 'I do not know what remote ancestor may have sent down the seed that corrupted him, and I do not know through how many ancestors it may have passed until it reached Dickey Loeb. All I know is, it is true, and there is not a biologist in the world who will not say I am right.' "

It may have been that the "unenlightened" legislators of Tennessee entertained something of the view of Mr. Darrow as to the effect of un-



wise teaching to the pupil or student in the schools of Tennessee, "too early for him." It may be that Mr. Darrow thinks the teaching of evolution in the public schools wise and proper; nevertheless, if the legislature differed from him, and thought it not good policy to permit the teaching to immature minds of students in the public schools of Tennessee "that man has descended from a lower order of animals," the legislature was certainly within the exercise of its own peculiar power, and acting within its own exclusive sphere in prohibiting such teaching, and was really performing its *high duty* in so doing.

Again, we submit, the legislature could have had in mind, the quality of teachers who are available for the public schools of the state. How few of them could be found who could intelligently discuss the question of "Evolution" —in view of the raging conflict, confusion and crisis in that field of *pseudo*-scientific thought and frenzy, to be hereinafter noticed; and how superficial of necessity the teaching of the subject so far as the origin of man is concerned would be. The legislature may have remembered that—

## "A LITTLE LEARNING IS A DANGEROUS THING."

No really great and outstanding scientist, none except (1) the little group of superficialists and those who are very desirous and enthusiastic to be regarded as sublimated "intellectuals," (2) some well-intentioned would-be rescuers of religion who have been unduly alarmed by the clamor of these superficialists, and (3) some others who belong to the forces of unrest—have ever *claimed* that it has ever been, or, by the nature of things, can ever be, demonstrated or established "that man has descended from a lower order of animals."

It has been and is, for the most part, reserved to those who "rush in"—those near-"scientific" intolerants who mistake and substitute superficial and fragmentary reading and study for real scientific learning and profundity, and some other sinister ones who thoroughly understand that surely to overthrow the existing order and established government, *all* religions must be undermined—to those is it reserved to make any clamorous statement or contention that it has ever been or can ever be really established or demonstrated that man has descended from a lower order of animals.

None other than these who brush the surface of science and are intolerant of opposition to the



dangerous thing of their "little learning," and persons misled by them, and those others who abhor all religion because they resent that orderly government of society which is largely dependent for its existence upon a sense of religious duty, creating in the human heart a belief in the categorical imperative "I ought"—have ever insisted that it has ever been or can ever be *established* or *demonstrated* "that man has descended from a lower order of animals," or that to prohibit the teaching of such undemonstrated and undemonstrable hypothesis will hamper any "science" or retard, to any degree, any "scientific" progress.

To those "scientific" *dilettanti* and "intolerants" who appear to have become so saturated with the patter and jargon of each other in regard to the "hypothesis" (unproven assumption), or "theory" (speculation) that man has descended from a lower order of animals, that they do not stop to analyze the statements and admissions of the really eminent and outstanding scientific protagonists of this "guess"—(who concede that it is, and must ever be, merely a "guess," with many insurmountable difficulties in the way of ever establishing its truth)—we recommend for careful thought and perusal a paragraph in the *introduction* to the book of McCann (1921), as follows:

"Journalists, popular writers, school teachers and pupils of advanced grades are the *chief victims* of this weird compound of scientifically *flavored catch phrases* and extravagantly *fabricated skeletal evidence* in support of the theory that 500,000 years ago a huge ape, which was not gorilla, chimpanzee, orang or gibbon, became the father of an ape-man who by infinitesimal steps over gigantic periods of time gradually lost his ape character and became the father of modern man."

To this same relatively very small group of *pseudo*-scientists who, for the last few years, have been very busy parading around on a small rug and hypnotizing themselves and each other with a revival of the superficial chattering in regard to the truth of the "hypothesis" (guess) of the "Evolution" or "Transformism" theory in regard to the origin of man, and who feel constrained repeatedly to make hysterical and incoherent reference to the Galileo incident, to which the attorneys for defendant Scopes make such seemingly serious and pathetic references in their Brief in the case at Bar—we recommend the careful perusal and study of the recent unbiased, frank and learned book of O'Toole (published in 1924 and re-published in 1926), from the "Foreword" of which we quote the following paragraph:

"There is, in brief, no parity at all between Transformism and the Copernican theory. Among other points of difference,



Tuccimei notes especially the following: 'The Copernican system,' he remarks, 'explains *that which is*, whereas evolution attempts to explain *that which was;* it enters, in other words, into the problem of origins, an *insoluble problem* in the estimation of *many illustrious evolutionists*, according to whom no *experimental verification* is possible, given the processes and factors in conjunction with which the theory was proposed. But what is of still greater significance for those who desire to see a parallelism between the two theories is the fact that the Copernican system became, with the discoveries of Newton, a demonstrated thesis, scarcely fifty years after the death of Galileo; the theory of evolution, on the other hand, is at the present day no longer able to hold its own even as an hypothesis, so numerous are its incoherencies and the objections to it raised by its own partisans." (*La Decadenza di una Teoria*, 1908, p. 11.)

To this same relatively small group of near-scientists, whose members appear to be self and mutually hypnotized—we suggest the simple *realization* and *appreciation* of the fact that in Darwin's own "Origin of Species," which he admits to be the foundation of his later book on "The Descent of Man," it is *expressly admitted* that his entire "hypothesis" is and must remain but a *guess*. This is demonstrated by the keystone paragraph of Darwin's "Introduction" to his "Origin of Species," which is as follows:

"I am well aware that scarcely a *single point* is discussed in this volume on which

*facts* cannot be adduced, often apparently leading to conclusions *directly opposite* to those at which I have arrived. A *fair result* can be obtained only by fully stating and balancing the facts and arguments on both sides of each question; and this is *here impossible.*" (Italics ours.)

To this same small group of the ultra-modern self-styled "intellectuals" or "*intelligentsia*" and "esthetics"—we recommend an appreciation of the fact that, in his introduction to "The Descent of Man," Darwin himself admits that his hypothesis therein set forth is foundationed and entirely dependent upon his views expressed in his earlier "Origin of Species," which, as we have just shown, he admitted contained scarcely a "single point" as to which "*facts*" could not be adduced leading to conclusions "directly opposite" to those at which he had arrived; and as to which he admitted, as we have seen, that no "fair result" could be obtained, because that would require the full stating and balancing of the facts and arguments on both sides of the question which he frankly admitted, as we have seen, is "here impossible" and we might add, elsewhere impossible. Of course, in so far as the admitted *mere guess* of Darwin, in regard to the "Origin of Species" and the "Descent of Man," is to be regarded as largely dependent upon or confirmed by the agency of "natural selection," to which he attached so much im-



portance—it now stands *disavowed* and *discredited* by the modern group of the protagonists of the Evolution or Transformism hypothesis as to the origin of man.

To the few well-meaning Christians referred to by the attorneys for Scopes as "scholarly" and who have been so impressed by the clamor of the few ultra-modern *pseudo*-scientists that the descent of man from a lower order of animals is now the "universally accepted" *scientific view*, so that these "scholarly Christians" feel called upon to rescue religion from a possible renewal of the Galileo episode—we recommend a real study and appreciation of the thought contained in another paragraph of the "Foreword" of O'Toole's recent book hereinbefore referred to, as follows:

> "The prospect, then, of a renewal of the Galileo episode is exceedingly remote. Far more imminent to the writer seems the danger that the well-intentioned rescuers of religion may be obliged to perform a most humiliating *volte face*, after having accepted all too hastily a doctrine favored only for the time being in scientific circles. It is, in fact, by no means inconceivable that the scientific world will eventually discard the now prevalent dogma of evolution. In that case those who have seen fit to reconcile religion with evolution will have the questionable pleasure of reconciling it in response to this reversal of scientific opinion."

These same "scholarly Christians" ought also to realize and recall the sad state to which the cultured George John Romanes—(sometimes referred to as the successor of Darwin, and who was prominent enough to be given extended space and reference in both the Encyclopedia Americana and the Encyclopedia Britannica)—was *reduced* by the study and belief in the *guess* which lies at the basis of the "new faith." Romanes, like Darwin, at one time accepted the views and convictions of orthodox Christianity. Like Darwin, Romanes was led by evolution away from religion. (See "Thoughts on Religion," p. 180.) For 25 years he could not pray. Shortly after becoming an agnostic he wrote his book entitled, "A Candid Examination of Theism," under the assumed name of "Physicus"; and in this book he set out (see p. 29 of "Thoughts on Religion") the following sad and pathetic confession:

> "And for as much as I am far from being able to agree with those who affirm that the twilight doctrine of the 'new faith' is a desirable substitute for the waning splendor of 'the old,' I am not ashamed to confess that with this virtual negation of God the universe to me has lost its soul of loveliness; and although from henceforth the precept to 'work while it is day' will doubtless but gain an intensified force from the terribly intensified meaning of the words that 'the night cometh when no man can work,' yet when at times I



> think, as think at times I must, of the appalling contrast between the hallowed glory of that creed which was once mine, and the lonely mystery of existence as now I find it—at such times I shall ever feel it impossible to avoid the sharpest pang of which my nature is susceptible."

To this same group of "scholarly Christians" referred to in the brief for defendant, we also recommend a close perusal and a thorough appreciation of the book entitled, "The New Decalogue of Science"—[By Albert Edward Wiggam (1923), Publisher, The Bobbs-Merrill Co., Indianapolis]—which, if they desire to accept or remain fearful of opposing, they should understand does not tend to lead upward and onward, but backward and downward, to a degeneracy into the philosophy of Nietzsche, the German advocate of the superman, whose teachings, according to Clarence Darrow, are pregnant, as we have shown, with sufficient power over the immature undergraduate mind logically to lead or drive to a *Saturnale* of gruesome murder, and who (Nietzsche) in "Zarathustra" proclaims that "God is dead." In this recently published book, "The New Decalogue of Science," the author describes Nietzsche as "the bravest soul since Jesus"; and, then, at another place in the book, says:

> "Most of our morals today are jungle products," and then affirms that—"It would

be safer, biologically, if they were more so now."

Then, at page 34 of "The New Decalogue of Science," it is stated:

> "Evolution is a bloody business, but civilization tries to make it a pink tea. *Barbarism* is the only process by which man has ever organically *progressed*, and *civilization* is the only process by which he has ever organically *declined*. Civilization is the most dangerous enterprise upon which man ever set out. For when you take man out of the bloody, brutal, but beneficent hand of natural selection you place him at once in the soft, perfumed, daintily gloved, but far more dangerous hand of artificial selection. And, unless you call science to your aid and make this artificial selection as efficient as the rude methods of nature, you *bungle* the *whole task*."
>
> (NOTE.—From the above it seems that "natural selection" is the mania of the above mentioned *recent work*, "The New Decalogue of *Science*"—notwithstanding all the "learning" of the present *pseudo*-scientific cult now eliminates "natural selection" and denounces it as an exploded fallacy; but a Dervish when whirling his best may be excused from doing anything else for the time being.)

Then let this same group of apprehensive and "scholarly Christians" consider and try to reconcile their views with the frank statement of James Harvey Robinson, one of the *august* spokesmen of this pseudo-scientific cult, whose teachings inevitably lead to the idea of making the human mind or soul the product of "evolution" in such way as to be equivalent to a denial of its spirituality—as follows:



> "It is the extraordinarily *illuminating discovery* (*sic*) of man's *animalhood* rather than evolution in general that troubles the *routine* mind. Many are willing to admit that it looks as if life had developed on the earth slowly, in successive stages; this they can regard as a merely *curious fact* and of no great moment if only man can be defended as an honorable exception. The fact that we have an animal body may also be conceded, but surely man must have A SOUL and A MIND, altogether distinct and unique from the very beginning bestowed on him by the Creator and setting him off an immeasurable distance from any *mere animal*. But whatever may be the RELIGIOUS and POETIC significance of this compromise it is becoming *less* and *less tenable* as a *scientific and historic truth*. The *facts* indicate that man's *mind* is quite as clearly of *animal extraction* as his body." (Italics ours.) ("Science," July 28, 1922.

In entire accord with the above quoted sad and hopeless outlook of "The New Decalogue of Science," are the views expressed by Clarence Darrow, in the chapter entitled, "Industrialism and Crime" of his book entitled, "Crime, Its Cause and Treatment, where, on page 211, it is said:

> "Not only, it seems to me, does the growth of civilization mean the growth of crime, but that civilization likewise leads to decay. The world has seen the result

over and over again, but it cannot learn. Man is an animal"—etc.

The above hopeless view of civilization and all organized government is the ripened fruit of an acceptance of the hypothesis which tends to undermine all religions, upon which alone hang the hopes of the world—the hypothesis that man is but a brute descended from a lower order of animals, that he thrives best under the brute law of the jungle, that civilization carries in its breast the seed of its own death, and that after death there comes the everlasting night.

Under this head we feel in duty bound to call the attention of this Court to the fact that counsel for defendant Scopes in their Brief make imposing quotation from their selected spokesman of the "Free Thought" cult, J. B. Bury, who in 1913 published a small book entitled "A History of Freedom of Thought." This little book, so admired and copiously quoted by our adversaries, represents the quintessence of anti-religion and the fashionable views entertained by a small group of ultra-modern *pseudo*-scientists. Under the declarations of the Supreme Court of the United States and of this Court hereinbefore quoted by us to the effect that religion must be regarded as the principal safeguard underlying the very structure and constitutions of all our governments, State and National—this little anti-religious book, so admiringly and copiously quoted by our adversaries, can represent nothing beyond what it is—a perverted thing that seeks to damn all religion as crude superstition lying across the path of progress.



For the convenience of the Court we pass in to your Honors a copy of this little publication so admired by our adversaries, which not only strikes at all religion, which is the safeguard of constitutional government in our State and Nation, but which strikes at even the integrity of the family, and actually closes its last page with this perverted and repulsive statement:

> "Meanwhile, nothing should be left undone to impress upon the young that *freedom of thought* is an axiom of human progress. It may be feared, however, that this is not likely to be done for a long time to come. For our *methods* of *early education* are founded on *authority*. It is true that children are sometimes exhorted to think for themselves. But the parent or instructor who gives this *excellent advice* is confident that the results of the child's thinking for himself will agree with the opinions which his elders consider desirable. It is assumed that he will reason from *principles* which have already been instilled into him by *authority*. But if his thinking for himself takes the form of questioning these principles, WHETHER MORAL OR RELIGIOUS, his parents and teachers, unless

they are very exceptional persons, will be extremely displeased, and will certainly discourage him. It is, of course, only singularly *promising children* whose freedom of thoughts will go so far. In this sense it might be said that 'DISTRUST THY FATHER AND MOTHER' is the *first commandment with promise.* It should be a part of *education* to explain to *children,* as soon as they are old enough to understand, *when* it is *reasonable,* and when it is *not,* to accept what they are told, *on authority.*" (Italics ours.)

Let the above quoted *favorite authority* of our adversaries—(the authority which has forged and shaped their thoughts and the words of their printed brief on the *duties* of the "conscientious school teacher" and numerous other passages therein)—and which closes with the announcement of the proposition that for the children of this nation "the first commandment with promise" should be "distrust thy father and mother"—be *compared* by your Honors with the following language of the Supreme Court of the United States, in the recent case of *Pierce* v. *Society of Sisters,* 268 U. S., 534, 535, as follows:

> "Under the doctrine of *Meyer* v. *Nebraska,* 262 U. S., 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the *liberty of parents* and guardians to *direct* the *upbringing* and *education of children under their control.* As often



> heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from *public teachers only.* The child 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 obligations." (Italics ours.)
>
> (268 U. S., 534-535.)

From the report of the above case we also quote a paragraph contained in the winning brief of counsel which announced the proposition adopted by the Court, as follows:

> "But there is involved in the case at bar a far more important group of individual rights, namely, the rights of the parents and guardians who desire to send their children to such schools" (private or parochial) "and the rights of the children themselves. Reflection should soon convince the court that those rights, which the statute seriously abridges and impairs, are of the very essence of personal liberty and freedom. *Tillman* v. *Tillman,* 26 L. R. A. (n. s.) 781, 785, (S. Car.) In this day and under our civilization, the child of man is his parent's child and not the State's. 'Take away from the parents all care and concern for their children's education, and

you make a social life an impossible and unintelligible notion.' Pufendorf's Law of Nature and Nations, book VI, C. II, Sec. 4. It need, therefore, not excite our wonder that to-day no country holds parenthood in so slight esteem as did Plato or the Spartans—except Soviet Russia."
(268 U. S., 518.)

Bear in mind that the fathers and mothers of the rank and file of our children who are pupils and students in our public schools and State-maintained institutions of learning can only exercise their "liberty" and their "high duty" of supervising the proper education of their children by means of laws passed by their constitutional representatives elected by them to the legislature of our State.

At pages 45 and 46 of the printed Brief for defendant Scopes there will be found a long quotation from the above mentioned "History of Freedom of Thought" by Bury. The first typewritten Brief filed by our adversaries at Knoxville (pages 59-61) included another quotation from this same perverted book; and on page 58 of said first Brief, immediately preceding one of such quotations, the attorneys for defendant Scopes pointed out, in the same language used by them on page 44 of their printed Brief, how for many centuries any difference with the established church or the tenets thereof involved,



under then prevailing governments, both political and economic consequences; and in said first Brief our adversaries then say:

> "Likewise, politically, any differences by individuals with the Church threatened the State, just as *belief* or its *expression* in Bolshevistic economic doctrines are *supposed* to be dangerous TO OUR CAPITALISTIC FORM OF SOCIETY. Criminal syndicalist laws such as exist in many States today, are our answer to political or economic *heresy*." (Italics ours.)

The significance of the vein of thought contained in the language last quoted is submitted by us to your Honors without comment.

We submit that this Court possesses neither the power nor the inclination to rule that our Legislature acted "arbitrarily" and beyond "possible justice" when it passed a law to prohibit the teaching, at public expense, in our public schools, and to the future citizens of this State, that man has descended from a lower order of animals, which hypothesis, in the hearts of its greatest advocates and exponents, has almost invariably led to the undermining of their religion and leading them on to the tragical brink of a hopeless grave. Both this Court and the Supreme Court of the United States have ruled, as we have before quoted, that religion underlies the very structure of the government of this State

and of this Nation, and is the one thing which, more than any other, maintains the rule of law, order and decent living.

In concluding the discussion of this Assignment V we say that the Act in question to no degree interferes with the cherishing of literature or science, and if the provisions of the Tennessee Constitution as to this were held to be mandatory (which of course they are not), the challenged Act could in no manner be said to offend against these provisions.

## F.

## THE ACT DOES NOT "IMPAIR THE OBLIGATION OF CONTRACTS" IN VIOLATION OF ART. 1, SEC. 10, OF THE FEDERAL CONSTITUTION.

Under this head of discussion we will briefly reply to Assignment of Error VIII stated at pages 13, 14; and discussed at pages 108-111 of the printed Brief of defendant Scopes.

What our adversaries present, in support of their said Assignment VIII, is without substance or merit, and really only tends to illustrate some more of their peculiar views.

When they first present in support of this Assignment to the effect that the Act "impairs the obligation" of a contract or contracts—is, merely, that in 1862 Congress donated some public lands to various States, under the Morrill Act, with the stipulation that the proceeds should be inviolably appropriated to the endowment, support and maintenance of at least one college where the "leading object" should be, without excluding other scientific and classical studies, and including military tactics,—

> "to *teach such branches* of learning as are related to agriculture and the mechanical arts *in such manner as the legislature of the States may*, respectively, *prescribe*, in order to permit the liberal and practical education of the industrial classes in the several pursuits and professions of life."

How the Act in question does or could violate either the letter or the spirit of the Act of Congress above quoted, or impair the obligation of any contract, even in the excited imagination of our adversaries, is a thing we cannot understand.

It will be noted that the Act of Congress, above quoted, expressly declares that the proceeds of the land grant shall be appropriated to the support of at least one college, where the "leading object" shall be, to teach such branches of learning as are related to "agriculture" and the "mechanical arts"—

> "in *such manner* as *the legislature* of the States may, respectively, *prescribe*," etc.

Neither our adversaries, nor the school teacher, nor this Court, under the quoted language, but only the "legislature" has anything to do with the "manner" of the teaching to be applied in such college having such "leading object."

The normal and dispassionate mind, we submit, can really have no substantial idea that merely to prohibit the teaching "that man descended from a lower order of animals" can to any degree interfere with the teaching of any branch of learning related to "agriculture" and the "mechanical arts."

Again, after correcting some misprints on page 108 of the Brief for defendant Scopes, we find our adversaries saying, that by Chapter 220 of the Acts of 1887, the legislature of Tennessee authorized the acceptance of assistance from the Government to the University of Tennessee, pursuant to the provisions of the Hatch Act, under which Congress had appropriated certain moneys from the sale of public lands, to each State and territory for the establishment of agricultural experimental stations—

> "in order to and in acquiring and diffusing among the people of the United States *useful* and *practical* information on subjects connected with *agriculture* and to permit scientific investigation and experiment respecting the principles and applications of *agricultural* science."



Our adversaries may really think that to prohibit the teaching "that man has descended from a lower order of animals" will interfere with the diffusing of "useful" and "practical" information on subjects connected with "agriculture" or scientific investigation and experiment respecting the principles and applications of "agricultural" science—but if they have such thought we leave them in undisputed sole possession thereof and simply disclaim a belief that anyone else can entertain it.

Again, in this connection, our adversaries say that by an Act of Congress of August 30, 1890, Congress appropriated money to—

> "be applied only to instruction in *agriculture* and *mechanical arts*, the English language and the various branches of mathetical, physical, natural and economic science, with special reference to their applications in the *industries* of life and to the facilities for such instruction."

Our adversaries say that, pursuant to the above Act of Congress, the legislature of Tennessee empowered the University of Tennessee to accept the money.

If the attorneys for the defendant Scopes *really* think that to prohibit the teaching "that man has descended from a lower order of animals" has any reference to, or could possibly

interfere with, any of the branches of training mentioned in said Act, then, we submit, that to the *pseudo*-scientist or agnostic it may be possible that such idea might tend to establish, in their opinion, merely that man has so descended —we respectfully and deferentially submit.

In this connection, our adversaries say that under the Adams Act of March 16, 1906, further money was appropriated by Congress for researches or experiments, bearing upon the "*agricultural industry*," and that this money was accepted by our State legislature. If this be true our answer is merely a repetition of our last above observation.

And then, we submit, it might really occur to our learned adversaries, if they will brood over the proposition for a while, that the police power of a State to enact laws for the public welfare cannot be foreclosed or parted with by any legislature so as to affect the power of succeeding State legislatures to pass proper and needful police power laws. And in this connection we only deem it necessary to present one authority, to which a reference will disclose how abundantly the elementary propositions there announced are supported and sustained—



**12 Corpus Juris, p. 991, 992, Sec. 603.**

The above authority assembles many decisions, including scores of cases decided by the Supreme Court of the United States, and states the resulting rule thus:

> "SEC. 603. *Exercise of Police Power.* The police power of a state is an inherent attribute of its sovereignty with which it is endowed for the protection and general welfare of its citizens, and of which the state may not divest itself by contracts or otherwise. Our state legislature, therefore, cannot by any agreement bind itself or its successors not to exercise the police power of the state. All contracts, whether made by the *state itself*, by municipal corporations, or by individuals, are subject to be interfered with, or otherwise affected by, subsequent statutes enacted in the *bona fide* exercise of the police power, and do not, by reason of the contracts clause of the constitution, enjoy any *immunity* from such legislation."

If the United States ever makes any question, or tries to make it—(which we think about as remote from happening as our ideas are different from the ideas of our adversaries in respect of many fundamental principles of constitutional law and government)—to the effect that the passage and enforcement of the Act in question, merely prohibiting the teaching "that man has descended from a lower order of animals," has interfered with or impaired any

contract between the United States and the State of Tennessee, under or resulting from any of the Acts of Congress and State statutes above referred to, and if the United States undertakes to bring any action against the State of Tennessee for "money had and received" upon any such claimed ground or pretense—(which is the most that could happen)—then the State of Tennessee will defend that lawsuit; and will insist, of course, that the police power statute in question is the sovereign and valid continuing legislative enactment of this State, whether the Government succeeds in getting a recovery or not.

We respectfully submit that by making and endeavoring seriously to present any insistences like or similar to their contentions made in support of their Assignment of Error VIII—our adversaries are but illustrating how hard pressed they are, and what peculiar ideas they entertain of constitutional limitations and government, as well as some other things which we will not consume the time of this Court further to mention or discuss.



## G.

## NO ERROR IN THE EXCLUSION BY THE TRIAL JUDGE OF ANY OFFERED SO-CALLED EXPERT OR "SCIENTIFIC" TESTIMONY.

By Assignment of Error IX stated at page 14, and elaborated at pages 111 to 126 of the Brief for defendant Scopes, a question is sought to be made in this Court to the effect that the trial judge erred in excluding from the jury alleged offered expert or "scientific" testimony of alleged witnesses.

We have already dealt with the utter lack of any merit or substance in this Assignment in presenting our proposition (11) in our preceding Brief. (*Ante*, pp. 85-90.)

It is not our purpose here to extend very much what we have already there said in regard to the lack of any merit in this Assignment.

As we have already there shown—none of this alleged offered evidence is now in the record before this Court at all; and this fact, under numerous previous decisions of this Court, coupled with our statutes forbidding a reversal for mere abstract or innocuous error, and the previous decisions of this Court construing those statutes—simply operate to extract any and all

substance from this Assignment and put its lack of merit beyond debate.

We cannot resist showing, however, that with this Act construed as it is so clearly to be construed, and as the trial judge construed it, as prohibiting nothing except the teaching—"that man has descended from a lower order of animals," there could exist no possible or conceivable ground or *room* for the introduction of any so-called expert or "scientific" testimony in this case.

It so happens that the Supreme Court of the United States has already exploded the fallacy behind, and declared the lack of any merit in any contention, that expert or "scientific" testimony can be introduced, used or considered to overthrow the enforcement of a regulation passed under the police power of the State—merely because some experts or "scientists" might be of the opinion, and get their consent to testify, that the police power regulation was grounded on a false or unscientific premise, or unsound, unnecessary, or detrimental from a "scientific" standpoint. This case we will next briefly notice.

**Jacobson v. Massachusetts, 197 U. S., 11.**

In the above case a constitutional attack was made upon C. 75, Sec. 137, of the Revised Laws



of Massachusetts, which empowered the Board of Health of a city or town if, in its opinion, it was necessary for the public health or safety, to require and enforce vaccination and re-vaccination of all the inhabitants thereof. Proceeding under the authority of this statute the Board of Health of the city of Cambridge, Mass., adopted a regulation requiring the compulsory vaccination or re-vaccination of all the inhabitants of said city who had not been successfully vaccinated since March 1, 1897.

Jacobson had refused to submit to such vaccination, and was proceeded against by "criminal complaint" in one of the inferior courts of Massachusetts.

The Board of Health at the trial simply made proof tending to show that its chairman had informed the defendant Jacobson that by refusing to be vaccinated he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined and the defendant refused to be vaccinated.

The prosecution offered no other evidence at the trial.

The defendant Jacobson made numerous of-

fers of proof, but the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant Jacobson was convicted and fined, and such action had been affirmed by the Supreme Judicial Court of Massachusetts; and Jacobson thereupon, in the Supreme Court of the United States, sued out writ of error to the said highest Court of Massachusetts; and insisted that the compulsory vaccination regulation was unconstitutional because he had been thereby deprived of his "liberty" in violation of the Fourteenth Amendment to the Constitution of the United States.

In the Supreme Court of the United States Jacobson insisted that the trial court had erred in the exclusion of the testimony offered by him.

The excluded testimony offered by Jacobson relating to vaccination, consisted of its alleged injurious or dangerous effects in general, and upon him in particular as shown by a previous experience which he had gone through, and to the lack of any scientific *necessity* for, or any preventive *virtue* in vaccination.

In the course of its opinion in the above case, the Supreme Court of the United States, speak-



ing through Mr. Justice *Harlan*, quoted from the opinion which the highest court of Massachusetts had rendered in said case, among other things, as follows:

> "Assuming that *medical experts* could have been been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Commonwealth* v. *Athes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been *obliged* to consider the evidence in connection with facts of *common knowledge*, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of *experts* in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive and that not only the medical profession and the *people generally* have for a long time entertained these *opinions*, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such *expert testimony* as he had in support of these several propositions, it could not

have *changed the result*. It would not have *justified* the *court* in holding that the *legislature* had transcended its *power* in enacting this statute on *their judgment* of what the *welfare* of the people demands. *Commonwealth* v. *Jacobson*, 183 Mass., 242." (Italics ours.) (197 U. S., 23, 24.)

Still later in the opinion the Court said:

"Looking at the propositions embodied in the defendant's rejected offers of proof it is clear that they are more formidable by their *number* than by their *inherent value*. Those offers in the main seem to have had *no purpose* except to state the *general theory* of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. *What everybody knows the court must know*, and therefore the state court *judicially knew*, as *this court knows*, that an *opposite* theory accords with the *common belief* and is maintained by high medical authority. We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of *these opposing theories*, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the *final decision of a court or jury*. It is no part of the *function* of a *court* or a *jury* to determine which one of two modes are likely to be the most effective for the protection of the public against disease. That was for the *legislative department* to *determine* in the light of all the information it had or could obtain. It could



not properly abdicate *its* function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperilled an entire population. Upon what sound principles as to the *relation* existing between the *different departments* of government can the *court* review this *action* of the *legislature?* If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or *substantial relation* to *those objects*, or is, beyond *all question*, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' *Mugler* v. *Kansas*, 123 U. S., 623, 661; *Minnesota* v. *Barber*, 136 U. S., 313, 320; *Atkin* v. *Kansas*, 191 U. S., 207, 223." (Italics ours.) (197 U. S., 30-31.)

Later in its opinion, the Court quoted with approval from the then latest case of *Viemeister* v. *White, President, etc.*, 72 N. E., 97, decided by the *Court of Appeals* of *New York* as follows:

" 'It must be conceded that *some laymen*, both *learned* and *unlearned*, and some *physicians* of great *skill* and *repute*, do not believe that vaccination is a preventive of smallpox. The *common belief*, however, is

that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the *mass of the people*, as well as by most members of the medical profession. It has been general in our State and in most civilized nations for generations. It is generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the command of law. Nearly every State of the Union has statutes to encourage, or directly or indirectly to require, vaccination, and this is true of most nations of Europe.

" 'A *common belief*, like *common knowledge*, does not *require evidence* to establish its existence, but may be acted upon *without proof* by the *legislature* and the *courts*. . . .

" 'The fact that the *belief* is not *universal* is not controlling, for there is scarcely any belief that is accepted by everyone. The *possibility* that the belief may be wrong, and that *science* may yet show it to be wrong, is not conclusive; for the *legislature* has the right to pass laws which, according to the *common belief of the people*, are adapted to prevent the spread of contagious diseases. In a *free country*, where the government is *by the people*, through their *chosen representatives*, practical legislation admits of *no other standard of action;* for *what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or or not.* Any other basis would conflict with the spirit of the Constitution, and would



sanction measures *opposed to a republican form of government.* While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take *judicial notice* of the fact that this is the *common belief* of the people of the State, and with this fact as a *foundation* we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the *police power.*' 72 N. E., 97." (Italics ours.) (197 U. S., 34, 35.)

Still later in the opinion the Court dealt with some of the specific "offers" by Jacobson of evidence which the trial court had excluded, and in this connection said:

"The defendant offered to prove that vaccination 'quite often' caused serious and permanent injury to the health of the person vaccinated; that the operation 'occasionally' resulted in death; that it was 'impossible' to tell 'in any particular case' what the results of vaccination would be or whether it would injure the health or result in death; that 'quite often' one's blood is in a certain condition of impurity when it is not prudent or safe to vaccinate him; that there is no practical test by which to determine 'with any degree of certainty' whether one's blood is in such condition of impurity as to render vaccination necessarily unsafe or dangerous; that vaccine matter is 'quite often' impure and dangerous to be used, but whether impure or not, cannot be ascertained by any known practical test; that the defendant refused to submit to vaccination for the reason that he had, 'when a child,' been caused great

and extreme suffering for a long period by a disease produced by vaccination; and that he had witnessed a similar result of vaccination not only in the case of his son, but in the cases of others." (197 U. S., 36.)

The Court then, in the language of its opinion, dropped into the interrogatory form of discourse, and noticed the insistences of Jacobson that the excluded testimony had been competent and proper, in the form of phrasing *questions*, an affirmative answer to which would have meant that the excluded testimony would have been competent; and the Court then said:

"It seems to the Court that an affirmative answer to these questions would practically *strip the legislative department* of its function to care for the public health and the public safety when endangered by epidemics and disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was *the belief* of the community and of its medical advisers, that a system of general vaccination was vital to the safety of all.

"We are not prepared to hold that a *minority*, residing or remaining in any city or town where smallpox is prevalent, and enoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in *good faith* for all, under the *legislative sanction* of the State. If such be the



privilege of a *minority* then a like privilege would belong to *each individual* of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the motives of a *single individual* who chooses to remain a *part* of that population." (Italics ours.) (197 U. S., 37, 38.)

The result was that the holding of the highest Court of Massachusetts affirming the action of the trial Court in excluding the expert or scientific testimony offered by Jacobson to avoid the application of the police regulation to him, was held to have been proper, and his conviction was affirmed by the Supreme Court of the United States.

The above decision, we submit, would be entirely conclusive upon the proposition that the trial judge in the case at bar could have committed no error in the exclusion of any so-called "scientific" testimony offered by the defendant Scopes to avoid the application to him of this plain police power regulation, construed as it was and is properly to be construed—even if there were a bill of exceptions in this case and such excluded testimony were now before this Court, which is not, however, the case at all.

We respectfully submit that it would certainly be subversive of any correct constitutional standard if a defendant indicted for violating a

plain police power regulation, could be allowed to introduce so-called expert or "scientific" testimony of witnesses for the purpose of showing that in the opinion of said "scientist" the regulation was unsound, improper, grounded on false premises, ambiguous, uncertain, or "unscientific," etc., etc.; and thus have submitted to the decision of the Court and jury any question touching the validity or propriety of the enforcement of the police power regulation which the legislature had prescribed and enacted.

For all the foregoing reasons, as well as for all the reasons and upon all the authorities hereinbefore set out in our preceding Brief at pages 85 to 90, we submit that there is no merit in Assignment of Error IX, and that the same should be overruled.

## H.

## "THE PRESENT CRISIS IN EVOLUTIONARY THOUGHT."

We say again there is no conflict and no strife between religion and real science. There is no such idea in the minds of the writers of this Brief. Whether there is or not any such conflict, in the opinion of our adversaries, is not material to any issue in this case. Our adversaries' main and chief concern seems to be to assert that



there is such a conflict and seek to exploit it in every way possible.

On page 10 of the Brief for defendant Scopes, our adversaries, without a critical regard of current common knowledge directly to the *contrary*,—sweepingly assert that:

> "Neither the story of creation in the first chapter of Genesis, nor the conflicting story of creation in the second chapter of Genesis *is accredited by science*, but the doctrine of organic evolution, *including the ascent of man 'from a lower order of animals,'* is *universally accepted* by *scientists* at the *present time.*"

On page 56 of their Brief our adversaries get their consent to say—

> "On the other hand, is there any agreement among the scientists of today on the subject of evolution? Does science believe in evolution? The *general acceptance* of this doctrine is so *pronounced* that the evolution of man 'from a lower order of animals' is *no longer* regarded as *a theory* but as *a fact.*"

On page 57, our adversaries, quoting from Webster's New International Dictionary—(1924)—speaking of the "theory" of evolution, say:

> " 'This *theory*, which *involves also the descent of man from the lower animals*, is *based* on facts abundantly disclosed in every branch of biological study, especially by

paleontology, embryology, comparative anatomy, experiments in hybridization, etc. . . . The *indications* are that all *animals* and *plants* are the descendants of a very few simple organisms (or *perhaps* of *but one*) not very unlike some of the simplest protozoans.' "

It will be noted that the above definition of such "theory" is not so sweepingly and uncritically phrased as are the foregoing statements of counsel for defendant.

On pages 57 and 58, quoting from the contributors to the *Encyclopedia Britannica*, it is sweepingly and erroneously said:

" 'Since *Huxley* and *Sully* wrote their masterly essays in the 9th edition of this Encyclopedia, the doctrine of Evolution has *outgrown* the trammels of *controversy* and has been *accepted* as a *fundamental principle*. Writers on biological subjects no longer have to waste space in weighing evolution against this or that philosophical theory or *religious tradition;* philosophical writers have frankly *accepted* it, and the *supporters* of *religious tradition* have made *broad* their *phylacteries* to write on them the *new words.* ' "

On the same page 58, of the Brief for defendant Scopes, quoting from the *New International Encyclopedia*, it is erroneously and brazenly said:

" 'The *proof* of man's origin from some other primate is now *past dispute. In fact,*



no *scientist* now *doubts* man's descent, less directly from all lower forms of life, and more *immediately* from a *common ancestor* with the *anthropoid apes.* ' "

On the same page 58, quoting from the *Americanna*, it is said:

" 'The evolution *conception* is no longer a debated question. The particular *methods*, and, *above all*, the *so-called factors*, or initiating and guiding causes of evolution are *well open to debate*, and indeed are continuously and vigorously debated.' "

Compare the above false, scrambled and unscholarly *extravaganzas* emanating from the blindly partisan individual contributors to these encyclopedias, with the more critical and conservative published statement of Dudley Field Malone, whose name appears upon the present Brief for Scopes in this Court, which published statement is as follows:

"The *most* that *science* says *today* is that there is *an order* of *men like mammals* which are *more capable* of *walking erect* than other animals, and *more capable* than other animals *in the use of forefeet as hands.*

"There are *indications* that, *not* 6,000 years ago, but through the long course of *the ages*, from this order came man in one direction, and monkeys in the other. *All that science says* is that *probably* some time *not* 6,000 years ago, but in the course of the *ages*, and *all* that *science* says *today* is that

there are *tendencies* which *indicate* the *validity* of this *opinion.*" (Italics ours.)
["World's Most Famous Court Trial"—(Published, 1925, by National Book Co., of Cincinnati, Ohio)—page 115.]

That any or all of the above extravagant and uncritical statements—undertaking to say, claim or intimate that among *real scientists* it is "universally accepted" that man has descended from a lower order of animals, or that such is now "past dispute" or is no longer regarded as a *theory*, "but as *a fact*"—are *true* statements is a thing which common sense, common truth, and current common knowledge *denounce* and *deny*.

Such statements coming from blindly partisan propagandists procured to write articles for publication in recent so-called *encyclopedias*, not only represent a perfectly blind and amazing lack of current information and common knowledge directly to the contrary as this Court *judicially knows*, but they actually and merely amount to nothing except superficial and "scientifically" *flavored* "catch phrases" of *pseudo*-scientists and self-styled "intellectuals" whose intolerant utterances are now frequently reiterated and systematically *exploited* "with the purpose of *subversive propaganda*"—as we have hereinbefore stated and shown.



We submit for the consideration of this honorable Court, which may and *must* take *judicial knowledge* of "common belief" and existing "common knowledge"—what must be the real *mental* or *nervous state* of any *pseudo*-scientist or *propagandist* who announces in these encyclopedais or elsewhere—that the descent of man from a lower order of animals is now "universally accepted" by *scientists*, or is "universally accepted" by even any substantial number of *real* outstanding *scientists*, or is a thing no longer to be regarded as a *theory* but *accepted* "as a fact" by the "supporters" of "religious *tradition*" who now stand ready to write on their sacred tablets the "new words" of a little coterie of *pseudo*-scientific and materialistic phrase-mongers.

Does this Court think, could any reasonably well-informed legislator or other person think that any individual, blindly accepting and ready and willing to reiterate such propaganda, would be fit to teach in our public schools or attempt to guide the undergraduate mind in our State's higher institutions of learning?

It is just such inherently and necessarily fallacious and misleading statements, made by the "uncritical" and "unscholarly" advocates of this undemonstrated and undemonstrable "hypo-

thesis," repeated and reaffirmed "with the purpose of subversive propaganda" which very justly, properly, wisely and defensively prompted the legislature of Tennessee to pass the Act in question, to *cut out* of our public schools and publicly maintained institutions of learning any such exclamatory, perverted and unscholarly anti-religious *crusade* and government subverting *propaganda.*

This Act was passed not offensively but *defensively* against the systematic, disturbing, misleading, uncritical, unscholarly, unhelpful and untrue intrusion of such half-baked and ill-considered cant and fustian.

We venture the prophecy that unless a retreat and abandonment of such uncritical and unscholarly clamor and sinister propaganda is sounded, and an "about face" of this *pseudo*-scientific cult is executed, very many more States of this Union will follow the example of Tennessee—(ever willing to "volunteer" for *real service*)— in addition those States which have already followed that example—to the end that *real* and critical scholarship and science may be inculcated in the youth of our Nation, and all religions and orderly constitutional government be not *attempted* to be *undermined* and *subverted.*

On page 69 of defendant's Brief there is



quoted an alleged letter of six lines, dated Aug. 29, 1922, addressed to "My dear Professor Curtis" and signed "Woodrow Wilson," and which is merely in these words:

> "May it not suffice for me to say in reply to your letter of August twenty-fifth that of course, like every other man of intelligence and education, I do believe in organic evolution. It surprises me that at this late date such questions should be raised.
>
> Sincerely yours,
> Woodrow Wilson."

It will be observed that the superlatively great Woodrow Wilson did not say that he thought or believed—"that man has descended from a lower order of animals."

What was in any letter that "Professor Curtis" had written President Wilson, and *how far* these questions went and how they were phrased —we do not know.

Many scholarly persons believe in "organic evolution" who would consider it an insult to both their scholarship and religion to suggest that it followed that they believed "that man had descended from a lower order of animals." If President Wilson did have such personal belief—(though we do not think he did and certainly, to the best of our knowledge and belief, he has left no writing intimating any such

thing)—we think Woodrow Wilson would have been the *last man* to have advocated the affirmative teaching or injection of such an idea, through the medium of some unscholarly and uncritical *pseudo*-scientist or subversive propagandist, into the *immature mind* of the public school pupil and undergraduate. He dedicated his life, before he entered upon the arena of national and world achievement and leadership, to the teaching of *real* and *wholesome* representative and constitutional government to the University undergraduates and post-graduates of America.

To seek to leave the impression, without daring to make the statement, that Woodrow Wilson, as to the *origin of man*, divinely made in the image of God, ever entertained *that idea* that ultimately grows into the *ripened fruit* of Clarence Darrow's declaration that man is but an animal and that "the growth of civilization means the growth of crime," and James Harvey Robinson's statement that "the *facts* indicate that man's *mind*" (soul) "is quite as clearly of *animal extraction* as *his body*," and Nietzche's mad conclusion that "*God is dead*"—is a thing sufficiently *answered* and *denounced* by the record of the life work of that peace-loving *covenanter* and *religionist*, who finally led our aroused nation into the war against the German



*cult* of the *superman* with the simple culminating statement (a paraphrase of the words of the great "old dead Luther" when starting on a fateful journey) that America was entering that war to fight with all her power and might, because—"*God helping her*, she can do no other."

This recognition and appeal to God with which President Wilson closed his memorable address to the Congress, on April 2, 1917, when he asked and advised that war be declared upon Germany, came from his very *heart* and *soul*.

He was invoking the "God of our fathers known of old," the God of the universe, the God of our Nation, the God of our Constitution and the God a belief in Whom underlies the very fabric and life of our governments, State and Federal, as reverently declared by both this Court and the Supreme Court of the United States.

At page 53 of their Brief the attorneys for defendant Scopes quote Webster's New International Dictionary (1924 edition) which defines "science" in these words:

> " 'Accumulated and accepted *knowledge* which has been *systematized* and *formulated* with reference to the discovery of *general truths* or the operation of *general laws*.' "

We leave it to this Court, without any comment in this connection, to say whether the undemonstrated and inherently undemonstrable "theory" or "hypothesis" "that man has descended from a lower order of animals" comes within the above quoted definition of "science" or touches it side, edge or bottom, or would be helpful to any really "scientific" accomplishment, purpose or *hope.*

The truth is a "crisis" is on in the ranks of the *pseudo*-scientists, superficialists and subversive propagandists.

George Barry O'Toole, Ph.D., S.T.D., Professor of Theology and Professor Emeritus of Philosophy, St. Vincent Archabbey, and Professor of Animal Biology, Seton Hill College—has recently written an *impartial* and critically scientific book, published in 1925, and re-published in 1926, entitled "The Case Against Evolution."

This learned educator and scientist, in this recent work, starts at the beginning and notices and quotes from all the past advocates and protagonists of the varying "theories" of Evolution, showing how inconsistent have been their ideas and how they expose the fallacies of, and really destroy each other, and he brings his impartial and scholarly treatment of this hopelessly controversial and repulsively inconsistent and self-



devouring field of alleged "scientific" learning and propaganda down to the *present hour.*

For the convenience of each member of the Court we quote below a little from the opening chapter of this thorough work of O'Toole upon the subject of "The Present Crisis in Evolutionary Thought."

Beginning on page 1 of this recent work it is said:

> "Three prominent men, a scientist, a publicist, and an orator, have recently made pronouncements on the theory of Evolution. The trio, of course, to whom allusion is made, are Bateson, Wells and Bryan. As a result of their utterances, there has been a general re-awakening of interest in the problem to which they drew attention. Again and again, in popular as well as scientific publications, men are raising and answering the question: 'Is Darwinism dead?' Manifold and various are the answers given, but none of them appears to take the form of an unqualified affirmation or negation. Some reply by drawing a distinction between Darwinism, as a synonym for the theory of evolution in general, and Darwinism, in the sense of the particular form of that theory which had Darwin for its author. Modern research, they assure us, has not affected the former, but has necessitated a revision of ideas with respect to the latter. There are other forms of evolution besides Darwinism, and, as a matter of fact, not Darwin, but Lamarck was the originator of the scientific theory of

evolution. Others, though imitating the prudence of the first group in their avoidance of a categorical answer, prefer to reply by means of a distinction based upon their interpretation of the realities of the problem rather than upon any mere terminological consideration.

"Of the second group, some, like Osborn, distinguish between the *law* of evolution and the theoretical *explanations* of this law proposed by individual scientists. The existence of the law itself, they insist, is not open to question; it is only with respect to hypotheses explanatory of the aforesaid law that doubt and disagreement exist. The obvious objection to such solution is that, if evolution is really a law of nature, it ought to be reducible to some clear-cut mathematical formula comparable to the formulations of the laws of constant, multiple, and reciprocal proportion in chemistry, or of the laws of segregation, assortment, and linkage in genetics. Assuming, then that it is a genuine law, how is it that today no one ventures to formulate this evolutional law in definite and quantitative terms?

"Others, comprising, perhaps, a majority, prefer to distinguish between the *fact* and the *causes* of evolution. Practically all scientists, they aver, agree in accepting evolution as an established fact; it is only with reference to the agencies of evolution that controversy and uncertainty are permissible. To this contention one may justly reply that, by all the canons of linguistic usage, *a fact is an observed or experienced*



*event*, and that hitherto no one in the past or present has ever been privileged to witness with his senses even so elemental a phenomena in the evolutionary process as the actual origin of a new and genuine organic species. If, however, the admission be made that the term 'fact' is here used in an *untechnical* sense to denote an *inferred event* postulated for the purpose of interpreting certain natural phenomena, then the statement that the majority of modern scientists agree as to the 'fact' of evolution may be allowed to stand, with no further comment than to note that the formidable number and prestige of the advocates fail to intimidate us. Considerations of this sort are wholly irrelevant, for in science no less than in philosophy authority is worth as much as its arguments and no more."

A little later, and beginning on page 3 of this work, it is said:

"Evolution, or transformism, as it is more properly called, may be defined as the theory which regards the present species of plants and animals as modified descendants of earlier forms of life. Nowadays, therefore, the principal use of the term evolution is to denote the developmental theory of organic species. It is, however, a word of *many senses*. In the eighteenth century, for example, it was employed in a sense at variance with the present usage, that is, to designate the non-development theory of embryological encasement or performation as opposed to the developmental theory of epigenesis. According to the theory of encasement, the adult organism did

not arise by the generation of new parts (epigenesis), but by a mere 'unfolding' (*evolutio*) of pre-existent parts. At present, however, evolution is used as a synonym for transformism, though it has other meanings, besides, being sometimes used to signify the formation of inorganic nature as well as the transformation of organic species.

"Evolution, in the sense of transformism, is opposed to fixism, the older theory of Linne, according to whom no *specific* change is possible in plants and animals, all organisms being assumed to have persisted in essential sameness of type from the dawn of organic life down to the present day. The latter theory admits the possibility of environmentally-induced modifications, which are non-germinal and therefore non-inheritable. It also admits the possibility of germinal changes of the varietal, as opposed to the specific order, but it maintains that all such changes are confined within the limits of the species, and that the boundaries of an organic species are impassable. Transformism, on the contrary, affirms the possibility of specific change, and assumes that the boundaries of organic species have actually been traversed.

"What, then, is an organic species? It may be defined as a group of organisms endowed with the *hardihood* necessary to survive and propagate themselves under natural conditions (*i. e.*, in the wild state), exhibiting a common inheritable type, different from one another by no major germinal difference, perfectly interfertile with one another, but *sexually incompatible* with members of an alien specific group,



in such wise that they produce hybrids wholly, or partially, sterile when crossed with organisms outside their own specific group.

"David Starr Jordan has wisely called attention to the requisite of viability and survival under natural conditions. 'A species,' he says, 'is not merely a form or group of individuals distinguished from other groups by definable features. A complete definition involves longevity. A species is a kind of animal or plant which has run the gauntlet of the ages and persisted. . . . A form is not a species until it has "stood." (Science, October 20, 1922, p. 488.)' "

Then after outlining the theory of Lamarck advanced in his "Philosophie Zoologique" in 1809, and the later theory of Darwin, who published his "Origin of Species" in the year 1859, this recent work, beginning on page 10, says:

"Such was the scheme of evolution elaborated by Charles Darwin. His hypothesis leaves the origin of variations an *unsolved mystery*. It assumes what has never been proved, namely, the efficacy of 'natural selection.' It rests on what has been *definitely disproved* by *factual evidence*, namely, the inheritability of the slight variations, now called fluctuations, which, not being transmitted even, by the hereditary process, cannot possibly accumulate from generation to generation, as Darwin imagined. Moreover, fluctuations owe their origin to variability in the external conditions of life (*e. g.* in temperature, moisture, altitude,

exposure, soil, food, etc.), being due to the *direct* influence of pressure of the environment, and not to any spontaneous tendency, within the organism itself. Hence Darwin erred no less with respect to the spontaneity, than with respect to the inheritability and summation, of his 'slight variations.'

"The subsequent history of Lamarkian and Darwinian Transformism is briefly told. That both should pass into the *discard* was *inevitable*, but, thanks to *repeated revisions* undertaken by loyal *adherents*, their *demise* was somewhat *retarded*. In vain, however, did the Neo-Darwinians attempt to do for Darwinism what the Neo-Lamarckians had as futilely striven to do for Lamarckism. The *revisers* succeeded only in precipitating a *lethal duel* between these two rival systems, which has proved disastrous to both. The controversy begun in 1891 between Herbert Spencer and August Weismann marked the climax of this *fatal conflict*."

And then, with infinite care and accuracy, this recent work of O'Toole proceeds to notice all the inconsistent theories and guesses of the protagonists and advocates of evolution, or more properly speaking "transformism," and how many of them are fundamentally inconsistent with and destroy each other, and how *really*, as we read his work, none of them get anybody anywhere along the line of even probable scientific truth or usefulness. And all the above is in regard to the "general" theory of evolution or transformism.



When it comes to the "*problem* of *origins*," including the "origin of man" and the "origin of the human soul"—(a disbelief in the *immortality* of which disqualifies from the right to hold civil office in Tennessee)—of course, no *real scientist* undertakes or claims to have any demonstrated or demonstrable materialistic or scientific knowledge or prescience.

But the clamor and extravagantly declaimed scientifically flavored "catch-phrases" of the *pseudo*-scientific cult and its self-sufficient spokesmen, even in this pure field of *all religions*, not only *continue* and *refuse* to be *stilled*, or even critically to examine their own wildly asserted *pretentions* of alleged "scientific" *knowledge*, but *now*, in this case, the insistence is *seriously* made that such disturbing and uncritical fustian can not be constitutionally *cut out* of our public school curriculum in Tennessee.

**Conclusion.**

Even though by some it may not be conceded that it was the voice of the divine Son of God, most every normal person in our Nation and State will concede the eternal wisdom contained in the statement—

> "Render therefore unto Caesar the things which be Caesar's and unto God the things which be God's." (Luke 20: 25.)

There are some who rebel at recognizing either the "Caesar" of our established constitutional form of civil government or the God of the Universe.

While under our American system the "Caesar" of civil government and no particularly preferred or favored church or religious sect can go "hand in hand"—our established constitutional governments, State and Federal, and *all religions* which accept and affirm the being of God and the doctrine of immortality have ever journeyed and must continue to march "side by side," if our established civil institutions are not to be stricken down.

Both this Court and the Supreme Court of the United States have even gone further and have declared that our constitutional governments, in both our Nation and our States, are foundationed upon the *acceptance* of the being of God and the immortality of the soul, and that upon the foundation of revealed and accepted religion, creating in the minds and hearts of our citizens a belief in the categorical imperative "I ought," more than upon any mere legal sanctions or penalties, our constitutional governments, resting upon *covenants*, must continue to depend for their very existence.



So there is not only a *religious element* in our American systems of government, but their very life and foundations rest and depend upon *religion*—meaning by that term what the Supreme Court of the United States has declared the term relates to.

To those who believe in the being of God and the immortality of the soul, the Act in question —(which does nothing but prohibit, in our public schools, and State-maintained institutions of learning, the teaching "that man has descended from a lower order of animals")—is not and cannot be regarded as objectionable.

Even to those who individually believe that man has descended from a lower order of animals, *including* any who question or deny the being of God and the immortality of the soul, but who nevertheless recognize the wisdom of *cutting out* of our public school curriculum the extravagant and uncritical pretensions of alleged "scientific" knowledge upon the part of the little coterie of *pseudo*-scientists in regard to the insoluble problem of the *origin of man*, or, in any event, the wisdom of *eliminating* the *disturbance* and distraction to school *discipline*, *quiet* and real scholarship and education that such fustian has caused and must continue to cause,

in this field of *religious beliefs* and *convictions*—the Act in question is not and cannot be objectionable.

To the uncritical and intolerant group of *pseudo*-scientists, and those well intentioned persons who have been misled or made apprehensive by their catch-phrase clamor and declamation; and to any who disbelieve in both God and the "Caesar" of our constituted civil authorities, and who want to *strike* at *the Act* in order to *strike down* our present form of constitutional government—this Act is no doubt objectionable.

The number of these latter are very limited.

The *great* "common belief" and "common consent" of the "mass" of our citizens, which this Court may and must judicially *know* and *recognize*, and which stands embodied in the unsurrendered police power of each of our States, and stands protected, under our constitutions, State and Federal, by the declaration of the Supreme Court of the United States, quoting with approval the highest court of New York, in the words: "*What the people believe is for the comman welfare must be accepted as tending to promote the common welfare, whether it does in fact or not*"—these are the *fundamental* things or concepts which put the Act in question, we



respectfully submit, beyond the power of this or any other Court to strike down and destroy.

So far as concerns any insistence that this Act violates Art. 1, Sec. 8, or Art. XI, Sec. 8, or the "Equality," "Liberty," or "Due Process" clauses of the Fourteenth Amendment to the Federal Constitution, we have also initially and primarily shown *how clear* it is that the Act in question—(just like any other Act by which the State undertakes to control the manner of the doing of any public work or service voluntarily entered upon by the State and to be done at public expense)—is entirely outside of the scope and purview of such constitutional provisions which are utterly inapplicable to any such act. With the policy of such statutes the Courts can have no concern, and they present no question *open* for judicial review under said constitutional provisions.

So far as concerns any insistence that the enforcement of this simple Act would to any degree hamper or impede the teaching of any "science" or impair or retard any investigation or progress or even hope of progress along any "scientific" line, or that this Act to any degree prefers any "religious establishment" or "mode of worship" over any other—we submit that

we have demonstrated the utter fallacy and lack of any merit in any such contentions.

For all the reasons hereinbefore presented we say there is no merit in any of the Assignments of Error, that they should each and all be overruled, and the judgment of the Court below should be affirmed.

Respectfully submitted,

FRANK M. THOMPSON,
*Attorney-General.*

ED. T. SEAY,
K. T. MCCONNICO,
*Special Counsel*
*for State of Tennessee.*

WM. JENNINGS BRYAN, JR.,
CHARLES T. CATES, JR.,
KEEBLE & SEAY,
PITTS, MCCONNICO & HATCHER,
*Of Counsel.*