# Black: Concurrence

MR. JUSTICE BLACK, concurring.

I am by no means sure that this case presents a genuinely justiciable case or controversy. Although Arkansas Initiated Act No. 1, the statute alleged to be unconstitutional, was passed by the voters of Arkansas in 1928, we are informed that there has never been even a single attempt by the State to enforce it. And the pallid, unenthusiastic, even apologetic defense of the Act presented by the State in this Court indicates that the State would make no attempt to enforce the law **[p. 110]** should it remain on the books for the next century. Now, nearly 40 years after the law has slumbered on the books as though dead, a teacher, alleging fear that the State might arouse from its lethargy and try to punish her, has asked for a declaratory judgment holding the law unconstitutional. She was subsequently joined by a parent who alleged his interest in seeing that his two then school-age sons "be informed of all scientific theories and hypotheses. . . ." But whether this Arkansas teacher is still a teacher, fearful of punishment under the Act, we do not know. It may be, as has been published in the daily press, that she has long since given up her job as a teacher and moved to a distant city, thereby escaping the dangers she had imagined might befall her under this lifeless Arkansas Act. And there is not one iota of concrete evidence to show that the parent-intervenor's sons have not been or will not be taught about evolution. The textbook adopted for use in biology classes in Little Rock includes an entire chapter dealing with evolution. There is no evidence that this chapter is not being freely taught in the schools that use the textbook, and no evidence that the intervenor's sons, who were 15 and 17 years old when this suit was brought three years ago, are still in high school, or yet to take biology. Unfortunately, however, the State's languid interest in the case has not prompted it to keep this Court informed concerning facts that might easily justify dismissal of this alleged lawsuit as moot or as lacking the qualities of a genuine case or controversy.

Notwithstanding my own doubts as to whether the case presents a justiciable controversy, the Court brushes aside these doubts and leaps headlong into the middle of the very broad problems involved in federal intrusion into state powers to decide what subjects and schoolbooks it may wish to use in teaching state pupils. While I hesitate to enter into the consideration and decision **[p. 111]** of such sensitive state-federal relationships, I reluctantly acquiesce. But, agreeing to consider this as a genuine case or controversy, I cannot agree to thrust the Federal Government's long arm the least bit further into state school curriculums than decision of this particular case requires. And the Court, in order to invalidate the Arkansas law as a violation of the First Amendment, has been compelled to give the State's law a broader meaning than the State Supreme Court was willing to give it. The Arkansas Supreme Court's opinion, in its entirety, stated that:

"Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark.Stat.Ann. § 81627 and § 81628 (Repl.1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true, the answer not being necessary to a decision in the case and the issue not having been raised."

It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine. It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum. And, for all the Supreme Court of Arkansas has said, this particular Act may prohibit that and nothing else. This Court, however, treats the Arkansas Act as though it made it a misdemeanor to teach or to use a book that teaches that evolution is true. But it is not for this Court to arrogate to itself the power to determine the scope of Arkansas statutes. Since the highest court of **[p. 112]** Arkansas has deliberately refused to give its statute that meaning, we should not presume to do so.

It seems to me that, in this situation, the statute is too vague for us to strike it down on any ground but that: vagueness. Under this statute, as construed by the Arkansas Supreme Court, a teacher cannot know whether he is forbidden to mention Darwin's theory at all or only free to discuss it as long as he refrains from contending that it is true. It is an established rule that a statute which leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies him the first essential of due process. *See, e.g., Connally v. General Construction Co.,* 269 U. S. 385,269 U. S. 391 (1926). Holding the statute too vague to enforce would not only follow longstanding constitutional precedents, but it would avoid having this Court take unto itself the duty of a State's highest court to interpret and mark the boundaries of the State's laws. And, more important, it would not place this Court in the unenviable position of violating the principle of leaving the States absolutely free to choose their own curriculums for their own schools so long as their action does not palpably conflict with a clear constitutional command.

The Court, not content to strike down this Arkansas Act on the unchallengeable ground of its plain vagueness, chooses rather to invalidate it as a violation of the Establishment of Religion Clause of the First Amendment. I would not decide this case on such a sweeping ground for the following reasons, among others.

1. In the first place I find it difficult to agree with the Court's statement that

"there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man."

It may be, instead, that the people's motive was merely that it would be best to remove this controversial **[p. 113]** subject from its schools; there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. And this Court has consistently held that it is not for us to invalidate a statute because of our views that the "motives" behind its passage were improper; it is simply too difficult to determine what those motives were. *See, e.g., United States v. O'Brien,* 391 U. S. 367, 391 U. S. 382-383 (1968).

2. A second question that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine. If the theory is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an "anti-religious" doctrine to school children? The very cases cited by the Court as supporting its conclusion hold that the State must be neutral, not favoring one religious or anti-religious view over another. The Darwinian theory is said to challenge the Bible's story of creation; so, too, have some of those who believe in the Bible, along with many others, challenged the Darwinian theory. Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.

3. I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, **[p. 114]** political, or religious subjects that the school's managers do not want discussed. This Court has said that the rights of free speech, "while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana,* 379 U. S. 536,379 U. S. 554; *Cox v. Louisiana,* 379 U. S. 559, 379 U. S. 574. I question whether it is absolutely certain, as the Court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

Certainly the Darwinian theory, precisely like the Genesis story of the creation of man, is not above challenge. In fact the Darwinian theory has not merely been criticized by religionists, but by scientists, and perhaps no scientist would be willing to take an oath and swear that everything announced in the Darwinian theory is unquestionably true. The Court, it seems to me, makes a serious mistake in bypassing the plain, unconstitutional vagueness of this statute in order to reach out and decide this troublesome, to me, First Amendment question. However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible.

I would either strike down the Arkansas Act as too vague to enforce or remand to the State Supreme Court for clarification of its holding and opinion.