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The Legality of Bible Reading

THE HIGH WATERMARK of the principle of separation of church and state seems to have occurred in the waning days of the nineteenth century and the early years of the twentieth. Since that time, Bible reading in the public schools has increased noticeably, especially since World War I. In 1952 and 1960 the United States Supreme Court refused to rule on the question because of jurisdictional reasons. In 1963, however, the Supreme Court declared that Bible-reading exercises in the public schools were unconstitutional. Prior to this, the high courts of twenty-one states, plus a federal district court in Pennsylvania (the Schempp case) ruled on the question. And their litigation has given rise to some lengthy and sometimes learned opinions.

Two generalizations may be made regarding these lower court opinions. The first relates to the almost completely divergent views held by the different judges on the central and essential issues running through all of the cases. The second is that while the fact situation in all the cases is not exactly the same, all of the cases discussed in this chapter and

the next have the issue of Bible reading as their core. Other cases in which the question of Bible reading plays an incidental part will be discussed later.

The highest courts of fourteen states took an expressly favorable view of Bible reading in their public schools. These states are: Iowa, Kentucky, Kansas, Michigan, Minnesota, Massachusetts, Maine, New York, New Jersey, Texas, Tennessee, Colorado, Georgia, and Maryland.¹ The fact situations in these cases, as in all cases dealing with this question, ran the gamut from the Pfeiffer case to the Stanley case. In the former an action to restrain the Board of Education from using a textbook entitled *Readings From the Bible* as a supplementary textbook failed. The book was composed of selections taken mostly from the Old Testament and it contained no comment on the biblical passages. Nor did the teachers make oral comment on these passages. In addition to this, the pupils were not compelled to take part in the exercise if they presented a note from their parents asking that they be excused.²

In *People ex rel. Vollmar v. Stanley*,³ the school board in a Colorado community had decreed that selections from the King James Version of the Bible be read aloud each day in the public schools. When the Roman Catholic pupils in these schools walked out of the room during this reading, the board proceeded to make attendance compulsory. A mandamus suit was then brought by the Catholic parents against the school board. The parents sought to prevent compulsory attendance at the time the Bible was being read. They also sought to prohibit this practice entirely in the public schools.

The Supreme Court of Colorado decided that although compulsory attendance violated the pupil's religious liberty

granted by the State and Federal constitutions, nothing was inherently wrong with the practice of Bible reading, and the school board was entitled to continue the practice so long as it did not require compulsory attendance. The facts in other cases may differ slightly, but the essential ingredients of the litigation arising over Bible reading in the public schools are contained in the foregoing examples.

Basic Issues

The courts were confronted with three fundamental questions in connection with Bible reading. The first and most important question is: Is the Bible a sectarian book? The second question need be discussed in detail only if the first question is answered in the negative. It is: May the Bible without note or comment be used as a textbook in public schools? The third question is: May the boards of education and teachers require compulsory attendance during the period set aside for Bible reading?

While the remainder of this chapter, as well as the next chapter, will go into a detailed examination of representative opinions by various courts on these questions, a few general observations are in order at this point. In regard to the first question, the fourteen state courts which have held Bible reading to be legal believe that Bible reading in the public schools without note or comment is not sectarian instruction. Seven of these states have provisions in their constitutions prohibiting the use of tax revenue for sectarian purposes.⁴ Five other states have statutes which prohibit sectarian instruction in their public schools.⁵ It is interesting to note, however, that Kentucky, Maine, New Jersey, and Georgia which have statutes forbidding sectarian instruction in the schools, also have statutes which require

Bible reading.⁶ In a similar vein, Kansas, which has a statute prohibiting sectarian instruction, also has a statute which permits Bible reading.⁷

In three states where the courts have held Bible reading to be legal, statutes exist which specifically refer to Bible reading in the public schools. Massachusetts and Tennessee have statutes⁸ which require Bible reading, and Iowa has a statute⁹ which permits this practice.

The attitude of the fourteen state courts which have held that the Bible is not a sectarian book seems to be based upon the conception that the constitutions and statutes of most states recognize the broad principles of Christianity, at least so far as its general moral teachings are concerned. This explains the ability of some courts to countenance Bible reading in public schools while at the same time believing in the importance and necessity of the provisions forbidding sectarian instruction in state constitutions and statutes. These courts which have viewed Bible reading favorably appear to think that,

While Bible reading and exercises which merely tend to inculcate fundamental morality in pupils, and to quiet them in their studies are not prohibited, such exercises may be carried so far as to emphasize the teachings of a particular sect and this comes within a constitutional provision.¹⁰

The term "sectarian" is apparently viewed by most of these courts in a purely Christian context. It would seem likely that groups such as the Jews, Mohammedans, and Buddhists, would regard at least parts of the Bible as sectarian.

While the state courts are split in their views regarding the legality of using the Bible as a textbook, all of them

recognize that it has great historical and literary value which would be an asset for pupils to acquire. They also generally acknowledge that it is rich in moral instruction, which all students should acquire in some way, but on how this is to be accomplished there is no agreement. It should also be mentioned that even courts opposed to Bible reading in the public schools felt that textbooks founded upon the Bible and emphasizing its fundamental teachings may be legally used in the public schools.¹¹

The question whether compulsory attendance for Bible-reading exercises in the schools is legal has been most difficult for the state courts taking a favorable view of Bible reading to rationalize. Their problem was this: if the Bible is a sectarian book, reading it in school will restrict the religious liberties of some pupils. If it is not sectarian, it will not irritate the religious convictions of any sect, and since pupils are not excused from the other nonsectarian studies, such as arithmetic and chemistry, there is no reason why they should be excused from Bible reading. The facts seemed to indicate, however, that large sects, such as Roman Catholics and Jews, were opposed to reading the King James Version because it appeared to them to be inconsistent with their religious beliefs.

THE BIBLE IS NONSECTARIAN

From this somewhat perfunctory overview let us look more closely at basic issues faced by the courts in litigation arising over Bible-reading exercises in the public schools. The court that holds Bible reading to be legal obviously concludes it is not sectarian, or at least not of the type as was envisioned to be prohibited by the framers of the state constitutions and statutes.

A stumbling-block in the courts has been the semantic confusion surrounding the word "sect." It means many things to many people, but a working definition was offered by the Texas court which said a sect is, "A body of persons distinguished by peculiarities of faith and practice from other bodies and adhering to the same general system."¹² The court felt from this that a school in which Bible reading was practiced could not be a sect or religious society. It admitted, however, that:

The right to instruct the young in the morality of the Bible might be carried to such an extent in the public schools as would make it obnoxious to the constitutional inhibition, not because God is worshipped, but because by the character of the services the place would be made a place of worship.¹³

The Colorado court in the Stanley case used a somewhat different approach to deny the intrinsic sectarian quality of the Bible. To the claim of the plaintiff that the King James Version was sectarian, the court replied, "The Bible is a compilation of many books. Even an atheist could find nothing sectarian in the book of Esther." It also explained that:

Some of it [the Bible] is sectarian in the sense that it is relied upon by this or that sect to prove its particular doctrines, but that does not make its reading the teaching of a sectarian tenet or doctrine. If all *religious* instruction were prohibited, no history could be taught. Hume was an unbeliever and writes as such; Macauley is accused of partiality to dissenters; Motley of injustice to Roman Catholics. Nearly all histories of New England and indirectly of the United States are bound up with religion, religious inferences, implications, and often prejudices Even religious toleration cannot be taught without teaching religion.¹⁴

The Colorado court apparently takes a wider view of the term "sect" than does the Texas court, for the former speaks of an atheist's relation to the Bible, while the latter's view of a sect appears to be that it is merely a faction within an accepted religion. Perhaps what the Texas court meant by "the same general system," however, was any one of the monotheistic religions or even any belief in a primordial being. It would appear that some of the courts which have held Bible reading legal conceive the term sectarian as applying only to the Christian religion; this might have a tendency to curtail the religious freedom of non-Christian and eclectic groups. The logical gymnastics which are engaged in by some courts to get around this point are illustrated by the New York Supreme Court's rejecting the claim that Bible reading in the public schools is sectarian or that it violates the religious liberties of anyone. It said:

A sect or tenet which is intolerant of those of a different sect or tenet is precisely the antithesis of religious liberty. Freedom is negated if it does not comprehend freedom for those who believe as well as those who disbelieve.¹⁵

It might be suggested that the freedom for those who believe has generally received a priority from the courts which have held Bible reading legal over the freedom of those who do not believe, or those who hold minority beliefs. Swancara has pointed out another important fact to be considered in a discussion of the sectarian nature of the Bible. He explains that even a nonsectarian book is capable of being used for sectarian purposes, and if we concede the Bible is nonsectarian we are forced to grant that it is generally used for sectarian purposes.¹⁶

HISTORICAL INVESTIGATIONS

Other courts, in discussing the potential sectarianism of the Bible, have looked to history for answers to the questions of what the founding fathers of the federal and state constitutions meant by religious freedom and sectarianism, and what they believed about the United States' being a Christian country. The Georgia court, after tracing the history of the separation principle in history, concluded that the founding fathers did not want or "have in mind a complete separation of Church and state." It was shocked to think anyone might think the Bible sectarian and thus incapable of use in the public schools of Georgia. It stressed:

And so every denomination may object for conscience sake, and war upon the Bible and its use in common schools. Those who drafted and adopted our Constitution could never have intended it to meet such narrow and sectarian views. That section of the Constitution was clearly intended for higher and nobler purposes.¹⁷

These "higher and nobler purposes," the court believed, were to protect all religions, the Buddhists, pagans, Brahmans, etc., in the enjoyment of unrestricted liberty in their religion and to be assured that they would not be taxed or fined to support another religion. It is difficult to see how the court felt that reading the King James Version of the Christian Bible in public schools would aid the unrestricted religious liberty of non-Christian groups in the community.

The Texas court found from its historical investigations that the state constitutional provision forbidding sec-

tarian instruction and an establishment of religion were calculated to prevent a condition such as existed in Texas when Mexico controlled that area. At that time, the Roman Catholic church was state-sponsored there, and received a portion of the tax revenue for its maintenance.¹⁸ To assume that Bible reading came within the scope of these prohibitions was absurd, the court felt. "In fact," it went on to say:

Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering of prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering on moral anarchy.¹⁹

It pointed to examples of cooperation between church and state — chapels at the state's universities, chaplains in the state's prisons, and chaplains in the state's institutions for the blind — to fortify its position that Bible reading was a mild form of cooperation between church and state, and thus was not prohibited by the constitutional provision against sectarian instruction in the public schools.

The United States as a Christian Nation

Another element that the lower courts felt called upon to discuss involved the often-heard statement that the United States is a Christian country. If this is true, the Bible would then appear to be an essential part of our cultural background, and its place in the public school system apparently could not be ignored. The Minnesota court's rather condescending discussion of this question is characteristic of the courts which view Bible reading favorably. It said:

We shall not stop to discuss whether or not this is a Christian nation; it is enough to refer to such discussions here-

inafter cited. However, we think it can not be successfully controverted that this government was founded on the principles of Christianity by men either dominated by or reared amidst its influence.²⁰

It goes on to discount the importance of the Treaty with Tripoli which states that the United States is not founded upon the theories of Christianity²¹ and concludes that the contention that the short extract from the Bible read in public schools constitutes sectarian instruction is in reality "a trivial argument."²² Perhaps if the Justices found themselves placed by religious upbringing on the opposing side of the question the triviality of the argument would be more difficult to discern.

A more legalistic approach to the historic analysis of sectarianism, and Bible reading's place in the public schools, is made by the Michigan court and is representative of the approach used by some midwestern courts.²³ The Michigan court explained that the state constitution of 1835 incorporated the Federal Ordinance of 1787. The Ordinance said in part,

Religion, morality and knowledge are essential to good Government and the happiness of mankind, and for these purposes, schools and the means to education shall ever be encouraged.

The court also pointed out that while the Ordinance did not make the teaching of religion imperative, it precludes the idea that the founders of the state's constitution meant to exclude the Bible from the public schools.²⁴

Justice Moore of the Michigan Supreme Court, in his dissenting opinion, makes a frontal attack upon this theory by pointing out its logical consequences. In objecting to the argument concerning the incorporation theory of the Ordinance of 1787, he said:

If his [Justice Montgomery's] position is sound, not only should the Bible be taught, but all forms of Christian religious instruction should be given in the schools. If this reasoning is sound, the constitution left it open to the school authorities to determine what variety of Christian religion they should teach, and the school board of the City of Detroit has the power today to have taught in the public schools . . . the theological tenets of any Christian church.²⁵

He concludes with the ringing words used frequently by the courts which have held Bible reading to be illegal.

A form of religion that cannot live under equal and impartial laws ought to die, and sooner or later must die. Legal Christianity is a solecism—a contradiction of terms.²⁶

Public Funds and Sectarian Instruction

The next point that arises in litigation discussing the sectarian nature of Bible reading involves the expenditure of public funds for religious and sectarian purposes. As pointed out earlier this is generally forbidden by the constitutions and statutes of a number of these states. The courts which have viewed Bible reading favorably say that it does not constitute a public expenditure for sectarian purposes. The reasoning of the several courts, while not identical, follows a similar vein.

The Iowa court's summary is representative of the general attitude expressed by these courts. This court agreed that the possibility existed that Bible-reading exercises might be adopted with a potential view to worship; and in some sense the school might be considered a place of worship. It continued:

But it seems to us that if we should hold that it [a school where Bible reading is practiced] is a place of worship, within the meaning of the constitution, we should put

a very strained construction upon it. The object of the provision, we think, is not to prevent the casual use of a public building as a place of offering prayer or of doing other acts of religious worship, but to prevent an enactment of a law whereby any persons can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden.²⁷

The court went on to investigate the plaintiff's motives in bringing the suit and concluded that his real objection did not grow out of the question of taxation, but was to Bible reading as such. It tartly concluded:

Possibly the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this is so or not, it is sufficient to say the the courts are charged with no such mission.²⁸

The New York Supreme Court analyzed the motive involved in a suit questioning the practice of Bible reading in the same way. It felt that the plaintiff's attack was on the belief and trust in God, not on the expenditure of tax revenue for religious purposes. It continued by stating that these "beliefs and trusts, regardless of our own belief have received recognition in state and judicial documents from the earliest days of our republic."²⁹ After summing up the stock examples of cooperation between church and state, e.g., chaplains in the two houses of Congress and in the armed forces, and the inscription of the slogan "In God We Trust" on United States coins, the court rather paradoxically stated:

These quotations are not intended to convey the thought that state and church should be brought into closer harmony. . . . The principle that religion has no place in public temporal education is so inexecutable that a reaffirmation of it would be supererogatory.³⁰

Bible Reading and Liberty of Conscience

While these fourteen state courts have held Bible reading to be legal, they were equally insistent that religious freedom and the liberty of conscience must be protected. They have, however, a tendency to speak in generalities, and some people might feel that the courts' actions belie their words. An example of the vociferous devotion to the principles of religious liberty may be found in the opinion of the Massachusetts court, which is illustrative of the views of the other courts which have held Bible reading to be legal. It feels that the school board has a right to require Bible reading in the schools, but it goes on to explain:

We do not mean to say that it would be competent for a school committee to pass an order or regulation requiring pupils to conform to any religious forms or ceremonies which are inconsistent with or contrary to their religious convictions or conscientious scruples.³¹

Even though these courts pay homage to the principles of religious equality and the freedom of conscience they seem to suggest that these are ideals which cannot always be achieved in practical situations. Some have developed a theory which makes allowances for practices such as Bible reading, which have a tendency to ruffle the rights of free conscience for some people. The Maine court expressed this in one of the first cases on Bible reading. It pointed out that the legislature passes general laws for the guidance of the citizen:

It is not necessarily true that they are unconstitutional because they conflict with his conscientious beliefs, nor is the citizen allowed to ignore them for that reason.³²

To be sure, there is something to be said for this view, but in recent years some justices of the United States Supreme Court have pointed out that First Amendment rights,

including the right to freedom of conscience, have a somewhat preferred position when they come into conflict with certain legislative enactments. In the *Barnette* case,³³ for example, the United States Supreme Court held that a religious aversion to saluting the United States flag with an affirmation of a certain political belief had precedence over an ordinance requiring that all students go through a flag salute exercise in the public schools.

Another charge leveled against the practice of Bible reading in the public schools is the allegation that the practice constitutes a legislative preference of one religion over others. The Maine court, when called upon to answer this charge, explained:

If this were to be regarded as a legislative preference, much more must those laws by which the Sabbath is established as a day of rest, in which labor, except for necessity, is prohibited being done, be regarded as a subordination of the religious views of all other sects to those holding that day as sacred.³⁴

(This court apparently felt that the legality of Blue Laws was above question.) This is a view concurred in by the United States Supreme Court in 1961, when, in a series of cases, it upheld the constitutionality of such laws.³⁵

THE KING JAMES VERSION IS NONSECTARIAN

The King James Bible is the version almost invariably chosen to be read in the schools. Nearly all of the litigation resulting from the practice of Bible reading was brought by Roman Catholics and Jews who objected to the selection of this version as being sectarian. The courts which have viewed Bible reading favorably have held these objections to be invalid.

In this connection the general attitude taken by the courts that have upheld the legality of Bible-reading exer-

cises is exemplified by the views expressed by the Kentucky court. It felt that a book is not sectarian simply because it is so comprehensive as to include the partial interpretation of the adherents of certain sects or because it is edited or compiled by persons 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."³⁶

The Kentucky court also had to determine the legality of a general prayer which was given at the beginning of the school day. The court concluded that neither the prayer nor Bible reading constituted sectarian instruction, since the children were not compelled to attend the exercises.

The Maine court saw the difference between the Protestant and Catholic version of the Bible as a mere translation problem, which should pose no serious difficulty. It explained that while the King James Version might be chosen by the school board of one area the Douay Version might be the choice of the board in another area. "The adoption of one is no authoritative sanction of purity of text or accuracy of translation."³⁷ The choice, it felt, was the result of the popular will, and could not be termed a preference of religion by law.

In regard to the Jewish taxpayers' objection that the reading of the New Testament constituted an expenditure of tax revenue for sectarian purposes, the Georgia court said:

The Jew may complain to the court as a taxpayer just exactly when, and only when, a Christian may complain to a court as a taxpayer *i. e.*, when the Legislature authorizes such reading of the Bible or such instruction in the Christian religion in the public schools as gives one Christian sect a preference over others.³⁸

It went on to explain that it did not believe an ordinance which required the reading of the King James Version injured Roman Catholics or Jews, since they were not required to attend this exercise, and also because the Bible was read without note or comment. This, it felt, made it a study of a moral treatise on the same order as a study of the Koran might be.

Dissenting Views

The opinion of those who feel that Bible reading represents sectarian instruction is well summed up in Justice Wilson's dissenting opinion in the Kaplan case, heard by the Minnesota Supreme Court.³⁹ He said he did not feel it was proper to have Jewish children read the New Testament, for it has a tendency to show that their teaching at home is in error. This also holds true in regard to Roman Catholic pupils reading the King James Version of the Bible, or to Protestants' reading the theory of purgatory as explained in the Book of Maccabees of the Douay Bible, if the Board of Education happens to require the Douay Version be used in Bible reading exercise. "No man must feel that his religion is tolerated. His Constitutional rights of conscience should be indefeasible and beyond the control and interference of men. The Constitution says so."⁴⁰

A somewhat unusual view is taken by Swancara⁴¹ in objecting to the Colorado court's decision⁴² which held that reading the King James Version was not sectarian. He states in connection with the court's rejection of the Roman Catholics' protest that their constitutional right to be free from sectarian instruction in the public school was being violated; "It reminds one of a Christian Science 'cure'; the

disease is deemed imaginable only, and there is no occasion for seeking a cure."⁴³

He also suggests that there is a correlation in this case between the Ku Klux Klan and the movement to have the King James Version read in the schools. He shows that the judge who dissented in this case because he felt that the reading should be compulsory, had been a speaker at a Klan meeting which was billed as the "Cosmopolitan Club" in the *Rocky Mountain News* on January 14, 1925. While at the meeting the judge was "lauded by other orators as a great judge and a man of the highest integrity." When the Roman Catholics lost the battle to stop Bible reading in the Colorado schools, Swancara states:

Probably some Klanized Protestants thereupon rejoiced, not because any version of the Bible was read in the public schools [they insisted on the use of the King James Version only] but because of the ensuing vexation to some of the Catholic patrons, notwithstanding the fact that such rejoicing parties professed reverence for the Christian principle: 'Love thy neighbor as thyself.'

While this may be an extreme view, its uniqueness is noteworthy for a possible insight into the political forces at work behind a policy to institute Bible reading in the public schools.

One additional point is made by Swancara: when secular books which contain religious matters are read in class they do not give the pupils the impression that they are being influenced to favor one religion or another. The Koran, when used in school, is not read with a reverent tone. "This," he states, "is not true with the King James Version, it is meant to propagate the Protestant faith." If, as most of the courts suggest, the purpose of Bible reading

is to impart moral instruction, the Koran should receive the same treatment as the Bible, for he concludes both are rich in moral and ethical lessons.

THE BIBLE AND MORAL INSTRUCTION

The courts which viewed Bible reading favorably were either not impressed by this argument or ignored it. They generally maintained that the inculcation of the moral precepts of the Bible cannot be considered sectarian instruction. The Massachusetts court said:

No more appropriate method could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by statutes of this commonwealth, and which teachers are especially enjoined to carry into effect is 'to impress on the minds of children and youths committed to their care and instruction the principles of piety and justice and a sacred regard for truth.'⁴⁴

The Kansas court stressed that moral instruction is a public duty. It states that the public has a right to expect that pupils coming out of the public schools have a more acute sense of right and wrong, as well as higher ideals of life. "The system ought to be so maintained as to make this certain. The noblest ideals of moral character are found in the Bible."⁴⁵

The Minnesota court pointed out that the State Legislature provided for moral instruction in Section 2906, General Statutes, 1923, which read:

The teachers in all public schools shall give instruction in morals; in physiology and hygiene and in the effects of narcotics and stimulants.

It then concludes: "What is more natural than turning to that Book for moral precepts which for ages has been

regarded by the majority of the peoples of the civilized nations as the fountain of moral teachings.”⁴⁶

Some boards of education have gone to extraordinary lengths to avoid the charge that they are using sectarian texts in the Bible-reading exercises carried on in the public schools. The New York Board, in an attempt to live up to the constitutional and statutory provisions forbidding sectarian instruction in the schools, and yet to maintain a system of Bible reading, bought the Douay Version of the Bible, the King James Version, a book entitled *Bible Readings*, the International Bible (authorized version) and portions of the Hebrew Bible in translation by Izaack Lessar. These were to be read to the students at regular intervals. The record is not clear as to which version was chosen to be read to any given group of pupils, or how the selection was arrived at. Nevertheless, the practice was challenged in the Lewis case, and the Supreme Court of New York held it to be legal.⁴⁷

In addition to being rich in moral lessons, the Bible is regarded by the courts of some states as being an excellent disciplinarian. There are a number of cases where the stated purpose of Bible reading was to quiet the pupils at the beginning of the school day, and to place them in a receptive mood for the day's work. The Kansas court found nothing objectionable when a teacher, for the purpose of quieting the pupils, read the Lord's Prayer and biblical selections without note or comment. The court could see “not the slightest effort on the part of the teacher to inculcate any religious dogmas.”⁴⁸

The Massachusetts court, in dismissing the charge that Bible-reading exercises violated religious freedom by being sectarian instruction, said:

But we are unable to see that the regulation with which the plaintiff was required to comply can be justly said to fall within this category. In the first place, it did not prescribe an act, which was necessarily one of devotion or religious ceremony.

It went on to say that the only thing required was the observance of quiet and decorum during the religious exercise with which the school is opened. The pupils were not compelled to join in the prayers and Bible-reading exercises, but "only to assume an attitude which was calculated to prevent interruption by avoiding communication with others . . ." ⁴⁹

THE BIBLE AS A TEXTBOOK

After the fourteen courts which looked favorably upon Bible reading had decided that the Bible was not a sectarian book, they investigated the legality of its use as a textbook in the schools. While they pointed out that since it was not sectarian, there could be no objection on that score, they went further and gave additional reasons for allowing the Bible to be used as a text. The consensus among the courts was that the choice of teaching materials rested with the state legislatures and their local educational counterparts, the school boards. The courts felt that judges had no right to set themselves above these agencies in matters of educational policy.

In *Nessle v. Hum*,⁵⁰ an early Ohio case which has not been previously cited since the question of Bible reading played only an incidental part in the litigation, the court addressed itself to the role legislatures play in the selection of educational material for the public schools. It explained that the legislature placed the management of the public

schools under the exclusive direction of the Directors or the Boards of Education. It went on to point out that the courts have no authority to interfere with the boards by determining what instructions should or should not be given or what books should be chosen and what others should be cast aside.

The Maine court took a more extreme attitude. It repeated that the power of curriculum planning must rest somewhere, and it believed it rested with the legislature. However, it went on to explain that this power is general and unlimited. Even if the selection of text material was unwise or immoral, the court felt it had no power to interfere with it. There is only one recourse open to those who object to the educational material selected by school committees, and this is voting against the members of the school committee at the next election. An additional factor in this case was a damage claim made by the plaintiff which resulted from the expulsion of his son from school for a refusal to take part in the Bible-reading exercises. The court in dismissing this claim emphasized the immunity from liability of educational officials. It pointed out that even if the officials had been in error (which it did not concede) they could not be sued for making a mistake while in the good faith performance of their official duty.⁵¹

Judicial Reaction to Minority Group Views

In addition to stressing the power of the legislature and school boards in the choice of subject matter, the courts have also stressed the danger of allowing minorities to dictate or frustrate school policies. On this point also, the Maine court formulated the logical pattern to be used by later judges. It felt that if the objection to the Bible-reading

exercise was allowed to stand, the choice of texts might become subordinate to an individual's will. It pointed out:

The right of negation is, in its operation equivalent to that of proposing and establishing. The right of one sect to interdict or expurgate would place all schools in subordination to the sect interdicting or expurgating.⁵²

This court, in rejecting the plaintiff's objections to Bible reading, concluded, "The right as claimed undermines the power of the state. It is that the will of the majority shall bow to the conscience of the minority or of one."

The Texas court discussed the danger of minority control of educational matters on a moral and ethical level. It said:

But it does not follow that one or more individuals have the right to have the courts deny the people the privilege of having their children instructed in the moral truths of the Bible because such objectors do not desire that their own children shall be participants therein. This would be to starve the moral and spiritual natures of the many out of deference to the few.⁵³

A lower Pennsylvania court once extended this view to a point which might shock our contemporary educators. It stated:

The principle on which the common schools of this commonwealth were established was not a regard for children as individuals, but as part of an organized community for the working out of a higher civilization and freedom . . . They are the outgrowth of the state policy for the encouragement of virtue and the prevention of vice and immorality and are based upon the public conviction of what is necessary for the public safety.⁵⁴

This court seemed to feel that the right of conscience is subordinate to the community need for uniformity.

The Bible as History and Literature

Another point which the courts investigate when looking into the merits of using the Bible as a text concerns its historical and literary aspects. It has been mentioned previously that even the courts which have ruled Bible reading to be illegal concede that it may make valuable historical and literary contributions to the pupil's education.

The New York court, speaking specifically about the Bible's literary value, said:

Even those who do not accept the Bible as an accurate historical chronicle, enthusiastically regard it as possessing rare and sublime literary qualities. Suppose it were read in an English Class as an example of pure English. . . . It would be treading upon explosive ground for the courts to essay a regime for the public schools.⁵⁵

When speaking of the historical importance of the Bible, the Kentucky court pointed out that if its contents were in another book not called by the same name, no one would object to its use in the schools. It then suggests the consequences inherent in the projection of the view that the Bible is a sectarian textbook.

May it not be said then with equal force that to teach the Constitution, which itself teaches the right to perfect freedom in the worship of God, is sectarian, because some sect may deny that it was right to teach the children to worship God in any way except according to the teachings of that particular sect?⁵⁶

Almost all of these courts felt that if they sustained the objection that the Bible was a sectarian textbook, they would be forced to banish from the schools any books even remotely touching upon religion. The Maine court explained that the Bible was used merely as a book from which read-

ing exercises were given. If this was sectarian instruction, then the reading of Greek mythology would be instruction in paganism, it believed. The court then approached the question from a different angle by pointing out that:

Because Galileo, Copernicus and Newton may chance to be found in some prohibitory index, is that a reason why the youth of the country should be educated in ignorance of the scientific teachings of those great philosophers?⁵⁷

The Colorado court was appalled by the results which might stem from a doctrinaire view holding that any religious discussion in a textbook constituted sectarianism. It asserted that "if all religious instructions were prohibited, no history could be taught." It went on to predict that the "Star Spangled Banner" and "America" could not be sung in the school because they both mention God. Shakespeare or Milton could not be taught because of their frequent reference to God and to religion, nor could the student study the works of Webster, Clay, or Lincoln. From this and other similar analyses, it concluded that religious instruction was not always synonymous with sectarian instruction, and the Bible might advantageously be used as a text on some occasions.⁵⁸

In *Evans v. Selma High School*,⁵⁹ where an unsuccessful attempt was made to enjoin the school authorities from purchasing a number of Bibles to be included in the high school library, the California court also drew a line between sectarian books which are prohibited and general books touching upon religion which may have a place in a high school library. After stating that the constitution and statutes of California do not exclude religious books from the schools, but prohibit the use of sectarian and denominational literature, the court declared:

In a word, a book on any subject may be strongly partisan in tone and treatment. A religious book treating its subject in this manner would be sectarian. But not all books of religion would be thus excluded. The fact that it is not approved by all sects of a particular religion nor by the followers of all religions would not class it as sectarian for library purposes.⁶⁰

It concluded that the King James Bible was not a sectarian book forbidden by any of the states constitutional or statutory provisions. "The mere act of purchasing it carries no implication of adoption of the dogmas therein."

The dissenting justices in these cases have frequently objected specifically to the use of the Bible as a textbook in the public schools. The objections have a tendency to follow the same vein as expressed by the dissenting opinion of the Michigan court. Here it was pointed out that there is a great deal of difference between using the Bible as a text or merely including occasional quotations from it in other textbooks. In the latter case the quotations are not placed there to give them authority as religious doctrine. Then speaking of the Bible specifically, Justice Moore inquired:

Does not the fact that the teacher reads the book without note or comment warrant the pupil in believing that what is read is recommended to him as true?⁶¹

Finally he dealt with the need for a moral and ethical training in the schools, by explaining that as the efficiency of the schools and other means of education increased, religion and morality and knowledge will prosper.⁶²

BIBLE READING AND COMPULSORY ATTENDANCE

While the courts of fourteen states have agreed that the Bible is not a sectarian book, and thus may be used in the public schools, there is no unanimity among them as

to the question of compulsory attendance by students. There is agreement among most of the courts that pupils cannot be forced to attend Bible-reading exercises, but at least one — the Texas court — felt that since students are not excused from other nonsectarian instruction, such as geometry, there is no reason why they should be excused from Bible reading. This difference of opinion does not result from any essential difference in constitutional or statutory provisions affecting the subject. In *Church v. Bulloch*⁶³ and *People ex rel. Vollmar v. Stanley*⁶⁴ the constitutional and statutory provisions were similar, but the conclusions the courts of Texas and Colorado reached concerning the legality of compulsory attendance at Bible-reading exercises were quite different. The Texas court felt that the pupils must be present but need not pray, while the Colorado court stated that while the exercises were not contrary to the constitution of that state, pupils could not be forced to attend them.

The Colorado court reasoned that the "Right to liberty included the parents' right to determine what their children shall be taught, and refuse to have them taught what they think harmful." The one exception to this proposition, the court ruled, is that no one has a right to object to the teaching of good citizenship. The court did not believe, however, that Bible-reading exercises were essential to good citizenship, and therefore, the parents had a legitimate right to object to their children's being compelled to take part in such exercises. Compulsory attendance of this type would violate the individual's freedom guaranteed under the Fourteenth Amendment to the United States Constitution, this court concluded.⁶⁵

In both the Colorado case and the Kaplan case in Minnesota, there was at least one judge who believed that compulsory attendance would be legal. In the former, this

was expressed in one of the dissenting opinions, while in the latter Justice Stone concurred. He said, however, that while he was in agreement with the majority opinion, he did not think that the pupils would have to be released to make Bible reading legal in the public schools. He felt that it is merely, "considerate and tactful rather than legally necessary to permit certain children to absent themselves during the scripture reading."⁶⁶ This somewhat restrained view is not shared by one justice of the Colorado court who felt that Bible-reading exercises should be compulsory. He believed essentially that if the court felt the practice was legal and if the school authorities saw merit in the practice, all students should be compelled to attend.⁶⁷

A problem facing courts that have ruled attendance at Bible-reading exercises could not be compulsory has been concerned with the effects upon pupils with conscientious objections who leave the room when the exercises begin. Counsels have argued that a youth is extremely gregarious and desires to be part of the group. Any forced separation from his school fellows, such as occurs when a child's conscience forbids him to attend Bible reading in which the majority of the class takes part, places a religious stigma upon the departing pupil which may result in social ostracism for him. In this way the pupil is denied his democratic right of equality. The courts have taken completely divergent views of this question, depending upon whether they have viewed Bible reading favorably or unfavorably.

The Colorado court's attitude on this question is representative of those courts which have looked favorably upon Bible reading. It rejected the above contention as an "idle argument," saying:

We cannot agree to that. The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations, but never one for neglecting them or absenting himself from them.⁶⁸

Possibly this represents a somewhat cloistered view.

DISSENTS AND DIVERGENCES

Chief Justice Wilson of the Minnesota Supreme Court, in his dissenting opinion in the Kaplan case, objected to a statement by the majority which was similar to the above-mentioned view of the Colorado court. He pointed out that excluding pupils from Bible-reading exercises because of their conscientious objections constituted discrimination against those pupils who leave the room. He explained that a pupil's constitutionally guaranteed right to freedom of conscience must mean that:

He may not only worship as his conscience dictates, but, surely, he also has a right not to be annoyed by those things which directly interfere with what he genuinely believes is wrong, even though they act only upon an incidental, but, to his mind, an important, angle of his way of worship.⁶⁹

It might be noted further that not all of the fourteen courts which upheld Bible-reading exercises were unanimous in their respective opinions. Nor was there complete agreement among the majority opinions on points of philosophic and historic interpretation. In the fourteen cases to come before state courts where Bible reading was declared legal, nine of the decisions were unanimous. Furthermore, the two judges who dissented in the Colorado (Stanley) case did not object to Bible-reading programs as such. Their objection was directed at the court's decision to make such exercises

noncompulsory. One of the two dissenting votes in the Georgia court⁷⁰ was cast for exactly this same reason.

Thus in only four of the fourteen courts which upheld Bible reading was there any real difference of opinion regarding the actual practice. These were the courts of Michigan, Minnesota, Maryland, and Georgia.

Statistically then, we see that a total of eighty-five judges heard these cases in the fourteen state courts which upheld Bible reading. Of the eighty-five judges, only six dissented because of objections to Bible reading. This reveals a remarkable degree of agreement considering the explosive nature of the subject involved.

THE DOREMUS CASE

The Doremus case⁷¹ has been reserved for separate consideration for several reasons. First, it was one of the more recent cases concerning Bible reading to be litigated. Secondly, it was the first case in which the United States Supreme Court gave us even the slightest insight as to how it stood on the question. It was not, however, the first case involving Bible-reading exercises to come before the Supreme Court of the United States. The first case was *State ex rel. Clithero v. Showalter*.⁷² Here the court in a *per curiam* opinion dismissed for want of a substantial federal question, a mandamus suit seeking to force the school board to institute Bible reading in the public schools of Washington.

It should be noted that the Supreme Court in the Doremus case also refused to rule on the issues, and dismissed the appeal for lack of jurisdiction. Nonetheless, its reasoning is of particular interest since it not only reiterates some of the points already noted, but introduces some new approaches to the problem.

The facts in this case are similar to many cases previously discussed with several exceptions. The litigation involved a New Jersey statute⁷³ providing for the reading without comment of five verses of the Old Testament at the opening of each school day. No issue was raised under the state constitution, but the act was claimed to violate that clause of the First Amendment to the federal Constitution prohibiting the establishment of religion.

Doremus, who had no interest in the case other than being a "citizen and taxpayer," and Mrs. Anna Klein, whose seventeen-year-old daughter was a pupil in the school, brought the suit. There was no assertion that the Klein girl was offended, injured, or compelled to accept, approve, or listen to any dogma or creed when the Bible was read. Actually there was a pre-trial stipulation that any student at his own or his parent's request could be excused during Bible reading, and in this case no such excuse was asked. A point to be noted, however, is that the Klein girl had graduated from the high school before the appeal reached the Supreme Court of the United States.

In this case there was no trial held in the lower state court. The trial court denied relief on the merits on the basis of the pleading and a pre-trial conference. The Supreme Court of New Jersey, on appeal, held that the act did not violate the federal Constitution in spite of its jurisdictional doubts.⁷⁴ These doubts referred to Doremus' right as a citizen and taxpayer, for while the New Jersey court did not question this status, it did not concede, nor did it accept the proof that "the brief interruption in the day's schooling caused by compliance with the Statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work."⁷⁵

The Supreme Court of New Jersey observed at the out-

set that no one in this case asserted that his religious practices had been interfered with or that his right of conscience had been suppressed. The only purpose and function of the plaintiffs, the court noted, is "that they assume the role of actors so there may be a suit which will invoke a court ruling upon the constitutionality of the Statute." It went on to deny that the intent of the First Amendment to the United States Constitution was to negate the existence of a Supreme Being or to suppress governmental recognition of God. To prove this it cited the usual examples of state cooperation with religion and quoted a stanza from our national anthem which announces, "And this be our motto — In God is Our Trust!"

Speaking more specifically of the Bible and of Bible-reading exercises, the court said: "We consider that the Old Testament because of its antiquity, its content, and its wide acceptance, is not a sectarian book, when read without comment." It believed that the Bible is accepted by three great religions — Jewish, Roman Catholic, and Protestant — and in part, at least, by others. While the court conceded that there were other religions in the United States beside the ones mentioned it noted that they were numerically small and "negligible" in point of impact on our national life. This caused it to conclude that, "these minor groups had no vital part in the formation of our national character."

This did not mean, the court hastened to point out, that a small group thereby loses its constitutional rights. Since "theism is in the warp and woof of the social and governmental fabric," the court concluded, there can be no constitutional objection to Bible-reading exercises on the grounds that one religion is preferred above another. Furthermore, it went on to explain, the statute in question has been in

operation forty-seven years, and courts have no right to invalidate a statute which has never been challenged for so many years unless its unconstitutionality is obvious.

The United States Supreme Court and the Doremus Case

Justice Jackson, speaking for the majority of the United States Supreme Court, delved into the fact situation before analyzing the merits of the case. He noted that since no trial was held in the state court, the United States Supreme Court had no findings of fact. Furthermore, the record contained "meager notes" of the pre-trial conference in the lower court. He then explained that though the highest state court believed that the plaintiffs had sufficient standing to maintain a suit to have a statute declared unconstitutional, and while this opinion was entitled to respect, it could not be binding upon the Supreme Court of the United States. He went on to state that the Supreme Court could make an independent examination of the record and upon so doing "we find nothing more substantial in support of jurisdiction than did the court below."⁷⁶

He next discussed the significance to the case of the fact that the Klein girl had graduated from high school by the time the appeal was taken and pointed to the mootness of the question involved in the case as a result of this graduation. He explained:

Obviously no decision we could render now would protect any rights she may have had, and this court does not sit to decide arguments after events have put them to rest.⁷⁷

Justice Jackson pointed up the weakness of the argument advanced by Mrs. Klein when he stressed that there was no assertion that the child was injured or offended by this prac-

tice, since she was not even required to attend the Bible-reading exercise.

The controlling factor in cases such as this, the majority felt, was the requirement of substantial financial interests. They agreed that the motivation in this case was primarily of a religious nature, but they went on to say:

It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be injured by the unconstitutional conduct. We find no such direct and particular financial interest here.⁷⁸

The court attempted to spell out what type of taxpayer action involving the question of Bible reading would present a "case or controversy" within the jurisdiction of the United States Supreme Court. It explained that this occurs only when it is a "good-faith pocket book" action seeking to litigate a direct and particular financial injury. When this is the case, it concluded, it does not matter that the taxpayer's dominant inducement is more religious than mercenary.⁷⁹

Dissenting Views

Justice Douglas wrote a dissenting opinion in which Justices Reed and Burton concurred. He felt that the case deserved a decision on the merits, for no group is more interested in the operation of the public schools than taxpayers who support them and parents whose children attend them. He doubted if any taxpayers could show more interest than is present in this case, by showing that, "the Bible adds to the taxes they pay." He denied that the issues are "feigned" in this case, or that the suit is collusive. "The mismanagement of the school system that is alleged is clear and plain." He admitted that the rule of *Massachusetts v. Mellon*⁸⁰ would

prevent a case such as this from being maintained if it were a suit to enjoin a federal law. But, he stressed, "New Jersey can fashion her own rules governing the institution of suits in her courts." Thus, if she gives these taxpayers status to sue, Justice Douglas could see nothing in the Constitution to prohibit it. He concluded:

And where the clash of interests is as real and as strong as it is here, it is odd indeed to hold there is no case or controversy within the meaning of Art. III, sec. 2 of the Constitution.⁸¹

The Supreme Court is ever sensitive to public opinion as expressed by newspapers and legal journals. The tremendous furore which arose as a result of the *McCollum* case undoubtedly had a profound effect upon the sensibilities of the Justices in an area in which they have consistently expressed a deep solicitude, that of individual and religious liberty. Religious controversies such as those in the *Doremus* case have a habit of creating headlines and stirring up debates inevitably characterized by heat as well as light.

The action of the Supreme Court in the *Doremus* and more particularly in the *Zorach* case, (See Chapter 5) which was decided in the same year, perhaps indicated a retrenchment policy on the part of the Court calculated to smooth the ruffled feathers of highly vocal religious groups incensed by the *McCollum* decision.

THE TUDOR CASE

It is impossible to conclude a discussion of the *Doremus* case without calling attention to the remarkable change in attitude of the New Jersey Supreme Court one year afterward as revealed in the *Tudor* case.⁸² This case also helps

explain the attitudes of the New Jersey Supreme Court concerning matters of over-all religious education and related subjects. The Tudor case did not specifically deal with the problem of Bible reading in the public schools, but involved an action by parents of pupils in the public schools to determine the validity of a program involving the distribution of Gideon Bibles in the schools and to obtain an injunction against such distribution.

A temporary injunction was granted, but the Superior Court, law division, found in favor of the defendant Board of Education and vacated the restraining order, whereupon the plaintiff appealed. When the case reached the New Jersey Supreme Court, Chief Justice Vanderbilt, speaking for a unanimous court, held that permitting the distribution of King James Versions of the New Testament, or the so-called Gideon Bible, violated the constitutional provision prohibiting the making of any law respecting an establishment of religion as provided for in the First Amendment of the United States Constitution. Moreover, the court held that the practice also violated the New Jersey constitutional provision prohibiting an establishment of one religious sect in preference to another.

The court felt that although the school board's method of distributing the Gideon Bible was voluntary and no one was forced to take one and that no religious exercises or instruments were brought to the classrooms, there still existed, nonetheless, the preference of one religion over another and the distribution could not be sustained on the basis of mere assistance to religion as permitted in the *Zorach* case. The practice of distributing Bibles had been objected to by members of the Jewish and the Roman Catholics faiths.

In an intriguing exercise in logic, the New Jersey Supreme Court affirmed the Doremus case in the Tudor case but in so doing accepted the opposite set of arguments. In fact, the arguments accepted were those which had been advanced against the practice of Bible reading which was permitted in the Doremus case.⁸⁸

There is little doubt that the New Jersey Supreme Court accepted a different notion of sectarianism in the Tudor case in contrast to the concept of sectarianism adopted in the Doremus case. The key difference between the two appears to be that in the Tudor case, the court felt that there truly were present examples of bona fide allegations of religious disapproval coming from Roman Catholic and Jewish groups. In the Doremus case, on the other hand, no one actually alleged injury. In other words, the court in Tudor clearly suggested that those things which religious groups consider unacceptable and which each group determines to be of doctrinal significance will be of controlling importance to the Supreme Court's interpretation of the concept of sectarianism. It would seem, therefore, that the New Jersey court had abandoned the technique of decision which is necessary to uphold programs of Bible reading in the public schools.

After hearing the testimony from Jewish biblical scholars who noted that, "the New Testament is in profound conflict with basic principles of Judaism," the New Jersey court held that the King James Version and the Gideon Bible were unacceptable to those of the Jewish faith. Moreover, after reviewing the Protestant version of the Bible and the Roman Catholic version of the Bible, the New Jersey court observed that:

. . . the King James version of the Bible is as unacceptable to Catholics as the Douay version is to the Protestants. According to the testimony in this case the Canon Law of the Catholic Church provides that 'editions of the original text of the Sacred Scriptures published by non-Catholics are forbidden *ipso jure*.'

From these findings, the New Jersey Court concluded:

. . . to permit the distribution of the King James version of the Bible in the public schools of this State would be to cast aside all the progress made in the United States and throughout New Jersey in the field of religious toleration and freedom. We would be renewing the ancient struggles among the various religious faiths to the detriment of all. This we must decline to do.

THE CARDEN CASE

Another case in which a state supreme court upheld the validity of Bible-reading exercises in the public school occurred in Tennessee in the case of *Carden v. Bland*.⁸⁴ This case requires a separate discussion not only because of its contemporary quality but because of certain side issues which would seem to have some long-range significance. It also has more than its fair share of paradoxes.

The litigation involved proceedings brought by a citizen and taxpayer against the City of Nashville Board of Education to enjoin the board members and others from engaging in certain practices pertaining to religion. Plaintiff also sought to obtain a declaratory judgment declaring unconstitutional the state statute imposing upon the teachers the duty to read at the opening of each school day a selection from the Bible. The state statute is somewhat unique in that it prohibits the same selection from being read more than twice a month. The chancery court of Davidson county sustained the demurrers and complainant appealed.

There were two major issues in the case, although the court in its opinion devoted the greatest share of its time to the second. Carden, first, sought a declaratory judgment prohibiting the public school teachers from requiring the students to attend Sunday school and to make a report of their attendance to the public school authorities. It was alleged that those students who failed to attend Sunday school were required as a penalty to copy many verses of the Bible; that on each Monday morning the teacher regularly followed a practice of requesting those pupils who had attended Sunday school the day before to stand; and those who remained seated were given special assignments, i.e. to copy some portion of the Bible. It was also charged that some of the teachers at Ross Public School kept on display in the classroom a record of the attendance of their pupils in Sunday school and that during school hours they conducted a devotional period consisting of reading from the Bible and saying the Lord's Prayer as it appeared in the King James Version.⁸⁵

Secondly, Carden complained that it was a customary practice of his son's teachers to use school time to read or have some student read from the Bible and to ask questions of the pupils, including his son, concerning the contents of such passages; to repeat prayers, especially the Lord's Prayer; to sing hymns and other religious songs and to inquire of the pupils as to their attendance or nonattendance at Sunday school. The complainant stated that the practice of inquiring into a student's Sunday school attendance and the practice of Bible reading in the public school offended and embarrassed his son.

The court dealt very quickly with the question of requiring pupils to attend Sunday school. It noted that coun-

sel had conceded that these practices and the penalties imposed for nonattendance had been discontinued by school authorities. The court therefore held that it was not necessary to consider and determine the legality of such practices. In no uncertain terms, however, it went on to say: "It is beyond the scope and authority of school boards and teachers in the public schools to conduct a program of education in the Bible and undertake to explain the meaning of any chapter or verse in either the Old or the New Testament."

The court thereupon stated that the sole question at issue was whether or not the state statute previously referred to violated the constitution of Tennessee and that of the United States.⁸⁶ In the court's opinion, the First Amendment of the United States Constitution and Article I, Section 3 of the Tennessee Constitution are practically synonymous. It felt that, if anything, the Tennessee Organic Law was broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience.

Historical Analysis

The court first reviewed the bloody history of religious wars and the fight to establish religious freedom in the United States out of which emerged the First Amendment to the United States Constitution and Article I, Section 3 of the Tennessee Constitution. From this historical analysis, the court concluded that Bible-reading exercises are not a violation of the Constitutional mandate which guarantees to all men a "natural and inalienable right to worship almighty God according to the dictates of their own conscience." Nor did the court feel it was reasonable to

suppose such practices constituted, "the support of any place or form of worship" or an effort to "control or interfere with the rights of conscience."

The court attempted to answer those who argue the need for separation of church and state and for one's personal right to worship as he sees fit. It pointed out that they confused a short period of reverence or a simple act of spiritual devotion as being a form of worship sponsored and approved by an agency of the state "to the prejudice of other religious groups." It went on to explain: "We find it more or less difficult to conceive that these simple ceremonies amount to 'establishment of a religion,' or any attempt to do so, nor is it interference with any student's secular beliefs contrary to law."

The court next reviewed a number of state court decisions which it felt tended toward the consensus that the Bible is not a sectarian or denominational book. The court at this point, however, carefully refrained from mentioning any state supreme court decision which declared Bible reading in public schools to be unconstitutional. It did make reference to the Tudor case. But since that case was concerned with the distribution of Gideon Bibles to children in public schools, the court distinguished it from the present case on the basis of its facts.

Counsel for the complainant was given a brief but sharp lecture from the court because of the court's opinion that "they have taken a rather narrow and dogmatic view of these constitutional inhibitions." The court was of the opinion that in their concern for liberty of conscience and religious worship "they have overlooked the broader concept that religion per se is something which transcends all

man-made creeds." If the complainants' views were sustained, the court believed that this would strike from the schoolroom and school libraries the great story of the Bible and prohibit the singing of great and "inspiring songs" such as "Faith of Our Fathers," and "America the Beautiful."

Judicial Reaction to Precedents

In acknowledging the brief filed by the American Civil Liberties Union as an amicus curiae the court took judicial note of the extent to which both state and federal courts have been engaged in reviewing state statutes involving Bible reading and religious instruction in the public schools. It agreed that such cases were numerous. It then went on to say in a highly misleading and indeed inaccurate statement: ". . . but these statutes have been stricken down only when instruction in the Bible is made compulsory."⁸⁷ To substantiate this statement, the court cited *People ex rel. Ring v. Board of Education*⁸⁸ where there was, in fact, a degree of compulsion in such Bible-reading exercises. It ignored those state supreme court decisions, however, involving exercises of this sort in which no compulsion was alleged, and where the supreme courts of several states nonetheless struck down the practice as violating the constitution.

The Tennessee court agreed that the separation of church and state is important but was of the opinion that the conception could not be tortured into meaning that the public school systems of the several states are compelled to be made Godless institutions as a matter of law. On the other hand, it emphasized, "We do not wish, however, to be understood as holding that any form of sectarian wor-

ship or secular instruction of the Bible is permissible under our statute and the constitution of this state."

The court concluded its decision by stating: "...the highest duty of those who are charged with the responsibility of training the young people of this state in the public schools is in teaching both by precept and example that in the conflicts of life they should not forget God . . . For this court to hold that the statute herein assailed contemplates the establishment of a religion, and that it is a subtle method of breaking down Mr. Jefferson's 'wall of separation' between church and state would be a spectacular exhibition of judicial sophistry."

In this decision the Tennessee Supreme Court clearly accepted the notion that the Bible per se is not a sectarian book. While the court was not willing to open the door to any form of sectarian instruction it was clearly of the opinion that voluntary Bible-reading exercises in the public school were not a violation of the United States Constitution or the constitution of Tennessee.

THE MURRAY CASE

On April 6, 1962, the Maryland Supreme Court, although badly divided, tended to follow the Tennessee court's general approach in upholding a program of Bible reading in the public schools.⁸⁹ By a vote of four to three the Maryland court concluded that programs involving Bible reading and recitation of the Lord's Prayer did not violate the religious clauses of the First Amendment in view of the fact that the use of school time and the expenditure of public funds for such programs was negligible. Furthermore, the court majority felt that the provision in the statute permitting a child

to be excused from participating in such programs at the request of his parents further emphasized the validity of these programs.

Unlike many early cases, this one did not involve a challenge directed at a state law. The attack here was aimed at an administrative rule adopted by the Board of School Commissioners of Baltimore City pursuant to general authority conferred upon it by the state. The rule compelled each school in the district to be opened by reading without comment from the "Holy Bible" and/or the use of the Lord's Prayer. The Douay Version of the Bible might be used by the pupils who preferred it. In 1960, as a result of an opinion rendered by Attorney General C. F. Sybert who had become a member of the Maryland Supreme Court by the time this case was heard by that body, the rule was amended to permit any pupil whose parents requested it to be excused from these exercises. Judge Sybert did not participate in the decision of this case.

Along with the contention that the rule contravened their freedom of religion under the First and Fourteenth Amendments, the petitioners who claimed to be atheists argued that the rule "subjects their freedom of conscience to the rule of the majority." Moreover, they urged that the rule, by equating moral and spiritual values with religious values, had thereby rendered their beliefs and ideals "sinister, alien and suspect" thus tending to promote "doubt and questions of their morality, good citizenship and good faith."⁹⁰ This is a relatively new argument in a debate that has raged for a century, and is heard also in the *Engel* case (See Chapter 5).

When the case was tried in the lower court, the Board demurred on the grounds that the case did not state a cause of action for which relief could be granted properly by a

writ of mandamus. The court sustained the demurrer and dismissed the petition without leave to amend. The trial court gave two reasons for this action. One, that the Board, in ordering such a program, was acting in the exercise of its discretionary power and thus its action could not be stayed by a writ of mandamus. Secondly, the trial court found that the facts in the petition for the writ of mandamus did not "spell out any violation of constitutional rights."

The case was argued twice on these grounds before the Maryland Supreme Court. The first time it was heard by five of the seven judges and the reargument was heard by seven judges, one of whom substituted for Judge Sybert. Judge Horney spoke for the majority, including Judge Prescott, Marbury, and L. L. Barrett, who was specially assigned to the case.

In dealing first with the jurisdictional arguments over the propriety of the use of a writ of mandamus in this case, the court concluded that "where the performance of a duty prescribed by law depends on whether the statute or regulation is constitutional or invalid, there is no reason why the question may not be determined on a petition for a writ of mandamus . . ." To bolster its position the court cited a substantial body of case law.⁹¹

The only other jurisdictional question — whether the petitioner had standing to sue — the court assumed in the affirmative, since they found the rule and practice constitutional. Some might regard this as an interesting, albeit somewhat unusual, device for getting to the jugular of constitutional issues without the nice-nelly inhibitions of judicial self-restraint.

Getting to the substantive issue, the court denied that the "Establishment Clause" or the "Free Exercise of Re-

ligion Clause" (of the First Amendment), or the "Equal Protection Clause" (of the Fourteenth Amendment) were violated by the practices under consideration. "Neither the First nor Fourteenth Amendment," the court insisted, "was intended to stifle all rapport between religion and government."⁹²

It goes on to quote Justice Douglas' majority opinion in the *Zorach* case, to the effect that "We are a religious people." The Maryland court is of the opinion that the United States Supreme Court in both the *Everson* case and the *Zorach* case made it clear that programs of this type "where the time and money spent on it is inconsequential" do not violate the religious clauses of the First Amendment. Exercises such as these, the court felt, are in the same category as opening prayer ceremonies in the legislatures and courts of the states and the national government.

The fact that a student is not compelled to attend these programs, the Maryland court finds especially controlling. It regards as significant the fact that the United States Supreme Court remanded the *Schempp* case (See Chapter 4) back to the federal district court after the Pennsylvania legislature had amended the state law to provide for voluntary attendance on the part of the pupils, even though the programs themselves were mandatory in the schools. "It seems to us that the remand of this case [*Schempp*] at least indicated that the use of coercion or the lack of it may be the controlling factor in deciding whether or not a constitutional right has been denied," the Maryland court explained.⁹³

While reading substantive judgments into the United States Supreme Court's remand of the *Schempp* case — a questionable practice at best — the Maryland court rejected the

federal district court of Pennsylvania's subsequent ruling that the Bible-reading program in Pennsylvania violated the First and Fourteenth Amendments. The Maryland court argued that the case before it was not governed by the *McCormick* rule since the students were not compelled to attend the programs. It should be stressed that under the Pennsylvania program, struck down by the federal district court in 1962, the students were not required to participate in programs of this type.

Since there is no compulsion under the Maryland order, the court here refused to believe that the United States Supreme Court's 1961 ruling in *Torcaso v. Watkins*⁹⁴ that "neither a state nor federal government can constitutionally force a person 'to profess a belief or disbelief in any religion'" applied here. The distinction, as the court saw it, in the *Torcaso* case was concerned with the compulsion which required a nonbeliever to profess a belief in God in order to qualify for public office. Moreover, the Maryland court appears to accept the Tennessee court's erroneous notion that in other states when Bible-reading programs permitted optional attendance, the state courts invariably upheld such exercises.

Finally, the majority opinion deals with the allegations that the pupil has been denied the equal protection of the laws guaranteed him by the Fourteenth Amendment. The student relied on *Brown v. Board of Education*⁹⁵ — declaring segregation on the basis of color in the public schools to be unconstitutional — to support his contention that his self-exile from the opening exercises had a deleterious effect on his relationship with other students. The court had a quick answer to this argument. It felt that the equality of treatment

guaranteed by the Fourteenth Amendment does not provide protection from the "embarrassment, the divisiveness or the psychological discontent arising out of nonconformance with the mores of the majority."⁹⁶

Dissenting Views

In a vigorous dissent, concurred in by Judges Henderson and Prescott, Judge Brune pinpointed an element in the case ignored in the majority opinion. It was that the school board order made mandatory the reading of the Holy Bible in the public schools. Since there seems to be no substantial room for dispute that the reading of passages from the Bible and recital of the Lord's Prayer are Christian religious exercises, the dissenters felt that programs in the public schools involving Bible reading and reciting the Lord's Prayer, plainly favor "one religion and do so against other religions and against nonbelievers in any religion."⁹⁷ As such they violated the First Amendment's provision prohibiting any law *respecting an establishment* of religion.

Judge Brune observed that Chief Justice Warren of the United States Supreme Court, commented in this connection in the McGowan case:⁹⁸ "But the First Amendment, in its final form did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*."

The dissenters rejected the notion that such programs resist the taint of unconstitutionality simply because the pupils are not compelled to attend. "The coercive or compulsive power of the state is exercised at least to the extent of requiring pupils to attend school and it requires affirmative action to exempt them from participation in these religious exercises," Judge Brune explained. Moreover, the

majority opinion tended to place too much specific weight on the general statement of Justice Douglas in the *Zorach* case, "We are a religious people whose institutions presuppose a Supreme Being," the minority believed.

Finally, Judge Brune noted that the United States Supreme Court recognized in the *Brown* case (when applying the Fourteenth Amendment to segregation by race in the public schools) that the psychological effects upon children may be of vital importance. He implied that if such reasons have significance to the Supreme Court they should be given equal weight by the Maryland court.

The dissenters also pointed out that since attendance at these religious exercises is compulsory unless a written parental excuse is presented to school authorities, this amounts to a formal profession of disbelief of the religion of the school which is required by the school authorities. This puts the child and the parents in peril of being subject to pressures from the majority. Thus Judge Brune feels that this case is the converse of the *Torcaso* decision where the United States Supreme Court held that no state or the national government may require a profession of belief in the existence of God as a condition for holding public office. "Neither a profession of belief or disbelief may be required," the minority felt. Judge Brune concluded by explaining:

Hesitancy to expose a child to the suspicion of his fellows and to losing caste with them will tend to cause the surrender of his and his parents' religious or nonreligious convictions and will thus tend to put the hand of the state into the scales on the side of a particular religion which is supported by the prescribed exercises.

The *Murray* case was unique in several ways. First, there was the altered emphasis by plaintiff and the dissenters on

the concept of compulsion, also revealed by the Supreme Court of the United States in the *Schempp* case (see Chapter 4) and the *Engel* case (see Chapter 5). In prior cases, there was a tendency for the courts to concern themselves solely with the question of whether student attendance at such exercises was mandatory or voluntary.

Secondly, the plaintiffs in this case called into question not only the due process clause of the First Amendment's provisions concerning religion, but they also raised the question of whether these practices violated the equal protection clause of the Fourteenth Amendment. The latter provision proved a mainstay in the Supreme Court's arsenal in handling civil rights cases in the decade from 1950 to 1960, particularly in the race relations field. It had the advantage of permitting a court to study psychological and other peripheral consequences of programs such as these and it made use of the sociological aspects of contemporary law in a fashion that the more philosophically based due process clause had difficulty achieving.

THE UNITED STATES SUPREME COURT AND THE MURRAY CASE

On appeal from the Court of Appeals of Maryland, the *Murray* case was heard jointly with the *Schempp* case as noted in Chapter 4, pages 144 ff. Since the United States Supreme Court majority and dissenting opinions are quoted in some detail in Chapter 4, it will be necessary here only to note that the Supreme Court rejected the rationale of the Maryland high court and declared that the state-sponsored program of Bible reading was unconstitutional on the grounds that it violated the Establishment Clause of the First Amendment.

It may or may not be significant that the Supreme Court chose to focus its primary attention on the Schempp case rather than the Murray case in 1963. The former involved a protest brought by Unitarians, a group which constitutes something of an organized sect. The Murray case, of course, concerned an action brought by self-avowed atheists. The potential for public misunderstanding of the court's position relating to religion would probably have been greater if the latter case had formed the nub of the court's opinion.