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THE HOLY BIBLE AND THE PUBLIC SCHOOLS

*Robert Fairchild Cushman**

The decision in 1953 of *Tudor v. Board of Education*¹ marks the second time in five years that a decision by New Jersey's highest court has focused public attention on the thorny problems surrounding the use of the Bible in the public schools. Together with its sister case of *Doremus v. Board of Education*,² decided in 1950, it presents a number of new and challenging constitutional questions not raised in the earlier Bible reading cases and not yet answered in the Supreme Court of the United States.

In the *Doremus* case a taxpayer challenged the validity of two statutes³ requiring the reading of at least five verses from the Old Testament and permitting the recitation of the Lord's Prayer daily at the opening of school. The Board of Education had ruled that those who wished could be excused from this exercise. The complainant, who neither objected to the content of the Bible reading nor asked that his daughter be excused, contended only that this use of the Holy Scriptures constituted aid to religion in violation of the first amendment, made applicable to the states by the fourteenth. Despite his apparent lack of injury the New Jersey court sustained his request for a declaratory judgment and held that the Bible reading did not violate the United States Constitution. The Constitution, said the court, forbids aid only to *sectarian* religion—and reading the Bible is not sectarian.

In 1951 the Gideon's International asked permission of the Rutherford Board of Education to distribute the "Gideon Bible" to all pupils in the public schools as part of its campaign to "win men and women for the Lord Jesus Christ."⁴ The Board approved the plan and a request form was prepared and distributed to the pupils so their parents could signify whether or not they wanted their child to have a Gideon Bible. Before the books were distributed members of the Jewish and Catholic faiths brought suit to enjoin the action. In the *Tudor* case the New Jersey Supreme Court held the proposed distribution a violation of both state and federal constitutions. Both constitutions, the court explained, forbid sectarianism and permitting one sect to distribute its Bible in the schools shows a preference for that sect.⁵

* See Contributors' Section, Masthead, p. 535, for biographical data.

¹ 14 N.J. 31, 100 A.2d 857 (1953).

² 5 N.J. 435, 75 A.2d 880 (1950), appeal dismissed, 342 U.S. 429 (1952).

³ N.J. Rev. Stat. 18:14-77, 78 (1940).

⁴ 14 N.J. 31, 33, 100 A.2d 857, 858 (1953).

⁵ The court considered the nature of the book the deciding factor and placed scant

Since 1854 state courts have dealt with cases involving the use of the Bible in public schools. While some went one way and some the other, the principal issue presented in each was that of "sectarianism" as distinguished from merely "religion." As in the New Jersey cases, if a particular version or use of the Bible was found to be sectarian it was held bad. No grounds existed on which these early cases could be appealed to the Supreme Court of the United States⁶ until 1947, when the Court in *Everson v. Board of Education* made the establishment of religion cause of the first amendment applicable to the states through the fourteenth amendment. In a classic statement the Court said that "neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."⁷ But neither in this case, which involved bus service to parochial schools, nor in the two decisions dealing with "released time" which followed it,⁸ did the Court distinguish between sectarianism and religion. The New Jersey court, nevertheless, interpreted the Supreme Court's words as meaning only *sectarian* religion and held that while the distribution of the King James Bible was sectarian and unconstitutional, reading the Old Testament and Lord's Prayer was not. In view of the apparent inconsistency of these two opinions and their debatable interpretation of the holdings of the United States Supreme Court, it is important to consider how the New Jersey court reached its conclusions.

BIBLE READING IN STATE COURTS

In dealing with the question of sectarianism the New Jersey court followed a well trod path of constitutional theory embodied in the earlier cases, and it is in the light of the long controversy from which this theory emerged that the *Tudor* decision can best be understood and evaluated. Bible reading in the public schools dates from a time when this country was almost unanimously Protestant in faith and religion was considered a proper part of a child's schooling. As a result of the inter-faith struggle the points of doctrine on which the Protestants disagreed

emphasis on the machinery of distribution. Hence it may fairly be considered as a Bible reading case.

⁶ In *Hamilton v. Regents of the U. of California*, 293 U.S. 245 (1934), the Supreme Court first took jurisdiction of a state religious liberty case under the due process clause of the fourteenth amendment. The cases which followed involved questions of religious freedom, and it was not until *Everson v. Board of Education*, 330 U.S. 1 (1947), that the Supreme Court finally took a case involving state aid to religion.

⁷ 330 U.S. 1, 15 (1947).

⁸ *McCullum v. Board of Education*, 333 U.S. 203 (1948), and *Zorach v. Clauson*, 343 U.S. 306 (1952). These two cases are discussed below.

had been gradually eliminated until the schooling, from a Protestant viewpoint, had become almost completely nonsectarian. But with the growth of a Catholic population in the years following the Irish famine of 1830 there appeared a group to challenge what it considered Protestant, and therefore sectarian, education in the public schools. While in one or two of the state cases Jewish children complained that Christianity was being taught, and in one case an atheist objected to all religious teaching, in most of the cases a Catholic objected that the Bible used in the school was the King James, or Protestant version, and that when prayers were given and songs sung, they were Protestant prayers and hymns. While a careful review of the twenty-odd cases involving Bible reading fails to reveal any clear relation between the particular form of religious exercise and its subsequent validity, clearly those involving compulsion were held invalid more often than those that did not. In three of the seven cases in which a pupil was required by law to participate in religious ceremonies, the ceremonies were held invalid,⁹ while in eleven of the thirteen not involving direct legal compulsion the court sustained the religious activity involved.¹⁰ In one of these cases it was claimed that the Bible was being used as a textbook rather than as a religious exercise.¹¹ Nor does the wording of the various constitutional provisions involved appear to have weighed heavily in the outcome of these cases, for the courts judging substantially the same facts under almost identical constitutional provisions have come out with opposing results.¹² Since essentially the same provisions have been interpreted

⁹ Compulsory Bible reading was sustained in *Commonwealth v. Cooke*, 7 Am. Law Reg. 417 (Police Ct., Boston, Mass. 1859); *Church v. Bullock*, 20 Tex. Ct. Rep. 917, 109 S.W. 115 (1908); *Spiller v. Inhabitants of Woburn*, 94 Mass. (12 Allen) 127 (1866); held void in *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910); *State ex rel. Finger v. Weedman*, 55 S.D. 343, 226 N.W. 348 (1929); *State v. Scheve*, 65 Neb. 853, 91 N.W. 846 (1902). Compulsory attendance, but not the Bible reading itself, was held void in *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927).

¹⁰ Bible reading held valid in *Nessle v. Hum*, 2 Ohio Dec. 60 (1894); *Stevenson v. Hanyon*, 7 Pa. Dist. 585 (1898); *Lewis v. Board of Education*, 247 App. Div. 106, 286 N.Y. Supp. 174 (1st Dep't 1936); *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N.W. 250 (1898); *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Kaplan v. Independent School Dist.* 171 Minn. 142, 214 N.W. 18 (1927); *Wilkerson v. Rome*, 152 Ga. 762, 110 S.E. 895 (1921); *Hart v. School Dist.*, 2 Lanc. Law Rev. 346 (Pa., Mercer County Ct. 1885); *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884); *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905); *Billard v. Board of Education*, 69 Kan. 53, 76 Pac. 422 (1904); held invalid in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915).

¹¹ *Donahoe v. Richards*, 38 Me. 379 (1854).

¹² Compare Texas Const. Art. I (under which compulsory Bible reading was sustained) with Ill. Const. Art. VIII (under which compulsory Bible reading was held void). Com-

both as permitting and prohibiting Bible reading one may conclude that the crucial factor in any decision is the attitude of the particular court concerning the respective rights of majority and minority religious groups in society. Though these state courts have failed to achieve consistent results, they have, nonetheless, built a coherent body of constitutional theory, significant aspects of which find expression in the two decisions of the New Jersey court.

The Case for Bible Reading

Three major arguments were relied upon in the long line of state cases to show that Bible reading and prayers in the schools were constitutional: *first*, the state constitutions did not intend to bar nonsectarian religion from the schools; *second*, the religious exercises involved were in fact nonsectarian; and *third*, such exercises did not discriminate against anyone or otherwise abridge his civil rights or religious liberty.

I.

The constitutions, it was emphasized, could not have intended to ban all religion from the schools. The framers of the constitutions were, in general, devout men representing a society in which religion was a dominant element, and it is unthinkable that they intended to bar all governmental recognition of religion. In fact a number of state constitutions clearly recognize God, at least in the preamble, and "it cannot," it was reasoned, "be unconstitutional to teach what the constitution itself affirms."¹³ The Michigan court pointed out that the Northwest Ordinance of 1787 (under the authority of which it had framed its constitution) "declared that religion, morality and knowledge were necessary to good government . . . and provided that, for these purposes, schools and the means of education should forever be encouraged."¹⁴ Even the wording of the constitutions seemed to support, or at least not to deny, the propriety of teaching nonsectarian religion. Most of them forbade the states to prefer one religion over others, or to teach or aid sectarian religion. From these provisions two inferences were drawn. First, the teaching of mere religious doctrines was not banned, since it would have been as easy for the framers to ban "religious" doctrines as "sectarian"

pare also Colo. Const. Art. II, § 4, Art. V, § 34, Art. IX, § 8 (under which voluntary Bible reading was sustained) with Wis. Const. Art. I, § 18, Art. X, § 3 (under which it was held void).

¹³ State ex rel. Finger v. Weedman, 55 S.D. 343, 360, 226 N.W. 348, 355 (1929) (dissenting opinion).

¹⁴ Pfeiffer v. Board of Education, 118 Mich. 560, 565, 77 N.W. 250, 252 (1898).

doctrines, had they so intended. Moreover, an injunction against religious preference implied permission to conduct "nonpreferential" religious exercises. Second, a prohibition against sectarianism seemed to argue for the existence of a nonsectarian religion that was not prohibited. If all religion were sectarian why had not the framers simply banned all religion?

II.

But is reading the Bible, coupled in most cases with prayers and religious songs, in fact nonsectarian? The answer obviously depends upon what is meant by sectarianism, which in turn depends upon who defines the term. If Bible reading were to be sustained it was crucial that the courts, rather than the religious sects, make the definition on the bases of their own standards of judgment. Religious groups, it was argued, would tend to define as sectarian anything to which they were doctrinally opposed. Allowing them to define the term would give them a veto power over the entire scholastic curriculum—a patent violation of the separation of church and state.¹⁵ Moreover, to find the Bible (or parts of it) nonsectarian, the court definition had to be a narrow one. It was argued generally that to be sectarian a book must teach the peculiar tenets of a particular sect. As the dissent in *Ring v. Board of Education*¹⁶ put it:

To hold that the Bible cannot be read in the public schools requires a judicial determination that it teaches the doctrine of some sect, and if that is so we ought to be able to say what sect.¹⁷

In *Hackett v. Brooksville Graded School District*,¹⁸ the court observed that although a Catholic priest claimed that a particular prayer was sectarian

he admits that there is nothing in it repugnant to the doctrines of his religious belief (Roman Catholic). Nor does he claim that it is promulgated, authorized, or used by any sect of religionists whatever. As neither the form nor substance of the prayer complained of seem to represent any peculiar view or dogma of any sect or denomination . . . it is not sectarian. . . .¹⁹

¹⁵ *Donahoe v. Richards*, 38 Me. 379, 406 (1854); *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 617, 87 S.W. 792, 794 (1905); *Commonwealth v. Cooke*, 7 Am. Law Reg. 417, 424 (Police Ct., Boston, Mass. 1859). In the latter case the court gave the doctrine a curious twist, holding that to allow Catholics to read the Douay version of the Bible would be to introduce sectarianism into the school, while using the King James version was nonsectarian.

¹⁶ 245 Ill. 334, 92 N.E. 251 (1910) (dissenting opinion).

¹⁷ *Id.* at 375, 92 N.E. at 265.

¹⁸ 120 Ky. 608, 87 S.W. 792 (1905).

¹⁹ *Id.* at 615, 87 S.W. at 793.

Nor, it was argued, did the adoption of an authorized version of the Bible make that version sectarian. As the court in the *Hackett* case explained,

That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents, that give it its character.²⁰

Since Jews, Mohammedans and Atheists would regard any version of the Bible as sectarian, the courts commonly held that "sectarian" referred only to Christian sects. In *Wilkerson v. City of Rome*,²¹ the Georgia court quoted with approval a review of the *Ring* case in which Professor Schofield of Northwestern University said:

The Jew may complain to a 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 . . . as gives one Christian sect a preference over others.²²

The dissenting justices in the *Ring* case made clear the status of Atheists:

Freethinkers and atheists do not constitute a sect which is an organized religious body, and the prohibition against sectarian instruction, which relates only to the teaching of the doctrine of a particular sect, has no application to them.²³

It was easy to show, also, what absurd results would follow from any broader interpretation of "sectarian." Not only would it make impossible the teaching of all mythology and moral philosophy²⁴ and those portions of American history that deal with the Catholics, the Quakers and the Puritans,²⁵ but even the constitutions which teach freedom of worship

²⁰ *Id.* at 617, 87 S.W. at 794.

²¹ 152 Ga. 762, 110 S.E. 895 (1921).

²² *Id.* at 780, 110 S.E. at 904. See also 2 Schofield, *Essays on Constitutional Law and Equity* 403-4 (1921). In *Stevenson v. Hanyon*, 7 Pa. Dist. 585, 590 (1898), the court said: "We do not understand how the reading of the Bible in the public schools can be termed sectarian. The Bible is not a sectarian book. On its broad foundation Christianity rests. Without it there is no Christianity. This proposition is recognized by every division of Christendom throughout the whole world. . . ." And revealing the intensity of its feeling on the subject, the court added: "The assertion that the Bible, in either version, is a sectarian book, borders on sacrilege, and this phase of the question deserves no further consideration at our hands."

²³ 245 Ill. 334, 376, 92 N.E. 251, 265 (1910). (dissenting opinion).

²⁴ *Ibid.*

²⁵ *State ex rel. Finger v. Weedman*, 55 S.D. 343, 389, 226 N.W. 348, 366 (1929).

might be sectarian to a sect that denied the right to teach children that each can worship God in his own way.²⁶

III.

The remaining argument of those defending Bible reading attempted to show that those who phrased the constitutional guarantees of religious liberty and freedom of worship had not intended to outlaw all religious instruction in the public schools. The most important of these guarantees comprise prohibitions against (1) forcing anyone to attend or support a place of worship,²⁷ (2) interference with the rights of conscience,²⁸ and (3) any diminution or enlargement of anyone's civil rights because of his religious faith.²⁹

It would be foolish, it was argued, to consider a school a place of worship merely because some worshipping was done there. That prohibition was obviously directed against compulsory attendance at, or support of, a church, rather than the "casual use of a public building as a place for offering prayer or doing other acts of religious worship."³⁰ To hold otherwise would put a "strained construction" on the constitution, since legislatures, penal institutions and the armed forces all employ the use of chaplains and "no one has had the temerity to point to any constitutional infringement therein, nor to contend that the halls of congress . . . have been converted into 'places of worship.'"³¹ Even if Bible reading were conceded to be "worship," the increase in the tax burden because of it was so inconsequential as not to constitute support of religion.³²

In the second place, no rights of conscience were being abridged. In those cases where attendance upon the religious exercise was voluntary, no one could possibly claim an infringement of his rights, since he was

²⁶ *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 619, 87 S.W. 792, 794 (1905).

²⁷ See e.g., Ill. Const. Art. VIII, § 3; Wis. Const. Art. I, § 18.

²⁸ See e.g., Ala. Const. Art. I, § 3; Mich. Const. Art. I, § 4.

²⁹ See, e.g., Miss. Const. Art. I, § 5; Okla. Const. Art. I, § 2.

³⁰ *Moore v. Monroe*, 64 Iowa 367, 369, 20 N.W. 475, 476 (1884).

³¹ *Kaplan v. Independent School Dist.*, 171 Minn. 142, 148, 214 N.W. 18, 20 (1927). See also, *Church v. Bullock*, 20 Tex. Ct. Rep. 917, 921, 109 S.W. 115, 117 (1908) and *State v. Scheve*, 65 Neb. 853, 874, 91 N.W. 846, 848 (1902) (concurring opinion). In *State ex rel. Conway v. District Board*, 162 Wis. 482, 156 N.W. 477 (1916), the Wisconsin court held that during a school graduation exercise even a church is not a place of worship, despite the fact that the exercises themselves included prayers.

³² *Wilkerson v. Rome*, 152 Ga. 762, 781, 110 S.E. 895, 904 (1921); *Moore v. Monroe*, 64 Iowa 367, 369, 20 N.W. 475, 476 (1884); *Kaplan v. Independent School Dist.*, 171 Minn. 142, 148, 214 N.W. 18, 20 (1927).

not compelled to listen to what he did not believe.³³ Where attendance was required, on the other hand, either he was not required to participate actively in the exercise,³⁴ or if he was required to participate he was not required to believe what he was taught.³⁵

Finally, the constitutional prohibition against diminishing or enlarging anyone's civil rights because of his religious beliefs was designed only to exclude religious tests for the right to vote and hold public office and was not applicable to the question at hand.³⁶ Furthermore, offering religious instruction to a person who would not, for conscientious reasons, take advantage of it was no more discriminatory than offering an elective course in Greek to those who did not want to take Greek.³⁷

The Case Against Bible Reading

Those who attacked the validity of the Bible reading did not contend that the state constitutions banned *all* religion from the schools. They even argued positively for the use of passages from the Bible in connection with secular studies,³⁸ and in only one case was it suggested that worship in the schools made the school a place of worship within the meaning of the constitutional prohibition.³⁹ Nor did anyone deny that the framers must have envisaged a nonsectarian religion that could be taught in the schools. The principal arguments were *first*, that if one sect disapproved what was taught then it was sectarian teaching, assuming without argument that religious groups, rather than the courts, were the ones to decide what constituted sectarian differences; and *second*, that it was impossible to teach or offer any religion in the public schools without (1) abridging the civil liberties and religious equality of those who do not approve the religion taught, and (2) forcing them to support a religion in which they do not believe.

³³ Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 615, 87 S.W. 792, 793 (1905); Moore v. Monroe, note 32 supra.

³⁴ State ex rel. Finger v. Weedman, 55 S.D. 343, 377, 226 N.W. 348, 362 (1929); Spiller v. Inhabitants of Woburn, 94 Mass. (12 Allen) 127, 130 (1866).

³⁵ Commonwealth v. Cooke, 7 Am. Law Reg. 417, 423 (Police Ct., Boston, Mass., 1859).

³⁶ Pfeiffer v. Board of Education, 118 Mich. 560, 563, 77 N.W. 250, 251 (1898).

³⁷ Ibid.

³⁸ State v. Scheve, 65 Neb. 853, 883, 91 N.W. 846 (1902); State ex rel. Weiss v. District Board, 76 Wis. 177, 195, 44 N.W. 967, 974 (1890); State ex rel. Finger v. Weedman, 55 S.D. 343, 353, 226 N.W. 348, 352 (1929).

³⁹ State ex rel. Weiss v. District Board, 76 Wis. 177, 213, 44 N.W. 967, 979 (1890) (concurring opinion).

I.

The whole concept of a nonsectarian religion, it was argued, was a paradox. "Granting," said the court in the *Ring* case, "that instruction on these subjects is desirable, yet the sects do not agree on what instruction shall be given. Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrine of one or more of them."⁴⁰ Furthermore, the version of the Bible to be used is at the root of many of the differences between Christian sects,⁴¹ and it is therefore impossible to consider the Bible a nonsectarian book. "The only means of preventing sectarian instruction in the schools," the *Ring* case concluded, "is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise."⁴²

II.

Any religious instruction, it was urged, also violates religious equality. The use of the King James Bible gives one group the religious teaching it desires at the expense of all, puts the stamp of official approval on the religious beliefs of one group "and thus discriminates in favor of and aids the Protestant sects. . . ."⁴³ Any use of the New Testament gives preference to Christians over Jews who do not believe in the divinity of Christ.⁴⁴ Nor, it was emphasized, does excusing a child from these exercises abolish their discriminatory nature. Not only are the child's parents still paying for a religious education from which they cannot benefit,⁴⁵ but the very fact of excusing the child is an admission that what is taught discriminates against the religious beliefs of some, and "the exclusion of a pupil from this part of the school exercise in which the rest of the school joins, separates him from his fellows . . . subjects him to a religious stigma and places him at a disadvantage in the school which the law never contemplated."⁴⁶ As the Wisconsin court in *State ex rel. Weiss v. District Board*⁴⁷ explained:

⁴⁰ 245 Ill. 334, 346, 92 N.E. 251, 255 (1910).

⁴¹ *State v. Scheve*, 65 Neb. 853, 870, 91 N.W. 846, 847 (1902).

⁴² 245 Ill. 334, 348, 92 N.E. 251, 255 (1910).

⁴³ *Wilkerson v. Rome*, 152 Ga. 762, 786, 110 S.E. 895, 906 (1921) (dissenting opinion).

⁴⁴ *Herold v. Parish Board*, 136 La. 1034, 1047, 68 So. 116, 121 (1915).

⁴⁵ *Pfeiffer v. Board of Education*, 118 Mich. 560, 579, 77 N.W. 250, 257 (1898) (dissenting opinion).

⁴⁶ *State ex rel. Ring v. Board of Education*, 245 Ill. 334, 351, 92 N.E. 251, 256 (1910). See also *State ex rel. Weiss v. District Board*, 76 Wis. 177, 199, 44 N.W. 967, 975 (1890); *Herold v. Parish Board*, 136 La. 1034, 1049, 68 So. 116, 121 (1915).

⁴⁷ 76 Wis. 177, 44 N.W. 967 (1890).

When . . . a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. . . . The practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage. . . .⁴⁸

The Arguments in the New Jersey Court

The New Jersey court in the *Doremus* and *Tudor* cases, although it was considering the federal as well as its own state constitution, followed the traditional pattern of argument spelled out in the state court decisions. The confusing thing about the two cases is this: in the *Doremus* case the court accepted one set of arguments, and then in the *Tudor* case, while reaffirming its previous decision, accepted the opposing set of arguments. And since these arguments concern the technique by which sectarianism is defined, rather than the definition itself, they would appear to be irreconcilable.

The *Doremus* decision followed closely the pattern of argument laid out by those who sustained Bible reading, i.e., there was no intent to bar Bible reading; it was nonsectarian; and it neither abridged religious liberty nor constituted support of religion. First, said the court, it was not "the intent of the First Amendment that the existence of a Supreme Being should be negated and that the governmental recognition of God should be suppressed."⁴⁹ Such recognition, it was pointed out, appears in such things as the Declaration of Independence, our national anthem, the existence of chaplains in the Congress and the armed forces, in the oath taken by federal judges and the motto on our coins. New Jersey constitutions, including the one adopted in 1948, have included references to Almighty God and laws against blasphemy have long been on the statute books. Not only is the recognition of God not forbidden, but the court gives the argument a modern touch by suggesting that the positive fostering of religion may be part of the fight against Communism.

It may be a tragic experience for this country and for its conception of life, liberty and the pursuit of happiness if our people lose their religious feeling and are left to live their lives without faith. . . . It may be of the highest importance to the nation that the people remain theistic, not that one or another sect or denomination may survive, but that belief in God shall abide. . . . Organized atheistic society is making a determined drive for supremacy by conquest as well as by infiltration. Recent his-

⁴⁸ Id. at 199, 44 N.W. at 975.

⁴⁹ 5 N.J. 435, 439, 75 A.2d 880, 882 (1950).

tory has demonstrated that when such a totalitarian power comes into control it exercises a ruthless supremacy over men and ideas, and over such remnants of religious worship as it permits to exist. . . . Faced with this threat to the continuance of elements deeply imbedded in our national life the adoption of a public policy with respect thereto is a reasonable function to be performed by those on whom responsibility lies.⁵⁰

In holding, in the second place, that the Old Testament and Lord's Prayer were nonsectarian the court (1) defined sectarianism for itself, (2) defined it narrowly enough to include only Jews and Christians, and (3) appeared to insist that to be sectarian a document had to teach the peculiar doctrines of some sect. The Old Testament, it was explained, was accepted by Catholics, Protestants and Jews alike, and even the Lord's Prayer, accepted in slightly different versions by Catholics and Protestants, was based on an old Jewish prayer called the Kaddish. Despite the appellant's plea that "the context in which the Lord's Prayer is presented in the New Testament reveals it to be a prayer offered as avowedly contrary to Jewish practices,"⁵¹ the court found it nonsectarian. "*We find nothing in the Lord's Prayer,*" the court concluded, "*that is controversial, ritualistic, or dogmatic.*"⁵² Although recognizing the existence of religious groups to whom even the Old Testament might be sectarian, the court emphasizes that "in this country they are numerically small and, in point of impact upon our national life, negligible,"⁵³ and explained that while these groups did not lose their constitutional rights by being small, they were subject to the laws and mores of a Judeo-Christian country. Taking the atheist as an example:

[H]e has all the protection of the constitution; he may not be held to any religious function or to the support, financial or otherwise, of a religious establishment; he may entertain his belief or the lack of belief as he will; but he lives in a country where theism is in the warp and woof of the social and the governmental fabric and he has no authority to eradicate from governmental activities every vestige of the existence of God.⁵⁴

Nor, in the third place, did the Bible reading statutes abridge civil rights and religious equality or constitute support of religion. Any claim that rights of conscience might have been abridged, the court said, was refuted by the fact that those not wishing to attend the Bible reading need not do so. Moreover, "it is not charged and it is neither conceded nor proved that the brief interruption in the day's schooling caused by

⁵⁰ Id. at 451, 75 A.2d at 888.

⁵¹ Brief for Appellants, p. 3, *Doremus v. Bd. of Educ.*, note 49 supra.

⁵² 5 N.J. 435, 451, 75 A.2d 880, 888 (1950).

⁵³ Id. at 449, 75 A.2d at 887.

⁵⁴ *Ibid.*

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."⁵⁵

Appellants in the case had presented all the basic arguments against the validity of the Bible reading, i.e., it favors Christians and Jews over all other religions and atheists, excusing pupils is merely an admission that the action is discriminatory, and in excusing some pupils the state is fostering divisive groups who ridicule one another for their faith or lack of it.⁵⁶ These were the arguments that had proved persuasive in those states where Bible reading was held invalid. But the essentially nonadversary nature of the *Doremus* suit⁵⁷ played a vital part in the decision. Appellants appeared only as citizens and taxpayers, not as persons who objected on religious grounds to the use of the Bible. Furthermore, only one of the taxpayers had a child in school, and she apparently did not object to the Bible reading nor ask to be excused from it. So while the arguments were duly presented, any claim that civil rights had been infringed was palpably weakened. In the language of the court:

No one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. . . . No violated rights are urged.⁵⁸

When it faced these same problems in the *Tudor* case the court took a fundamentally different approach. True, it did underscore a superficial distinction between the two cases by noting that in *Doremus* it had merely held "the Old Testament and Lord's Prayer, pronounced without comment, are not sectarian,"⁵⁹ while "here the issue is the distribution of the New Testament."⁶⁰ And while it acknowledged that a number of legal scholars considered the Bible a nonsectarian "universal book of the Christian world," it emphasized that "in many of these statements

⁵⁵ Id. at 439, 75 A.2d at 882.

⁵⁶ Brief for Appellants, *Doremus v. Bd. of Educ.*, note 49 supra.

⁵⁷ "It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter. Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute. Respondents urge that under the circumstances the question is moot as to the plaintiff-appellants and that our declaratory judgment statute may not properly be used in justification of such a proceeding. . . . The point has substance but we have nevertheless concluded to dispose of the appeal on its merits." 5 N.J. 435, 439, 75 A.2d 880, 882 (1950).

⁵⁸ 5 N.J. 435, 439, 75 A.2d 880, 881 (1950).

⁵⁹ 14 N.J. 31, 47, 100 A.2d 857, 866 (1953).

⁶⁰ Id. at 48, 100 A.2d at 866.

the question of the New Testament was not discussed."⁶¹ Most important to the decision, however, was the court's changed approach to defining sectarianism. Rather than search the King James Bible for explicit sectarian teaching, the court accepted as sectarian those things which the religious groups considered "unacceptable," and allowed each group to determine for itself the doctrinal significance of parts and versions of the Bible. After reviewing the testimony of members of the Jewish and Catholic clergy, the court concluded that

[a] review of the testimony at the trial convinces us that the King James version or Gideon Bible is unacceptable to those of the Jewish faith.⁶²

Nor is there any doubt that the King James version of the Bible is as unacceptable to Catholics as the Douay version is to 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*."⁶³

On the basis of this "uncontradicted evidence presented by the plaintiff . . ." the court concluded that "as far as the Jewish faith is concerned, the Gideon Bible is a sectarian book. . . ."⁶⁴

Having determined that the Gideon Bible was sectarian the court had no trouble deciding that its distribution gave a preference to one sect over others and abridged the religious freedom of those who did not want a copy. Abandoning such reliance as it had placed in the *Doremus* case on the fact that "the presence of the scholar at, and his participation in, that exercise is . . . voluntary,"⁶⁵ the court concluded that there was, in fact, coercion. It rejected the contention that "no one is forced to take a New Testament"⁶⁶ and that this is merely the "accommodation" of religion held permissible by the Supreme Court of the United States.⁶⁷ It quoted at length and with approval the statement in the *Weiss* case and others to show that excusing a pupil creates a divisive and discriminatory influence in the school.⁶⁸

It is quite apparent on reading the two cases that a deciding factor was the absence in one and the presence in the other of a bona fide

⁶¹ *Id.* at 47, 100 A.2d at 866.

⁶² *Id.* at 46, 100 A.2d at 865.

⁶³ *Id.* at 47, 100 A.2d at 865. The court mentions this testimony, although the Catholic plaintiff had withdrawn so the issue was moot as to him.

⁶⁴ *Id.* at 48, 100 A.2d at 866.

⁶⁵ 5 N.J. 435, 454, 75 A.2d 880, 889 (1950).

⁶⁶ 14 N.J. 31, 48, 100 A.2d 857, 866 (1953). Cf. *Miller v. Cooper*, 56 N.M. 355, 244 P. 2d 520 (1952), where the court enjoined having piles of religious pamphlets conspicuous in the schoolroom.

⁶⁷ See *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

⁶⁸ 14 N.J. 31, 49, 100 A.2d 857, 867 (1953). See note 48 *supra*.

allegation of religious disapproval of what was being done. Although the court had tried to decide the *Doremus* case on the broad issues involved, the simple fact was that no one in that case was alleging injury. Since in the long run the proper decision of constitutional questions involves a delicate weighing of the rights of individuals against the rights of the community, the absence of an injury in the *Doremus* case was bound to influence that determination. In the *Tudor* case, on the other hand, because the individual right of conscience was actually involved, it was natural that a different balance between the competing forces should be struck—a balance which would find emphasis throughout the opinion. But there is, in addition, a marked difference in the tone of the two opinions. In *Doremus* the court speaks with strong approval of state legislation enacted “so that at the beginning of the day the children should pause to hear a few words from the wisdom of the ages and to bow the head in humility before the Supreme Power. . . .”⁶⁹ One third of the *Tudor* opinion, in contrast, is devoted to tracing historically the long struggle for individual religious freedom from state interference.

What, then, of the statement in *Tudor* that “we adhere to the *Doremus* case, but its holding does not apply here . . .”⁷⁰ When facts are different a distinction is always possible. But it is still a *King James* Old Testament and a *King James* and *Christian* Lord’s Prayer, and the Catholics and Jews are certain to consider them Protestant and hence sectarian. In deciding *Tudor* the court has let the religious sects make such decisions for themselves, and in so doing has abandoned the technique of decision that makes it possible to sustain Bible reading in the public schools.

Bible Reading and the Supreme Court of the United States

The New Jersey court, in deciding *Doremus* and *Tudor*, relied upon a distinction between sectarian and nonsectarian religion, and contended that only state aid to *sectarian* religion was forbidden by the United States Constitution. Sooner or later the Supreme Court will get a case squarely raising this issue. So far it has decided only three cases involving religion and the public schools⁷¹ and in none of them has this distinction been an important factor.

Everson v. Board of Education,⁷² the first such case to come to the

⁶⁹ 5 N.J. 435, 451, 75 A.2d 880, 888 (1950).

⁷⁰ 14 N.J. 31, 48, 100 A.2d 857, 866 (1953).

⁷¹ Appeal in the *Doremus* case was dismissed after hearing, 342 U.S. 429 (1952). Certiorari in the *Tudor* case was denied, 348 U.S. 816, 75 S.Ct. 25 (1954).

⁷² 330 U.S. 1 (1947).

Supreme Court, involved the right of New Jersey to supply bus transportation at public expense to children attending Catholic schools. While the entire Court agreed that the first amendment forbade the states to aid religion, five of the justices decided that children, rather than religion, were being aided. The second case was *McCullum v. Board of Education*⁷³ in which an atheist challenged the so-called "released time" program of Champaign, Illinois. Here the state was allowing religious groups to come into the classrooms and conduct religious classes during school hours, those who wished to attend being "released" from their secular studies at the request of their parents. Eight members of the Court held that this use of school property together with the cooperation of the school in providing the pupils for religious classes amounted to an unconstitutional aid to religion. Following the decision in the *McCullum* case the state of New York reorganized its released time program so that the religious classes were not conducted on the school premises. The only participation of the school authorities was the release of pupils at the request of their parents to take religious training conducted by "duly constituted" religious bodies. The church groups reported attendance to the school, and those who did not attend church classes had to stay in school. Six justices agreed in *Zorach v. Clauson*⁷⁴ that this met the objections of the *McCullum* case. The cooperation of the school in releasing the pupils was held to be "accommodation" rather than aid.

Each of these cases involved situations and problems which differ in many fundamental ways from those raised by reading the Bible in the public schools. Most important is the fact that these cases involved teaching of religion *by religious groups*. The school did not provide the teachers, and such aid as was given religion was of an ancillary nature, involving the use of school property and the cooperation of the school administration. The Court had to decide whether these things constituted aid to religion, but in each case it was clear that religious sects and sectarian religion were involved. In reaching its decision the Court trod the delicate path between the first amendment prohibition of an "establishment of religion" on the one hand and the equally strict mandate against "prohibiting the free exercise" of religion on the other. In the *Everson* and *McCullum* cases it traced out what appeared to be a logically consistent theoretical interpretation of the meaning of the first amendment. All agreed that both federal and state governments were forbidden to set up an established church. And despite the objection of

⁷³ 333 U.S. 203 (1948).

⁷⁴ 343 U.S. 306 (1952).

those who wished to see religion aided, they went on to say that the state could not "aid one religion, aid all religions, or prefer one religion over another."⁷⁵ This, as Mr. Justice Frankfurter explained, "is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."⁷⁶ Explicitly ruled out is the concept that the first amendment is an "equal protection" clause among religions. And while the Court is clear that religion cannot be aided, it also concedes that it cannot be discriminated against. What is called for is a doctrine of state neutrality. But what is neutrality? Under a constitutional system in which the state can aid lay social and economic groups but is forbidden to aid religion, what constitutes a neutral position?

It is this writer's contention that the answer lies in distinguishing between the religious functions of a religious organization, and its other attributes and characteristics. Clearly the state cannot aid or hinder it in the performance of its religious functions.⁷⁷ But if its other characteristics place it in a class of institutions which the state undertakes to aid or regulate, it should receive such aid or regulation on the same basis as the other institutions in its class. As this writer has argued elsewhere, "a church may receive police protection when classed as property, tax exemption when classed as a non-profit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution, since such a class may not validly be given public aid."⁷⁸ Thus if a state allows social groups, without regard to their ideas or purposes, to use a public park, extending this permission to a religious group would not be an unconstitutional aid to religion. If all social groups, without regard to purpose, were allowed to come into the schools and conduct meetings which the students could attend, religious groups, since they are social groups, would be included. In this view the vice of the Illinois plan was that the religious function of the groups was recognized, and only groups performing a religious function were admitted. This was certainly an aid to religion *qua* religion.

Although the Court in the *McCullum* case does not define neutrality,

⁷⁵ See note 7 *supra*.

⁷⁶ 333 U.S. 203, 227 (1948).

⁷⁷ The religious group's definition of a religious function may not be definitive. Such questions as the number of wives a man may have, the desirability of snake handling and human sacrifice are social rather than religious functions, and thus subject to regulation. A church building could certainly be condemned if it were unsafe for human occupancy.

⁷⁸ Cushman, "Public Support of Religious Education in American Constitutional Law," 45 Ill. L. Rev. 333, 348 (1950).

it is plausible to argue that the decision rests on such a concept as the one above. True, it condemns as aid the use of the "state's tax-supported public school buildings . . . for the dissemination of religious doctrines."⁷⁹ But the whole tenor of the opinion indicates that if the school doors had been thrown open to any group which wished to enter, that if the Community Sandlot Baseball League, the Model Railroad Club and the American Federation of Barbershop Quartets were also permitted to offer an official curricular program at the same time, the unconstitutional features of the released time program would disappear. The Court's real objection seems to be the pattern whereby "pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes."⁸⁰ The school is fostering religion specifically, not community social life generally.

However accurate this guess may be with regard to the *McCullum* case, it is clear that in *Zorach v. Clauson* the Court has swung far toward permitting aid to religion *qua* religion—toward thinking of the first amendment as an equal protection clause *among* religions. In writing the Court's opinion Mr. Justice Douglas pointed out that "a callous indifference to religious groups" would amount to "preferring those who believe in no religion over those who do believe,"⁸¹ adding "the government must be neutral when it comes to competition *between* sects . . . but it can close its doors or suspend its operations *as to those* who want to repair to their religious sanctuary. . . ."⁸² Thus in *Zorach* the "duly constituted" religious groups are allowed to furnish a part of the official school curriculum while secular and nonbeliever groups are denied a like opportunity. This, which would be aid under the "neutrality" theory, is held to be mere accommodation of "the public service to . . . [the people's] . . . spiritual needs."⁸³

But in contrast to the "released time" programs, the problems raised by the use of the Bible in the schools are not those of mere ancillary aid to religious groups. Here not only are the school buildings used, but whatever religious instruction is given is given by the school officials. It is not the problem of equal treatment for recognized groups coming in from outside, but of equal treatment by the school officials for the ideas which such groups espouse. Even assuming that such a practice

⁷⁹ 333 U.S. 203, 212 (1948).

⁸⁰ *Id.* at 209.

⁸¹ 343 U.S. 306, 314 (1952).

⁸² *Ibid.*

⁸³ *Ibid.*

would be constitutional it is inconceivable that a staff of public school teachers could treat the individual doctrines of all religious sects equally. Some groups have a doctrinal objection to any religious teaching by laymen. Hence to some, religious training by the school would constitute aid to religion for one religion while to others it would constitute a preference over another. It is in this situation that the Court would be urged to let the school aid *nonsectarian* religion (while refusing such aid to sectarian religion, nonbelievers and secular ideas) on the theory that aid to nonsectarian religion does not favor any one religion, but is in effect equal treatment for all.

Lending support to the idea that the Court might approve this, is its changed attitude in the *Zorach* case. Abandoning the strong implication of both *Everson* and *McCullum*, that religious believers are not to be given preference over nonbelievers, the *Zorach* case emphasizes the importance of religion in our society:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of pupils' events to sectarian needs, it follows the best of our traditions.⁸⁴

A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."⁸⁵

This is the language of the *Doremus* case—of any state court preparing to sustain reading the Bible in the public schools. But despite this, even the six justices who were willing to go this far toward helping religion appeared to agree that "Government may not finance religious groups *nor undertake religious instruction* nor blend secular and sectarian education. . . ."⁸⁶ [Emphasis supplied]. Whether the Court chooses to forbid the teaching of all religion or merely sectarian religion, it faces a serious problem of definition. If it is *sectarian* instruction which the states cannot undertake it faces the problem, with the aid of theories and techniques already formulated by the state courts, of defining sectarianism. If the state is to be permitted to give nonsectarian religious instruction the Court must of necessity define the term for itself, and define it sufficiently narrowly so that mere disapproval by some will not make what is taught "sectarian." If it does this, then the school authorities will be free to inculcate nondenominational religious beliefs in their pupils. But those who strongly desire this goal face the almost insurmountable obstacle of persuading the Court that this religion which they wish to teach,

⁸⁴ Id. at 313.

⁸⁵ Ibid.

⁸⁶ Id. at 314.

whose nondenominational characteristics merely make it *different* from other religions, is not in fact a state established religion in violation of the first and fourteenth amendments.

If, on the other hand, the Court holds that the state cannot give any religious instruction, it faces the ticklish problem of defining religion. Is, for example, teaching the germ theory of disease in hygiene class the teaching of religion since Christian Scientists reject it on religious grounds? Is all secular education in fact religious education because a certain Jewish sect believes that all secular teaching is forbidden?⁸⁷ Obviously the Court must define religion for itself if each sect is not to be a school censor, and the definition must be fairly narrow if public schooling as we know it is to remain intact. Mr. Justice Jackson in his concurring opinion in the *McColum* case shows an acute awareness of the "magnitude, intricacy and delicacy" of the task:

I think it remains to be demonstrated whether it is possible, even if desirable, to . . . isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet. . . .⁸⁸

Perhaps, as Mr. Justice Jackson suggests, the answer lies in a definition which will "prohibit teaching of creed and catechism and ceremonial and . . . forbid forthright proselyting in the schools. . . ."⁸⁹ Perhaps it lies in forbidding the teaching that *there is* a God, while permitting teaching that *most people believe there is* a God. The decision, ultimately, must be rooted in a wise balance between the right of society to further its culture through collective action and the right of the individual not to have the state interfere with the beliefs about divinity which he wishes to instill in his child.

One other alternative is open to the Court—the one taken by the New Jersey court in the *Tudor* case. This would permit the state to teach nonsectarian religious doctrine, but let the various religious sects decide which ideas and practices were sectarian and therefore forbidden. The

⁸⁷ See *People v. Donner*, 199 Misc. 643 (N.Y. Dom. Rel. Ct. 1950), reported 99 N.Y.S.2d 830 sub nom. *Shapiro v. Dorin*.

⁸⁸ 333 U.S. 203, 235 (1948) (concurring opinion).

⁸⁹ *Ibid.*

exigencies of litigation would doubtless yield widely varying results in different communities, and in large cities the variety of belief would probably bar from the schools not only all religion, but a fair share of all public schooling. The somewhat anomalous answer to this would be to let the sects define sectarianism within the confines of a judicially defined concept of religion.

Compulsion

The discussion thus far has been based upon the assumption that there is no compulsion upon the child to attend either the sectarian classes or the nonsectarian Bible reading. Such conditions would exist if the religious activities took place either before or after school, or if the school-sponsored religion was offered as one of a set of elective alternatives so varied and attractive that no pressure existed to get the child to take the religious instruction. Under such circumstances the only problem the Court would face would be whether there was aid to religion. But a new vice appears when the child is required to attend—a threat to the religious freedom of the individual. The problem of aid to religion might be removed in the case of outsiders coming into the school simply by giving all community groups the same privileges, religious groups included. But such programs would have to be optional alternatives to an otherwise available secular program, since the first amendment would surely bar requiring a group of pupils to take "Community Activity" were the Baptists the only community group to show up with a program. Our neutrality doctrine, useful when the state is providing facilities or regulation, fails when the state is providing a captive audience. By general consensus religious freedom means no one can be compelled to take sectarian religious training.

Nor is it seriously argued that the state could force attendance at nonsectarian religious exercises conducted by the school, assuming the school could constitutionally conduct such training. There is no evident dissent from the statement in the *Zorach* case that "government may not . . . use secular institutions to force *one or some* religion on any person."⁹⁰ [Emphasis supplied]. In fact it is altogether likely that even subjects which could legitimately be taught in the schools could still not be forced upon a child who objected upon religious grounds. In *West Virginia State Board of Education v. Barnette*⁹¹ the Court held that a Jehovah's Witness could not be forced over his religious objections to salute the flag or recite an oath of allegiance. But nowhere does the

⁹⁰ 343 U.S. 306, 314 (1952).

⁹¹ 319 U.S. 624 (1943).

Court suggest that the flag salute and oath constitute religion in the public schools.

Actually the most serious problem the Court faces is not whether a child may be compelled to take religious training, but rather what constitutes compulsion. Is a pupil who may sit in study hall while his playmates leave for church put under compulsion to go too? Is the pupil who may be excused from the schoolroom during the morning devotional period under compulsion to stay? Setting aside the possibilities of direct pressure by the teachers, it is argued that two kinds of compulsion are present in any such arrangement—the pressure of conformity and the pressure presented by limited alternatives.

A number of psychologists, backed by parents who have tried to send a child to school with an umbrella when "all the other kids have rain-coats," point out the tremendous strength of the pressure to conform. If his playmates take religious training, he wants to also. If they go to the Catholic church he wants to go there. If Johnny has to make himself conspicuous by leaving the room during Bible reading he may well stay and thus defeat his parents' wishes with regard to his religious training. The state presents the parent with the unhappy alternative of letting his child take a disapproved religion, or of augmenting his adjustment difficulties by insisting he be "different." As Mr. Justice Frankfurter put it, "non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."⁹²

The answer to this argument is, of course, that these pressures to conform are part of the normal social pattern and part of the price of being a religious nonconformist is the social stigma which all nonconformists have to bear. "It may be doubted," said Mr. Justice Jackson, "whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity."⁹³

The second claim is that the school, by offering religion as an official alternative, is exerting compulsion on the pupils to take religious training. The pupil is required by law to be either in church or in school, and like the miscreant who is given a choice of ten days or \$100 fine, it can hardly be said he is not coerced merely because he chooses one alternative rather than the other. This compulsion, it is argued, exists even when the choices are equal, but in some cases a seductive effect is achieved by reducing the desirability of the secular alternatives. Com-

⁹² 333 U.S. 203, 227 (1948) (concurring opinion).

⁹³ *Id.* at 233.

munity pressures, to which the school bows, are against offering such options as gym, glee club, shop or music.

Those who claim that this is not compulsion point out that the pupil can legitimately be required to be in school, that he does not have to go to church, and, to pursue the analogy, offering a convict a choice between jail (which can be required) and deportation to Russia (which cannot) is not in any sense compulsion to go to Russia. As far as the seductive effect goes, Professor Edward S. Corwin has called attention to the statement of the Court in *Steward Machine Co. v. Davis* that "to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties."⁹⁴

While the Court may well have a point, it is clear that a holding that temptation and coercion are *different* will scarcely solve these difficulties. For what is usually meant by coercion is not the actual use of physical force. A person is coerced into a course of action by making the alternatives unpalatable, and how unpalatable they have to be to achieve the desired result depends on the circumstances and the persons involved. The alternative of a \$2 fine will tempt most motorists to obey the parking laws, while some can only be persuaded by a stretch in the workhouse. While a child may easily be persuaded to take religion merely by making the secular alternative more difficult or more boring, a mature conscientious objector may prefer jail to religious conformity.

However enticing the theoretical possibilities of this kind of argument, there is evidence that the Court would consider both persuasion and coercion bad. Mr. Justice Douglas, speaking for the Court in the *Zorach* case, indicates that a violation of rights would exist "if it were established that any one or more teachers were using their office to *persuade or force* students to take the religious instruction."⁹⁵ [Emphasis supplied]. But the Court refused to consider the mere inclusion of church classes in the curriculum sufficiently persuasive or coercive to be forbidden by the Constitution. "It takes obtuse reasoning," said the Court, "to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom. . . ."⁹⁶ From this it might well be argued that Bible reading which a child need not attend, assuming it was not invalid as aid to religion, would not be considered a denial of religious freedom.

But the argument that this does not amount to persuasion is belied

⁹⁴ 301 U.S. 548, 589 (1937).

⁹⁵ 343 U.S. 306, 311 (1952).

⁹⁶ *Ibid.*

by the facts. For the whole purpose of enlisting the co-operation of the school is to provide an attendance at religious training, be it Bible reading or released time classes, which could not be obtained if school were simply dismissed and religion had to compete for the child's free time. The measure of the coercive effect, of the aid provided, and the infringement of rights involved, can best be measured in the reaction of religious leaders were the school to offer training in atheism as the only alternative. It is hard to conceive that only by "obtuse reasoning" could the state be said to be pressuring pupils into godlessness. To the extent that religion relies upon the state to provide adherents which the power of faith fails to attract—to that extent have we an establishment of religion.

CONCLUSIONS

The century-long judicial struggle over the use of the Bible in the public schools has had as its fulcrum the concept of "sectarianism." Either the definition itself or the technique of defining it has been the crucial factor in nearly every case, including *Doremus* and *Tudor*.

When the Supreme Court hears a Bible reading case, as eventually it must, it will certainly be pressed to adopt the familiar distinction between sectarian religion and nonsectarian religion. So far the Court has managed to avoid giving any real clue as to what it would do in answer to these pressures. It has, to be sure, condemned aid to religious sects, but never under circumstances which suggest a distinction between sectarian and nonsectarian religion.

There are, however, compelling reasons why the Supreme Court should reject such a distinction in spite of its ancient lineage. It is essentially a parochial concept—a survivor from the days when the country knew one dominant religious faith and differences of opinion were limited to variations on a single basic theme. By eliminating the *sectarian* differences between the Congregationalists and the Baptists it was possible to have left a substantial body of agreement on religious principles which could justly be called nonsectarian. It was this body of principles that the framers of the state constitutions did not outlaw from the public schools. There were few who disapproved, and those few were ignored without compunction. As the court in the *Tudor* case notes, the same provision of the first New Jersey constitution that provides there shall be "no establishment of any one religious sect in this province in preference to another," goes on to guarantee civil rights and the right to hold civil office to all who are of the 'protestant sect.'⁹⁷ The disadvan-

⁹⁷ 14 N.J. 31, 41, 100 A.2d 857, 862 (1953).

tages suffered by these minority groups was not a matter of serious concern.

But time has turned the whole idea of sectarianism into an anachronism. Not only has our country become so cosmopolitan that many of these minority groups are no longer insignificant, but our democracy has matured to a point where no minority is dismissed as insignificant, however small. It is not his voting strength, but the fact he is an individual that entitles a person to enjoy his religion free from governmental pressure. Each of us wants to be his brother's keeper, while firmly insisting that he has no right to be our keeper. The freedom to believe things that seem odd to our neighbors is a right we each demand for ourselves, and it is the role of the Court to insure this right for those who have not the political strength to protect themselves. The real strength of democracy lies in individual freedom, not cultural uniformity governmentally imposed.

While it seems desirable that the Court should bar not merely sectarian but all religion from the public schools, the question still remains, "What is religion?" A strongly held religious belief cannot be lightly dismissed simply because most people feel it is a secular matter. It seems inevitable that the Court should define "religion" for itself, and where the issue is the public school curriculum such definition should be a narrow one. Banned under such a definition would be outright worship, proselyting and catechism, as well as all teaching designed to instill a belief or nonbelief in God. But the proper interest of the community in an educated electorate urges a definition that would leave intact the normal school curriculum. Only those very few whose religion includes what society in general considers secular would be the victims of such a definition, and society's interest in education would properly outweigh their right to keep such subjects out of the public schools. The rules of no society could be expected to please everyone.

Those, on the other hand, who ask to be excused from these "secular" subjects on the grounds of religious faith raise a different problem. Here the determining factor should be not a definition of religion, but the careful weighing of the cost to society with the cost to the individual. In this uncertain realm there are no fixed guideposts. A person should not be compelled to salute the flag against his religion, but probably should be required to get a minimum education despite his convictions. Whether he should be excused from hygiene class for religious reasons necessarily involves weighing the benefits to society of such instruction against the harm done to the individual and society by overriding his

conscience. It is the decision of such controversies that calls for the nation's best in maturity, intelligence and wisdom. The guiding spirit that should prevail is best summed up by the great English liberal, Edmund Burke:

Liberty, too, must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public counsel to find out by cautious experiments, and rational, cool endeavors, with how little, not how much, of this restraint the community can subsist.