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State Control of Public School Curriculum

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STATE CONTROL OF PUBLIC SCHOOL CURRICULUM

Recent decisions in the Supreme Court of the United States and in the Supreme Court of Tennessee have brought again to the foreground of public thought the problem of a state's power to control the education of the children. The discussion of that power is limited in this paper to the public schools, not because the private school curriculum is of less importance to the state, but because it seems that legislative exercise of that control in the immediate future will be directed to the public school curriculum only.

1. A Broad and Comprehensive Power.

The power of the state to prescribe subjects and text books for the public schools is unquestioned. That power must reside somewhere, unless the public schools are to be left as neglected children to grow as they please and to do what they please. The power of control might have been vested in local communities, in counties or in the state, but without exception that control is primarily vested in the state legislature. "Essentially and intrinsically—the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of state and not of local jurisdiction. In such matters the state is a unit and the Legislature the source of power." [1]

The customary method by which state legislature have exercised this control is by delegating authority in generous terms to local boards, city, county or district. No constitutional objection can be successfully urged against this delegation,[2] nor can

[1] *State of Indiana, ex rel. Clark* v. *Haworth*, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240 (1890). See also *Roach* v. *St. Louis Public Schools*, 77 Mo. 484 (1883); *Associated Schools* v. *School District No.* 83, 122 Minn. 254, 142 N. W. 325, 47 L. R. A. (N. S.) 200 (1913); *Fenton* v. *Board of Cimmissioners*, 20 Idaho 392, 119 Pac. 41 (1911); *State* v. *Hine*, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83 (1890).

[2] *Donahue* v. *Richards*, 38 Me. 379, 61 Am. Dec. 256 (1854); *Board of Public Education* v. *Barlow*, 49 Ga. 232 (1873); *Ratcliff* v. *Faris*, 6 Neb. 539 (1877).

it be claimed that the legislature is thereafter precluded from resuming the direct control of the school system or from adding to or otherwise changing the curriculum or the books. "As the power over schools is a legislative one, it is not exhausted by exercise. The legislature, having tried one plan, is not precluded from trying another. It has a choice of methods and may change its plans as often as it deems it necessary or expedient."[3]

Where the control of the public schools has been vested in a local body, such as a city board of school commissioners, that body has the same general authority over the schools that the legislature has, but it must exercise that authority consistently with the laws of the state. For example, a state statute may provide for the teaching of a designated foreign language provided the parents of twenty-five or more children in the city shall so demand. This statute imposes a duty upon the city school board, regardless of the board's opinion as to the wisdom or expediency of the language course. In *School Commissioners of Indianapolis* v. *State, ex rel.,* Sander[4] the court said: "With reference to the act under consideration, we are of the opinion that where the requisite demand is made, it becomes the duty of the Board of School Commissioners to introduce the German language as a study into the particular school where it is demanded. . . . They have no discretion to refuse but must act."

Similarly, when the legislature, instead of acting directly gives to a state board of education the power to prescribe the course which is to be carried out by the local boards of education, such local boards must adopt the course prescribed by the state board,[5] and are as fully controlled by the action of the state board acting under such statutory authority as they would be by an express legislative prescription of the course. The authority of state boards has been frequently upheld in litigation concerning text books. When the legislature has placed in the hands of the state board of education or of a special commission, the authority to select text books, the selection is as binding on

[3] *State of Indiana, ex rel Clark* v. *Haworth, supra.*
[4] 129 Ind. 14, 28 N. E. 61, 13 L. R. A. 147 (1891).
[5] *Wagner* v. *Royal,* 36 Wash. 428, 78 Pac. 1094 (1904); *Westland Pub. Co.* v. *Royal,* 36 Wash. 399, 78 Pac. 1096 (1904).

the teachers and pupils as if the legislature by statutory enactment had specifically named the books.[6]

The power to prescribe courses of study is frequently delegated in whole or in part to the local board of education, and the question is then presented whether the local board is limited to the subjects named in the state statute. This power to prescribe the course of study is broadly construed and is measured by the discretion and sound judgment of the board. Constitutional and statutory prohibitions must be obeyed, but the mere fact that a school district board provides that other branches besides those specifically enumerated in the statute shall be taught does not mean that the provision of the additional subject is unauthorized.

Among the subjects which may be prescribed, although not specifically mentioned in the statute, and not falling within the usual scope of common school education may be mentioned bookkeeping,[7] debates and composition,[8] kindergarten,[9] manual training,[10] foreign languages[11] and music.[12] The legislature itself may add to a curriculum already established, as by requiring courses in agriculture and home economics.[13]

We have thus far seen no limitation on the power of the state to prescribe the course of study in the public schools. The power is full and comprehensive. But the question may be raised whether this control has been in any way weakened by recent decisions of the Supreme Court of the United States which declared unconstitutional two measures that were largely sup-

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[6] *Keeper* v. *State*, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167 (1899); *McCormick* v. *Burt*, 95 Ill. 263, 35 Am. Rep. 163 (1880); *Donahoe* v. *Richards*, 38 Me. 379, 61 Am. Dec. 256 (1854); *Rand McNally & Co.* v. *Royal*, 36 Wash. 420, 78 Pac. 1103 (1904).

[7] *Rulison* v. *Post*, 79 Ill. 567 (1875).

[8] *Samuel Benedict Memorial School* v. *Bradford*, 111 Ga. 801, 36 S. E. 920 (1900).

[9] *Sinnott* v. *Colombet*, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (1895).

[10] *People ex rel. McKeever* v. *Board of Education*, 176 Ill. App 491 (1912).

[11] *Roach* v. *St. Louis Public Schools*, 77 Mo. 484; *Powell* v. *Board of Education*, 97 Ill. 375, 37 Am. Rep. 123 (1881); *Board of Education* v. *Welch*, 51 Kan. 792, 33 Pac. 654 (1893).

[12] *State ex rel. Andrew* v. *Weber*, 108 Ind. 31, 8 N. E. 708, 58 Am. Rep. 30 (1886); *Bellmeyer* v. *Independent Dist.*, 44 Iowa 564 (1876); *Epley* v. *Hall*, 97 Kan. 594, 155 Pac. 1083, Am. Cas. 1918 D. 151 (1918).

[13] *Associated Schools* v. *School Dist. No.* 83, 122 Minn. 254, 142 N. W. 325, 47 L. R. A. N. S. 200 (1913).

ported by eager believers in the American public school system. These cases are *Meyer* v. *Nebraska*[14] dealing with the Nebraska statute forbidding the teaching of a foreign language in public or private schools, and *Pierce* v. *Society of Sisters*[15] requiring all children to attend the public schools. An examination of these cases will show that the power of the state to control the curriculum of a public school is left unimpaired.

In *Nebraska Distict, etc.* v. *McKelvie,*[16] the statute provided that no person, individually or as a teacher, shall in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language, and that languages other than English may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade, as evidenced by a certificate of graduation issued by the county superintendent. The state court said that the statute was intended "not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become part of them, they should not in the schools be taught any other language." The state court then held that the enactment of the law was within the police power of the state.

The test of this law came before the Supreme Court on appeal in the case of *Meyer* v. *Nebraska,*[17] where the court readily admitted the power of the state to require that schools give instruction in English but held that the prohibition against the teaching of a foreign language in the schools was not within the competency of the state. The statute, it is true, prohibited such teaching in all schools, public and private. But in the opinion of Mr. Justice McReynolds, which reversed the conviction of the defendant for teaching a foreign language in a parochial school,

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[14] 262 U. S. 390, 67 L. Ed. 1042, 29 A. L. R. 1446, (1923) reversing 107 Neb. 657, 187 N. W. 100 (1922).

[15] 268 U. S. 510, 69 L. Ed. 1070, 39 A. L. R. 468 (1925).

[16] 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1633 (1919).

[17] 262 U. S. 390, 67 L. Ed. 1042, 29 A. L. R. 1446 (1923), reversing 107 Neb. 657, 187 N. W. 100 (1922). See also *Bartels* v. *Iowa*, reversing 191 Iowa 1061, 181 N. W. 508 (1921). *Bohning* v. *Ohio*, reversing 102 Ohio St. 474, 132 N. E. 20, (1921); and *Nebraska District, etc.* v. *McKelvie*, reversing 100 Neb. 448, 187 N. W. 927 (1922), all of these cases being reported in the Supreme Court in 262 U. S. 404, 67 L. Ed. 1047 (1923).

occurs this phrase: "Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports." The absence of such a challenge indicated that the state can do in the public schools what the Supreme Court has held to be beyond its power as to private schools, namely, that it can require that in the public schools not only must all subjects be taught in English but also that no foreign language shall be taught in the public schools until the pupil shall have passed the eighth grade.

In *Pierce* v. *Society of Sisters*[18] the Supreme Court declared unconstitutional an act of the State of Oregon requiring all children between the ages of eight and sixteen years to attend the public schools. But the court is again careful to point out what is not decided. "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers, and pupils: to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." The scope of the opinion is limited to a declaration that the state cannot "standardize its children by forcing them to accept instruction from public teachers only." The decision does not impair the broad powers of control over public school curriculum but merely holds that all children cannot be subjected to that curriculum.

II. PARENTAL CONTROL.

We return therefore to the blanket proposition that the determination of the public school curriculum is within the power of the state. Are there any limits to this power? After the state legislature has acted or the state board of education or the local board as the case may be, is there any objection that can be made to the curriculum thus established for the public schools which would call for a judicial review?

There are two main arguments that have been advanced, which we consider in turn. (1) That the right of the parent to control the education of the child has been illegally impaired;

[18] 268 U. S. 510, 69 L. Ed. 1070, 39 L. R. A. 468 (1925).

(2) that the curriculum prescribed violates a constitutional provision, usually one relating to freedom of worship or the teaching of religion.

The great objection to the unlimited powers of the state over the education of the child has come from parents. As to the selection of courses, there are well considered cases that hold that the parent has no right to pick a course for his child but such course can be laid down by the state or local authorities without providing any room for election or choice by pupil or parent.[19] On the other hand, there is authority for the proposition that the parent has the right to make reasonable selections of courses.[20] On which side rests the weight of logic and of the felt but unrecognized consideration of expediency?

The case of *School Board District No.* 18 v. *Thompson*[21] presents the issue. The Constitution of Oklahoma provided that the supervision of instruction in the public schools shall be vested in a board of education and that the legislature should provide a uniform system of text books for the schools. The parent objected to his child taking lessons in singing which were part of the prescribed course. The court said: "To our mind the right of the board of education to prescribe the course of study and designate the text-books to be used does not carry with it the absolute power to require the pupils to study all of the branches prescribed in the course, in opposition to the parents' reasonable wishes in relation to some of them."

It then rests for support upon a series of three cases, from which the following excerpts are taken as indicating how little the learned judges knew about modern methods of education. In *Morrow* v. *Wood*[22] the court said: "It is unreasonable to suppose any scholar who attends school can or will study all the

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[19] *State* v. *Webber*, 108 Ind. 31, 8 N. E. 708, 58 Am. Rep. 30 (1886). *Kidder* v. *Chellis*, 59 N. H. 473 (1879); *Board of Education of Sycamore* v. *State*, 80 Ohio St. 133, 88 N. E. 412 (1909); *Donahoe* v. *Richards*, 38 Me. 379, 61 Am. Dec. 256 (1854).

[20] *State ex rel. Kelley* v. *Ferguson*, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. N. S. 268 (1914); *School Board District No.* 18 v. *Thompson*, 24 Okla. 1, 103 Pac. 578, 24 L. R. A. N. S. 221 (1909); *Sheibley* v. *School District No.* 1, 31 Neb. 552, 48 N. W. 393 (1891); *Morrow* v. *Wood*, 35 Wis. 59, 17 Am. Rep. 471 (1874); *School Trustees* v. *People*, 87 Ill. 303, 29 Am. Rep. 55 (1877); *Rulison* v. *Post*, 79 Ill. 567 (1875); *Sewell* v. *Defiance Union School Board of Education*, 29 Ohio St. 89 (1876).

[21] 24 Okla. 1, 103 Pac. 578, 24 L. R. A. N. S. 221 (1909).

[22] 35 Wis. 59, 17 Am. Rep. 471, (1874).

branches taught in them. From the nature of the case some choice must be made and some discretion be exercised as to the studies which the different pupils shall pursue. The parent is quite as likely to make a wise and judicious selection as the teacher."

In *Sheibley* v. *School District No. 1*[23] the court said: "There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school. Such pupils are not idle, but merely devoting their attention to other branches; and so long as the failure of the students, thus excepted, to study all the branches of the prescribed course, does not prejudice the equal rights of other student, there is no cause for complaint."

In *School Trustees* v. *People*[24] the court said: "It is possible that a father may have very satisfactory reasons for having his son perfected in certain branches of education to the entire exclusion of others and so long as, in exercising his parental authority in making the selection of the branches he shall pursue, none others are affected, it can be of no practical concern to those having the public schools in charge."

In these opinions the learned judges fail to reckon with the wreckage that such parental selections would make of discipline and the orderly development of common school courses. Even where some electives are permitted by the school authorities, this fact does not authorize the court to widen the field of electives to include courses designated as "required" by the educators who worked out the course. In spite of the rather solemn judicial warnings that we are perhaps approaching the theory of state control over children set forth in Plato's Republic, it is perhaps better to restrict parental control over the choice of studies and compel the child to profit by the selections made by the educational experts on behalf of the state. It is barely possible that, in spite of judicial opinion to the contrary, the teacher may know what the best interests of a child may require far better than the most devoted parent.

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[23] 31 Neb. 552, 48 N. W. 393 (1891).

[24] 87 Ill. 303, 29 Am. Rep. 55 (1877).

The true rule has been laid down in *State ex rel. Andrew* v. *Webber*,[25] where a parent brought suit for a writ of mandamus to compel the school authorities to revoke a suspension pronounced on his son because of his failure to take music as required by the school authorities. The son refused because his father directed him to do so, the father believing that it was not for the best interests of the son to take the musical studies. In sustaining a demurrer to the relator's petition, the court said: "The important question arises, which would govern the public high school of the city of Laporte, as to the branches of learning to be taught and the course of instruction therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator, without cause or reason in its support? We are of opinion that only one answer can be or ought to be given to this question; the arbitrary wishes of the relator in the premises, must yield and be subordinated to the governing authorities of the school city of Laporte, and their reasonable rules and regulations for the government of the pupils of this high school."

Yet there can be no quick or complete dismissal of the parent's claims to control the education of the child. It was the recognition of the right of parents to direct the education of their children that explains the decision of the Supreme Court in nullifying the Oregon statute requiring all children between the ages of eight and sixteen years to attend the public schools.[26] Mr. Justice McReynolds wrote: "We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him

[25] 108 Ind. 31, 58 Am. Rep. 30 (1886).

[26] *Perce* v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070, 39 A. L. R. 468 (1925).

and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Likewise, in deciding the Nebraska case concerning the teaching of foreign languages[27] the learned justice said: "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life. . . . . Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parent to engage him so to instruct their children, we think, are within the liberty of the Amendment. Evidently the legislature has attempted materially to interfere with the calling of modern-language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

While neither of these cases related to the curriculum in the public school, it is easy to see that the same convictions as to parental control might lead the judges to uphold the right of a parent to interfere with the public school curriculum. Or it might be a sufficient answer to judicial fears as to standardized children and official guardians to point out that the parent can always take his child out of the public school and send him to a private school where the curriculum more nearly approaches the parental ideal. It is submitted that this course will safeguard the parent's right of control which is largely the heritage of days when there were no public schools and at the same time save from embarrassment and interference the state's plans for the education of all the children whose parents submit them to the curriculum of the public schools.

It has been assumed that these state-prescribed courses for the public schools are educationally and scientifically sound. Occasionally they may not be. Acts may be passed, for example, which prohibit the teaching of evolution in the public schools or in any of the universities or normal schools which are supported by state funds, and such acts, if enforced, may limit or prevent effective instruction in certain sciences. Such an act, passed by the legislature of the State of Tennessee in 1925 has been held

[27] *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 29 A. L. R. 1446 (1923).

to be constitutional in *Scopes* v. *State of Tennessee*,[28] a case involving the prosecution of a public school teacher for violating the terms of the act. Bills of substantially the same tenor as the Tennessee law were introduced on January 13, 1927 in the legislature of Arkansas and of Alabama. In 1926, anti-evolution laws were introduced and withdrawn in Virginia, defeated in Kentucky, passed by the house and postponed by the senate in Louisiana, and passed and signed by the governor in Mississippi.[29] If these and similar proposals should, wisely or unwisely, be enacted into law, would the parents have any right to object? If the course in biology were entirely omitted, could the parents object? Would these courts which have sustained the parent's right to object to the inclusion of singing in the curriculum sustain his right to object to the exclusion of biology or the evolutionary theory?

Obviously the courts could not sustain the objections of the parent. In the Scopes case, the majority opinion remarks: "Our school authorities are quite free to determine how they shall act in this state of the law. . . . . This course of study (biology) may be entirely omitted from the curriculum of our schools." Indeed it may be, and the parent would be powerless to prevent the omission. The parent cannot control the legislative prescription of the public school curriculum by exclusion or by inclusion. Whether the state legislature or the state board or local boards decide wisely or unwisely as to the curriculum, the parent must either accept this legislative decree or withdraw his children from the public schools until such time as wiser legislators or sounder educators are chosen to control the curriculum of the public schools. The remedy is political, not judicial.

III. REGIONS LIBERTY.

The second argument usually advanced against the curriculum prescribed by the legislature or the educational board acting as its agent is that in some way the course violates a constitutional provision concerning freedom of worship or the prohibition against the giving of sectarian instruction. Nearly every state constitution contains a clause similar to the provis-

[28] 289 S. W. 363 (Tenn.) (1927).
[29] See summary in Christian Century Vol. 44, page 100, issue of January 27, 1927.

ion in the First Amendment of the Federal Constitution, guaranteeing religious liberty.[30] Many states prohibit sectarian instruction; others prohibit the expenditure of money in support of places of worship or for any sectarian purpose.[31] The legislature or the school board cannot in the guise of prescribing a curriculum violate any of these provisions, but unfortunately the courts have not always agreed on what constitutes such an infringement of the constitutional guarantees.

It should be noted first that religious liberty does not include the right to compel school boards to prescribe religious exercises. If the board therefore decides to limit or prohibit exercises in the public schools of a religious nature, such as the reading of the Bible, such restrictive regulations are valid. In the absence of legislative action enjoining or requiring religious instruction in the public schools, the courts have no power to determine what branches of learning must be taught or what the curriculum shall be, and therefore the action of a school board in prohibiting the reading of the Bible in the schools must be sustained.[32]

But on the other hand a school board, while it can forbid religious exercises, cannot compel such exercises as the courts

[30] *Illinois, Constitution,* Art. 2, Sec. 3, guaranteeing "the free exercise and enjoyment of religious profession and worship; *Maine, Constitution,* Art. 1, Sec. 3, "No one shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience nor for his religious professions or sentiments." *Kansas Bill of Rights,* Sec. 7, "The right to worship God according to the dictates of conscience shall never be infringed." "Nor shall any person be compelled to attend or support any form of worship, nor shall any control of or interference with the rights of conscience be permitted."

[31] *Louisiana, Constitution,* Sec. 53, "No money shall ever be taken from the public treasury directly or indirectly, in aid of any church, sect, or denomination of religion." *Kentucky, Constitution,* Sec. 189, "No portion of any fund or tax . . . for educational purposes, shall be appropriated to or used by or in aid of any church, sectarian or denominational schools." *New York, Constitution,* Art. 9, Sec. 4, "Neither the state nor any subdivision thereof shall use its property or credit or any public money in aid or maintenance . . . of any school . . . in which any denominational tenet or doctrine is taught."

Illinois, Constitution, Article 8, Sec. 3, prohibits the appropriation of any public fund in aid of any "'sectarian purpose;" *Pennsylvania, Constitution,* Art 10, Sec. 2, "No moneys received for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian school."

[32] *Board of Education* v. *Minor,* 23 Ohio St. 211, 13 Am. Rep. 233 (1872).

have declared to be unconstitutional. What are they? The great dispute here has centered on the reading of the Bible in the schools. But for provisions usually contained in the statute or rule making attendance at the Bible reading optional and not compulsory, nearly all these regulations would have been nullified on one or more of the constitutional grounds heretofore stated. But where the rule has not compelled attendance at the Bible reading, it has frequently been held that such reading does not constitute sectarian instruction[33] nor any restriction on the civil rights and religious liberties of those students who do not care to attend.[34] Nor does the reading of the Bible make the school building a place of worship in violation of a constitutional provision prohibiting such use of school property.[35] The placing of the King James Version of the Bible in the school library does not violate the provisions of a statute providing that no publication of a sectarian, partisan or denominational character shall be made part of a school library.[36]

In spite of the friendly tone of these opinions favorable to Bible reading in the public schools, we must not ignore the frequently expressed limitation that attendance on such readings must not be made compulsory.[37] It has been held that if the reading is in school hours, that fact alone is enough to prove that attendance is compelled, for within school hours the

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[33] *Hackett* v. *Brooksville Graded School Dist.*, 120 Ky. 608, 69 L. R. A. 592, 117 Am. St. Rep. 599, 87 S. W. 792 (1905); *Donahoe* v. *Richards*, 38 Me. 379, 61 Am. Dec. 256 (1854). In *Freeman* v. *Scheve*, 65 Neb. 853, 91 N. W. 846 (1902); 65 Neb. 876, 93 N. W. 169 (1903), it was held that the morning exercises as conducted by the teacher constituted "sectarian instruction," but that the mere reading of the Bible would not be sectarian instruction if it were read as "mere literature."

[34] *Wilkerson* v. *Rome*, 52 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334 (1922); *Billard* v. *Board of Education*, 69 Kan. 53, 76 Pac. 442, 66 L. R. A. 166, (1904); *Spiller* v. *Inhabitants of Woburn*, 12 Allen (Mass.) 127 (1866). *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792 (1905).

[35] *Moore* v. *Monroe*, 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444 (1884); *Church* v. *Bullock*, 104 Tex. 1, 109 S. W. 115, 16 L. R. A. N. S. 860 (1908). *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792 (1905).

[36] *Evans* v. *Selma Union High School District*, 193 Cal. 54, 222 Pac. 801, 31 A. L. R. 112 (1924).

[37] *Church* v. *Bullock*, 104 Tex. 1, 109 S. W. 115, 16 L. R. A. N. S. 860, (1908); *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792, (1905).

teacher's wish has the effect of a command.[38] Where it is established that the Bible reading is a part of the regular exercises of the public school which the pupils are expected to attend, several courts have pronounced this requirement unconstitutional on the ground that it violates the constitutional right to the free exercise of religious worship,[39] or on the ground that it amounts to sectarian instruction or violates the provisions against the use of public money or public buildings for sectarian purposes.[40] Nor does it seem likely that provisions by which children of objecting parents might be excused from attendance at the Bible reading would affect the course of these decisions, where the reading was part of the regular schedule of the school.[41]

In a few cases, the reading of the Bible has been part of the prescribed course in reading rather than part of the opening exercises of worship. Can the Bible be made a text in the course in literature without impairing the religious liberties of the children or violating provisions forbidding sectarian institution? In the early Maine case of *Donahoe* v. *Richards*[42] the court held that it was within the power of a school committee to select the Bible as a reading book, and said: "The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as

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[38] *State ex rel. Freeman* v. *Scheve*, 65 Neb. 876, 93 N. W. 169, 59 L. R. A. 932 (1903).

[39] *People ex rel. Ring* v. *Board of Education*, 245 Ill 334, 92 N. E. 251, 29 L. R. A. N. S. 442 (1910); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N. W. 846 (1902), motion for rehearing overuled in 65 Neb. 876, 93 N. W. 169, 59 L. R. A. 932 (1903).

[40] *People ex rel. Ring* v. *Board of Education, supra; Herold* v. *Parish Board*, 136 La. 1034, 68 So. 116, L. R. A. 1915 D 941 (1915); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330 (1890).

[41] In *People ex rel. Ring* v. *Board of Education, supra*, the children were required to remain quiet during the exercises, to fold their hands and bow their heads, but it was not alleged that they were required to participate in the Lord's Prayer or the singing of hymns. In *State ex rel. Weiss* v. *District Board, supra*, the children were not required to remain in school during the reading of the Bible. In *Herold* v. *Parish Board, supra*, the court, referring to the argument that teachers might with propriety excuse from attendance the children of objecting parents, said that it amounted to "an admission of discrimination" against such children.

[42] 38 Maine 279, 61 Am. Dec. 256 (1854).

interfering with religious belief or an affirmance of the pagan creeds. A chapter in the Koran might be read, yet it would not be an affirmation of the truth of Mohammedanism, or an interferference with religious faith. The Bible was used merely as a reading book, and for the information contained in it, as the Koran might be, and not for religious instruction. No one was required to believe or punished for disbelief, either in its inspiration or want of inspiration, in the fidelity of the translation or its inaccuracy, or in any set of doctrines deducible or not deducible therefrom."

Likewise in *State ex rel. Freeman* v. *Scheve*[43] the court, after holding that the Bible reading constituted religious worship in violation of the state constitution, proceeded to point out that the Bible might be read as a work of literature as any other notable book might be. The court said: "Certainly the Iliad may be read in the schools without inculcating a belief in the Olympic divinities, and the Koran may be read without teaching the Moslem faith. Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequaled in purity and elegance. Its style has never been surpassed. Among the classics of our literature it stands preeminant."

A somewhat similar problem was presented in *Pfeiffer* v. *Board of Education*[44] where the court held that a book entitled "Reading from the Bible" might be used as a supplemented text book, because it merely affirmed the moral obligations laid down in the Ten Commandments and the reading of it was not compulsory. But this decision merely points out the possibility of selecting passages from the Bible the reading or study of which would not involve constitutional problems of religious liberty or sectarian instruction, a proposition that can scarcely be open to question.

But can the Bible be used as the text book even in a course in literature, as has been decided in *Donahue* v. *Richards, supra,* and suggested in dicta in *State ex rel Freeman* v. *Scheve, supra?* The argument against such a use of the Bible as a reading text

[43] 65 Neb. 876, 93 N. W. 169, 59 L. R. A. 932 (1903).
[44] 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536 (1898).

is thus stated in *State ex rel Weiss* v. *District Boards* [45] "That the reading from the Bible in the schools, altho unaccompanied by any comment on the part of the teacher, is 'instruction,' seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition. The question, therefore, seems to narrow down to this: Is the reading of the Bible in the schools, not merely selected passage therefrom, but the whole of it—sectarian instruction of the pupils? In view of the fact already mentioned, that the Bible contains numerous doctrinal passages, upon some of which the peculiar creed of almost every religious sect is based, and that such passages may reasonably be understood to inculcate the doctrines predicated upon them, an affirmative answer to the question seems unavoidable. Any pupil of ordinary intelligence who listens to the reading of the doctrinal portions of the Bible will be more or less instructed thereby in the doctrines of the divinity of Jesus Christ, the eternal punishment of the wicked, the authority of the priesthood, the binding forces and efficacy of the sacraments, and many other conflicting sectarian doctrines."

The court carefully points out that this reasoning would not apply to such text books as are founded upon the fundamental moral precepts of the Bible or contain extracts of a nonsectarian character, from the Scriptures. But the Bible as a whole, the court concludes, cannot be used as a text book without violating the constitutional provisions against sectrian instruction.

Where the rule or the practice goes beyond the mere reading of the Bible, as when the pupils are examined upon the historical, biographical, narrative and literary features of the Bible, this clearly makes the Bible a textbook. In *State ex rel. Dearle* v. *Frazier*[46] the court held that such examinations, even when the preparatory work of Bible study was done outside the school, violated the constitutional provision against applying money to any religious exercise or instruction.

It is perhaps sufficient to say in regard to the use of the Bible as a text book in reading a court of law should

[45] 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41 (1890).
[46] 102 Wash. 369, 173 Pac. 35, L. R. A. 1918F-1056 (1918).

probably find that such a use constituted sectarian instruction unless a careful selection of non-controversial Bible passages was made and the reading limited to such passages. In subjects other than reading or literature, it is not to be expected that the Bible would be required as a text, as it does not purport to be a book of science but a book of religion. But in view of the number of Anti-Evolution Acts which have been presented to state legislatures, it is perhaps not beyond the realm of the possible that at least certain passages of the Bible may be prescribed as part of the text or the basis of instruction in biology or other natural sciences. Can this be done? And if it cannot be done, can the legislature prohibit the teaching of any theory that contradicts the Bible?

In 1925, the legislature of Tennessee passed an act providing that "it shall be unlawful for any teacher in any of the universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, to teach any theory that denies the story of Divine Creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals."[47] It might seem that the judicial determination of the validity of this act would involve the answer to the questions we have just raised. But in *Scopes* v. *State of Tennessee*[48] the case was presented to the court on the theory that the Act merely prohibited the teaching that man has descended from a lower order of animals, and that the teaching of any theory which denied the story of the Divine Creation of man as taught in the Bible would not constitute an offense unless the teacher taught instead that man has descended from a lower order of animals.[49] At page 63, the brief for the state says: "The act prohibits nothing except the teaching in our public schools and institutions of learning 'that man has descended from a lower order of animals.' No religion in the history of the world has ever held or taught any such tenet, precept or doctrine."

In an effort to give some effect to the clause forbidding the teaching of any theory that denies the story of Divine Creation as taught in the Bible, and thereafter to argue that the statute

[47] Capter 27 of the Public Acts of Tennessee for 1925.
[48] 289 S. W. 363 (Tenn. 1927))
[49] State's brief in Scopes case, pp. 7-12.

was indefinite because of the uncertainty as to what is meant by such Biblical theory of creation, Thomas F. Malone, a distinguished Nashville lawyer, filed a brief as amicus curiae in which he thus criticized the argument for the state.[50] "If the clause of the act be read out of it, it defeats the primary purpose of the legislature, for it makes possible a sneer at the Bible and the Divine origin of man, together with the teaching of the materialistic doctrine of evolution as to everything else,—provided only the teacher refrains from expressing his views as to the descent of man from lower animals."

In deciding this issue, the court on appeal adopted the construction urged by the State, and said:[51] "It thus seems plain that the Legislature in this enactment only intended to forbid teaching that man descended from a lower order of animals. The denunciation of any theory denying the Bible story of creation is restricted by the caption and by the final clause of section 1." The caption referred to is "An Act prohibiting the teaching of the evolution theory," and the final clause is "to teach instead (of the Bible story of creation) that man has descended from a lower order of animals."

The Scopes case thus failed to add anything to the law in regard to religious teaching in the public schools. It merely raises the question it was supposed to answer. It suggests the inquiry whether the legislature can provide that no theory shall be taught in these schools which denies the story of Divine Creation of man as taught in the Bible, or any other part of the Bible, that specifically commends itself to legislative favor. The unwillingness of the state to support the statute as thus interpreted indicates a recognition that such an interpretation of the statute would mean its overthrow, and the opinion of the court is a tacit admission of the same fact. "We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. So far as we know there is no religious establishment or organized body that has in its creed or confession of faith any article denying or affirming such a theory." This statement could obviously not be made, if the act had been construed as prohibiting the teaching of any

[50] Brief of Mr. Malone, p. 23.
[51] *Scopes* v. *State*, 289 S. W. 363, at 364 (Tenn., 1927).

theory that denies the story of the divine creation of man as taught in the Bible.

Regardless of the answer that courts may make to the question whether the legislature can definitely provide that a public school teacher must teach certain Biblical theories of science and assuming for the moment that such a provision would be invalid as constituting sectarian instruction, it is perhaps not improper to point out that a legislative prohibition of scientific theories opposed to the Bible narrative would logically fall under the same condemnation. If as seems probable,[52] the Bible cannot be adopted as the text book in reading or geography or astronomy or biology, can the legislature provide that no public school teacher shall teach any theory that denies the whole or any part of the Bible? It would seem that such an enactment if valid, would accomplish by indirection what the legislature is powerless to do directly. If the Bible cannot be prescribed as a text, it cannot be prescribed as the standard by which other texts and instruction shall be measured.

To hold otherwise would be to guarantee religious liberty against affirmative attacks by legislative bodies and to leave it unprotected against interference more subtle and dangerous because it is veiled. "You must teach this Book" and "You must not teach anything contradicting this Book" are two ways of accomplishing the same result. If the legislature and school boards cannot do the one, they cannot do the other. It is therefore submitted that legislative prohibition of the teaching of theories that happen to contradict the Bible and that are forbidden *on that account* constitutes an indirect violation of fundamental concepts of religious liberty that safeguard children in public schools from sectarian instruction.

This conclusion ought not to disturb those who are devout believers in religious truth. In *Board of Education* v. *Minor*[53] Judge Welch makes this profound observation:—"United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both." The

[52] *State ex rel. Dearle* v. *Frazier*, 102 Wash. 369, 173 Pac. 35, L. R. A. 1918 F 1056 (1918).

[53] 23 Ohio St. 211, 13 Am. Rep. 233 (1872).

American government was founded on the idea of complete separation of church and state, and it would be unfortunate if through misguided zeal, religionists who happen to have a temporary legislative majority should break down that separation which has been their own support and protection.

In *People ex rel. Ring* v. *Board of Education*[54] Judge Dunn has restated the true relation of the church and the civil authority. "Religion is taught and should be taught in the churches, Sunday schools, parochial and other church schools, and religious meetings. Parents should teach it to their children at home, where its truths can be most effectively enforced. Religion does not need an alliance with the state to encourage its growth. The law does not attempt to enforce Christianity. Christianity had its beginning and grew under oppression. Where it has depended upon the sword of civil authority for its enforcement, it has been weakest. Its weapons are moral and spiritual, and its powers are not dependant upon the force of a majority. It asks from the civil government only impartial protection, and concedes to every other sect and religion the same impartial civil right." Under these principles, legislative support of Biblical truth would seem to be unnecessary and unwise.

IV. THE RIGHT TO ACQUIRE KNOWLEDGE.

But is there not a third objection to legislative enactment of theories of knowledge or principles of science? Is it not beyond the power of a state legislature to prescribe the theories on which any given subject must be taught? Granted that the legislature may select what fields of truth may be explored by the children in the public schools, is it not beyond the legislative power to prescribe how such search for the truth must be conducted, what theories accepted and what theories rejected?

Is it within the power of a legislature to prescribe that no theory of the physical world shall be taught which contradicts in any particular the world view of the Bible which has thus

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[54] 245 Ill. 334, 92 N. E. 251, 29 L. R. A. N. S. 442 (1910).

been summarized:[55] "The flat earth is founded on an underlying sea, it is stationary, the heavens are like an upturned bowl or canopy above it, the circumference of this vault rests on pillars; the sun, moon, and stars move within this firmament of special purpose to illumine man; there is a sea above the sky, 'the waters which were above the heavens;' and through the 'windows of heaven' the rain comes down; within the earth is Sheol, where dwell the shadowy dead; this whole cosmic system is suspended over vacancy; and it was all made in six days, each with a morning and an evening, a short and measurable time before."

Or, again, is it within the power of a legislature to prescribe that no theory of economics shall be taught which contradicts in any particular the economic theories of Adam Smith, or that no theory of chemistry or physics shall be taught which contradicts the best textbook in these respective fields, published prior to 1900? Can the legislature control the teaching of civics and government by providing (in Republican states) that no theory be taught that questions the political principles of Alexander Hamilton or (in democratic states) that no theory be taught that questions the political philosophy of Thomas Jefferson? It is submitted that legislatures and school boards can choose the subjects to be taught, but have no power to control the manner in which in every course the eternal principles of truth are sought. The "liberty" guaranteed by state and federal constitutions include a liberty to seek and express the truth.

That liberty is destroyed in the schools where it should be most zealously guarded if by legislative power certain theories of truth are enthroned and other theories of truth are proscribed. The point was thus presented in the Scopes case by

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[55] Harry Emerson Fosdict, "The Modern Use of the Bible," p. 46, citing as authorities for this description the following:
Psalm, 136:6, 24:1-2, Genesis 7:11.
Job 37:18, Genesis 1:6-8, Isaiah 40:22.
Job 26:11, Psalm 104:3.
Genesis 1:7, Psalm 148:4.
Isaiah 14:9-11.
Psalm 93:1, 104:5.
Psalm 104:2.
Genesis 1:14-18.
Psalm 78:23, Genesis 7:11.
Job 26:7.
Genesis Ch. 1.

the counsel for the defense: "The legislature may undoubtedly, within reasonable bounds, prescribe what sciences shall be taught in the public schools, but under the Constitution with the solemn duty resting upon it to foster science, the legislature cannot prescribe for the public schools courses in biology, geology, botany or any other science and then deliberately set aside the fundamental principles of these sciences and set up theories of its own." [56]

Justice McReynolds has stated, in the opinion deciding the case of *Meyer* v. *Nebraska*[57] that the phrase "liberty" in the fourteenth amendment includes "not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge,* to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Italics ours.) It does include the *right to acquire useful knowledge,* and that right is seriously impaired if the legislature has the power to control the search for knowledge by ruling out from the start certain theories of science or philosophy which have met its displeasure.

Mr. Justice Holmes who dissented in the *Meyer* v. *Nebraska* case and with whom Mr. Justice Sutherland concurred, held that men might reasonably differ whether a statute prohibiting the teaching of a foreign language to children might not be a proper method of reaching the desired result of a commonwealth in which all the citizens should speak a common tongue, and he therefore held that the State of Nebraska ought to be allowed to make this experiment. His criterion for determining how much a teacher might be forbidden to teach is[58] "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat." This criterion, on its face, makes no distinction between the public school teacher and the private school teacher, but must be considered in the light of the individual whose case was before the court, a teacher in a parochial school. This view of Mr. Justice

[56] Page 59 of brief for defendant Scopes.
[57] 262 U. S. 398, 67 L. Ed. 1045 (1923).
[58] 262 U. S. 390 at page 412.

Holmes would, if adopted by the court, apparently safeguard the liberties of private school teachers and students from the arbitrary determination of legislatures that certain subjects or theories shall not be taught. But in the public schools, the courses and the theories might still apparently be restricted as far as the legislature cares to go.

It may be, however, that the learned justice did not intend thus to limit his statement. Perhaps he meant that the criterion for any legislative control over education, public or private, is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat." If this phrase becomes a living power by which legislative interference with public school courses is checked by the courts whenever the freedom of the search for truth is impaired, then the public schools will retain their proud position of leadership in the educational world. But if efforts to control the theories on which the subject matter of a course is to be presented should be regarded merely as matters of legislative discretion, then the public school curriculum may become the football for all the groups in the commonwealth who have special theories to espouse or to hate. The purity of their motives will not excuse these zealous advocates who would wreck the teaching of arts, literature and the sciences by placing arbitrary restrictions around the common enterprise of student and teacher to find the truth, whatever that truth may be, and wherever it may lead. The legislature when it attempts to dictate theories of truth even for a public school curriculum is not merely abusing its discretion; it is exceeding its power. For no enforced rejection of a theory can be other than "an arbitrary fiat" when applied to the right of every child to acquire knowledge and find the truth.

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