Kaplan v. Independent School District of Virginia—The Max Kaplan Story

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In 1927, Max Kaplan—a kosher butcher from Virginia, Minnesota, located in the heart of the great Minnesota Iron Range (“Range”)—challenged the practice of Bible verse reading in the city’s public schools. *Kaplan v. Independent School District of Virginia*¹ is one of many state court cases involving similar issues both before and after the turn of the twentieth century until the Supreme Court of the United States resolved the issue as a matter of federal constitutional law in *School District of Abington Township v. Schempp* in 1963.²

Every case has its story. This is Max Kaplan’s. It is part of a broader story of Jewish acclimation and adaptation to a new environment on the Range and a continuing struggle for religious equality in a climate of religious intolerance fostered in part by the second rise of the Ku Klux Klan in the 1920s.

The story includes a detailed examination of the legal issues in Max Kaplan’s case, issues that were common to many of the Bible verse reading cases from the late nineteenth and early twentieth centuries,³ up to *Schempp*. Those cases raised the issues of whether reading Bible verses from the King James version constituted sectarian instruction, turned the schoolhouse into a place of worship, or interfered with the rights of conscience of children, who with their parents objected to the readings.⁴ The challenges were made under state constitutions because the Religion Clauses in the Federal Constitution had not yet been applied to the states by the Supreme Court of the United States.⁵ In *Kaplan*, the Minnesota Supreme Court held the practice to be constitutional under the Minnesota Constitution, a holding

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¹ 214 N.W. 18 (Minn. 1927).
⁵ The Supreme Court first applied the Establishment Clause to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947) and the Free Exercise Clause to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
not out of line with many of the other state court decisions involving Bible reading and prayer in public schools.\(^6\)

Chapter One covers migration to the Range.\(^7\) Two is devoted to Max Kaplan.\(^8\) Three recounts Christianity on the Range and the response of the Jewish community.\(^9\) Four discusses the Ku Klux Klan.\(^10\) Five establishes the background of religion and Bible reading in the public schools.\(^11\) Six explores religion and the Minnesota Constitution.\(^12\) Seven covers Bible reading in the Virginia public schools,\(^13\) and Eight is the Jewish response.\(^14\) Finally, Nine involves a detailed look at the litigation with the Epilogue closing the story.\(^15\)

Max Kaplan’s story is riveted to his times, of course, but the issues it involves have rippled with distressing familiarity through ours.

**CHAPTER 1 – THE MINNESOTA IRON RANGE – MIGRATION**

Iron ore was discovered in Minnesota in the 1880s and mined on the Mesabi, Vermillion, and Cuyuna ranges.\(^16\) The discovery of iron ore coincided with a massive migration from Europe.\(^17\) The development of the mines created a need for labor.\(^18\) The mining jobs, which did not require skilled labor or English-language skills, were well-suited for new immigrants.\(^19\)

By 1900, some seventy percent of immigrants on the Range came from Finland, Sweden, Slovenia, and Croatia, along with dozens of other countries.\(^20\) The earlier wave of

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\(^6\) See Newsom, *supra* note 4, at 244–48 (providing a detailed discussion of the cases).

\(^7\) See *infra* Chapter 1.

\(^8\) See *infra* Chapter 2.

\(^9\) See *infra* Chapter 3.

\(^10\) See *infra* Chapter 4.

\(^11\) See *infra* Chapter 5.

\(^12\) See *infra* Chapter 6.

\(^13\) See *infra* Chapter 7.

\(^14\) See *infra* Chapter 8.

\(^15\) See *infra* Chapter 9.

\(^16\) See David LaVigne, *Immigration to the Iron Range, 1880–1930*, MNOPEDIA, MINN. HIST. SOCY (Aug. 26, 2015), http://www.mnopedia.org/immigration-iron-range-1880-1930\((https://perma.cc/A7QV-9FUQ)\). Vermilion is the northernmost range, and Cuyuna is the southernmost. *Id.* Mesabi is the largest range and includes Virginia, Minnesota. *Id.*

\(^17\) *Id.*

\(^18\) *Id.*


\(^20\) *Id.*
immigrants, from 1840 to 1890, came largely from northern and western Europe.\textsuperscript{21} The immigrants who arrived between 1890 and 1914 came primarily from eastern and southern Europe.\textsuperscript{22}

Between 1880 and 1920, over two million Jews—almost one-third of all Eastern European Jews, primarily from Russia and Russia-Poland—immigrated to the United States.\textsuperscript{23} Many Jews who found their way to the Range embarked for the United States from Germany.\textsuperscript{24}

The story of migration to the Range was somewhat different for Jews, who were not recruited to work in the mines and had no intent to return to their homeland.\textsuperscript{25} Increasingly harsh Tsarist policies in Russia initially forced Jews into the Pale of Settlement,\textsuperscript{26} where other restrictions precluded them from engaging in any occupation that would develop marketable skills. Nearly two and a half million Jews fled the Pale and immigrated to the United States between 1880 and 1924.\textsuperscript{27} Some of them ended up settling on the Range, drawn in part by economic opportunity outside the mines.\textsuperscript{28} Max Kaplan was one of them.

Historian Marilyn Chiat notes the pattern of Jewish settlement on the Range:

\begin{quote}
HISTORIAN MARILYN CHIAT NOTES THE PATTERN OF JEWISH SETTLEMENT ON THE RANGE:
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\textsuperscript{21} Id.  
\textsuperscript{22} Id.  
\textsuperscript{25} Chiat, supra note 24, at 67.  
\textsuperscript{26} Howard Markel, \textit{Di Goldine Medina (The Golden Land): Historical Perspectives of Eugenics and the East European (Ashkenazi) Jewish-American Community, 1880-1925}, 7 \textit{HEALTH MATRIX} 49, 51–54 (1997). The Pale of Settlement was “an area that was comprised of fifteen western districts of Russia and ten districts of the former kingdom of Poland” where the vast majority of Russian Jews were exiled to. \textit{Id.} at 51–52.  
\textsuperscript{28} Proshan, supra note 24, at 92.
Ninety percent of the Range’s Jewish settlers were from Lithuania, mainly merchants from Kovno and Vilna, some of whom settled briefly in the Twin Port towns of Duluth, Minnesota, and Superior, Wisconsin, before venturing further north to the booming towns on the Range. Among those who traveled this route were the twenty Jews living in Virginia, Minnesota, in 1895. By 1910, the number increased to over one hundred, and a total of about one thousand Jews were then living in towns and locations throughout the Mesabi Range.\(^{29}\)

They established synagogues in four cities, including the B’Nai Abraham Synagogue in Virginia, Minnesota.\(^{30}\) A standard pattern of growth in Jewish migration was for one family member to become established and then send for the remaining family members.\(^{31}\) Max Kaplan’s family followed that long and winding path.

**CHAPTER 2 – MAX KAPLAN**

Max Kaplan was born in Vilna, Lithuania, on March 24, 1871.\(^{32}\) He later emigrated from Vilna to Bremen, Germany,
and from there to the United States. He sailed in steerage from Bremen on the S.S. Grosser Kurfurst on October 10, 1908, and arrived in New York on October 20, 1908. That same year on November 11, he filed his Declaration of Intention in Boston to become a U.S. citizen. Thirty-seven at the time, he identified himself as a “rag-pedlar.” He was four feet, ten inches tall, with black hair and grey eyes.

Max, known in some documents as Motel, made his way to Minnesota by 1909. His wife Gital, or Gittel, and their

during his twelve-year reign beginning with the infamous 1882 May Edicts that limited Jews from traveling across the Empire and also limited their business dealings and religious rituals. Furthermore, these laws barred Jews from entering Russian universities and enforced conscription into the Russian Army for all-first born Jewish males between the ages of twelve and eighteen. But most trying of all for the Russian Jews were the mass orders of expulsion and the violent pogroms that threatened their lives. At the arbitrary whim of a provincial governor, an entire shtetl, or village population, could be abruptly ordered to resettle or leave the Pale entirely. Worse still, Jews of the Pale were commonly beaten, killed, or spat upon. Moreover, their cemeteries and synagogues were vandalized, and they were exposed to other atrocities without any means of recourse or protection. The Russian partitioning of the Jews was so successful that by 1897, approximately 4,900,000 Jews, or ninety-four percent of the entire Russian Jewish population, lived in the 386,000 square mile Pale from the Baltic to the Black Sea. As the social critic and historian Irving Howe observed: “[n]either stability nor peace, well-being nor equality, was possible for the Jews of Russia.”

Markel notes the extreme isolation in the Pale: “One of the most striking social features of East European Jewry during this period was its isolation from the Gentile Russian and Polish cultures. Jews tended to live in small towns or villages, called shtetls, throughout the districts of the Pale where their own Jewish culture flourished. East European Jews, too, were active participants in this process of social separation. Most East European Jews believed in long-held traditions that called for a complete separation from the secular or Gentile world. Their deeply held religious and cultural convictions and a language, Yiddish, that was markedly different from their Russian or Polish neighbors, only fortified the social walls of the economic, geographical, and legal sanctions built around them.”

33 List or Manifest of Alien Passengers for the United States Immigration Officer at Port of Arrival (Oct. 20, 1908) (on file with author).
34 Id.
35 U.S. Dep’t of Com. & Lab., Bureau of Immigr. & Naturalization, Div. of Naturalization, Declaration of Intention, No. 7229 (Nov. 11, 1908) (on file with author).
36 Id.
37 Id. He noted that he was born in Wilna, Russia and that his residence was in Boston, Massachusetts. Id.
38 See Affidavit of Motel Kaplan (June 28, 1915) (on file with author) (noting that Kaplan used the name Max Kaplan on his certificate of arrival and that Motel Kaplan was his true name); see also Oath of Allegiance, Nov. 20, 1915, in which he renounced “all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to Nicholas II the Emperor of all the Russias.”
five children, Bertha (born in 1896), Samuel (born in 1898), Jacob (born in 1902), Edna (born in 1905), and Sarah (born in 1908) all arrived later to the United States by 1914. Max filed his petition for naturalization in 1915. His wife and children would have been automatically naturalized.

Max operated a meat market in Virginia, Minnesota, and initially lived above the shop with his wife and younger children. Two of his children apparently boarded nearby. Max moved his shop two times over the next few years. During that time, another child of Max’s, Manuel Kaplan, was born on October 8, 1919.

By the time of the 1920 U.S. Census, Max had bought a home and had a mortgage. His family seemed to be settled, and his daughters, Edna and Sarah, were enrolled in the Virginia public schools. Sarah was an honor roll student, and Edna was a declamatory contest participant. They were part of a growing and thriving Jewish community in Virginia. In 1910, there were 121 Jews in Virginia. The number had grown to 332 by 1920, when the city population was 14,022, but the population declined to 160 by 1927 and 135 by 1937.

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40 Id.
41 Petition for Naturalization of Motel Kaplan, supra note 32.
42 NW. BELL TEL. CO., TELEPHONE DIRECTORY 65 (1921) (on file with author) (noting that Max Kaplan was the proprietor of a meat market at 201 S. 2nd Ave. W. and resided at 202 1st St. S.); R. L. POLK & CO., VIRGINIA DIRECTORY 505 (1917) (on file with author) (listing Bertha Kaplan (clerk for Max Kaplan), Max Kaplan (grocer), and Samuel Kaplan (driver) as residing at 109 1st St., Virginia, and the business at 204 S. 2nd Ave. W.); R. L. POLK & CO., TELEPHONE DIRECTORY 399 (1922) (on file with author) (listing Jacob Kaplan, as a meat cutter, and Max Kaplan residing at 202 S. 1st St.).
43 Compare NORTHWESTERN BELL TEL. CO., TELEPHONE DIRECTORY 65 (1921) (on file with author) (listing the meat shop’s address as 201 S. 2nd Ave. W.), with R. L. POLK & CO., VIRGINIA DIRECTORY 505 (1917) (on file with author) (listing the meat shop’s address as 204 S. 2nd Ave. W.).
44 MINN. STATE DEP’T OF HEALTH, BIRTH CERTIFICATE NO. 72079 (Oct. 8, 1919) (on file with author). The birth certificate issued to Manuel Kaplan lists his father’s occupation as rabbi and his residence as Boston, Massachusetts. Id.
45 DEP’T OF COM.-BUREAU OF THE CENSUS, supra note 39.
46 Id.
47 Semester Honor Roll, STAR OF THE NORTH, Mar. 20, 1925, at 4 (on file with author); Spellbinders Not to Be Outdone, STAR OF THE NORTH, Mar. 20, 1925, at 4 (on file with author). Star of the North was the school newspaper, a monthly publication by the students of the technical and vocational high school in Virginia, Minnesota.
48 Proshan, supra note 24, at 341 fig.5.
50 Proshan, supra note 24, at 341 fig.5.
Economic survival necessitated political involvement. Jews became citizens and, while only one percent of the population, comprised a larger percentage of voters. A few were elected to city-wide office, but the rise of the Ku Klux Klan in the 1920s and their open hostility to Jews resulted in decreased political involvement.

CHAPTER 3 – CHRISTIANITY ON THE IRON RANGE – AND THE JEWISH REACTION

Christian religious groups dominated community affairs on the Range. “Christianity was indeed part of the fabric of general life in the early Range towns.” Notwithstanding, “Jewish immigrants on the Iron Range pursued greater contact with non-Jews in the religious arena than their coreligionists did in the big cities.” It was not uncommon to see cooperation in the public setting in support of public causes, including crossover in the support of those causes, although it took the form of individual rather than institutional aid. Notwithstanding that cooperation, local Jews faced religious inequality:

They accommodated themselves to a society which did not treat all religions equally. Members of the second generation, for example, remember being instructed by parents to remain silent when Christmas carols were sung in class. There were, however, occasions when public protest was lodged. . . . In 1918 the country was struck by a horrible epidemic of influenza . . . . In Virginia, to stem the spread of the disease, the school system was closed. When the schools reopened, the school board, which was dominated by a Protestant Old Guard, proposed holding some class sessions on Saturdays to readjust the academic calendar. Local Jews, viewing this plan as an infringement

51 Chiat Part 2, supra note 29.
52 Id.
53 Proshan, supra note 24, at 174–75.
54 Id. at 229.
55 Id. at 227.
56 Id. at 228–29.
on their religious liberties, organized through the synagogue and prepared a formal protest to the board . . . .57

It is not clear from surviving records what happened, but the School Board did not schedule the makeup classes on Saturday.58 The Jewish community in the 1920s also lived in the dark shadow of the Ku Klux Klan and its white protestant agenda.

CHAPTER 4 – THE KU KLUX KLAN

The Ku Klux Klan ("KKK" or "Klan") was founded in 1866 and was virtually destroyed by Reconstruction.59 The second coming of the KKK was inspired by *The Birth of a Nation*.60 At its highpoint in the 1920s, KKK membership exceeded four million.61 Some thirty percent of that membership came from the Midwest.62 There were many Klan chapters throughout Minnesota, including one in Max's hometown of Virginia. During this time, membership in Minnesota continually grew as some were drawn in by the Klan's "gospel of white Protestant supremacy."63

The Klan was heavily involved in national and local politics, using right-wing mobilization to stay in power in the

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57 *Id.* at 230–31.
58 *Id.* at 231.
60 *The Birth of a Nation* is a 1915 film by D.W. Griffith that "depicts Reconstruction as a time when the South was ruled by incompetent and corrupt black politicians, when black troops humiliated white southerners, and black men threaten[ed] to rape white women." *Id.* at 319.
61 *Id.* at 319–25.
62 Elizabeth Dorsey Hatle & Nancy M. Vaillancourt, *One Flag, One School, One Language: Minnesota's Ku Klux Klan in the 1920s*, Minn. Hist., Winter 2009–10, at 361. Timothy Egan writes that "[i]n the golden age of fraternal organizations, the Klan was the largest and most powerful of the secret societies among American men—bigger by far than the Odd Fellows, the Elks, or the Freemasons, and vastly greater in number than the original Klan born in violence just after the Civil War." *Timothy Egan, A Fever in the Heartland: The Ku Klux Klan's Plot to Take Over America, and the Woman Who Stopped Them* xv (2023). "The twentieth-century Klan was . . . fighting to close the door on those whose religion, accents, and appearances made them suspect in large parts of the United States—mainly Eastern European Jews, Polish and Italian Catholics, Greeks, and Asians." *Id.* at xv–xviii.
Nationally, the Klan had influence in shaping both the Republican and Democratic platforms in 1924. Notably, a motion to denounce the Klan by name at the 1924 Democratic National Convention failed. Locally, Klan members were most likely on the Virginia School Board when the resolution to permit Bible verse reading was adopted. While there is no indication that any of the Virginia Ministerial Association members who sponsored the resolution were Klan members, it was well known that “[a]lliances with Protestant ministers, particularly evangelicals who believed that principles of Christian faith should guide political, social, and cultural life, were an important part of Klan strategy.” A 1920s photo captured Klan members in full Klan regalia, marching in an enclave and proudly carrying signs reading, “Virginia put the Holy Bible in the Public School of Minnesota,” and, “Arrowhead Klan of Virginia Realm of Minnesota.”

On July 29, 1927—just a few months after the Minnesota Supreme Court decided the Kaplan case—ten to twenty thousand Klan members rallied in Virginia, Minnesota. The Imperial Wizard Hiram Evans attended. Notwithstanding that showing, the Klan was in decline;
although as the Klan rally in Virginia indicates, it had an active presence in Northern Minnesota as late as 1927.  

The Klan’s involvement in the life and politics of the Range is only a part of the backdrop to Max Kaplan’s story. Bible reading and prayer in the public schools was a contentious issue since the middle of the nineteenth century in Minnesota as well as other states.

CHAPTER 5 – RELIGION AND BIBLE READING IN THE PUBLIC SCHOOLS

Bible reading and prayer in public schools were standard practices in the nineteenth century. American public schools were effectively controlled by Protestants, who, while eschewing sectarian instruction, assumed without question that Bible reading was an appropriate and necessary means of teaching morals and instilling republican values in a populace that received inadequate moral instruction at home. The concept of nonsectarianism provided a solution to the potential problems of centralizing Protestantism posed by expanding religious diversity. Teaching morality was

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Oberholtzer. Egan, supra note 62, at 344–45. Egan also notes the role of Stephenson and others in promoting the Klan, but raises an alternative question: "What if the leaders of the 1920s Klan didn’t drive public sentiment, but rode it? A vein of hatred was always there for the tapping. It’s there still, and explains much of the madness threatening American life a hundred years after Stephenson made a mockery of the moral principles of the Heartland. The Grand Dragon was a symptom, not a cause, of an age that has been mischaracterized as one of Gatsby frivolity and the mayhem of modernism. It’s entirely possible that the Klan fell apart not just because of scandals and high-level hypocrisy, but also because it had achieved all of its major goals—Prohibition, disenfranchisement of African Americans, slamming the door on immigrants whose religion or skin color didn’t match that of the majority. Long after Stephenson was put away, the ideas that his followers promoted while marching in masks behind a flaming cross prevailed as the law of the land." Id. at 345–46.

Hatle, supra note 64, at 117.


Noah Feldman, Divided by God: America’s Church-State Problem—And What We Should Do About It 59 (2005).

Id. at 60–61. The concept of nonsectarianism is that there exists certain “moral principles shared in common by all Christian sects, independent of their particular theological beliefs.” Id. at 61. Feldman notes that “[n]onsectarianism would turn out to be among the most powerful—and controversial—ideas in American public life in the nineteenth century and beyond, an idea whose resonances are still felt in our own contemporary debates over religion and values.” Id.
inextricably linked to religion, however, which meant that morality came from the Bible.\textsuperscript{78}

\textbf{CHAPTER 6 – RELIGION AND THE MINNESOTA CONSTITUTION}

As in sectarian education, these concerns of teaching morality and its inherent link to religion were present at the beginning of statehood in Minnesota. The Minnesota State Constitutional Convention, which took place in 1857, was uniquely split into two separate conventions due to irresolvable differences between Republicans and Democrats.\textsuperscript{79} Each convention adopted its own constitution with a conference committee adopting the final version of the constitution.\textsuperscript{80}

The value of the debates for purposes of constitutional interpretation is questionable, but the debates are indicative of the concern over religious instruction and schools in Minnesota, even in the mid-nineteenth century. The debates in the Democratic convention illustrate concerns about school funding and religious instruction. In these debates, Mr. Setzer moved to insert a section in Article 8 of the proposed constitution providing that “[n]o religious instruction of any kind shall be given in public schools in this State.”\textsuperscript{81} The amendment was rejected without debate.\textsuperscript{82}

Mr. Setzer also argued that the convention would fail to accomplish its goals if it did not provide for sectarian schools, and that Catholic parents would not send their children to a public school if it had a Protestant student base because of concerns that Protestant beliefs would be forced on their children.\textsuperscript{83} His concern was that if the State failed to establish a system of private sectarian schools, the public schools would be overtaken by the majority, and the minority students would lose the benefit of public school education.\textsuperscript{84} His solution was for the State to fund public schools with no

\begin{footnotesize}
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    \item \textsuperscript{78} \textit{Id.} at 59–60.
    \item \textsuperscript{79} MARY JANE MORRISON, THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE 1–2 (G. Alan Tarr ed., 2002).
    \item \textsuperscript{80} \textit{Id.}
    \item \textsuperscript{81} FRANCIS H. SMITH, THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 454 (Earle S. Goodrich ed., Pioneer and Democrat Office 1857).
    \item \textsuperscript{82} \textit{Id.}
    \item \textsuperscript{83} \textit{Id.} at 461.
    \item \textsuperscript{84} \textit{Id.}
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religious teaching and private schools with religious teaching.\textsuperscript{85}

Mr. McGrorty, a Catholic who sent his children to private school, argued that religion should be taught in the public schools because fear of “infidelity and skepticism” is greater than the fear of sectarianism.\textsuperscript{86} Mr. Curtis argued that public schools should not be turned into theological institutions and that specialized theological institutions are better suited to teach such religious principles.\textsuperscript{87} He also asserted that there are certain principles of morality engrained in specific religions that should not be taught in public schools, using Mormonism as an example.\textsuperscript{88}

Mr. McGrorty offered other amendments. He proposed adding a section to the constitution stating that wisdom, knowledge, virtue, and religion are “essential to the preservation of the rights and liberties of the people” and that the legislature should therefore establish a system of public and private schools that would promote religion, art, science, commerce, trade, manufactures, and history.\textsuperscript{89} The proposed section was ultimately rejected.\textsuperscript{90} He also suggested an amendment stating that “[r]eligious instructions shall be inculcated in all the Common Schools in this State, according to the religious belief of the pupils respectively.”\textsuperscript{91} That amendment was also rejected.\textsuperscript{92}

There were two provisions governing religion in the Minnesota Constitution as adopted in 1857. Article I, Section 16, provided in part that

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[t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted or any
\end{quote}

\textsuperscript{85} See id.
\textsuperscript{86} Id. at 461–62.
\textsuperscript{87} Id. at 462.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 461.
\textsuperscript{90} Id. at 462.
\textsuperscript{91} Id. at 463.
\textsuperscript{92} Id.
preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury. . . .

Article I, Section 17, covered religious tests and qualifications:

No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this State; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.

Those two sections have remained unchanged in the Minnesota Constitution.

No conclusions concerning the intent of the framers of the Minnesota Constitution can be drawn from the debates, although amendments allowing religion to play a prominent role in public school education were rejected.

William Watts Folwell, in his book *A History of Minnesota*, notes the role of religion in the common schools and the problems it created. The common schools were expected to instill Christian morality in the students. Beginning the day with Bible reading and a prayer or hymn was standard. The common schools were Christian as were the communities they served. Folwell notes that

[a] tardy restriction of this custom resulted through a change in the composition of the population, brought about by the immense increase of foreign immigration that set in about

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93 MINN. CONST. art. I, § 16.
94 Id. art. I, § 17.
95 Id. art. I, §§ 16–17.
96 FOLWELL, supra note 75, at 170–71.
97 Id. at 171.
98 Id.
the middle of the nineteenth century. In 1870 more than one-third of the people of Minnesota were foreign born. . . . In their European homes they had been taught their religion, either Catholic or Protestant, in their schools. When public schools were organized in the new communities, the teachers . . . conducted familiar forms of worship and taught doctrines of religion. . . . In the rapidly filling counties of the frontier there was a mixture of native and foreign-born people and their children in the schools.99

Folwell suggests that the ethnic and religious differences made conflict inevitable because “Catholics could not tolerate the reading of the King James translation of the Bible” and “Protestants would have no other.”100

An 1877 amendment to the Minnesota Constitution, Article VIII, Section 3, later renumbered as Article XIII, Section 2,101 provided that

[t]he Legislature shall make such provisions by taxation or otherwise as with the income arising from the School fund, will secure a thorough and efficient system of Public Schools in each township in the State.

But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creed or tenets of any particular Christian or other religious sect are promulgated or taught.102

The 1877 amendment was a so-called “Little Blaine Amendment,” modeled on James G. Blaine’s proposal to

99 Id.
100 Id.
101 MINN. CONST. art. VIII, § 3 (amended 1877). After the two paragraphs were renumbered as article XIII, section 2, the wording of the second paragraph changed slightly to read as follows: “In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.” MINN. CONST. art. XIII, § 2.
102 MINN. CONST. art. VIII, § 3 (amended 1877).
amend the United States Constitution to prohibit the use of state funds at sectarian schools.103

According to Folwell, the 1877 constitutional amendment “appears immediately to have been understood to prohibit the reading of the Bible in any version in the schools.”104 The Minnesota Attorney General took the position that the practices of school prayer and Bible reading in the schools were prohibited by the Minnesota Constitution.105

Exclusion of the Bible triggered concern that a prohibition on Bible reading would result in a rise in crime and a decrease in morals. While instruction in morals and manners was considered a proper function of the common schools, many believed they could be taught only with a religious foundation. Others believed morals could be taught and imbued in students by purely secular agencies and the schools could be the nurseries of proper behavior. That view, Folwell notes, found expression in the Legislature in an 1881 statute that passed both houses of the Legislature by large margins, authorizing, but not requiring, public school teachers “to give instruction in the ‘elements of social and moral science, including industry, order, economy, punctuality, patience, self-denial, health, purity, temperance, cleanliness, honesty, truth, justice, politeness, peace, fidelity, philanthropy, patriotism, self-respect, hope, perseverance, cheerfulness, courage, self-reliance, gratitude, pity, mercy, kindness, conscience, reflection and the will.’”106 Teachers could “give short oral lessons every day and require pupils the following morning to give illustrations, which they were to put into practice in their daily conduct.”107

The State Superintendent of Schools referred to the statute favorably in his 1881 report.108 “The Revised Laws of 1905 reduced [the statute] to a single sentence,” which stated that “[t]he teachers in all public schools shall give instruction in morals, in physiology and hygiene, and in the effects of

104 FOLWELL, supra note 75, at 173.
105 See infra note 145 for the Minnesota Attorney General Lyndon A. Smith’s 1923 letter that incorporates Attorney General H.W. Childs’s 1895 opinion.
106 FOLWELL, supra note 75, at 172.
107 Id.
108 Id.
narcotics and stimulants.” 109 The State Superintendent argued “in successive reports . . . that morals could be taught in schools” and that “religion [could] be left to the family.” 110 He “urged conformance to the [statute].” 111

Folwell questions whether the great majority of Minnesota teachers were aware of the law. He calls the act of 1881 “nothing more than a pious gesture, creditable to the good intentions, if not to the intelligence, of the legislature.” 112

CHAPTER 7 – BIBLE READING IN THE VIRGINIA PUBLIC SCHOOLS

Notwithstanding the Attorney General’s opinions, in 1925 the Virginia School Board adopted verbatim a resolution it had received from the Ministerial Association of Virginia, an association composed of Protestant ministers in the city. 113 The resolution reads in its entirety as follows:

Whereas, our nation was founded upon Christian principles, and
Whereas, it is our firm conviction that this nation can prosper only when its citizenship is guided by the teachings of the Bible, and
Whereas, we believe that the youth of the community will receive moral and spiritual help thereby,
Therefore, be it resolved, that we, the Ministerial Association of Virginia make request to the school board of the Independent School District of Virginia, Minn.
1. That provision be made for the placing of a copy of the Holy Bible in each and every school room in the district.
2. That the superintendent be enjoined to make suitable selections to be read by the teacher in each room at the opening of school each school day.
3. That these selections be read to the class by the teacher without note or comment.

109 Id. at 172–73.
110 Id. at 173.
111 Id.
112 Id.
Be it further resolved, that a copy of this resolution be spread upon the minutes of the association and that a copy be presented to the school board of the Independent School District of Virginia.\textsuperscript{114}

The resolution was moved and adopted on September 25, 1924. It was presented to the School Board in open session on or about October 14, 1925, and was unanimously adopted by the Board.\textsuperscript{115}

\textsuperscript{114} Id.

The instructions from Superintendent Duffield concerning Bible verse reading were included in the record and are also contained in his instructions to the school teachers. After noting the School Board “voted to require the reading WITHOUT COMMENT of a passage of Scripture to every school child on every school day,” he noted that he was “therefore issuing the following instructions for carrying out these orders:

“All teachers in the Kindergartens and Grades One to Six inclusive, are instructed to read during the five minute opening exercise every morning, beginning Tuesday, September 7, 1926, at least ten verses selected from the list of passages given below.

“In Grades 7 and 8, the ‘home room’ teacher will read the passages from Scripture to her groups in the first hour of meeting each group.

“In Grades 9, 10, 11 and 12, the Scripture passages will be read at the beginning of every English class by the English teacher.

“In order that each teacher may have more freedom in selecting passages for the different groups, the privilege is granted of making individual selections from the list. At times where you feel the passages could be repeated with effect, that privilege is given also.

“If the entire list is finished before the end of the year, repeat such passages as you or the students may decide you like best. Passages listed below are selected to cover the entire school year.

“May I request that the Scripture readings be carefully prepared and read with deliberation, expression and sincerity[.].” Instructions from Superintendent E.T. Duffield to the School District Teachers Regarding Bible Readings at 1 (on file with author).


There is also a separate section in Superintendent Duffield’s directions concerning Bible verse selections for “SPECIAL DAYS AND OCCASIONS.” Id. at 3–4. That includes the opening of the school or college year, election day, Armistice Day, Thanksgiving, the New Year, Memorial Day, patriotic occasions, the inauguration of a president or governor, where peril or war threatens our country, on the occasion of a great calamity, on the death of a great man, the serious illness of a teacher or pupil, celebrating a historical event, awarding of scholarship prizes, and for commencement day. Id.
CHAPTER 8 – THE JEWISH RESPONSE

Local Jews, who had organized through the community’s B’nai B’rith chapter, lodged a protest against the resolution on the basis that the Board’s “action [was] contrary to the spirit of the doctrine of the constitution... [with] the public schools... intended... to serve as a common ground for the education of children... rather than religious... ['] instruction.”\(^1\)\(^16\) A delegation from the Jewish community appeared before the School Board to ask that the resolution be rescinded.\(^1\)\(^7\) The School Board summarily declined,\(^1\)\(^8\) and the practice of Bible reading was instituted by the School Superintendent, E.T. Duffield, who selected the Bible readings teachers were to read their students in their classes.\(^1\)\(^9\)

The situation the Jewish population faced in Virginia in 1925 was not isolated. It reflects the persistent problems Jews faced by interacting and surviving in predominantly Christian communities. Immigrant European Jews between 1865 and 1915 followed the pattern of their predecessors in determining how to interact “with their host society.”\(^1\)\(^2\)\(^0\) In “assess[ing] the opportunities and challenges to Jewish survival[,]... Jews experienced firsthand the clash between two equally compelling national visions vying to determine the character of the American nation and its cultural and political norms.”\(^1\)\(^2\)\(^1\) One was “an inclusivist view that conceived of America as an open, neutral civic society, grounded in democratic freedom, the separation of church

\(^1\)\(^5\) Findings of Fact and Conclusions of Law, supra note 113, at 78.
\(^1\)\(^6\) Proshán, supra note 24, at 231–32 (ellipses in original).
\(^1\)\(^7\) See Plaintiff’s Exhibit C at 55, Kaplan, 214 N.W. 18 (No. 25459).
\(^1\)\(^8\) The response, signed by the School District Clerk, stated: “Your letter... asking the Board to reconsider their decision in regard to placing the Holy Bible in all Public Schools in this District, was read at the regular meeting... and upon motion, supported and carried, the clerk was requested to advise you that the Board will not at this time rescind their action in regard to placing the Holy Bible in the Public Schools of this District.” Id.
\(^1\)\(^9\) Defendants’ Exhibit 1 at 56, Kaplan, 214 N.W. 18 (No. 25459).
\(^1\)\(^2\)\(^0\) Kraut, supra note 23, at 22.
\(^1\)\(^2\)\(^1\) Id.
and state, and de facto ethnic pluralism.” The other was “an exclusivist conception that denied cultural pluralism and took for granted that America was and ought to be a culturally homogeneous Protestant society dominated by the spirit of an evangelical Protestant temper.”

The Jewish community’s greatest fear was that if America was defined in Christian terms, it would relegate Jews to second-class citizenship and a tolerated minority. Kraut notes that

For most of the nineteenth century Jews reacted to perceived church-state violations with the demand for parity and did not invoke Jefferson’s “wall of separation” idea until the end of the nineteenth century and the opening decades of the twentieth, when widespread Protestantization of American culture and the intensity of societal anti-Semitism suggested that approach as being more fruitful for safeguarding Jewish rights. The tactics Jews used on church-state issues varied. For example, they petitioned governors and members of Congress against insensitive and unfair Christian proclamations, protested through the press and the lobbying of communal leaders against the provisions of American treaties with foreign governments that discriminated against them, fought in court over the repeal of Sunday Blue Laws or the lack of Jewish exemptions from them, lobbied against Bible readings and Christian hymns in public schools, boycotted public schools on Christmas, and joined with the religiously radical Free Religious Association and the secular National Liberal League to defeat proposed Christian amendments to the Constitution.

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122 Id.
123 Id. at 22–23.
125 Kraut, supra note 23, at 42.
One example of the Jewish response to Bible reading in common schools is a letter to the communal leader by the Central Conference of American Rabbis, which suggests how to approach the relevant authorities on the Bible-reading issue and includes a pamphlet on why the Bible should not be read in public schools. It provides an excellent insight into Jewish thought about Bible reading at the time and how to approach the issue in protesting the practice.

At the outset, the letter notes the importance of equality before the law, the logical consequence of which is the “absence of discrimination between sects and creeds in all matters of public policy.” It continues by noting the concerted attempt to introduce Bible readings into the public schools and the importance of confronting those attempts. While the letter notes the argument that Bible reading is “not only harmless to our republican institutions but also necessary for the right training of the future American citizen,” it also points out the reverse side:

Usually the Bible readings are introduced into the public schools under the warrant of a half-hearted rule in the Manual of the Board of Education, stating that the opening exercises of the schools shall consist of song (some-times hymn is the word), prayer, or reading of the Scripture. This gives the choice to teacher or principal as to whether the Bible shall or shall not be read. In some cases the Board of Education under the spur of some bigoted member is more aggressive, and the italicized or is changed to and; then the reading of the Bible receives the express sanction, nay, is

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126 “The Central Conference of American Rabbis is the Reform rabbinic professional leadership organization that instills excellence in the Reform Jewish rabbinate. The oldest and largest rabbinic organization in North America, the CCAR strengthens the Jewish community by providing religious, spiritual, ethical, and intellectual leadership and wisdom for the 2,200 rabbis who serve more than 2 million Reform Jews throughout North America, Israel, and the world.” Strengthening Jewish Life Through Rabbinic Leadership, CCAR, https://www.ccarnet.org [https://perma.cc/K22T-J2XQ].
128 See id.
129 Id. at 152.
130 Id.
commanded by the Board. This encroachment upon the right of religious liberty must arouse the protest of every truehearted American.\textsuperscript{131}

The letter urges caution in making challenges to Bible reading because raising a problem involving religious differences might revive religious prejudices and result in disrupting “the unity of common citizenship into opposing factional creeds and sects.”\textsuperscript{132} To avoid that problem, the letter recommends that protests should be lodged “quietly before the local Board of Education, [which is] presumably composed of broad-minded, cultured and thinking men, and only if they appear obdurate,” should there be an attempt “to create favorable public sentiment.”\textsuperscript{133}

The letter concludes with a suggested approach to the Board of Education, based on a protest in an Ohio city, which made several key legal points noted in the pamphlet.\textsuperscript{134} The protest included arguments that the practice violated the freedom of conscience provision in the Ohio Constitution and a constitutional provision prohibiting the funding of religious sects.\textsuperscript{135} It emphasized the importance of equality before the law and separation of church and state, and maintained that Bible reading, even without comment, was offensive to Jews.\textsuperscript{136} It concluded with the following statement:

Gentlemen, I thank you for your kind attention to these, as I feel, inadequate statements, I ask your reconsideration of this question with all the deliberation that the importance of the subject demands. I feel it my duty to protest, not merely as a rabbi, responsible for the spiritual welfare of many Jewish children, but as an American citizen, who is ready to concede a greater patriotism for this, his adopted country, to none, who so loves the noble institutions and principles established by the revolutionary

\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 153.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 153–54.
fathers that he cannot stand silent while one of them is about to be tarnished.137

Consistent with the Jewish position on Bible reading in the first decades of the twentieth century, the pamphlet argues it is wrong to tax people to support the common schools unless those schools are for the benefit of everyone, and the only alternative is to make the schools secular.138 It emphasizes the impact of Bible reading on children because it puts Jews in the position of forcing their children into a religious service.139 Even if children of objecting parents have the right to choose not to participate, they are indirectly coerced to participate, and if children do participate, they will be influenced by the exercise.140 “The situation is tantamount to actual compulsion,” and is inconsistent “with American traditions” and “our present American guarantees.”141 The pamphlet concludes where it began with the statement that “[c]hurch and [s]chool must be divorced.”142

This concludes the prologue to Max Kaplan’s suit to prevent the practice of Bible verse reading in the Virginia public schools.

CHAPTER 9 – THE LAWSUIT

This Chapter, the longest in the story, traces Max Kaplan’s lawsuit through the complaint, the trial, the trial court’s judgment and supporting memorandum, the briefing on appeal, and the supreme court’s opinion.

A. The Complaint

Kaplan filed suit on behalf of himself and others similarly situated against the Independent School District of Virginia; the members of the Board of Education; and E.T. Duffield, Superintendent of Schools.143 Kaplan alleged that he

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137 Id. at 155.
138 Id. at 162.
139 Id.
140 Id.
141 Id.
142 Id. at 166.
143 Complaint at 1–8, Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927) (No. 25459). Kaplan was represented by Archer & Rosemeier and S. L. Cohen of Virginia, Minnesota. Id. at 8. The School District was represented by
was a citizen and property owner of Virginia, Minnesota; he
owned real estate in the school district; he paid taxes for the
support of the school district; and he was the parent of two
children, Edna (age seventeen) and Sarah (age fifteen), who
attended schools in the district.¹⁴⁴

Kaplan alleged that the 1925 Virginia School Board
resolution violated the Attorney General’s opinion that school
prayer and reading scripture violated the Minnesota
Constitution.¹⁴⁵ That opinion, issued in 1895 by Attorney

Abbott, MacPherran, Dancer, and Gilbert & Doan. Answer at 18, Kaplan, 214
N.W. 18 (No. 25459). Herbert A. Dancer’s fee was $1,169.90. Bible Case Bill Is
Paid by Virginia School Board, Queen City Sun (Virginia, Minn.), May 27, 1927.
Dancer was appointed a district court judge at the age of thirty-six. Larson
Fisher Assocs., Intensive Survey of Duluth’s East End Neighborhood 22,
https://duluthmn.gov/media/5662/1-report-final.pdf [https://perma.cc/ZX9M-
QUHN]. He appears to have been highly regarded for his legal acumen. See id. He
served as a judge for thirteen years, when he resigned to return to the practice of
law. Id.

¹⁴⁴ Complaint, supra note 143, at 1–2. While the Complaint spells Kaplan’s
daughter’s name as Sara, other sources spell her name as Sarah. Compare id.,
with Dep’t of Com.–Bureau of the Census, supra note 39, and Star of the
North, supra note 47.

¹⁴⁵ Complaint, supra note 143, at 3–4; see also Plaintiff’s Exhibit B at 52–55,
Kaplan, 214 N.W. 18 (No. 25459). The opinion was in a letter dated December 5,
1923, written to Daniel Fish, Minneapolis City Attorney, by Lyndon A. Smith,
Minnesota Attorney General. Id. It incorporates an earlier opinion by Attorney
General H.W. Childs in 1895. Id. The letter reads as follows:

“Dear Sir:"

“In reply to your letter of recent date relative to the law as to the use
of the bible in the public schools, I have to say that the late Attorney General Childs
held in substance that the Bible could not be used in the public schools. That
decision has been recognized in this state, without being questioned in the courts,
for eighteen years. The latest law on the question of the force of the Attorney
General’s opinions in school matters was passed in 1905 and is as follows, as far
as material:

“On application of the state superintendent of public instruction, he
(the attorney general) shall give his opinion in writing upon any question arising
under the laws relating to public schools, and on all school matters such opinion
shall be decisive until the question shall be decided otherwise by a court of
competent jurisdiction.”

“General Statutes 1913, section 106.

“While the question asked General Childs was one involving the
interpretation of the constitution of the state, yet the constitution of the state is as
much a law relating to public schools as are statutes, in all cases where the
provisions of the constitution apply to school affairs. Consequently I am of the
opinion that the use of the bible in the public schools is not a question open to the
decision of the Attorney General but only to the decision of a court of competent
jurisdiction. In other words, General Childs’ opinion is ‘decisive until the
question involved shall be decided otherwise by a court of competent
jurisdiction.’

“The opinion of General Childs is as follows:

“You inquire whether it is lawful to open a public school with a recital of
the Lord’s Prayer.

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General Childs, was reaffirmed later by Attorney General Lyndon Smith.\textsuperscript{146} The defendants allegedly violated the law in implementing the resolution by using school funds, moneys, and taxes to purchase Bibles published by the American Bible Society.\textsuperscript{147} The allegation suggests, without stating, a violation of Article VIII, Section 3 of the Minnesota Constitution:

\begin{quote}
"The question involves a construction of section 16 of article 1 of the constitution, wherein it is, among other things, provided: "Nor shall any man be compelled to attend, erect or support any place of worship."

"In the absence of that provision I should not hesitate in answering your question in the affirmative. Indeed, there is a strong array of well considered cases in states whose constitutions are not thus characterized, to the effect that it is a question for the school authorities to determine whether or not a public school shall be opened with prayer and the reading of the scriptures. Wisconsin and Minnesota, so far as my examination extends, stand alone in respect to such a provision. In the first named state the supreme court, after exhaustive argument and in a carefully considered opinion, held that the reading of the scriptures in a public school was in violation of the constitution in that it compelled one to support a place of worship (State v. School District, 76 Wis. 177). No occasion has arisen for the constitution by our own court of the said provision. It was held by one of my predecessors at an early day, and some time prior to the decision reached by the Wisconsin court, that the reading of the scriptures is a matter over which the board of education or board of trustees has complete control (Op. Attys. Gen. 83). But on a later occasion it was said that, "when the use of the scriptures in a common school is objected to by the parents or guardians of pupils on account of religious or conscientious scruples, their adoption as a textbook is improper and the pupil may decline to use them for the same reason, without being liable to be deprived of the privileges of the school." (Op. Attys. Gen. 229.)

"No distinction can in principle be drawn between the opening of a school with prayer or the reading from the scriptures, so far as the question pertains to the violation of the provision above named. If one is unlawful, the other is also.

"It is the purpose of the law of this state to permit no intrusion into our public schools of any religious teachings whatsoever. They are to be kept purely secular in character, and as places where the children of parents of every shade of religious belief may assemble for purposes of instruction in authorized subjects and incidental moral improvement. The judicious teacher will never attempt to institute such a practice in schools against the wishes of the parents of his pupils.

"In view of the decision by the Wisconsin court, you are advised that the practice, however frequently tolerated or indulged in, is violative of the constitution.'"

\textsuperscript{146} Id.

\textsuperscript{147} Id.
The defendants have . . . made of each and every school room of said district a place of worship wherein is kept and taught a text of religion and the plaintiff and others similarly situated have been compelled, contrary to their beliefs and conscience, to financially contribute to and support a place of worship and to financially contribute toward the teaching of a religion in which they do not believe and which is contrary to their conscience, all of which is in violation of the laws and constitution of the state.\footnote{148 See id. at 4.}

The complaint emphasized that the Bible selected by the defendants contained the New Testament, the message of which is inconsistent with Jewish religion, and that the commentaries, explanations, and notes interpreting the Bible conflict with the beliefs of the plaintiff and Jewish people in general and that they “are disparaging to the Jewish people and hold the[m] up to contempt, scorn and ridicule . . . in violation of the laws of conscience of this plaintiff and others similarly situated and of the laws of the state.”\footnote{149 Id. at 5.} Kaplan alleged that

\[m\]any of the Jewish children have protested against joining in the form of worship as promulgated by the defendants pursuant to the resolution adopted by them and have under orders of the defendants under penalty of suspension and otherwise been compelled and are compelled and will be compelled to join in this said form of worship and listen to the religious teachings conducted by the defendants and maintained by them in the public schools of the Independent School District of Virginia at public expense.\footnote{150 Id. at 6.}

Many children in the school district were of diverse faiths, including “Roman Catholic, Christian Scientist, Jewish, and various Protestant beliefs,” all of which were not
in harmony with one another. The Bible reading creates discord, prejudice and enmity and causes many, particularly the children of the plaintiff, to take part in religious worship in which they do not believe and many taxpayers such as the plaintiff to support a place of worship and religious teachings in which they do not believe, contrary to their conscience.

The complaint further alleged that while the Jewish people in Virginia maintained a school where Jewish children received religious instruction and the laws of Minnesota provided release time to students from school for purposes of allowing the children to receive religious instruction, there was no other separate or secular school in the district where Jewish children could go to avoid the Bible reading. Kaplan asked for temporary and permanent injunctions restraining the defendants from Bible reading and using public moneys to purchase or pay for already-purchased Bibles.

B. The Trial

The case was tried before the court, the Honorable Edward Freeman presiding. Judge Freeman was born in Mankato in 1878. His father, Everett P. Freeman, had been a long-time lawyer in Mankato. Judge Freeman graduated from the University of Minnesota Law School in 1903. He moved to Chisholm shortly after his graduation and started practicing law. He was elected as a municipal judge three years later, and after a six-year term, he returned to the

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151 Id.
152 Id. at 6–7.
153 Id. at 7.
154 Id. at 7–8.
155 Judgment at 92, Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927) (No. 25459). An article in a local newspaper noted that “[p]lans to have all five district judges hear the case were abandoned when it became known that at least one other judge would be occupied with other matters and could not sit with his colleagues [sic].” Bible Case in Court Monday, VIRGINIA DAILY ENTER. (Minn.), Jan. 30, 1925, at 3.
157 See id.
158 Id.; see also MINN. ED. ASS’N, WHO’S WHO IN MINNESOTA 1102 (1941).
159 See SCHMAHL, supra note 156.
private practice of law. In 1917, he was appointed to the district court bench, where he served until 1950. Judge Freeman was a Mason and a member of the Presbyterian Church.

The trial transcript consisted of forty-seven typewritten pages plus exhibits. The parties stipulated to the basic facts concerning the adoption of the resolution.

Kaplan sought to bolster his constitutional arguments—that Bible verse reading necessarily constituted sectarian instruction and converted the schoolhouse into a place of worship—by eliciting testimony from School Board Members that the reason for the adoption of the Bible verse reading resolution was religious instruction. On direct and redirect examination of the School Board Members, the defense attorney, Mr. Dancer, sought to establish that the School Board adopted the resolution not for purposes of religious instruction, but rather for instruction on morals. Kaplan’s attorney, Mr. Archer, on cross-examination, was intent on establishing two points. One was that religious instruction was the purpose of the resolution, and if it was not the purpose, at least it was a purpose. The second point was to establish that the board did not consider any other Bibles, broadly referred to as the Catholic, Jewish, or Hebrew Bibles.

Mr. Bergeson, Chairman of the School Board, testified that “[t]he idea was for moral instruction, literary value and history [and that n]othing was said of religion.” A.E. McKenzie (Board Clerk), J.L. Fraza, Joseph Christopherson, and Mrs. Frances Johnson all took the same position.

Mr. Archer’s attempt to elicit testimony that religious instruction was one of the reasons was generally rebuffed, but he was able to establish general ignorance on the part of Board Members about the so-called Jewish and Catholic Bibles. Mr.

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160 See MINN. ED. ASS’N, supra note 158 (listing that Freeman practiced law in Chisholm from 1903 to 1917, and that he was a municipal judge from 1906 to 1912).
162 MINN. ED. ASS’N, supra note 158.
163 Stipulation at 74, Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927) (No. 25459).
164 Id.
165 Settled Case at 30–50, Kaplan, 214 N.W. 18 (No. 25459). The testimony of the school board members is set out in the pages as follows: J.O. Bergeson at 30–35; A.E. McKenzie at 35–38; J.I. Fraza at 38–40; Joseph Christopherson at 41–44; Frances Johnson at 44–47; and H.A. Ebner at 47–50. Id.
166 Id. at 33.
167 Id. at 35, 38, 41, 45.
Bergeson testified he had “heard there was such a thing as the Jewish Bible . . . [but] didn’t know that there was any difference between the Catholic Bible and this Bible here.”\textsuperscript{168} He understood that “the same things are in all the Bibles.”\textsuperscript{169} When asked by Mr. Archer why this particular Bible was adopted, Mr. Ebner stated that “it is generally recognized throughout our courts, as the Supreme Court, and so forth, the American Standard Bible is used.”\textsuperscript{170}

The Protestant blinders of the School Board Members effectively foreclosed consideration of the concerns raised by the Jewish committee that asked the Board to rescind the resolution. The collective obliviousness of the Board to religious differences and the impact of the resolution on religious minorities is an example of the Christian nation narrative at the grassroots level.

C. Findings of Fact and Conclusions of Law

The findings set out the resolution adopted by the School Board.\textsuperscript{171} This was followed by several additional key findings.\textsuperscript{172} First, the students objecting “on the grounds of conscientious or religious scruples” to Bible verse reading were permitted “to be excused from being present during such reading.”\textsuperscript{173} Second, the passages selected by the Superintendent for reading were from the Old Testament, “but the board desire[d] to and intend[ed] to have selected passages from the New Testament . . . if it [was] determined it ha[d] a legal right so to do.”\textsuperscript{174} Third, there are many differing versions of the Bible with some containing “explanations, notes, annotations and comments which are not accepted as correct and accurate by all sects and denominations.”\textsuperscript{175} Fourth, the Bibles in the classrooms did “not contain any commentaries, explanations, annotations or notes which are disparaging to the Jewish people or which hold the Jewish people up to contempt, scorn or ridicule.”\textsuperscript{176} Fifth, certain Jewish people protested against Bible reading and maintained

\begin{itemize}
\item \textsuperscript{168} Id. at 34.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 47.
\item \textsuperscript{171} Findings of Fact and Conclusions of Law, supra note 113, at 77–78.
\item \textsuperscript{172} Id. at 78–81.
\item \textsuperscript{173} Id. at 79.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id. at 79–80.
\item \textsuperscript{176} Id. at 80.
\end{itemize}
in “Virginia a school wherein their boys are taught the Jewish belief and wherein religious instructions, from the standpoint of the Jewish faith, are given to all boys who wish to take advantage of the same.” 177 Sixth, state statutes provided for release time for religious education outside of school. 178 Seventh, and most importantly, the School Board’s purpose in having Bible readings in public schools “was to implant in the minds of the pupils higher moral and ethical standards and a knowledge of the Bible and was not for the purpose of teaching the doctrines of any particular religious sect.” 179

The court’s conclusion of law was “[t]hat the reading of the Bible in the public schools does not constitute any infringement of the plaintiff’s constitutional rights and is lawful.” 180 The court denied the plaintiff’s request for an injunction. 181

Judge Freeman’s six-page supporting memorandum says much about the prevailing law on the use of the Bible in the classroom. 182 The memorandum acknowledged the religious diversity of groups and sects professing the Christian religion and the numerous differing translations of the Bible, some material and some not. 183 While “the King James version or Protestant version of the Bible” was adopted by the School Board, the court saw no problem because “[t]he ordinary lay reader” would not be informed of the differences in translation. 184

[T]he court believe[d], if his heart is right, one would get as much help and comfort out of one version as another[ for o]ur religious faith is largely that of our parents and we read and accept their Bible as a matter of course without much or any thought of the existence of any other version. 185

177 Id.
178 Id. at 80–81.
179 Id. at 81.
180 Id.
181 Id.
182 See Memo at 82–87, Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927) (No. 25459).
183 Id.
184 Id. at 82.
185 Id. at 82–83.
In a tone-deaf section of the memorandum, the court stated that any authorized version of the Old Testament could be read in the hearing of mixed groups embracing Jews, Catholics and Protestants, without any harm or detriment to their religious convictions or beliefs or injury to their feelings; and that if reading the Bible in the public schools is not unlawful on other grounds it cannot be because one particular version is used in preference to another.\footnote{Id. at 83.}

The court saw no differences between different versions of the Bible, including “between the King James version of the Old Testament and the Rabbinical text or other Bible used by the plaintiff or others of Jewish faith.”\footnote{Id.} Instead, it saw the Bible as “the common and accepted method of teaching and while the purpose may be moral uplift, it cannot help but be to some extent, religious training, for we cannot dissociate the Bible from its divine attribute without taking away from it its very life.”\footnote{Id. at 83.} The court explained further: “The believers in the Bible, Jew and Gentile alike, believe it is the word of God, written by men inspired by God, and they desire to have it read and studied, not for its historical and literary value only but for its moral teachings and because they believe that due to its divine origin it will impress its readers with a conviction and strength that they can obtain from no other written source.

“But mere reading of the Bible constitutes instruction in the Bible itself and not in the beliefs of any particular creed or sect. All people, regardless of their belief in the divine origin of the Bible, concede its great literary and historical value and the great effect it has had in the past and now has in elevating minds and conscience and moral standards and rules of conduct of many people and nations. All admit its greatness and that it contains the highest goal of moral conduct yet existing.

“It may be conceded that sectarian instruction may be given by reading the Bible but there is nothing in the record to show that it will and the presumption is the other way.”\footnote{Id. at 83–84.}

[There is no provision in the Constitution of the United States or of the state of Minnesota or of}
any other state, as far as the court is advised, that expressly prohibits the reading of the Bible in the public schools. We have never had a national state church or a national state religion and have never by organic law made the Christian faith a part of our system of government. But we are a Godly nation. The existence of a Supreme Being has been proclaimed by every act of our government. The Declaration of Independence, the preamble of our own state constitution, the Articles of Confederation, setting aside Thanksgiving days and holy days, the recognition of the Sabbath, the opening of all legislative sessions with prayer, the appointing of chaplains to the army and navy, the prayers at the instance of Franklin during the Constitutional Convention, the addresses of Washington, Lincoln and our other presidents, and our great state papers, the religious exercises in our penal and charitable institutions, the chapel exercises in our universities, the oath of office required by both federal and state officials, the oath of witnesses and jurors and prospective citizens, all attest the fact that we are a Godly nation and that most of us as individuals and we as a nation recognize the existence of a divine providence who rules over all and to whom we all owe allegiance and to whom we can appeal for divine guidance.190

While the court found nothing to indicate that the framers of the Federal and Minnesota Constitutions meant to undermine Christianity, or any other religion, the court noted that the framers “were determined to prevent a union between the state and any particular church or sect and to prevent public money being spent for the benefit of any particular religious denomination.”191 The framers intended “to prevent discrimination against anyone” and to guarantee all persons “equal standing before the law,” no matter their religious beliefs.192

190 Id. at 84–85.
191 Id. at 85.
192 Id. at 85–86.
The opinion considered whether the practice of Bible verse reading violated any provision of the Minnesota Constitution. It concluded it did not because there was no compulsion to attend and because “reading the Bible without note or comment does not infringe” on a person’s right to interpret the passages as they see fit, nor did it compel anyone to consider it as worship. Considering other cases on the issue, the court noted the great weight of authority concluding that Bible reading in public schools does not make schools a place of worship, is not sectarian instruction, and is not an interference with rights of conscience.

Following the entry of judgment for the defendants, Kaplan appealed to the Minnesota Supreme Court.

D. The Appeal – The Briefs

Kaplan’s brief is just one illustration of how challenges to reading from the Bible were structured in cases in the late nineteenth and early twentieth centuries. While the arguments were similar to other Bible verse reading cases, the basis for the Jewish challenge was slightly different. The dispute was not over which version of the Bible was appropriate but whether Bible verse reading should have been allowed at all.

Much of Kaplan’s brief is devoted to a discussion of the policy issues raised by Bible reading. It includes lengthy discussions of why the policy is detrimental to all faiths supported by reference to authority and lengthy soliloquies. The policy arguments turn on the inequality and lack of tolerance inherent in reading Bible verses from the King James version. The constitutional arguments are at various

193 Id. at 86.
194 Id. at 86–87.
195 Id. at 87.
196 Notice of Appeal at 93, Kaplan, 214 N.W. 18 (No. 25459).
197 See Newsom, supra note 4, at 241–42. In commenting on the objections of Jewish litigants to common school religion, Newsom notes that they “have raised a simple and straightforward objection to common school religion: it is not their religion. It is not even a variant or heretical or schismatic form of their religion. This objection has always tested the limits of the claims of American religious majoritarianism. Thus Jewish resistance has been of particular value in the fight for religious freedom and equality. Roman Catholics frequently found themselves arguing about competing claims of Christian truth, inadvertently blunting the power and force of their objection to common school religion. Given the pervasive anti-Roman Catholic bias of the American Protestant Empire, one can think of many reasons why the Roman Catholic objection would all too often fall on rocky soil.” Id.
points originalist, textualist, and pragmatic. They turn on establishing that Bible verse reading is necessarily sectarian instruction and a violation of freedom of conscience and due process to the extent that it encompasses freedom of religion. The brief relies on statements from prominent lawyers, public figures, and theologians to support the central argument that Bible reading is a violation of the Minnesota Constitution. As the foundation for his arguments, Kaplan’s appeal strategy was to establish that the definition of a Bible is necessarily broad and inclusive, that adoption of the King James version was necessarily sectarian, and that reading verses from that Bible in public schools constituted religious education in violation of the Minnesota Constitution’s Religion Clauses.198

A substantial part of the brief is devoted to a discussion of whether the United States is a Christian nation.199 The reason for the detailed analysis of that issue was to establish the basis for a separation of powers argument, making religious instruction in public schools unconstitutional. If the Christian nation narrative is accepted, then Bible verse reading in no way becomes sectarian instruction nor does it convert the schoolhouse into a place of public worship. It is simply a traditionally accepted and legal way of instilling moral values in students.

Drawing from numerous sources, the brief explains, in over six pages of discussion, the variances in what a Bible

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198 Appellant’s Brief at 11–17, Kaplan, 214 N.W. 18 (No. 25459).
After establishing that the name “Bible” is so broad and general that it cannot be reduced to a single meaning, the brief frames the “real question” as whether it is “lawful to read the King James translation or version or any other translation or version in the public schools of the state of Minnesota.”

There are five assignments of error in the brief. First, the selected biblical translation contains notations “which are disparaging to the Jewish people and which hold the Jewish people up to . . . contempt, scorn, and ridicule, and that . . . are contrary to the belief of the Jewish people.” Second, the School Board’s purpose of Bible reading in public schools was to “impart[] spiritual and religious training and giv[e] religious instruction to the pupils.” Third, Bible reading in public schools constitutes worship and converts schools into places of worship, which the appellant asserted are findings that the district court should have adopted. Fourth, the reading of the King James version of the Bible constitutes sectarian instruction. Fifth, the district court erred in failing to conclude that the Bible adopted by the School Board is a sectarian version of the Bible.

The assignments of error were followed by two legal questions. The first was, “[i]s it lawful to read the St. James translation or any other translation in the public schools of Minnesota?” The brief prefaced the second question with recognition that there are two lines of decisions in Bible-reading cases: “one holding under various constitutional

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200 Appellant’s Brief, supra note 198, at 11–17. The section concerning the definition of what a Bible is concludes with the following: “Which translation is correct? Which is the one true WORD? Which is ‘The Bible’? Ask the Mohammedan and he will tell you that none of these are correct, that the Koran is the one true word of God. The Brahman will tell you that the Vedas is the text of Divine truth. Now, we will humbly submit that our answer to the above question is simply this: The true word is the one in which the individual believes.

“When we speak the words ‘The Bible’ to the Hebrew, he thinks of the Old Testament. The devout Catholic thinks of the Douay-Rheims edition, certain Lutherans of the Luther Bible, certain other Protestants of the St. James or revised version. The name ‘Bible’ is too broad and too general to permit such a narrow or specified meaning or application as including but one of the many, many versions or that particular one version only.” Id. at 15–16.

201 Id. at 16–17.
202 Id. at 17–38.
203 Id. at 17.
204 Id. at 20.
205 Id. at 23.
206 Id. at 28.
207 Id. at 34.
208 Id. at 38–39.
209 Id. at 38.
provisions that it is lawful to read some translation of the Bible in the public schools;” and a second “line of decisions from Wisconsin, Illinois and Louisiana, holding under constitutional provisions similar to those of Minnesota that it is unlawful to read the Bible in the public schools.” The second legal question was, “[w]hich line of decisions will Minnesota follow?” The brief argues that “[t]he conclusion is irresistible that Minnesota should follow the decisions of Wisconsin, Illinois and Louisiana for several reasons, which are then detailed in the brief.

The argument intends to draw the Minnesota Supreme Court closer to other state supreme court decisions holding the practice of Bible reading in the schools unconstitutional, particularly the 1890 decision of the Wisconsin Supreme Court in State ex rel. Weiss v. District Board of School-District No. 8, and to provide constitutional distance from contrary decisions. The argument is, at various points, textualist, originalist, and pragmatic. The policy arguments are based on various factors, including the history and harmful impact of religious bigotry, the importance of reducing the religious conflict it causes, and the necessity of fostering equality in the public schools.

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210 Id. at 39.
211 Id.
212 State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8, 44 N.W. 967, 975 (Wis. 1890) (holding that “the use of the Bible as a text-book in the public schools, and the stated reading thereof in such schools, without restriction, ‘has a tendency to inculcate sectarian ideas,’ and is sectarian instruction, within the meaning and intention of the constitution and the statute”).
213 People ex rel. Ring v. Bd. of Educ. of Dist. 24, 92 N.E. 251, 256 (Ill. 1910). The court in Ring found Bible verse reading unconstitutional because it is sectarian, stating that “[t]he public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. . . . No one denies that they should be taught to the youth of the state. The Constitution and the law do not interfere with such teaching, but they do banish theological polemics from the schools and the school districts. This is done, not from any hostility to religion, but because it is no part of the duty of the state to teach religion—to take the money of all, and apply it to teaching the children of all the religion of a part only. Instruction in religion must be voluntary.” Id.
214 Herold v. Par. Bd. of Sch. Dirs., 68 So. 116, 121 (La. 1915) (finding “that when the New Testament is read it is Christian instruction,” which “infringes on the religious scruples of the Jews,” and requiring participation is in itself “discrimination against them”).
215 Appellant’s Brief, supra note 198, at 39.
216 44 N.W. 967.
217 Appellant’s Brief, supra note 198, at 43–44.
The brief then returns to the issue of whether Christianity is a part of Minnesota common and constitutional law, this time to bolster an argument essential to distinguishing state supreme court decisions holding that Bible verse reading is constitutional.\(^{218}\) The argument is that the decisions upholding the practice of Bible verse reading can be sustained only on "one legal premise, that Christianity is a part of the common or constitutional law of the state."\(^{219}\) In order for the Minnesota Supreme Court to find that Bible reading in the public schools is constitutional, it would have to necessarily "assume that Christianity is a part of our common and constitutional law," a position, the brief argues, not yet taken in Minnesota.\(^{220}\)

The argument in the brief is eclectic. It includes two references to the United States Constitution, the first arguing there was "a deliberate intent to avoid religious issues in the . . . Constitution,"\(^{221}\) and the second arguing the Due Process Clauses of the State and Federal Constitutions include freedom of religion, a point that is not further pursued.\(^{222}\)

In arguing that the United States is not a Christian nation, the brief distinguishes two Supreme Court cases that seemingly favor that position.\(^{223}\) It then circumvents the cases by arguing the issue was "thoroughly and completely disposed of by the treaty between the United States and Tripoli.

\(^{218}\) Id. at 49–55.

\(^{219}\) Id. at 49.

\(^{220}\) Id. at 50.

\(^{221}\) Id. The Supreme Court did not apply the Establishment Clause to the states until Everson v. Board of Education, 330 U.S. 1 (1947), and the Free Exercise Clause until Cantwell v. Connecticut, 310 U.S. 296 (1940).

\(^{222}\) Appellant's Brief, supra note 198, at 50. It is possible the brief did not further pursue this point because "it wasn't until the late 1920s that a lawyer would have felt confident in claiming a right to the freedom of speech as against a state or local government, and it wasn't until 1931 that he would have been certain." Alex Kozinski & Stuart Banner, The Anti-History and Pre-History of Commercial Speech, 71 Tex. L. Rev. 747, 760 (1993). At the time of Kaplan's appeal, the only case available to support the argument was Gitlow v. New York, 268 US 652, 666 (1925), involving New York's criminal anarchy law. In Gitlow, the Court assumed the application of the First Amendment to the States, as it did two years later in Whitney v. California, 274 U.S. 357, 371 (1927) and Fiske v. Kansas, 274 U.S. 380, 382 (1927), neither of which were decided until after the Minnesota Supreme Court's decision in Kaplan.

\(^{223}\) Appellant's Brief, supra note 198, at 51. The two cases are Vidal v. Girard's Executors, 43 U.S. 127 (1844) and Holy Trinity Church v. United States, 143 U.S. 457 (1892). The cases were used to establish that the United States is a Christian Nation. For a more detailed discussion of the cases, see Green, Christian Nationalism, supra note 199, at 450–51, 462–66.
concluded in 1796.” The brief cites the treaty as a key acknowledgment that the United States is not a Christian nation: “As the Government of the United States of America is not in any sense founded on the Christian religion . . . it is declared that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.” That segment of the brief concludes that “[t]he nation therefore adopted the doctrine of laissez faire so far as religion was concerned,” a position that “can be well adopted by this state.”

The next section distinguishes decisions from states taking the position that Christianity is part of the law of those states. The brief argues that the distinction between those states that reject “the theory that Christianity is either a part of [state] fundamental law, common law, or constitutional law” is based on distinctly different conceptions of the role of the state. One is the view “that the state is a moral person bound to act in the name of Christ,” a doctrine that manifests in a state church. The other is that church and state must be kept separated so that Christianity is not part of the law (whether the common law, fundamental law, or the Constitution) or an “object of government.” The brief argues that Minnesota should follow that theory.

The next part of the brief compares the state constitutions of the decisions favorable to Kaplan to

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225 Appellant’s Brief, supra note 198, at 51 (quoting Treaty of Tripoli, supra note 224, art. XI). There are continuing questions concerning the impact of the treaty on the Christian nation issue. See authorities cited supra note 199.

226 Appellant’s Brief, supra note 198, at 52.

227 Id. at 54–55.

228 Id. at 54.

229 Id. The brief ascribes that view to Gladstone’s book, Church and State, which, according to the brief, takes the position “that the state is a moral person bound to act in the name of Christ and for the Glory of God and to make religion the paramount end in guiding and governing the nation,” a doctrine which “in its extreme form” would soon result in a state church. Id. The apparent reference to Gladstone, which is fleeting, is to W.E. GLADSTONE, THE STATE IN ITS RELATIONS WITH THE CHURCH (John Murray, 4th ed. 1839), a two-volume work.

230 Appellant’s Brief, supra note 198, at 54–55. The brief mentions Roger Williams’s position that church and state should be kept separate, but without any citation. Id. For a short discussion of Williams’s beliefs, see Edward J. Eberle, Roger Williams’ Gift: Religious Freedom in America, 4 ROGER WILLIAMS U. L. REV. 425 (1999).

231 Appellant’s Brief, supra note 198, at 55.
Minnesota’s constitutional provisions governing religion.\textsuperscript{232} This is an originalist argument,\textsuperscript{233} based on similarities in the relevant constitutional provisions, the Organic Act,\textsuperscript{234} and Minnesota and Wisconsin history.\textsuperscript{235} The intent of the extended argument is to leverage Weiss\textsuperscript{236} to exact the conclusion that it “is entitled to great weight in Minnesota, and should be followed.”\textsuperscript{237}

The brief moves on to acknowledge the issue of whether deference is owed to the Virginia School Board’s decision, but ultimately sidesteps the issue by focusing instead on whether the Board possessed the constitutional power to authorize Bible verse reading.\textsuperscript{238} The pragmatic argument is that where there are competing views about the persuasiveness of decisions interpreting relevant constitutional provisions, courts should “follow the interpretation that is wiser, the better from the standpoint of public policy, the one that eliminates and prevents unwise legislation, the one that subdues strife that would destroy the patriotic unity and loyalty so necessary for a stable and enduring popular form of government.”\textsuperscript{239}

The brief next focuses on the impact of intolerance with references to the Scopes trial\textsuperscript{240} and, although not by name, the case of Pierce v. Society of Sisters, which the brief labels “[t]he Oregon School Law [that] attracted the nation because of the intolerance therein.”\textsuperscript{241} The brief notes that “[t]his case

\textsuperscript{232}Id. at 55–58.
\textsuperscript{233}See id. at 58.
\textsuperscript{234}Organic Act, ch. 121, § 12, 9 Stat. 403, 407 (1849). Section 12 linked Wisconsin and Minnesota: “[t]hat the inhabitants of the said Territory shall be entitled to all the rights, privileges, and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants; and the laws in force in the Territory of Wisconsin at the date of the admission of the State of Wisconsin shall continue to be valid and operative therein, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed by the governor and legislative assembly of the said Territory of Minnesota; and the laws of the United States are hereby extended over and declared to be in force in said Territory, so far as the same, or any provision thereof, may be applicable.” Id.
\textsuperscript{235}Appellant’s Brief, supra note 198, at 57–59.
\textsuperscript{236}State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8, 44 N.W. 967 (Wis. 1890).
\textsuperscript{237}Appellant’s Brief, supra note 198, at 62.
\textsuperscript{238}Id.
\textsuperscript{239}Id. at 62–63.
\textsuperscript{240}Id. at 63. For a detailed discussion of the Scopes case, see Jonathan K. Van Patten, The Trial of John Scopes, 66 S.D. L. REV. 273 (2021).
\textsuperscript{241}Appellant’s Brief, supra note 198, at 63. The reference is to Pierce v. Society of Sisters, 268 U.S. 510 (1925), which involved a challenge to Oregon’s Compulsory
itself is but a whitecap upon that sea of intolerance that at times seems to threaten to engulf our nation.” The intolerance theme continues with a fleeting reference to an address by President Coolidge in Omaha and a lengthy

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Education Act of 1922, requiring children between the ages of eight and sixteen to attend public schools in the district where they resided. See id. The Court in that case held the statute unconstitutional because it interfered with the fundamental right of parents to control the education of their children. Pierce, 268 U.S. at 534–35. The Ku Klux Klan contributed the holding to the passage of the statute. Richard F. Duncan, Public Schools and the Inevitability of Religious Inequality, 1996 BYU L. REV. 569, 575 (1996). The Klan “put their candidate, Walter Pierce, in the governor’s mansion in 1922,” and in “[t]he same year, a majority of his state’s voters approved of a centerpiece of the hooded order: an amendment requiring all children to attend only public schools, meaning Catholic ones would dry up.” Egan, supra note 62, at 130–31.

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242 Appellant’s Brief, supra note 198, at 63.
243 Id. at 64. The reference is to a 1925 speech given by President Coolidge at an American Legion Convention in Omaha, Nebraska, in which he urged toleration. See id. An excerpt from that speech, which may have been what counsel alluded to in the brief, is as follows: “In this period of a[f]ter-war rigidity, suspicion, and intolerance our own country has not been exempt from unfortunate experiences. Thanks to our comparative isolation, we have known less of the international frictions and rivalries than some other countries less fortunately situated. But among some of the varying racial, religious, and social groups of our people there have been manifestations of an intolerance of opinion, a narrowness of outlook, a fixity of judgment, against which we may well be warned. It is not easy to conceive of anything that would be more unfortunate in a community based upon the ideals of which Americans boast than any considerable development of intolerance as regards religion. To a great extent this country owes its beginnings to the determination of our hardy ancestors to maintain complete freedom in religion. Instead of a state church we have decreed that every citizen shall be free to follow the dictates of his own conscience as to his religious beliefs and affiliations. Under that guaranty we have erected a system which certainly is justified by its fruits. Under no other could we have dared to invite the peoples of all countries and creeds to come here and unite with us in creating the State of which we are all citizens.

“But having invited them here, having accepted their great and varied contributions to the building of the Nation, it is for us to maintain in all good faith those liberal institutions and traditions which have been so productive of good. The bringing together of all these different national, racial, religious, and cultural elements has made our country a kind of composite of the rest of the world, and we can render no greater service than by demonstrating the possibility of harmonious cooperation among so many various groups. Every one of them has something characteristic and significant of great value to cast into the common fund of our material, intellectual, and spiritual resources.” Calvin Coolidge, President of the United States, Address Before the American Legion Convention at Omaha, Nebraska (Oct. 6, 1925) (transcript available at Gerhard Peters & John T. Woolley, Address Before the American Legion Convention at Omaha, Nebraska, THE AM. PRESIDENCY PROJECT https://www.presidency.ucsb.edu/node/267547 [https://perma.cc/S6TJ-VMCS]).
three-page quotation of a speech given by Charles Evans Hughes before the American Bar Association in Detroit.244

244 Appellant’s Brief, supra note 198, at 64–67. This is Charles Evans Hughes’s speech before the American Bar Association as recorded in the brief: “The most ominous sign of our time, as it seems to me, is the indication of the growth of an intolerant spirit. It is more dangerous when armed as it usually is, with sincere conviction . . . . It is important to remember, as has well been said, that ‘The essential characteristic of true liberty is, that under its shelter many different types of life character and opinion and belief can develop unmolested and unobstructed.’ Nowhere could this shelter be more necessary than in our own country with its different racial stocks, variety of faiths, and the manifold interests and opinions which attest the vigor and zest of our intellectual life. Let not the vital principle be obscured by mere discussions of constitutional power. We justly prize our safeguards against abuses but they will not last long if intolerance gets underway . . . . Especially should we be on our guard against varieties of a false Americanism which professes to maintain American institutions while dethroning American ideals. . . . Shall not the people—that is, the majority—have their hearts’ desire? . . . The interests of liberty are peculiarly those of individuals, and hence of the minorities, and freedom is in danger of being slain at her own altars if the passion for uniformity and control of opinion gathers head . . . . After all allowances are made for multiplying laws and complex administration, after all the proper demands of an intricate social life have been fairly met, there still will remain the old categories—or let us call them [c]itadels—of individual liberty which are not to be surrendered. What are these? The Supreme Court of the United States has recently described them in these words: Liberty ‘denotes not merely freedom from bodily restraints, but also the right of the individual to contract, to engage in any of the common occupation of life, to acquire useful knowledge, to marry, to 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 . . . . This child,’ said the Supreme Court, ‘Is not the mere creature of the state. Those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations . . . .’

“If we are true to the ideal of religious liberty the power of government is not to be used to propagate religious doctrines or to interfere with the liberty of the citizen in order to maintain religious doctrines. The question is not whether these doctrines are true and should be embraced. The point is that this is not the way to foster their support. In our country there are all sorts of religious beliefs and practices, and at one time or another before religious liberty was established here our forebears in other lands have all alike—Baptists, Presbyterians, Catholics, Jews, Quakers and others—suffered persecution at the hands of the government. What was the reason of this persecution? Was it not a plausible one? What could be more plausible than that the truth of religion should be fostered and supported by the state? But if so fostered and supported, its nature will be determined by the state. What could be a nobler exercise of governmental power than to destroy religious errors and save the souls of men from perdition? That plausible pretext has given us the saddest pages of history. That is the road that leads back to the perversion of authority and the abhorrent practices of the dark days of political disqualifications on grounds of religion, of persecution, of religious wars, of tortures, of martyrdom. If kings and princes, or the legislative majorities which have succeeded them, may enter the domain of conscience it is certain that they will make this entry with the most fiery zeal, the most profound conviction, the most ruthless determination of which the human heart is capable. We have problems enough without introducing religious strife into our politics. If
The brief follows up with a lengthy plea for religious tolerance and inclusion, free from government interference. The plea concludes as follows:

The policy of the government should be to let all alone, permit all creeds to grow and die, just as they, by reason of their own virtue establish and maintain, their right to be and exist. The best religion does not need government aid. The poorest religion cannot grow strong for any length of time by reason thereof, but all are entitled to the same opportunity in this democracy of ours. Consequently we seek from the Constitution the protection for the minority for whom the principles of protection were written into our Constitution.

Still channeling Weiss, the next section of the brief argues that the opinion of Attorney General Childs in 1895, which relied on Weiss in taking the position that Bible verse reading should not be allowed in Minnesota’s public schools, should control. To assuage concerns that the plaintiff was trying to drive the Bible out of community life, the brief notes Minnesota’s release time statute, adopted in 1923, as an indication that the right to teach religion is protected but belongs to the church, not the schools.

The brief then moves on to principles of constitutional interpretation. Citing a Wisconsin Supreme Court case upholding the constitutionality of the Wisconsin Workman’s Compensation Law, the brief argues for a progressive interpretation of the Minnesota Constitution:

we are to be saved a recrudescence of interference with religious liberty, mistaken zeal must be checked as soon as it appears, not by opposing religion or faith, but by maintaining freedom for religion and faith, not on the false assumption that we are not a deeply religious people, but rather by appealing to the sincere patriotic hearts of those to whom religion and faith are dear that they may not be led to demand the sacrifice of the vital principles of free institutions.”

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245 Id. at 67–69.
246 Id. at 68–69.
247 Id. at 70–71.
248 Id. at 71.
249 Id. at 71–72.
250 The brief cites Weekes v. Heimann, 133 N.W. 208 (Neb. 1911), although that case appears not to be reported in the Northwestern Reporter as a Wisconsin
We have witnessed all over the nation as well as in Minnesota in recent months the development of religious intolerance. In some states it has assumed dangerous proportions. None of us can say that it cannot and will not assume dangerous proportions in Minnesota. The present condition is one requiring careful attention. If our Constitution is susceptible of such an interpretation as will prevent sowing the seeds of dissention, spreading religious strife, and bringing upon our people all of the intolerable consequences, that have developed in other states, certainly the Constitution should be so interpreted as to accomplish such purposes. Human progress and development demand it.251

The brief emphasizes again the importance of separation of church and state, and that a true democracy must protect minorities.252 Protecting minorities is more than a question of tolerance, the brief argues; it is a question of equality.253

Weaving together references to Yale Divinity School’s Dean Emeritus Dr. Luther Weigle, the “house divided” case. Rather, the quotation in the brief is from Borgnis v. Falk Co., 133 N.W. 209, 215 (Wis. 1911): “A Constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.” Appellant’s Brief, supra note 198, at 72.

251 Id. at 73.
252 Id. at 74.
253 Id. at 75.
254 Id. ("First, comes the principle of religious freedom; Second, the principle of public education for citizens in a democracy rather than private; Third, the variety of our population."). The source of the quotation is not identified. Id. Dr. Weigle was noted in a New York Times obituary as "[o]ne of the foremost religious educators in the nation." George Dugan, Dr. Luther A. Weigle Dies; Directed Revision of Bible, N.Y. TIMES, Sept. 3, 1976, at D14.
sentence from Lincoln’s 1858 Springfield speech, and Washington’s address to the Hebrew Congregation in Newport, the brief declares that respect for other religions must be based on principles of equality. It argues either intolerance goes or equality goes, and the classroom has to be a place where principles of equality are respected.

The brief’s final fourteen-page discussion anticipates and attempts to distinguish cases the respondents might cite based on differences in the constitutions and jurisdictions with adverse authority. Beyond the cases, the brief reiterates the problems with the exclusive use of the King James version of the Bible and the reading of verses from that Bible without commentary—an offense to both Catholics and Jews.

The conclusion follows:

[W]e respectfully submit that we have established our contention that the trial court erred in its various findings of fact and should have amended them in the manner we sought; that as a matter of law reading the Bible is giving

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255 Appellant’s Brief, supra note 198, at 76. The relevant part of the speech states the following: “A house divided against itself cannot stand. I believe this government cannot endure, permanently half slave and half free. I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing, or all the other.” Abraham Lincoln, President, House Divided Speech at the Republican State Convention in Springfield, Illinois (June 16, 1858) (available online at House Divided Speech, ABRAHAM LINCOLN ONLINE, https://www.abrahamlincolnonline.org/lincoln/speeches/house.htm [https://perma.cc/WQ6X-GZMW]). The brief refers to religious division, of course. Appellant’s Brief, supra note 198, at 76.

256 Appellant’s Brief, supra note 198, at 77. The relevant part of the address states the following: “The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship[.] It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights.” Letter from George Washington, President of the United States, to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790) (available online at From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-06-02-0135 [https://perma.cc/P6CM-LBLM]).

257 Appellant’s Brief, supra note 198, at 75–77.

258 Id. at 77–78. The point is supported by a segment from Liberty magazine, along with a reference in the same magazine to an excerpt from a lecture delivered by Professor Jesse B. Hearin to Alabama public school superintendents. Id. at 78–80.

259 Id. at 81–94.

260 Id. at 83–88.
sectarian instruction, violates the protection assured the citizens and the taxpayers by the Constitution and is contrary to law; that unlike other states Christianity is not a part of the common law of Minnesota; that Minnesota should follow the decisions of Wisconsin, Illinois and Louisiana; that the construction placed upon our constitutional provisions by the attorney general and the state legislature in passing other legislature [sic] and the people generally, continuing for a long period of time as it has been, should not be set aside; that any attempt at religious instruction is contrary to our theory and principles of government; that the manner of reading the Bible without note or comment is of itself a religious difference and should not be fostered by the public schools lest they become no longer public schools open to all; that religion is a matter concerning the individual and the home and something in which the state has no interest and it is not the business of the state to teach religion even by reading of the Bible; and that reading of the Bible in the public schools constitutes the first step toward reunion of the state and church, and is likewise the fatal step.261

E. Respondents’ Brief

The respondents’ brief is half the length of the appellant’s and somewhat more orderly.262 Rather than specifically addressing Kaplan’s assignments of error, the brief argues that the questions involved in the case “are simple ones.”263 The respondents’ brief asserts that reading from the Bible is not sectarian and doing so in public schools does not convert those schoolhouses into places of worship.264

The brief broadly agrees with the trial court’s conclusion that “reading the Bible without comment

261 Id. at 93–94.
262 Compare Respondents’ Brief, Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927) (No. 25459) (forty-seven pages in length), with Appellant’s Brief, supra note 198 (ninety-four pages in length).
263 Respondents’ Brief, supra note 262, at 3.
264 Id. at 8–9, 46–47.
constitute[d] instruction in the Bible,” but asserts that even so, “there is no constitutional prohibition against instruction in religion.” That argument is supported by a lengthy quote from *Vidal v. Girard’s Executors*, an 1844 Supreme Court of the United States case involving the validity of a restriction on a trust agreement precluding ministers or missionaries from teaching in a school the trust created for white male orphans. The majority’s opinion, delivered by Justice Story, concluded the exclusion was valid but also stated the Bible may be taught as a method of education in morality:

Why may not the Bible, and especially the New Testament without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidence of Christianity, from being read and taught in the college by lay teachers? Certainly, there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins ‘that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars, the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.’ Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly, or so perfectly, as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator

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265 *Id.* at 19.
266 *Id.* at 5–6; *Vidal v. Girard’s Ex’rs*, 43 U.S. 127 (1844).
has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and, of course, including the best, the surest and the most impressive.267

The majority’s argument in *Vidal* is that the use of the Bible for teaching purposes based on general principles of morality is not sectarian and is therefore constitutionally permissible.268 That proposition is bolstered in respondents’ brief by lengthy quotations from *Holy Trinity Church v. United States*,269 Cooley’s treatise on constitutional law,270 and *Church v. Bullock*,271 all intended to establish the primary role of Christianity in American law and support the conclusion that “there is no divorce between state and religion, but only between state and creed.”272

The brief also argues that reading the Bible in public schools does not make the schools places of worship.273 The respondents’ survey of relevant authority concluded that only the *Weiss* case in Wisconsin took that position.274 Distinguishing *Weiss* and the other cases relied on by the plaintiff is central to the argument in the brief.275

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269 Respondents’ Brief, supra note 262, at 19–20 (quoting *Holy Trinity Church v. United States*, 143 U.S. 457 (1892)).
270 *Id.* at 20 (referencing THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 470 (6th ed. 1890)).
271 *Id.* at 20–21 (quoting *Church v. Bullock*, 109 S.W. 115 (Tex. 1908)).
272 *Id.* at 22.
273 *Id.* at 23–24.
274 *Id.* at 24–41.
275 *Id.* at 12–19.
The brief spends seven pages distinguishing *Weiss*, arguing that the main opinion and three concurrences contained faulty logic and were result-oriented. The brief makes several related points. The first questions why *Weiss*'s determination that *some* readings from the Bible may constitute religious instruction necessarily leads to the conclusion that all Bible reading should be disallowed.

The second concerns the impact of excusing students from the classroom while there is Bible reading. Excusing students from the classroom while Bible verses are read is irrelevant in the *Weiss* opinion because it would foment religious discrimination against the students who leave, a fact the respondents' brief disputes. The brief argues that permitting students to be excused is, rather, an act of tolerance, but that even if attendance were compulsory, Bible verse reading would be valid.

The third point calls the continuing validity of *Weiss* into question because of a 1916 Wisconsin Supreme Court decision, *State ex rel. Conway v. District Board of Joint School District No. 6*, which involved prayer or invocations at graduation exercises. That decision interprets *Weiss* as creating a constitutional problem only where religious schooling becomes sectarian through inculcating doctrine or dogma in cases where religious sects are in conflict.

The brief goes on to reject Kaplan's argument that *Weiss* should be considered persuasive because of the filial relation between Minnesota and Wisconsin's Constitutional Religion Clause provisions. While both Religion Clauses had their origin in the Virginia Constitution, the brief argues that Kaplan's argument is weakened because other states have not generally interpreted their constitutional provisions as *Weiss* did.

Having put *Weiss* on the shelf, the respondents argue that to adopt the appellant's position would mean that any

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276 Id.
277 Id. at 13.
278 Id. at 15–16.
279 *State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8, 44 N.W. 967, 975 (Wis. 1890).*
281 Id.
282 156 N.W. 477 (Wis. 1916).
284 *Conway*, 156 N.W. at 481.
286 Id. at 17.
other public place, including a penal institution, would be a place of worship if the Bible is read there.287 The remainder of the brief details supportive case law and statutes taking the position that Bible reading without commentary, repeating a prayer, or singing religious songs does not violate constitutional provisions prohibiting sectarian instruction.288

The brief’s final point is that the use of the King James version of the Bible, rather than the Douay version—a version that some, but not all, Catholics follow—or some other version, was perfectly “natural [and] reasonable.”289 It is most familiar to the general public, of high literary quality, and not that different from the Douay version.290 The conclusion follows:

[W]e submit that in view of all the authorities above cited, this court must hold that merely reading from the Bible, either the Old or the New Testament, contravenes no constitutional rights of Jew or Catholic, and if, in reading the Bible, either the Old or the New Testament, the superintendent lays out a schedule of readings that is sectarian, or if the teachers indulge in that practice, then, and only then, will the objectors have a right to come into court for appropriate relief.291

F. The Appellant’s Reply Brief

The twenty-four-page reply brief opens by commenting that the respondents’ brief disregarded the appellant’s reference to the Due Process Clauses of the Federal and State Constitutions. The reply brief does not provide any further explanation of how due process is violated, other than the conclusory statement that the Due Process Clauses “are the provisions which secure to every man his freedom of conscience.”292

Much of the reply brief is devoted to rehashing whether

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287 Id. at 23–24.
288 Id. at 25–41.
289 Id. at 41.
290 Id.
291 Id. at 46–47.
292 Appellant’s Reply Brief at 1, Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927) (No. 25459).
the United States is a Christian nation, including a return to the respondents’ key case on the issue, *Vidal v. Girard’s Executors*. It argues again that the case is refuted by the Treaty of Tripoli, “which provides expressly that this is in no sense a Christian nation” and that *Trinity Lutheran* meets the same fate.

To conclude, the reply brief reiterates the main brief’s arguments, including the disregard of the rights of conscience and the beliefs of the plaintiff and others similarly situated; the compelled taxation of plaintiff and others for their children to attend a place of worship contrary to their beliefs; the violation of various state statutes and constitutional provisions related to sectarian instruction; and the deprivation of liberty of the plaintiff and others in violation of the Minnesota and federal constitutions.

**G. The Minnesota Supreme Court**

None of the justices on the court when *Kaplan* was decided were Catholic. At that time, only two Catholics had served on the court.

Justice Andrew Holt was the first member of the Minnesota Supreme Court to be born in Minnesota. He was appointed to the court in 1911 by Governor Eberhart, the seventeenth governor of Minnesota. Justice Holt was elected in 1912 and re-elected until he retired in 1942. “He was brought up in the Lutheran Church and remained throughout his life a deeply religious man.” He attended the common schools in Carver County and then St. Ansgar’s

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293 Id. at 1–3 (citing *Vidal v. Girard’s Ex’rs*, 43 U.S. 127 (1844)). *Vidal* is a “subtle affirmation of the Christian nation maxim.” *Green, Christian Nationalism*, supra note 199, at 451.

294 Appellant’s Reply Brief, supra note 292, at 2, 12.

295 Id. at 23–24.


298 Id.


300 *Andrew Holt*, supra note 297.

301 226 MINNESOTA REPORTS xxxii (1948).
Academy (now Gustavus Adolphus). He entered the University of Minnesota, graduating in 1880. He studied law and was admitted to the bar in 1881. He served as a municipal and district court judge until his appointment to the supreme court.

Justice James H. Quinn appears to have been Protestant. Born in Wisconsin in 1857, he moved to Blue Earth County, Minnesota, in 1863. He was admitted to practice in 1884 and was a five-term Faribault County Attorney. He was appointed District Judge in 1897 and elected to the supreme court in 1916, where he served until his retirement in 1928.

Justice Homer B. Dibell was born in Fillmore County, Minnesota, in 1864. He graduated from the University of Indiana in 1889 and Northwestern University Law School in Chicago in 1890. After being admitted to practice in Minnesota in 1890, he was elected to be a District Court Judge in 1898, 1904, and 1910. Governor Burnquist appointed him as an Associate Justice of the supreme court in 1918. He was elected in 1920, and reelected again in 1926 and

\[\text{REFERENCES}\]

302 Andrew Holt, supra note 297.
303 Id.
304 Id.
305 Id.
306 See Helberg, supra note 296, at 919 (“No indication other than Protestant was found for Justice[] James H. Quinn . . . .”); A Self-Made-Man., PRINCETON UNION (Minnesota), Mar. 14, 1912, at 1, https://newspapers.mnhs.org/jsp/PsImageViewer.jsp?doc_id=f68e5b89-b634-4fba-b402-de255a298518%2Fmnhio0031%2F1DFC525B%2F12031401 [https://perma.cc/82RG-PVPQ] (stating Judge Quinn’s attendance at Poynette Academy in Wisconsin, a biblical school alternative to public education); Judgeship Contest Causes a Mix-Up, ELLENDALE EAGLE (Minnesota), Oct. 26, 1916, at 3, https://newspapers.mnhs.org/jsp/PsImageViewer.jsp?doc_id=82de3b7-f11a-4b33-abb7-2e1ca7799010%2Fmnhio0031%2F17PNE5B%2F16102601 [https://perma.cc/6N2L-BXE6] (stating that people “voted against Judge Quinn because they assumed from his name that he [was] Catholic”).
308 Id.
309 Id.
311 Id.
312 Id.
313 Id.
1932. He appears to have been Protestant.

Justice Royal A. Stone served on the court from 1923 to 1942. He “was a Congregationalist and all his life took an active interest in the affairs of the church,” and “lived and practiced the fundamental Christian virtues which were a part of his character.” Born in LeSueur, Minnesota, in 1875, he graduated from Washington University in St. Louis. He was Assistant Attorney General from 1905 to 1907 and served in the infantry in the Spanish-American War and World War I. Governor Preus appointed him to the supreme court as an Associate Justice in 1923. He was elected in 1924, and reelected for two more terms; he died shortly after being nominated for a third term.

The lone dissenter in the Kaplan case, Chief Justice Samuel B. Wilson was born in Missouri in 1873 and attended public schools. He graduated from the Minnesota Teachers College in Mankato and the University of Minnesota with an LL.B. in 1896. He was a probate judge and served six years as Blue Earth County Attorney. Governor Preus appointed him as Chief Justice of the Supreme Court of Minnesota in 1923. He was elected two more times. His religion is unknown.

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314 Helberg, supra note 296, at 902.
315 Id. at 919 ("No indication other than Protestant was found for Justice[] . . . Homer B. Dibell."). Justice Dibell was a Mason. MINN. STATE L. LIBR., Homer B. Dibell, Associate Justice 1918-1934: Obituaries, https://mncourts.libguides.com/dibell/obits [https://perma.cc/S3RL-7CZX] ("He was a life member of Ionia lodge, No. 186, A. F. & A. M. of Duluth.").
318 Royal A. Stone, supra note 316.
319 Id.
320 Id.
321 Id.
323 Id.
324 Id.
325 Id.; MINN. LEGIS. REFERENCE LIBR., supra note 299 (listing J.A.O. Preus as Governor from 1921 to 1925).
326 Samuel B. Wilson, supra note 322.
H. The Minnesota Supreme Court Opinion

The Kaplan majority opinion was written by Justice Holt, who was halfway through his thirty-year tenure on the court, with Justices Dibell and Stone concurring and Chief Justice Wilson dissenting.327 The majority opinion opens with an affirmation of the trial court’s finding of fact that the School Board’s purpose “in having the Bible read in the public schools was to implant in the minds of the pupil higher moral and ethical standards and a knowledge of the Bible and was not for the purpose of teaching the doctrines of any religious sect.”328 Its conclusion of law follows “[t]hat the reading of the Bible in the public schools does not constitute any infringement of the plaintiff’s constitutional rights and is lawful.”329

The opinion recognized the State’s obligation to provide for a system of public education, the ceding of the curriculum and conduct of education primarily to local school boards, and the Legislature’s mandate that “[t]he teachers in all public schools shall give instruction in morals, in physiology and hygiene, and in the effects of narcotics and stimulants.”330 The court saw a clear connection between morals training and the Bible as a tool to teach morals.331 After all, the court asked, “What [could be] more natural than turning to that Book for moral precepts which for ages has been regarded by the majority of the peoples of the most civilized nations as the fountain of moral teachings?”332 Justice Holt set out the prevailing view of the Bible’s place in public school education:

It may be truthfully asserted that no more exacting rules of obedience to constituted civil authority and of right living conducive to good will among men exist anywhere than those

327 Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927).
328 Id. at 18.
329 Id.
330 Id. (quoting MINN. STAT. § 2906 (1923)).
331 Id.
332 Id. The opinion noted Justice Story’s statement in Vidal v. Girard’s Executors: “Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?” Id. at 18 (quoting 43 U.S. 127, 200 (1844)).
found in the New Testament of the Bible—rules
to which neither Jew nor atheist can reasonably
take exception. If this be true, and we think it is,
the only thing with which this court is concerned
is whether the practice adopted by authorities of
this school, as above stated, infringes any
constitutional rights of appellant.\textsuperscript{333}

Against that background, the remaining issues were
whether the practice of Bible reading violated Article I,
Section 16, or Article VIII, Section 3 of the Minnesota
Constitution.\textsuperscript{334} Article I, Section 16 provides that

[the right of every man to worship God
according to the dictates of his own conscience
shall never be infringed; nor shall any man be
compelled to attend, erect or support any place
of worship, or to maintain any religious or
ecclesiastical ministry, against his consent; nor
shall any control of or interference with the
rights of conscience be permitted, or any
preference be given by law to any religious
establishment or mode of worship; but the
liberty of conscience hereby secured shall not be
so construed as to excuse acts of licentiousness
or justify practices inconsistent with the peace
or safety of the state, nor shall any money be
drawn from the treasury for the benefit of any
religious societies or religious or theological
seminaries.\textsuperscript{335}

Article VIII, section 3, prohibits the use of public moneys or
property for sectarian instruction.\textsuperscript{336}

The opinion then dismantles Kaplan’s key arguments
as a prelude to its holding that the constitutional provisions
were not violated.\textsuperscript{337} Justice Holt thought it unnecessary “to
discuss whether or not this is a Christian nation,” concluding,
“it cannot be successfully controverted that this government
was founded on the principles of Christianity by men either

\textsuperscript{333} Id. at 18–19.
\textsuperscript{334} Id. at 19.
\textsuperscript{335} MINN. CONST. art. I, § 16.
\textsuperscript{336} Id. art. VIII, § 3 (amended 1877), renumbered art. XIII, § 2.
\textsuperscript{337} Kaplan, 214 N.W. at 18–19.
dominated by or reared amidst its influence.” Kaplan relied heavily on the Treaty of Tripoli in arguing that the United States is not a Christian nation, but Justice Holt rejected “the fugitive statement, found in a treaty of early times with a pirate nation, as an authority on constitutional law.” In response to Kaplan’s argument that Bible verse reading was sectarian instruction that constituted a violation of the Minnesota Constitution, Justice Holt characterized complaints related to the reading of short extracts from the Bible and the different Bible headings as “trivial” because “[t]hey could never have been thought of by the framers of or those adopting the Constitution.”

The opinion next refutes Kaplan’s reliance on other states’ constitutions and specifically the Weiss case. In addressing the constitutions that Kaplan argued disallowed Bible verse reading, the opinion generalizes that “[r]eligion is based on a belief in and accountability to God, a Supreme Being,” a point recognized in the preamble to the Minnesota Constitution and the First Amendment to the United States Constitution. The opinion’s central point is that the protection of religious liberty in most state constitutions is not so different in principle from Minnesota’s. The opinion brushed Kaplan’s argument aside, given the lack of any reason to make “fine distinctions” between state constitutional religion clauses, which are intended “to secure and protect religious liberty.” The opinion explained,

It is, no doubt, true that, at the time the original states adopted their Constitutions, society was more permeated by intolerance tending to active persecution of those deviating in religious views and practices from the majority than has been the case later in our history when this state adopted its Constitution. Although most of the early settlers came here to escape religious

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338 Id. at 19.
339 Id.
340 Id.
341 Id.
342 Id.; MINN. CONST. pmbl. (“We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution.”).
343 Kaplan, 214 N.W. at 19.
344 Id.
persecution, they themselves, at times, became persecutors. However, in framing state Constitutions the idea was dominant to protect religious liberty. Divine worship according to the dictates of the individual conscience was deemed essential to the welfare of every person and of importance to the state, by the peoples of every state. The main purpose was to protect the sincere worshipper, no matter of what sect, against persecution, to prohibit the majority from using the government in any form to further any sect or church, or coerce any citizen into any religious views or practice.345

Kaplan argued that the Wisconsin Supreme Court's interpretation of its constitutional provision in Weiss should control because it paralleled Minnesota's religion clauses, presumably on account of the states' territorial connection.346 Justice Holt dismissed the argument, asserting that the passage of time since the Weiss decision meant it was entitled to no more weight than any other Wisconsin decision.347 Justice Holt also dismissed the 1895 Minnesota Attorney General opinion—adopting the view in Weiss that opening school with the Lord's Prayer or reading of Scriptures violated the Minnesota Constitution—on account of the other Attorney General opinions prior to Weiss that claimed the issue was within the control of the school authorities.348 Kaplan's brief argued there were significant distinctions between sects and their differing perceptions of the legitimacy of the Bible, and the use of the King James Version of the Bible was inconsistent and offensive to sects not recognizing that version.349 The opinion noted the distinctions and dismissed them:

We are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded. We take notice that they are at variance. But we do feel that the intolerance

345 Id.
346 Appellant's Brief, supra note 198, at 59.
347 Kaplan, 214 N.W. at 19.
348 Id. at 19–20.
349 Appellant's Brief, supra note 198, at 80.
which drove so many to seek an asylum in America has gradually abated and is not now so intense. This intolerance touching religion, the Bible, or certain scientific lines of study is not confined to the Christian or to the orthodox Jew, but it seems to grip the atheist and the disbeliever as intensely. Speaking for myself only, I think that instead of fostering this spirit of intolerance by a strained construction of the Constitution so as to exclude from use by public schools of any book proclaiming great moral precepts, it is more desirable that a liberal construction be adopted to the end that even in the public school the pupils perceive that there is that in our principles of government which recognizes the religious element of man and guarantees protection to its free exercise and culture, and that divergent views of others concerning religion and worship should be tolerated and respected so long as there is no effort made to teach or induce any pupil to adopt them. But the practical effect of the practice of the school board in the instant case is not of great weight on the question before us. Some of the members of the court, who concur in the view that such practice does not infringe the Constitutions of the state or nation, deprecate the same as a cause of needless friction in the community.\(^{350}\)

The court also dismissed Kaplan’s claim that reading selections from the Bible converted the school into a place of worship in violation of Article I, Section 16 of the Minnesota Constitution.\(^{351}\) The court made short work of the claim, finding Kaplan’s argument “strained,” particularly in light of the practice in Congress and legislatures, “from time immemorial,” to open sessions with prayer, and the fact that the Army and Navy have been provided with chaplains, as have penal institutions.\(^{352}\) In such situations, “no one has had the temerity to point to any constitutional infringement” to

\(^{350}\) Kaplan, 214 N.W. at 20.
\(^{351}\) Id.
\(^{352}\) Id.
contend that Congress is turned into a place of worship because of prayer. The court concluded the constitutional provision in question, considered in relationship to the rest of Section 16, “clearly . . . refers to church buildings or places devoted exclusively or primarily to worship by persons of one faith or sect banded together.”

The court also quickly dismissed Kaplan’s argument based upon Article VIII, Section 3 of the Minnesota Constitution, Minnesota’s “Little Blaine amendment.” The intent of the provision is plainly “to prevent school moneys from being appropriated for denominational schools and to prevent the teaching of the distinctive doctrines of any sect or creed in the public schools maintained by the state,” and “this school as conducted cannot possibly come within any of those definitions without doing violence to the letter and spirit of the provision.”

The court took note of, but did not seem to be particularly impressed by, the attempts of counsel to argue that other state decisions involving similar issues under similar constitutions either supported or did not support the constitutionality of Bible reading in public schools. Even though there are numerous distinctions in the cases, the supreme court was not interested in the subtleties but instead focused on whether Bible reading is a sectarian exercise and concluded it was not. The court did distinguish two cases that Kaplan heavily relied on, one from Wisconsin and one from Illinois. The Weiss opinion limited the issue to whether the practice of using the Bible as a whole violated Article X, Section 3 of the Wisconsin Constitution, which prohibits sectarian instruction in the public schools, and found that it did.

The Illinois Supreme Court held in People ex rel. Ring v. Board of Education of District 24 that reading the Bible in class constituted sectarian instruction:

The Bible, in its entirety, is a sectarian book as

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353 Id.
354 Id.
355 Id.
356 Id. The Wisconsin Supreme Court in Weiss did not see it that way, however. See State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8, 44 N.W. 967 (1890).
357 Kaplan, 214 N.W. at 20.
358 See Newsom, supra note 4, at 244–48.
359 Kaplan, 214 N.W. at 20.
360 Weiss, 44 N.W. at 974–75.
to the Jew and every believer in any religion other than the Christian religion, and as to those who are heretical or who hold beliefs that are not regarded as orthodox. Whether it may be called sectarian or not, its use in the schools necessarily results in sectarian instruction. There are many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures—the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorably or otherwise, with reference to the doctrines supposed to be derived from them. The petition avers that selected portions of the Bible have been read by the teachers, without averring what portions, so that it does not appear whether or not the portions so read involved any doctrinal or sectarian question. No test suggests itself to us, and perhaps it would be impossible to lay down one, whereby to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine. Such a test seems impracticable. The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise.361

The supreme court in Kaplan distinguished Weiss because its conclusions concerning Bible reading did not mean to prohibit textbooks founded upon the Bible’s “fundamental teachings” or containing extracts from the Bible.362 Weiss said those textbooks could be used in secular instruction and could “also be used to inculcate good morals” because there is not a “more complete code of morals . . . than . . . in the New Testament.”363 The Minnesota Supreme Court saw no difference between the use of extracts from the Bible

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361 92 N.E. 251, 255 (Ill. 1910).
362 Kaplan, 214 N.W. at 21.
363 44 N.W. at 973–74.
in textbooks and school authorities reading selections to students.\textsuperscript{364} The court disposed of \textit{Ring} because it did not specifically overrule the earlier decision \textit{North v. Board of Trustees of the University of Illinois}, which held that mandatory chapel attendance for students at the University of Illinois did not violate the same section of the Illinois Constitution at issue in \textit{Ring}.\textsuperscript{365} \textit{Ring} distinguished \textit{North} on various grounds, which the Minnesota Supreme Court ignored in \textit{Kaplan}.\textsuperscript{366} In any event, the court in \textit{Kaplan} agreed with the dissenters in \textit{Ring}, concluding that reading from the Bible was not sectarian.\textsuperscript{367} The court in \textit{Kaplan} quoted with favor the following part of the \textit{Ring} dissent:

\begin{quote}
The Constitution is not directed against the Bible, but applies equally to all forms and phases of religious beliefs. If the Bible is to be excluded because it pertains to a religion and a future state, heathen mythology must go with it. Moral philosophy must be discarded because it reasons of God and immortality, and all literature which mentions a Supreme Being, or intimates any obligations to Him, must be excluded. We cannot conceive that the framers of the Constitution, or the people, intended that the best and most inspiring literature, history and science should be excluded from the public schools, so that nothing should be left except that which has been sterilized, so as not to interfere with the beliefs or offend the sensibilities of atheists.\textsuperscript{368}
\end{quote}

The \textit{Kaplan} court concluded by expressing no opinion on the wisdom of the practice of reading Bible extracts to students but declared that “[s]o long as no pupil is compelled to worship according to the tenets of any creed, or at all, and no sectarian belief is taught, courts should not hold that there

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\textsuperscript{364} \textit{Kaplan}, 214 N.W. at 21.
\textsuperscript{365} Id.
\textsuperscript{366} Id.
\textsuperscript{367} Id.
\textsuperscript{368} Id. at 21 (quoting People \textit{ex rel. Ring v. Bd. of Educ. of Dist. 24}, 92 N.E. 251, 265 (Ill. 1910)). \textit{Kaplan} also cited a California Supreme Court case, \textit{Evans v. Selma Union High School District}, for the proposition that the King James Version of the Bible is not sectarian. 222 P. 801, 803 (Cal. 1924) (per curiam).
is any violation of the constitutional guarantee of religious liberty."\textsuperscript{369}

Justices Dibell and Stone concurred.\textsuperscript{370} Justice Dibell stated that he did not agree with everything in the majority opinion but did not detail his disagreement.\textsuperscript{371} He thought the plaintiff’s constitutional rights were not invaded by the Old Testament readings within the limits fixed by the school and that the authorities were in substantial agreement on the issue.\textsuperscript{372} He separated the policy of reading the passages from the constitutionality of the practice.\textsuperscript{373}

Justice Stone concurred in the result because the practice was “nothing more than an effort to install a method of conscience training which is not open to constitutional objection.”\textsuperscript{374} He thought that excusing children from scripture readings was “considerate and tactful” but not constitutionally compelled.\textsuperscript{375} Justice Stone considered whether the use of the Bible, or any version, could be legitimately used, and he concluded it could:

The Bible can be used in the public schools so as to interfere with the rights of conscience or so as to give a preference to one faith or sect. But it can be used legitimately. And, so far as our Constitutions go, any version of it may be so used, as may be also the Talmud, the writings of Confucius, or those of any other preacher of the principles of righteous personal conduct. Whatever the text, until it is so used as to teach ‘distinctive doctrines, creed or tenets’ of religion or to convert the school for the time being into a place of worship, no constitutional limitation will be transgressed—at least so it seems to me. It is the difficulty of using the Bible without giving the instruction a sectarian bent that makes the wisdom of its use in public schools questionable. But that goes to considerations of

\textsuperscript{369} Kaplan, 214 N.W. at 21. The court also noted that other states with similar constitutional provisions had enacted statutes providing that Bible reading should not be prohibited based upon those constitutional provisions. \textit{Id.}
\textsuperscript{370} \textit{Id.} at 21 (Dibell, J., concurring); \textit{Id.} at 21–22 (Stone, J., concurring).
\textsuperscript{371} \textit{Id.} at 21 (Dibell, J., concurring).
\textsuperscript{372} \textit{Id.}
\textsuperscript{373} \textit{Id.}
\textsuperscript{374} \textit{Id.} at 21–22 (Stone, J., concurring).
\textsuperscript{375} \textit{Id.} at 22.
policy rather than legality, and, as has been said already, we are not the arbiters of policy. It has not been made to appear in this case that any attempt is or will be made to teach any distinctive doctrine, creed or tenet. We must assume there will be no such effort.376

Article I, Section 16 of the Minnesota Constitution provides that “the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.”377 Justice Stone thought that prohibiting the teaching of ethics and good morals would be “inconsistent with the peace or safety of the state” and would therefore justify an interference with the liberty of conscience.378

Chief Justice Wilson dissented.379 Although he agreed Bible reading in public schools did not require taxpayers to “support a place of worship,” he found that the practice interfered with the “rights of conscience” protected by Article I, Section 16 of the Minnesota Constitution.380 He defined “rights of conscience” as that internal conviction, self-knowledge, or moral sense that tells us that a thing is right or wrong.381 In matters of religion, Chief Justice Wilson saw the right of conscience as “the privilege of resting in peace or contentment according to one’s own judgment,” and that it is “a recognition of a right to religious complacency.”382

He forthrightly acknowledged in his opinion the impact of the practice of Bible reading on Jewish and Catholic students:

To require the Jewish children to read the New Testament which extols Christ as the Messiah is to tell them that their religious teachings at home are untrue. There they are taught a denial of Christ’s divinity and resurrection. Is it possible that this does not interfere with the ‘rights of conscience’ of the parent, and,

376 Id.
377 Minn. Const. art. I, § 16.
378 Kaplan, 214 N.W. at 22 (Stone, J., concurring).
379 Id. (Wilson, C.J., dissenting).
380 Id.
381 Id.
382 Id.
Perhaps, of the child?

The Catholic people do not believe it right to have a Bible read to their children in the absence of the light of construction placed thereon by their church. Are these people to be content to have a Bible read which substantially ignores the doctrine of purgatory, which is one of their vital beliefs? On the contrary, may a Catholic school board have the Catholic version of the Bible read disclosing the theory of purgatory as indicated in the Book of Maccabees, and not interfere with the ‘rights of conscience’ of Protestants? The Catholic Church objects not only to the King James version of the Bible, but also to its votaries reading any Bible except their own version with its copious annotations explanatory of the construction made by their church. They subordinate the Bible to the church, while Protestantism is a Bible Christianity. In the eyes of the Catholic, therefore, the use of the Bible in the school is, in effect, an indorsement of Protestantism and a repudiation of Catholicism. Is this the religious freedom contemplated by the Constitution? I think not. Is there not an interference with the ‘rights of conscience’ when we read in our schools a Bible whose dedication assails the Pope as the ‘man of sin’ and accuses him of desiring to keep the people in ignorance and darkness? The Catholic considers, and well he may, that the Bible is read in a spirit of worship. In a spirit of devotion. In a spirit of prayer. That its reading is the equivalent of prayer. In a spirit of seeking God’s blessing and guidance in the school work. They regard the reading of the Bible as an evangelical religion. It cannot be said that such belief is without foundation. But, regardless of actuality, how may we take unto ourselves the prerogative of saying there is not an ‘interference with the rights of conscience’? Such, to my mind, necessarily follows.
Otherwise this language is meaningless, and its application a conundrum or an enigma.\textsuperscript{383}

He also recognized the coercive impact of excusing children from the classroom during Bible reading because the excuse of some children stigmatizes and discriminates them and “is a distinct preference in favor of those who remain.”\textsuperscript{384} He attributed the impact to parents and students as an “interference with conscience”—a constitutional violation.\textsuperscript{385} In his view, the right of conscience should be unfettered and equal, not simply tolerated.\textsuperscript{386} Chief Justice Wilson saw the threat in the majority opinion:

The conclusion reached will necessarily be the source of much religious strife. It was the intention of the men who framed our Constitution to avoid all of the evils of religious controversies. There is no fight like a religious fight. The conclusion now reached offers a new qualification for members of local school boards and injects in school elections an element which will be detrimental to the general welfare. It is, indeed, the beginning of religion in our civil affairs. This decision will not settle anything. It merely adds fuel to the flames.\textsuperscript{387}

\textbf{I. The Supreme Court of the United States}

Chief Justice Wilson’s dissenting opinion foreshadowed the U.S. Supreme Court’s opinion thirty-eight years later in \textit{School District of Abington Township v. Schempp}.\textsuperscript{388} In holding the practice of Bible verse reading in public schools unconstitutional, \textit{Schempp} recognized the role of religion in our history.\textsuperscript{389} But unlike the court in \textit{Kaplan}, the Court in \textit{Schempp} split that history, recognizing the value of religious freedom as part of religious history and that the weight of religious history can both promote but also restrict

\textsuperscript{383} Id. at 22–23.
\textsuperscript{384} Id. at 23.
\textsuperscript{385} Id.
\textsuperscript{386} Id.
\textsuperscript{387} Id. at 24.
\textsuperscript{388} 374 U.S. 203 (1963).
\textsuperscript{389} Id. at 212.
freedom of religion. It has the potential for stifling free exercise by the focus on our history as a “Christian nation,” a theory not of inclusion, but of separation and exclusion.

The Court framed freedom of religion as a question of equality, punctuated by the Court’s reference to Judge Alphonso Taft’s opinion in Minor v. Board of Education of Cincinnati, which emphasized that the ideal of religious freedom is “absolute equality before the law, of all religious opinions and sects.”

EPILOGUE

The Minnesota Supreme Court’s opinion in Kaplan v. Virginia Independent School District belies the complexity of Max Kaplan’s story. That story unfolded in this Article through a series of chapters that detail his long journey to Minnesota, the thriving Jewish community that he joined in Virginia, and the efforts of that community to combat religious inequality. The story culminates in the litigation that led to district and supreme court opinions in the case, opinions that used a Christian-nation rudder to navigate Kaplan’s arguments stressing the inherent inequality of the use of the Bible in the Virginia public schools.

One may be struck by the familiarity of Kaplan’s legal arguments. Kaplan’s brief is lengthy and eclectic in the style of argument. At times, it is originalist in approach and other times textual and pragmatic, but always emphasizing the importance of equality of religious rights, government neutrality in matters of religion, and the strife that occurs if the Christian nation narrative prevails. Kaplan’s lawyers understood the consequences if it did. Chief Justice Wilson recognized those consequences in his dissent. Justice Holt, a product of his times, did not.

The Supreme Court of the United States acknowledged Kaplan’s position thirty-eight years later in Schempp. Kaplan’s case was cited in a footnote in the Court’s opinion as one of several state cases that applied state law in sustaining

390 Id. at 217–18.
391 Id.
392 Id. at 214–15. Alphonso Taft was the father of William Howard Taft, twenty-seventh President of the United States and later, the tenth Chief Justice of the Supreme Court of the United States. LIBR. OF CONG., William H. Taft Papers, https://www.loc.gov/collections/william-howard-taft-papers/about-this-collection [https://perma.cc/Y9TZ-AEH4].
393 374 U.S. 203.
devotional exercises while simultaneously recognizing that those exercises are primarily religious in nature. The Court noted that those state decisions rejected arguments that devotional exercises violated state constitutional provisions prohibiting the use of public funds for sectarian instruction or the use of the schoolhouse as a place of worship; but the Court also noted that the decisions said nothing about whether those devotional exercises constituted an establishment of religion. That, of course, was Kaplan’s point, but because at the time the Establishment Clause had not yet been applied to the states, he shaped much of his argument around the adverse policy implications of the devotional exercises.

Perhaps the most striking aspect of all this is the stark familiarity of Max Kaplan’s story today. There is a continuing refrain of Christian nationalism and anti-Semitism in the United States, and the Supreme Court has relied on history and tradition in reconfiguring Jefferson’s wall of separation between church and state.

For Max Kaplan, ninety-seven years late.

394 Id. at 277 n.52. Kaplan’s case is noted only for the proposition that the Minnesota Supreme Court recognized that Bible verse reading is a religious exercise.

395 Id. at 277.

