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The Illegality of Bible Reading

WE NOW TURN OUR ATTENTION to the states in which the courts have looked with disfavor upon the practice of Bible reading in the public schools. The high courts of seven states (Illinois, Louisiana, Nebraska, Ohio, South Dakota, Washington, and Wisconsin) and a federal district court in Pennsylvania have studied the problem and concluded that it violates either constitutional or statutory provisions.[1]

The fact situations in these cases are roughly analogous to those mentioned in the last chapter. This involved the proposed or actual reading of the Bible by an instructor to his students during regularly constituted class time. It was generally the King James Version which was read, and such reading was without note or comment. The litigation which subsequently occurred was generally brought about by Catholic or Jewish parents who objected not only to the practice itself but to the choice of the King James Version as well. The one possible exception to the foregoing is the South Dakota case of *State* ex rel. *Finger* v. *Weedman*.[2]

Here the King James Version was read without note or

comment, but attendance was compulsory. When fifteen Catholic students refused to attend class during this reading they were expelled from school, and were notified that they would not be readmitted without a written apology for their actions. When the litigation came before the high court of South Dakota, it was asked to decide two questions. Are the pupils to be readmitted without a written apology, and might they legally be allowed to absent themselves during subsequent reading? The court held affirmatively in both cases, and thus did not rule as such upon the legality of Bible reading in the public schools. However, its written opinion contained a clearly enunciated *dictum* specifically pointing out the court's feeling that Bible reading in the public schools is inconsistent with the South Dakota constitution. Following this decision a South Dakota statute permitting Bible reading was deleted from the South Dakota Code.[3]

The same basic issues arise to plague the judges in these cases as those which confronted the judges who ruled Bible reading in the public schools legal. Is the Bible a sectarian book? May the Bible be used as a textbook? May school authorities make attendance compulsory in classes where the Bible is read?

There are, however, several significant differences between the approach of the courts that viewed Bible reading with favor and those that did not. Since the courts that held Bible reading to be illegal did so because they regarded it clearly as a sectarian book, they devoted less time to a discussion of its potential use as a textbook, and dealt summarily with the problem of compulsory attendance; for if Bible reading was illegal, it was obviously illegal to attempt to compel attendance.

Another noteworthy difference is that the opinions in these cases are characterized by a careful historical and philosophical study of the general problem of church-state relations in the United States, as well as the position of the practice of Bible reading in this relationship. This approach results in some eloquent and scholarly opinions dealing with as delicate a subject as a judge may rule upon. Probably the best example of this is the Wisconsin case, *State* ex rel. *Weiss* v. *District Board of Edgerton*,[4] for most of the later opinions, in which other state courts declare Bible reading to be illegal, borrow heavily from the rational and literary elements of the majority and concurring opinions in this case.

HISTORICAL BACKGROUNDS

Several of the courts begin their investigation as to the legitimacy of Bible reading by checking back into history to discover what the founding fathers of the United States Constitution regarded as the proper relationship between church and state. Their consensus is that most of the men responsible for the First Amendment to the United States Constitution, especially Madison and Jefferson, felt that it was necessary to keep the spheres assigned to the church and the spheres assigned to the state carefully separated. The Illinois Supreme Court in the Ring case may be taken as an example. After a thorough discussion of the role played by Madison and Jefferson, both in the State of Virginia and in the United States, to achieve religious freedom and keep church and state separate, the court concluded, "In the very nature of things, therefore, religion, or the duty we owe to the creator, is not within the cognizance

of civil government, as was declared by James Madison in 1784 . . ."[5]

The authors of the national and state constitutions were apparently faced by the same charge that is levied today against anyone who favors maintaining the wall of separation between church and state. This is the claim that anyone who believes in this separation must be at least irreligious, but is more probably anti-religious. In answer to this type of reasoning, the Washington Supreme Court said:

> It is not that the men who framed and the people who adopted these constitutional enactments were wanting in reverence for the Bible, and respect and veneration for the sublime and pure morality taught therein, but because they were unwilling that any avenue should be left open for the invasion of the right of absolute freedom of conscience in religous affairs . . .[6]

The Ohio court in the Minor case developed a rather novel view of the separation principle as handed down by the founding fathers. In attempting to answer the question "how shall religious freedom be secured?" the court said:

> . . . it can best be secured by adopting the doctrine of the Seventh Section of our own Bill of Rights, and which I summarize in two words by calling it the doctrine of 'Hands Off!' Let the state not only keep its own hands off, but let it also see to it that religious sects keep their hands off each other.[7]

These courts generally feel that statutes and administrative decrees which permit Bible reading are ventures by the civil government into fields which it has no theoretic or historic right to enter. To bear this out they advanced some weighty arguments. The Illinois court explained that the law neither does nor should attempt to enforce Christianity. It said:

> Christianity had its beginnings and grew under oppression. Where it has depended upon the sword of civil authority for its authority it has been weakest. . . . It asks from civil government only impartial protection and concedes to every other sect and religion the same impartial civil right.[8]

In this same vein, the Ohio court reiterated the point that Christianity needs no help from the state. It echoed the Wisconsin court by pointing out that legal Christianity is a solecism. For Chrisianity to depend upon civil authority for the enforcement of its dogmas is to show its own weakness. "True Christianity never shields itself behind majorities . . . its laws are divine not human."[9]

Problems Involving Separation of Church and State

The courts which held Bible reading to be illegal are all deeply concerned with the possibility that the conflict over the separation of church and state might be fought out in the public schools. While the public schools provide a favorite whipping boy for some, to many thoughtful Americans they are believed to be the cornerstone of our democratic system. This fear is reflected in the concurring opinion of Justice Orton of the Wisconsin Supreme Court. He warned:

> There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. . . . The common school is one of the most indispensable, useful, and valuable civil institutions this state has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform, and may enjoy the benefits of an equal and common education.[10]

The Wisconsin Supreme Court was fully aware that by ruling Bible reading illegal in the public schools it was exposing itself to the charge that this action was derogatory to the Bible and its ideals. The Justices hastened to defend themselves from this charge, and by so doing established the line of reasoning which is frequently used by other state courts.

Justice Lyons pointed out in the majority opinion that:

> Religion teaches obedience to law and flourishes best where good government prevails. The constitutional prohibition was adopted in the interest of good government; and it argues but little faith in the vitality and power of religion to predict disaster to its progress because a constitutional provision enacted for such a purpose, is faithfully executed.[11]

In his concurring opinion, Justice Orton countered a charge which might have been taken from today's newspapers. He pointed out that there was a tendency to call the secular public schools Godless. "They are called so by those who wish to have not only religion, but their own religion taught therein." He continued, "They are Godless and the educational department of the government is Godless, in the same sense that the executive, legislative, and administrative departments are Godless."[12]

Another historical argument advanced by those who wanted to see Bible reading become a part of the public school curriculum was based on the Northwest Ordinance of 1787, and its present-day applicability to states which had once come under its provisions. The Illinois and Ohio courts in particular were called upon to answer this question.

In Ohio it was claimed that Bible reading should be legal under Article 7, Section 1, of the Ohio constitution.

This section was taken verbatim from the Ordinance of 1787 and reads:

> Religion, morality, and knowledge, however, being essential to good Government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceful enjoyment of its own mode of public worship, and to encourage schools and the means of education.[13]

The court, however, interpreted these words quite differently, and refused to agree that Bible reading or any active state participation in the church's sphere is sanctioned by this section. It explained:

> . . . Religion, morality and knowledge are essential to government in the sense that they have the instrumentalities for producing and perfecting a good form of government. On the other hand, no government is at all adapted for producing and perfecting or propagating a good religion. . . . Religion is the parent and not the offspring of good government.[14]

The problem facing the Illinois court was slightly different. It was argued that even though the above-mentioned section of the Ordinance of 1787 was not in the Illinois constitution, it might be considered a part of the spirit upon which the constitution rests. The court denied this allegation, pointing out that the Ordinance of 1787 was superseded by the state constitution and by the admission of the state into the Union. It went on to explain that during the state's constitutional convention attempts were made to add a section to the constitution which would prohibit the exclusion of the Bible from the public schools. Because this move failed, the court felt justified in denying that the constitution carried an implication that Bible reading was legal.[15]

DISSENTS AND DIVERGENCES

It should be noted that not all of the seven state courts which held Bible reading to be illegal were unanimous in their decision, nor did all of the majority opinions agree on some of these points of historic and philosophic interpretation. It might be interesting at this point to note the number of judges who dissented from court decisions holding Bible reading to be illegal. In the nine cases to come before the high courts of the seven states and a Pennsylvania federal district court, six decisions were unanimous. Furthermore, Justice Holcomb of the Washington Supreme Court, in his lone dissent in *Dearle* v. *Frazier*,[16] agreed that Bible reading was illegal. He felt, however, that since the Washington constitution so clearly prohibits Bible reading, there was no need for the long and involved decision of his colleagues. He dissented because he felt the case should have been dismissed summarily.

In effect, therefore, only two of the courts were divided on the issue of Bible reading. In the Illinois case,[17] two of the seven supreme court justices were dissenters, while in the South Dakota case,[18] two justices out of five felt Bible reading was legal. Among the courts which ruled against Bible reading we have a total of 51 judges hearing nine cases before the high courts of seven different states plus one federal district court decision. Forty-seven of these judges felt that Bible reading in the public schools was illegal, while only four would allow this practice. There is a remarkable degree of agreement here considering the controversial nature of the issue involved.

The dissents in the South Dakota case were illustrative of the opposition's line of reasoning. Justice Brown in his dissent pointed out what he considered to be the complete

impossibility of divorcing religion from the state. In addition, he did not believe that the founding fathers of the nation and the state had any intention of so doing. He used the stock examples to back up his argument; i.e., chaplains in the legislature and the armed services, the use of the slogan "In God We Trust" on United States coins, and the Presidential announcement of some religious holidays.[19]

There was also some disagreement in the majority opinions regarding the church-state relationship and the role of religion in American history and thought. This is indicated by the Louisiana court's opinion, which, while it held that Bible reading violated the right to religious freedom of the Jewish children, went on to say:

> There have been differences in expressions of opinion as to whether this is a Christian land or not . . . there has not been a question as to its being a Godly land, or that we are a religious people.

To demonstrate this fact, the court quoted from the "Declaration of Independence" and the "Articles of Confederation," both of which mention God.[20]

From this general attempt to analyze the historic forces active in determining the relationship between church and state in the United States, and the role of Bible reading in this process, the courts next looked more specifically at the possible sectarian quality of the Bible to determine whether or not this would justify a prohibition of the practice of Bible reading in the public schools.

THE BIBLE IS SECTARIAN

In their development of some working definition of the word "sect," a noticeable difference is seen between the fourteen state courts which held Bible reading to be legal, the seven state courts and the Pennsylvania federal district court which felt that it was illegal. It was the Wis-

consin court which enunciated the most thorough definition of what (to it) constituted a sect, and this definition is characteristic of the state courts which held Bible reading to be illegal.

Justice Lyons, speaking for the majority of the court, spelled out its understanding of the meaning of the word "sect."

> It should here be said that the term 'religious sect' is understood as applying to people believing in the same religious doctrines, who are more or less closely associated or organized to advance such doctrines, and increase the number of believers therein. The doctrines of one of these sects which are not common to all the others are sectarian; and the term 'sectarian' is, we think, used in that sense in the constitution.[21]

To forestall any erroneous conclusions which might result from this definition, he quickly pointed out:

> It is scarcely necessary to add that we have no concern with the truth or error of the doctrines of any sect. We are only concerned to know whether instruction in 'sectarian doctrines' has been, or is liable to be, given in the public schools of Edgerton.[22]

These eight courts generally felt that the Bible was a sectarian book, and that portions of it were used by the different sects to prove various points of sectarian dogma. At least one court — the Louisiana Supreme Court — felt that it was impossible to read the Bible without conjuring up religious and sectarian overtones. In regard to reading the Bible in the public school, it announced:

> To read the Bible for the purpose stated requires that it be read reverently and worshipfully. As God is the author of the Book, He is necessarily worshipped in the reading of it. And the reading of it forms part of all religious services in the Christian and Jewish churches, which use the Word. It is as much a part of the religious worship of the churches of the land as is the offering of prayer to God.[23]

There seems to be general agreement among these courts that not all parts of the Bible are sectarian. The difficulty they foresaw is that it is impossible to determine with any certainty what portion of this book some sect might regard as sectarian. The Illinois court pointed out, "The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction by means of reading the Bible or otherwise." This, it believed, was the only solution to the problem of determining exactly what parts of the Bible are sectarian. The Bible, in the last analysis, "cannot be separated from its character as an inspired book of religion."[24]

The Wisconsin court's view of the sectarian nature of the Bible was indicative of prevailing attitudes on this point in the eight states where Bible reading was held to be illegal. This court ruled that the sectarian instruction prohibited in the common schools (by Article 10, Section 3 of the Wisconsin constitution) was instruction in the doctrines held by one or another of the various religious sects and not by the rest. Bible reading in these schools came within this prohibition since each sect, with a few exceptions, based its peculiar doctrines upon some portion of the Bible, the reading of which tended to inculcate its beliefs.[25]

A minor variation on the theme of the sectarian nature of the Bible should be noted in the earlier Washington case, *Dearle* v. *Frazier*.[26] Here, the plaintiff hotly denied that the Bible was a sectarian book. The supreme court of Washington felt, however, that it was not necessary to prove the Bible sectarian, since the constitution of Washington states:

> No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.[27]

The court stressed the uniqueness of the Washington constitution, in that it speaks of "religious" and not "sectarian" instruction. It felt there could be no doubt that Bible reading in the public schools was religious instruction, or at least a religious exercise.[28] It went on to explain, "We have then, not only 'religious exercise' and 'instruction' which are prohibited, but their natural consequences — religious discussion and controversy."

The litigation in this case arose over the attempts by the plaintiff to compel the school authorities to give credit toward graduation for a course in Bible study. This was in keeping with a provision adopted by the State Board of Education several years earlier that proposed to give one-half of one high school credit for the study of the Old and New Testaments. All instruction was either to be given in the pupil's home or by a religious organization to which the pupil belonged. There was to be no high school supervision of the program other than preparing the syllabus of Bible readings, the setting up of the examination for the course, and the grading of the papers.

The court felt that the use of public money for the preparation of the syllabus and the final examination, as well as payment of teachers to grade the papers constituted an expenditure of public funds for religious purposes, which was forbidden by the state constitution.[29]

Use of Public Funds in Bible Reading

The questions of whether or not the taxpayers of an area may object to the use of public funds for various exercises such as Bible reading, and whether or not these exercises turn the school into a place of worship, have produced some varied opinions among the courts which held Bible

reading to be illegal. The views of the Wisconsin court receive general acceptance by the other courts. This court believed that the reading of the Bible is an act of worship as the term is used in the Wisconsin constitution. Therefore, the taxpayers of any district who are compelled to contribute to the erection and support of common schools have the right to object to the reading of the Bible in these schools under the Wisconsin constitution, Art. I, Sec. 18, Clause 12, which states, "No man shall be compelled to support any place of worship."[30]

In this same vein, the Illinois court pointed out that Bible reading in the public schools violated Article 8, Section 3, of the Illinois constitution, which prohibits the appropriation of any public fund to aid any sectarian purpose.[31] The majority opinion of the Nebraska Supreme Court stated essentially the same view.[32] Justice Holcomb of the Nebraska court, in a separate concurring opinion, took issue with his colleagues on this point. He agreed that Bible reading may be regarded as sectarian instruction, but went on to say:

> As to the views apparently entertained and held to in the opinion to the effect that the exercises complained of constitute thereby the school house a place of worship within the meaning and contrary to the constitution. . . I do not agree.[33]

He explained this objection by saying he feared the majority view, if accepted, would prevent religious exercises in any penal or charitable institutions of the state.

A somewhat different view was presented by the Louisiana court, which seemed to suggest that the schoolhouse may be different things at different times.

> The school houses of the parish belong to the people of that parish, and they are under the control of the school

> authorities of the parish. If, at any time when the school houses are not being occupied or used for school purposes, the school board were to permit the school houses to be used for religious or other purposes, the rights of the plaintiffs would not be infringed in any way, and they might not be heard to complain of such action by the school authorities.[34]

THE KING JAMES VERSION IS SECTARIAN

The courts holding Bible reading to be illegal show a deep concern for the rights of minority groups, and their decisions reflect an earnest attempt to work out some solution whereby no one's religious freedom is trampled under the foot of majority might.

When discussing the differences between the King James and the Douay Versions of the Bible, the Illinois court pointed out some practical political problems that might arise from using one or the other of them in Bible-reading exercises. The court suggested that struggles for control of the school board might occur between Roman Catholics and Protestants, for with control of the school board would go the power to choose which version of the Bible might be used. It concluded, "Our constitution has wisely provided against such a contest by excluding sectarian instruction altogether from the school."[35]

The Nebraska court likewise did not feel that the difference between the two versions of the Bible was negligible. This, it pointed out, was the major inadequacy of Section 7659 of Nebraska's Revised Code of 1919, which allowed Bible reading. It did not say which version of the Bible might be used in the schools, but it did forbid the teaching of sectarian dogmas in them. The court believed that the debate over Bible reading resulted from disagreements over the version of the Bible selected to be read, which in turn resulted in sectarian debates.[36]

While these courts in general agree that reading the King James Version of the Bible violates the religious freedom of Catholic and Jewish children, and is sectarian instruction, the Louisiana court is a partial exception to this rule. This court noted the difference between the Rabbinical Bible and the Christian Bible and concluded that the Jews have a just complaint against the practice of Bible reading. It did not feel that this is true in the case of Catholics. Since this court believed that the King James and the Douay Versions of the Bible are essentially similar, the Catholics could not validly complain of an injury. It concluded that while Bible reading violated the religious freedom of the Jewish children, it did not infringe on the religious liberty of the Catholics.[37] Finally, when speaking of religious liberty for the Jewish child, the court said:

> Therefore, while we are grateful to God for religious freedom, with other blessings, we may not interfere with any citizen's natural right to also worship the same God according to the dictates of his own conscience. The Jew will be permitted without interference to worship God according to his conscience, and so will others.

The court felt, therefore, that since Bible reading invaded the rights of conscience of Jewish children it could not be allowed in the public schools.

The Wisconsin Supreme Court took a broader view of the effects of Bible reading on non-Protestant religious groups. This is the more common interpretation among the other state courts. It explained:

> . . . is it unreasonable to say that sectarian instruction was thus excluded [from the public schools] to the end that the child of the Jew or Catholic or Unitarian or Universalist or Quaker should not be compelled to listen to the stated reading of passages of scripture which are accepted by others as giving the lie to the religious faith and beliefs of their parents and themselves.[38]

Majority Rights

Generally inherent in the argument of those who favor Bible reading in the public schools, is a suggestion which presupposes the right of the majority to fix the type of educational policies they deem advisable. Several of the courts which held Bible reading to be illegal addressed themselves to this problem, and upheld the rights of minorities over majority might. Incident to this argument is the view sometimes advanced by those favoring Bible reading, which maintains that the religious freedom spoken of in state constitutions and statutes includes only the Christian religion.

The Ohio court was called upon to decide this latter question, and pointed out forcefully:

> When they [the founders of the state constitutions] speak of 'all men' having certain rights, they cannot merely mean 'all Christian men.' Some of the very men who helped to frame these constitutions were themselves not Christian men.[39]

It went on to stress, "If Christianity is a *law* of the state, like every other law it must have a sanction." In addition to this, there would have to be adequate penalties to enforce Christianity, and the court felt that this was obviously not the case.

Speaking more generally of minority rights in this country, the Illinois court said:

> It is precisely for the protection of the minority that constitutional limitations exist. Majorities need no such protection — they can take care of themselves.[40]

The Ohio court echoed this sentiment almost verbatim, saying, "the protection guaranteed by the section in ques-

tion means protection to the minority. The majority can protect itself."[41]

As has been previously mentioned, these eight courts are concerned with keeping the public schools open to all children, regardless of religion. The only way that this could be accomplished, it appeared to them, was to prevent the teachings of the schools from injuring any child's religious sensibilities. The public schools were not the place to convert anyone to a given religious outlook, through programs of forcible attendance to what some children and their parents regard as sectarian instruction.

This view was especially well put by the Ohio court when it explained, "If you desire people to fall in love with your religion, make it lovely."[42] It went on to explain that one's attitude toward the advisability of government aid to religion depends upon who you are and where you are.

> No Protestant in Spain and no Catholic in this country will be found insisting that the government of his residence shall support and teach its own religion to the exclusion of all others and to tax all alike for its support.

The Nebraska court in a succinct passage might well speak for the other seven courts in voicing the desire to keep the public schools truly public. It stated, "It will be an evil day when anything happens to lower the public schools in popular esteem or to discourage attendance upon them by children of any class."[43]

THE BIBLE AND MORAL INSTRUCTION

One of the reasons given for favoring Bible reading is that it will aid in the general moral instruction of the pupils, quite apart from any sectarian connotations surround-

ing the book itself. They feel that the secular public schools have been lax in developing the moral awareness of the pupils, and all too frequently youngsters emerge from the public schools with a poor understanding of basic ethical principles. Those who subscribe to this belief seem to maintain that some common denominator of religious virtue might be inculcated through the practice of Bible reading. Very few agree, however, on what this common denominator is. What appears to be a common religious and moral tenet to one group frequently emerges as sectarian dogma to another.

The courts which held Bible reading illegal did not deny the possible benefit of added moral instruction in public schools. They were, however, deeply aware of the difficulty of arriving at major moral teachings which would be acceptable to all groups. At least one of these courts felt that determining what articles of religions constitute general morality was not within the scope of the judicial power. The Supreme Court of Washington pointed out:

> What guarantee has the citizen that the [school] board having a contrary faith will not inject those passages upon which their own sect rests its claim to be the true church under the guise of 'narrative or literary features,' and if they did so, where would the remedy be found? Surely the courts could not control their descretion, for judges are made of the same stuff as other men and what would appear to be heretical or doctrinal to one may stand out as a literary gem or as inoffensive narrative to another.[44]

Agreeing that it is nearly impossible to arrive at common moral and religious qualities which may be expounded through Bible reading exercises, the courts which looked upon Bible reading unfavorably felt that while it is important to teach these doctrines, the public school is not the place to do it. The Wisconsin court said:

> The priceless truths of the Bible are best taught to our youths in the church, the Sabbath and parochial schools, the social religious meetings, and above all, by parents in the home circle.[45]

Using essentially the same approach, the Nebraska court stated:

> . . . the state in its function as an educator must leave the teaching of religion to the church, because the church is the only body equipped to so teach, and on it rests the responsibility. . . . There need be no shock to the moral sense, nor to our religious and instincts, in barring religious subjects from our public schools and placing them where they belong, to be properly taught. Children of Catholics, Methodists, Presbyterians, Episcopalians, Baptists, or any other sect are not deprived of religious education, because it is not taught in the public school.[46]

The Illinois court also emphasized the necessity for keeping the spheres of church and state separate.

> The school like the government is simply a civil institution. It is secular, and not religious, in its purpose. The truths of the Bible are truths of religion, which do not come within the province of the public school.[47]

These courts then, feel that it is impossible to use the Bible as a textbook from which instructions in general morality may be garnered. Their views might be summed up by the Illinois court, which said:

> Any instruction on any one of the subjects [in the Bible] is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrine of one or more of them.[48]

THE BIBLE AS A TEXTBOOK

Since the courts which held Bible reading illegal did so because they believed it to be a sectarian book, they did

not spend time looking into the potential virtues of using it as a text, as did the courts which looked with favor upon Bible reading. Several of the courts, however, made some interesting comments upon the Bible as a text.

The general tenor of these court opinions on the use of the Bible as a textbook is exemplified by that of the Louisiana court. It stressed the fact that the reading of the Bible was religious instruction, and when the New Testament was read it was Christian instruction. The character of the book, it felt, was religious, and it was not adaptable for use as a text without arousing religious overtones.[49]

Those who argued for the legality of Bible reading before these courts, stressed that if the practice were declared illegal, the public would derive the general impression that any textbooks founded upon the fundamental teachings of the Bible or using an occasional extract from it, would also be illegal for use in the public school. This argument was advanced by Justices Hand and Cartwright of the Illinois court in their dissenting opinion. They felt that freethinkers and atheists did not constitute organized sects, and that the constitutional prohibition against the teaching of sectarian religion in the public schools had no application to them or to their opposition to the teaching of general Christian morality. They concluded by announcing that if the majority opinion of the Illinois court was allowed to stand, it would result in the removal from the public schools of all literature which mentioned a Supreme Being.[50]

The majority opinion of the Illinois court, following the lead of the Wisconsin court in the Weiss case,[51] refused to believe that its decision presupposed the exclusion from the schools of books which use occasional extracts from the Bible or mentioned a Supreme Being. It relied heavily upon

the argument advanced in the decision of the Wisconsin court. The Wisconsin court felt that while Bible reading itself was illegal under the Wisconsin constitution, this did not mean that textbooks founded upon the Bible and emphasizing its basic teachings of morality need be banished from the public schools.

This attitude is summed up by Justice Lyons of the Wisconsin court, when he stated:

> It should be observed, in this connection, that the above views do not, as counsel seemed to think they may, banish from the district schools such textbooks as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom. . . . [These extracts] pervade and ornament our secular literature and are important elements in its value and usefulness.[52]

The Courts and Educational Policy Formulation

One area of agreement exists between the courts looking favorably and the courts looking unfavorably upon the practice of Bible reading. They believed it was generally inadvisable for them to try to determine and dictate educational policies. They were reluctant to overrule the state legislature and the school boards in educational policies unless a clear-cut case could be made for the illegality of some educational program. In this connection it is necessary to point out a unique element in several of the cases where Bible reading was declared illegal.

In *Board of Education* v. *Minor*,[53] *State* ex rel. *Dearle* v. *Frazier*,[54] and *State* ex rel. *Clithero* v. *Showalter*[55] attempts were made to obtain court action which would have compelled the boards of education to institute a program of Bible reading in the schools, or to maintain such a program which had been discontinued because of a newly

adopted ordinance forbidding such exercises. In all three of these cases the courts refused to interfere with the school authorities' decisions.

The Ohio court in the Minor case[56] ruled that the constitution of the state did not enjoin or require religious instructions or the reading of religious books in the public schools of the state. It explained that the legislature had placed the management of the public schools under the exclusive control of directors, trustees, and boards of education. The courts, therefore, had no rightful authority to interfere by directing what instructions shall be given or what books shall be read in the public schools of the state. Justice Welch said, "There is no question before us of the wisdom or unwisdom of having the Bible in the schools or withdrawing it therefrom." He felt that the case presented merely a question of the court's rightful authority to interfere in the management and control of the public schools.

The Washington court in the Frazier case[57] expressed the same sentiments. The majority opinion pointed out that a plan which would give high school credit for reading the Old and New Testaments because of their "literary value" (and which the superintendent of the school refused to follow) violated Article I, Section I, of the Washington constitution. It said:

> . . . the vice of the present plan is that public school credit is given for instruction at the hands of sectarian agents . . . . The Bible history, narrative and biography cannot be taught without leading to opinion and ofttimes partisan opinion is understood and anticipated by the school board.[58]

In addition to this, the Washington court concluded that to compromise on this matter would be to make the courts

and not the school board the arbiters on matters of general educational policy.

In *State* ex rel. *Clithero* v. *Showalter*,[59] the Washington court disposed of the case on the basis of the rule laid down in the Frazier case.[60] The court felt there was no need to investigate the question anew, for it believed that if the people of the state seriously wanted the state's policy toward sectarian education in the public schools to change, the critics of the policy should strive to crystallize public opinion in favor of voting for a constitutional amendment. The court stressed that it is not the duty of the judiciary to revise the constitution because one group disapproves of certain provisions.[61]

Before concluding this section, one further point should be noted. While it is touched upon by only one of the courts holding Bible reading illegal, it presents a point of view which cannot be ignored by persons interested in the church-state relationship in the United States. The Ohio court not only felt that reading the King James Version of the Bible violated the rights of conscience of Roman Catholic and Jewish children, but it went on to express its concern for the rights of the Catholic or Jewish teacher who is required to read the Protestant Bible to children of all faiths.[62] The importance of this view should not be underemphasized, for the teacher is caught between two equally distasteful alternatives. If for reasons of conscience he refuses to conduct the Bible-reading exercises, there is a good possibility that he may lose his position. On the other hand, if he performs the exercise as prescribed by law, his religious beliefs and principles will be violated. From an academic standpoint it may be interesting to speculate as to the outcome of a collision between economic interests and religious

principles, but from the teacher's standpoint it is a decidedly uncomfortable decision to make. The Ohio court felt that the only way to keep such a situation from arising was to keep Bible-reading exercises out.

BIBLE READING AND COMPULSORY ATTENDANCE

The eight courts which held Bible reading to be illegal did not allow the question of compulsory attendance during such exercises to occupy much of their time, since they decided earlier that the Bible was sectarian and violated the religious sensibilities of certain groups. Several of the courts did touch lightly on this question, and the views of the Wisconsin court in particular are interesting as a direct antithesis of those presented by the Colorado court in the Stanley case. It has been previously mentioned that while the Colorado court held Bible reading legal, it stressed that attendance at such reading could not be made compulsory. To the charge that such a system discriminated against the pupils who left the classroom during such exercises, the Colorado court replied:

> We cannot agree to that. The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations, but never one for neglecting them or absenting himself from them.[63]

The Wisconsin court took the opposite view. It explained that the practice of Bible reading in the public schools could receive no sanction from the fact that the pupils are not compelled to remain in the school while the Bible is being read. The withdrawal of a portion of them at such a time would tend to destroy the equality and uniformity of treatment sought to be established and protected by the constitution of Wisconsin.[64] Justice Lyons said: Even

if the law allows pupils to leave during such reading, "the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult," since he is leaving because of apparent hostility to the Bible that those who remain revere.

The Illinois court felt that compulsory attendance during Bible-reading exercises would certainly be a violation of the constitutional guarantee of the free exercise of religion. It pointed out that, "One does not enjoy the free exercise of religious worship who is compelled to join in any form of religious worship." It also felt that, "the free enjoyment of religious worship includes the freedom not to worship."[65] Like the Wisconsin court, the Supreme Court of Illinois held that even though attendance at Bible reading was optional, with the pupils being allowed to absent themselves from such exercises for reasons of conscience, the practice would still be unconstitutional. It said the very fact that the pupil left the room during such a program would serve to stigmatize him and put him at a disadvantage in school, which the law did not contemplate.[66]

The case which came before the South Dakota court was concerned only with compulsory attendance.[67] However, the *obiter dictum* in the decision against it was so critical of Bible reading in general, that the statute permitting it was deleted from the South Dakota Code.

THE SCHEMPP CASE

The Schempp case[68] is unique in the controversial area of Bible-reading exercises in the public schools for several reasons. First, it is a recent case involving questions of this nature to be litigated. Secondly, unlike all of the other major cases involving this question, this case was

brought in a federal district court for the Eastern District of Pennsylvania rather than in the state courts, as is normally the case. It therefore gives us an opportunity to analyze the manner in which one federal court, at least, has applied the jurisdictional principles discussed by the Supreme Court of the United States in the Doremus case.

The suit was brought by Edward Schempp and Sidney Schempp as parents and guardians of their children who attended the public schools in Abington Township, Pennsylvania. Suit was brought under 28 U.S.C. Sections 1343 and 2281 and was heard by a three-judge federal district court under provisions of 28 U.S.C. Section 2284. The complainants attacked, as a violation of the First Amendment to the Constitution of the United States, the Pennsylvania state statute which provided for reading of ten verses of the "Holy Bible" by teachers or students.[69] Similar assertions were made in respect to reading ten verses of the Bible in conjunction with the pupils' practice of reciting the Lord's Prayer. The Schempps sought a permanent injunction enjoining these practices.

At the outset, the federal district court put its finger upon one of the knottiest problems arising in cases of this kind. It noted that the legislature of Pennsylvania did not define the term "Holy Bible." Nor, the court observed, did the legislature of Pennsylvania make any differentiation between the King James Version of the Bible frequently employed in the religious exercises of Protestants, and the Douay Version, the authorized Bible of the Roman Catholic church.

The court formally recognized that the complainants were Unitarians in Germantown, Philadelphia, Pennsylvania, and that they and their children regularly attended this

church. The three children and the father testified, moreover, as to items of religious doctrine conveyed by a literal reading of the Bible, particularly the King James Version. Such tenets, they argued, were contrary to the religious beliefs they held. One complainant testified, for example, that he did not believe in the divinity of Christ, the Immaculate Conception, the concept of an anthropomorphic God, or the Trinity.

In addition, one child testified that during the reading of the Bible in the public schools a standard of physical deportment and attention of a higher caliber than usual was required of the students. While several of the children admitted that they had not objected to taking part in the practices complained of, one child clearly made known his objection. In November of 1956, Ellory Schempp's objection took the form of reading to himself a copy of the Koran while the Bible was being read. Moreover, he refused to stand during the recitation of the Lord's Prayer.

His homeroom teacher, thereupon, told him he should stand during the recitation of the Lord's Prayer, and he then asked to be excused from morning devotions. As a result, he was sent to discuss the matter with the vice-principal and the school guidance counselor. Following this discussion, he spent the period of "morning devotions" in the guidance counselor's office for the remainder of the year. At the beginning of the next academic year, however, when he asked his homeroom teacher to be excused from attending the ceremonies, she discussed the matter with the assistant principal. Thereupon, that official told him he should remain in the homeroom and attend the morning Bible-reading and prayer-recitation period as did the other students. The student obeyed these instructions for the remainder of the year.

School officials testified that no complaints had been received other than that of Ellory Schempp. The court found that this evidence was uncontradicted.[70]

Role of Biblical Scholars

After this careful exposition of the fact situation, the court next evaluated testimony presented by biblical scholars. Dr. Solomon Grayzel, editor of the Jewish Publications Society, emphasized that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible. The most obvious, of course, was the absence of the New Testament in the Jewish Holy Scripture. Dr. Grayzel further noted that portions of the New Testament were offensive to Jewish tradition and, "from the standpoint of Jewish faith, the concept of Jesus Christ as the son of God was practically blasphemous." He noted instances in the New Testament which assertedly were not only sectarian in nature but tended to "bring the Jews into ridicule or scorn." Dr. Grayzel believed that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. On the other hand, if portions of the New Testament were read to such children without explanation, they could be, he felt, psychologically harmful to the child. In addition, practices of the latter type caused a divisive force within the social media of the school, Dr. Grayzel believed.

Dr. Luther A. Weigle, Dean Emeritus of the Yale Divinity School, testified for the school board. Dr. Weigle believed that the Bible was nonsectarian. He later explained that the phrase "nonsectarian" meant to him nonsectarian within the Christian faiths. Although admitting that his definition of the Holy Bible would include the Jewish Holy

Scriptures, he also stated that the "Holy Bible" would not be complete without the New Testament. Reading of the Holy Scriptures to the exclusion of the New Testament, he believed, would be a sectarian practice. The Bible was of great moral, historical, and literary value, Dr. Weigle emphasized.

Counsel for the school board denied the charge that Bible-reading exercises in the public schools constituted a violation of the First Amendment. They contended that the reading of the "Holy Bible" at the opening of each school day did not affect, favor, or establish a religion or prohibit the free exercise thereof. They stressed that freedom of religion or of conscience does not include a right to practice one's beliefs or disbeliefs concerning the Bible by preventing others from hearing it read in the public schools. Reading the Bible without note or comment, they believed, was a substantial aid in developing the minds and morals of school children, and that the state had a constitutional right to employ such practices in its educational programs. Lastly, the school board argued, there was no compulsion upon the complainants in respect to religious observances, and they had not shown that they had been deprived of any constitutional rights.

Jurisdictional Considerations

In its decision, the federal district court had, at the outset, to come to grips with certain jurisdictional questions. First, it concluded that in light of the First Amendment liberties involved, the case contained a substantial federal question. Secondly, it rejected the notion that the doctrine of abstention was applicable in this case on the grounds that a United States District Court had the duty to adjudicate a controversy properly before it.[71] In reference to the doctrine

of abstention, the court concluded, no interference with the administrative processes of the commonwealth of Pennsylvania was involved in this case, nor, by adjudicating the merits of the controversy, did the federal district court create "needless friction by unnecessarily enjoining state officials from executing domestic policies."

Third, the court confirmed the rights of the children of the parents in respect to their standing to maintain a suit at bar in this particular case. The court felt that the standing of the children was similar to that of the minor plaintiffs in *Brown* v. *Board of Education*.[72] The court believed that the parents had standing to bring suit in their own right in that they were the natural guardians of their children and had an immediate and direct interest in their spiritual and religious development.

Thereupon the court restricted itself in its decision to two major issues: One, the constitutional issues presented by the reading of ten verses of the Bible and two, the constitutional issues raised by reading of the Bible verses followed by the recital of the Lord's Prayer.

The Bible As Literature and History

At the outset of its evaluation into the merits of the case, the court said: "to characterize the Bible as a work of art, of literary or historic significance and to refuse to admit its essential character as a religious document would seem to us to be unrealistic." The court felt that the key question involved concerned whether or not to accept the Holy Bible as a religious document regardless of the version involved. The court agreed that Bible verses are of great literary merit but noted that these verses are embodied in books of worship regardless of the version. Furthermore, the Bible was

devoted primarily to bringing man in touch with God. Moreover, the court felt that the manner in which the Bible was used as required by the state statute did not affect a clear division between religious dogmas and general moral truths. It noted that the daily reading of the Bible, buttressed by the authority of the state, backed with the authority of the teachers, could hardly do less than inculcate or promote the inculcation of various religious doctrines in childish minds. Thus, the practice required by the state amounted to religious instruction or a promotion of religious education.

It made no difference, the court felt, that religious "truths" may vary from one child to the other. Inasmuch as the Bible deals with man's relationship to God, the court believed that the Pennsylvania statute required a daily reminder of that relationship, that the statute aided all religions, and, "inasmuch as the 'Holy Bible' is a Christian document, the practice aids and prefers that Christian religion."[73]

The court also felt that by requiring public school teachers to read selections from the Bible that the commonwealth of Pennsylvania through statutory mandate was supporting the establishment of religion.

In answer to the defendant's argument that each listener might interpret what he heard in the fashion he desired, the court gave two reasons why this argument was invalid. First, the argument either ignored the essential religious nature of the Bible, or assumed that its religious quality could be disregarded by the listener. "This is too much to ignore and too much to assume," the court stressed. Secondly, the testimonies of the Schempps and Dr. Grayzel proved that, "interpretations of the Bible dependent upon the inclination of scholars and students, can result in a spectrum of meanings

beginning at one end of the spectroscopic field with literal acceptance of the words of the Bible, objectionable to Unitarians such as the Schempps, and ending in the vague philosophical generalities condemned by fundamentalists."

The fact that during the morning exercises school children had to maintain a mien more in keeping with the devotional or religious rite than with order during classroom instruction also led to the conclusion that such exercises were sectarian in nature, the court believed. Indeed, these exercises were frequently referred to as "morning devotions" by the children and the school board, the court pointed out.

The school board had called to the court's attention the fact that several versions of the Bible plus the Jewish Holy Scriptures had been used in the exercises of the school. The court found, however, that this proved only "that the religion which is established is either sectless or is all-embracing, or that different religions are established equally. But none of these conditions, assuming them to exist, purges the use of the Bible as prescribed by the statutes of its constitutional infirmities."

Problems of Compulsion

The court also emphasized that a compulsory quality about the religious exercises required by Pennsylvania law could not be ignored. In the case of Ellory Schempp, the facts indicated he was compelled to attend the exercises by the assistant principal of his school acting under the authority of his office. On another occasion, Ellory Schempp was directed by his homeroom teacher to stand during the recitation of the Lord's Prayer. Moreover, the court believed that where a course of conduct is compelled for school teachers and

school superintendents that the school officials will use every effort to cause the children committed to their guidance and care to form an audience for the reading of the Bible according to the terms of the statute. On this score, the court concluded that, "the arguments made by the defendants that there was no compulsion ignores reality in the face of social suasion."[74]

Nor did the court buy the argument that merely because the Schempps alone objected, the statute prescribed conduct which was not compulsory both as to teachers and pupils. "Indeed," the court pointed out, "the lack of protest may in fact attest to the success and subtlety of the compulsion." The court had little difficulty saying with finality that in schools conducted in accordance with the legislative fiat, the reading of the "Holy Bible" was compulsory as to teachers and pupils.

Finally, attention was called to the fact that the rights of parents were even more clearly interfered with by the Pennsylvania law. Parents have some interest in the development of their children's religious sensibilities, the court believed. Thus, if the faith of the child were developed, "inconsistently with the faith of the parent and contrary to the wishes of the parent, interference with the familial right of the parent to inculcate in the child the religion the parent desires is clear beyond doubt." The court forcefully concluded its evaluation of the case by emphasizing: "the right of the parent to teach his own faith to his child, or to teach him no religion at all is one of the foundations of our way of life and enjoys full constitutional protection."[75] On the basis of the points discussed, therefore, the federal district court flatly held the Pennsylvania statute to be unconstitutional. As suggested by my earlier analysis

of the case it seems apparent that the district court's decision did not seem to turn merely on the fact that the state law made such exercises mandatory.

On the contrary, the decision seemed to rest upon a broader conception of First Amendment issues concerned with the Bible as a sectarian work and the ambiguity in the law which did not stipulate which version of the Bible was to be used for the programs in question. The district court pointed out that it was not merely the pressure of the statute, but the attitude of school officials resulting in "social suasion" which accounted for the compulsory features of the program. There was small reason to believe that the latter force would disappear merely because Bible-reading exercises were no longer demanded in the schools of Pennsylvania.

THE UNITED STATES SUPREME COURT AND THE SCHEMPP CASE

Moving with especial rapidity, by federal court standards, the Schempp case came to the United States Supreme Court on appeal from the United States District Court for the Eastern District of Pennsylvania. The Supreme Court, on October 24, 1960, in a brief opinion *per curiam* vacated the judgment and remanded the case to the District Court for further proceedings appropriate in light of Act Number 700 of the Laws of the Pennsylvania General Assembly enacted on December 17, 1959.[76] This act amended by making discretionary the Pennsylvania law which made Bible reading in the public schools mandatory.

The United States Supreme Court apparently chose to believe that the federal district court's decision rested primarily on the feeling that the conclusive factor in the practices complained of rested in the fact that the Bible-

reading exercises in the public schools were compulsory. Therefore, when the Pennsylvania law was amended making such programs discretionary, the Supreme Court seemed to feel that the original case became moot, and the court for jurisdictional reasons again refused to rule on the merits of Bible reading in the public schools.

While the Supreme Court's opinion in *Schempp* is brief to a point merging on inscrutability, it would seem that the court here, as in the Doremus case, hewed narrowly to the doctrine of avoiding a constitutional issue if a case can be decided on other grounds.

THE SCHEMPP CASE RETRIED

On February 1, 1962, the federal district court for the Eastern District of Pennsylvania reheard the Schempp case and once again unanimously held that the Pennsylvania statute, as amended, violated the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment.[77]

The court recognized that the schools' practices varied somewhat after the state statute was amended to provide that while Bible-reading exercises were mandatory in each public school of the state, students were not compelled to attend them. A few minutes after the children arrived at their "homerooms" at the start of the school day, the children sat "at attention" while ten verses of the Douay or Revised Standard Versions of the Bible, or Jewish Holy Scriptures, were broadcast without comment into each room through a loud-speaker. Immediately afterward, the students stood and repeated the Lord's Prayer and then gave the flag salute. General announcements were given next over the loud-

speaker, after which the students went to their regular classes.

The children's father, Edward Schempp, testified that after careful consideration he had decided not to have his children excused from attending these exercises. He gave a variety of reasons for his position, among them his fear that his children might be regarded as "odd-balls" by teachers and students. Moreover, he recognized that it is common today to label all religious objections or differences "atheism," and furthermore, a tendency to equate atheism today with Communism or "un-Americanism." He felt too that by absenting themselves from the room during the Bible-reading exercises his children would probably miss the general announcements that followed immediately after the ceremony. And since those not attending these exercises were required to stand in the halls, this, in itself, carried with it the imputation of punishment for bad conduct.[78]

The court at the outset again rejected the contention that the doctrine of abstention applied, since the issue whether such programs violate the Establishment Clause of the United States Constitution contains a substantial enough federal question for a federal court to decide it before the Pennsylvania courts had an opportunity to rule on the matter. Judge Biggs, speaking for the court, next observed that the reading of the Bible, even without comment, "possesses a devotional and religious character and constitutes, in effect, a religious observance." This, the court believed, is made even more apparent by the fact that the Bible-reading exercise is followed immediately with the recital of the Lord's Prayer, by the students in unison.

The court went on to emphasize that even excusing stu-

dents from the exercise does not mitigate the obligatory nature of the ceremony, even under the revised law, because the amended statute unequivocally requires that such exercises be held every school day. Moreover, they are held on school property, under the authority of the school officials, during school sessions. The law further requires that the "Holy Bible" be used, which, the court recognized, is a Christian document.

Thus it concluded that it was the intention of the Pennsylvania Legislature in Section 1516 of the School Code to introduce a religious ceremony into the public schools of that state in violation of the First and Fourteenth Amendments. The court felt that the decision of the Supreme Court in the McCollum case was controlling here, a point on which some may disagree even while agreeing with the court's holding.

The court finally perpetually enjoined and restrained the defendants from reading or permitting anyone subject to their control and direction to read to the students in Abington Senior High School, "any work or book known as the Holy Bible." The court went on to state, however, "that nothing herein shall be construed as interfering with or prohibiting the use of any book or works as educational source or reference material."[79]

THE UNITED STATES SUPREME COURT'S LAST WORD

The case was again appealed to the Supreme Court where it was joined with the Murray case. On June 17, 1963, the Supreme Court handed down its landmark decision and by a vote of eight to one held such laws and practices violated the Establishment Clause of the First Amendment.[80]

Justice Tom Clark, in the majority opinion, noted that "religion has been closely identified with our history and government." He went on to explain: "This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly embedded in our public and private life." The court emphasized the importance of freedom of worship especially to a nation which is composed of citizens drawn from the four corners of the world and in which eighty-three separate religious bodies, each with over fifty thousand members, function. In addition there are, of course, innumerable smaller religious sects functioning in the United States.

Saying that the court had rejected "unequivocally" the contention that the Establishment Clause forbids "only government preference of one religion over another," and quoting Justice Rutledge in an earlier opinion, the court explained that:

> The [First] Amendment's purpose was not to strike merely at the official establishment of a single . . . religion. . . . It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Justice Clark emphasized the First Amendment's requirement that the government remain neutral to religion, in the following words:

> The wholesome 'neutrality' . . . stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that official support of . . . Government would be placed behind the tenets of one or of all orthodoxies.

The court then fashioned a test to determine if a state law or practice violated the Establishment Clause. The test

as the court saw it was: "What are the purposes and primary effect of the enactment?" The First Amendment is violated, the court announced, "if either [the purpose or primary effect of the law] is the advancement or inhibition of religion." To clarify this position the court emphasized again that there was a distinction between the Establishment Clause and the Free Exercise Clause, and a given action might violate one but not the other. "A violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause need not be so attended," Justice Clark explained.

The programs attacked in these cases are prescribed as part of the curricular activities of students who are required by law to attend school. Moreover, the religious character of the exercise was admitted by the state, the court explained, since the alternate use of denominational versions of the Bible was permitted. This does not square, therefore, with the states' contention that the Bible was used either as an "instrument for nonreligious moral inspiration, or as a reference for the teaching of secular subjects," Justice Clark observed.

"It is no defense," the court noted, "to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." Quoting Madison, the court emphasized "it is proper to take alarm at the first experiment on our liberties."

Justice Clark denied that this decision would establish a "religion of secularism" in the schools. He went on to say that "one's education is not complete without a study of comparative religion or the history of religion." More-

over, the court saw the study of the literary and historic qualities of the Bible as worthy.

Finally the court rejected the argument that to prohibit a religious exercise approved by the majority would collide with the majority's right to free exercise of religion. The clause "has never meant that a majority could use the machinery of the state to practice its beliefs." The court felt that Justice Jackson in an earlier opinion effectively answered that contention. Jackson explained:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . . One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections.

In summary, the court's majority opinion makes it clear that religious exercises of this sort need not be compulsory for students in order for the practice to violate the Establishment Clause. Nor must they involve substantial expenditures of public funds to fail the test of constitutionality.

Concurring Views

In separate opinions, Justices Douglas, Goldberg and Harlan, and Brennan concurred with the majority decision. Justice Potter Stewart dissented.

In his concurring opinion, Justice Douglas noted that each of the cases under discussion violated the Establishment Clause in two different ways: first, the state is conducting a religious exercise and this cannot be done without violating the "neutrality" required of the state by the balance of power between individual, church, and state that has been

struck by the First Amendment, and, second, because public funds, though small in amount, are being used to promote a religious exercise — all the people being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.

Justice Brennan, in a résumé of the nation's historic attempts to expound the meaning of the Constitution in the intricate and demanding issue of the relationship between religion and the public schools, noted especially our contemporary religious diversity:

> Today the Nation is far more heterogenous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

The highlights of his opinion relating to the nature of public schools and to the McCollum and Zorach cases appear in Chapter 5.

When turning specifically to the cases at issue, Brennan felt that unless *Engel* v. *Vitale* was to be overruled, or the court was to engage in wholly disingenuous distinction, it could not sustain the nature of the exercises here challenged. Daily recital of the Lord's Prayer and the reading of passages of scripture were quite as clearly breaches of the command of the Establishment Clause as was the daily use of the rather bland Regents' Prayer in the New York public schools. Indeed, Brennan went on, "I would suppose that if anything the Lord's Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First

Amendment consequently more serious." Brennan noted that such a plainly religious means is necessarily forbidden by the Establishment Clause, in his opinion. Nor, said Brennan, is the justification valid that religious exercises may directly serve secular ends:

> . . . it would seem that less sensitive materials might equally well serve the same purpose. . . . without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.

Justice Brennan cited the Pennsylvania district court's answer after the remand of the Schempp case as dispositive to the argument that excusing or exempting students absolved the practices involved insofar as these practices are claimed to violate the Establishment Clause; i.e., that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day. The question of the infringement of the Free Exercise Clause, under such circumstances, is more difficult, however, but in Brennan's opinion, "the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused."

In a final important point, Justice Brennan refuted the contention by some that the invalidation of the exercises at bar permitted the court no alternative but to declare unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government:

> What the Framers [of the Constitution] meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers — as much to church as to state — which the Framers feared would subvert religious liberty and the strength of a system of secular government.

But, Brennan explained, there may be many forms of involvements of government with religion which do not import such dangers and therefore should not in his judgment be deemed to violate the Establishment Clause.

> Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives — that religious differences among Americans have important and pervasive implications for our society. Likewise nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.

Finally, Justice Brennan dealt with six areas of involvement between government and religion in which there has existed both legal and lay confusion, but in which he denied there was conflict with the decision in the present cases under discussion. All these areas have been subjects of cases in lower federal and state courts: A. The Conflict Between Establishment and Free Exercise. B. Establishment and Exercises in Legislative Bodies. C. Nondevotional

Use of the Bible in the Public Schools. D. Uniform Tax Exemptions Incidentally Available to Religious Institutions. E. Religious Considerations in Public Welfare Programs. F. Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.

In their concurring opinion, Justices Goldberg and Harlan agreed that the attitude of the state toward religion must be one of neutrality. "But," Justice Goldberg noted,

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither the state nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.

Finally, Justice Goldberg believed that opinions in the present and past cases made clear that the court would:

> . . . recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teachings *of* religion, in the public schools. The examples could readily be multiplied, for both the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the ultimate First Amendment objective of religious liberty.

Justice Goldberg concluded by noting:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Justice Stewart's Dissent

In the sole dissenting opinion in the 1963 hearing of the Schempp and Murray cases, Justice Potter Stewart (who was also the sole dissenter in the 1962 Engel case, see page 197) said, "I think the records in the two cases before us are so fundamentally deficient as to make impossible an informed or responsible determination of the constitutional issues presented. Specifically, I cannot agree that on these records we can say that the Establishment Clause has necessarily been violated." Stewart noted that neither complaint attacked the challenged practices as "establishments." "What both allege as the basis for their causes of actions are, rather, violations of religious liberty," he explained.

Taking issue again with the "conflict" between a "doctrinaire reading" of the Establishment Clause and the Free Exercise Clause, Justice Stewart mentioned the using of federal funds to employ chaplains for the armed forces, which might be said to violate the Establishment Clause. "Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. And such examples could readily be multiplied."

Quoting opinions in the Everson and Zorach cases, and *Hamilton* v. *Regents,* and *Cantwell* v. *Connecticut,* Justice Stewart said,

> It is this concept of constitutional protection embodied in our decisions which makes the cases before us such difficult ones for me. For there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible. . . . What seems to me to be of paramount importance, then, is recognition of the fact that the claim advanced here in favor of Bible reading is sufficiently substantial to make simple reference to the constitutional phrase 'establishment of religion' as inadequate an analysis of the cases before us as the ritualistic invocation of the nonconstitutional phrase 'separation of church and state.' What these cases compel, rather, is an analysis of just what the 'neutrality' is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth.

Justice Stewart stated he thought religious exercises became constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs.

> There is no evidence in either case as to whether there would exist any coercion of any kind upon a student who did not want to participate. No evidence at all was adduced in the *Murray* case, because it was decided upon a demurrer [an objection that assumes the truth of the allegations but argues that no cause of action is shown]. All that we have in that case, therefore, is the conclusory language of a pleading. While such conclusory allegations are acceptable for procedural purposes, I think that the nature of the constitutional problem involved here clearly demands that no decision be made except upon evidence. In the *Schempp* case the record shows no more than a subjective prophecy by a parent of what he thought would happen if a request were made to be excused from participation in the exercises under the amended statute.

Justice Stewart concluded by observing that,

> What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. . . . I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal.

One cannot conclude an investigation of the courts which have held Bible reading illegal without noting the great concern for the individual's right of freedom of conscience and religious beliefs uniformly expressed by these courts. Their decisions have generally upheld the rights of religious minorities in danger of having their religious sensibilities jolted by an impatient and occasionally unfeeling majority. These were difficult decisions to make and undoubtedly in many circles they were also unpopular decisions. It takes a courageous judge to rule against public opinion, particularly in a field as volatile as religion and its relation to the state. The courageousness of these judges is doubly apparent when one realizes that many state supreme court justices are elective, and thus lack the security of tenure of a federal judge.