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Allied Problems in Religious Education

A NUMBER OF MISCELLANEOUS CASES were not included in the two previous chapters because, while Bible reading played a role of varying importance in each, it was not the controlling element or issue involved. In these cases the question of Bible reading was but one of the questions involving church-state relationships the judges were called upon to decide. It is interesting to note that while a number of the cases arose in states where the supreme courts had previously ruled on the question of Bible reading, the rationale and general rule of these peripheral cases were not always consistent with the conclusions reached by the state's high court in a Bible-reading case.

An example of this somewhat paradoxical situation may be seen in the state of Wisconsin. It has been noted that in 1890, the supreme court of that state ruled in *State ex rel. Weiss v. District Board* that Bible-reading exercises in the public schools were illegal under the Wisconsin constitution. Justice Lyons, speaking for the majority, pointed out that Bible reading, even without comment, was "religious instruction," for the "Bible contains numerous doc-

trinal passages upon some of which the peculiar creed of almost every religious sect is based, and that such passages may reasonably be understood to inculcate the doctrines predicated upon them." He felt that the practice was illegal even though the students were not compelled to attend. The departure of any student for reasons of conscience tended to destroy the equality of pupils and "puts a portion of them to serious disadvantages in many ways with respect to the others." Justice Orton's concurring opinion in this case also stressed that ". . . common schools are not common as being low in character or grade, but common to all alike, to everybody, and to all sects or denominations of religion, but without bringing religion into them." The inescapable impression from this is that the Wisconsin constitution as interpreted by the court, intends no right of the schools to engage in religious exercises or programs.¹

BACCALAUREATE EXERCISES

In 1916, however, the Wisconsin supreme court in *State ex rel. Conway v. District Board*² took a somewhat different view. The litigation arose over the city of Elroy's practice of holding parts of the high school graduation exercises in different churches of that town. Various clergymen gave nonsectarian prayers and invocations. There was no compensation paid for the use of the church or for the clergymen's contributions to the program. A mandamus suit was brought seeking to restrain the board of education from continuing such a program, for it was charged that this violated Article X, Section 3, and Article I, Section 18 of the Wisconsin constitution. The former provision forbids sectarian education in the public schools of the state. The latter insures the rights of conscience and freedom from

forcible support of a place of worship. The Supreme Court of Wisconsin ruled that the use of church buildings for high school graduation exercises and the practice of allowing clergymen of various faiths to offer nonsectarian prayers was permissible under the Wisconsin constitution.

When discussing the objection to the use of the church buildings for the graduation exercises, the court stated, "It is what is done, not the name of the place where it is done which is significant." The court in a rather curious manner dismissed the charge that the practices questioned here violated the individual's right of conscience. It explained:

The individual cannot foreclose inquiry into the reasonableness of his request by his bare assertion (i.e., that his right of conscience has been violated). Some consciences are very tender and highly developed. . . they regard as wrong many things which the law sees as harmless.³

The court was concerned lest a misinterpretation of its action in this case might lead some to conclude that the door was now open to bring into the public schools sectarian instruction, prayers, and similar practices. It pointed out that this could not be condoned, and in a passage notable for some fuzzy logic explained why.

We do not underrate the efficacy of prayer. Neither are we prepared to say that the average high school graduate may not need it. But whenever it is likely to do more harm than good it might well be dispensed with. It is not at all times wise or politic to do certain things although no legal rights would be invaded by doing them.⁴

In the present case the court apparently felt the exercises did more good than harm, and thus permitted their continuation. One cannot help but wonder if this view can be squared with the rule of the Weiss case, or, if the implica-

tions of this view are followed, to what degree the two previously mentioned constitutional provisions are a safeguard against sectarianism in the public schools.

RELIGIOUS INSTRUCTION AT STATE UNIVERSITIES

The Illinois Supreme Court is also an example of a court which held Bible reading in the public schools illegal.⁵ But it took a more favorable view of religious instructions at the state university in an earlier case.⁶ The judicial logic presented in this case is studiously ignored by the Illinois court in the Ring case, which deals specifically with Bible reading, and is as critical of this practice as is the Wisconsin court in the Weiss case. The earlier Illinois case centered around a rule of the University of Illinois which required that the students of this school must attend nonsectarian religious exercises in the university chapel. A student named North petitioned for a writ of mandamus to force the Board of Trustees to reinstate him in the university after he was expelled for refusing to attend these exercises without asking to be excused. The board had ruled it would not compel anyone to attend these services if he asked to be excused.

The Illinois Supreme Court held that the Board's directive did not conflict with the Illinois constitution, Article II, Section 3, which states: "No person shall be required to attend or support any ministry or place of worship against his consent." The court pointed out that the petitioner admitted it was not his right of conscience which was interfered with; that, in fact, he had attended these chapel services for five years previously, and that he did not claim:

. . . that the exercises at the chapel meetings were sectarian and, therefore, objectionable; but the only objection to those exercises was and is that they were in part religious worship.⁷

The major issue involved the right of the faculty to inaugurate such a policy.

The court felt that the faculty had this right so long as it stayed within constitutional limits. There could be no doubt that this program was legal, it explained, since anyone might be excused from it if he presented a reason for his wish to the board. It was this feature which prevented the program from forcing anyone to attend religious services against his will. The court pointed out that the faculty had certain rights over the plaintiff of which he was surely aware when he voluntarily entered the institution; and it concluded:

We think the conclusion is irresistible that in his controversy with the faculty he was not attempting to protect himself in the exercise of a constitutional privilege, but was only using the clause of the Constitution as a shield for himself and endeavoring to furnish others an excuse for disobedience.⁸

This is another example of a case in which the court found the motives of an individual questioning religious exercises in public schools to be of greater importance than the issue of the constitutionality of the religious instruction as such.

Another case in the Illinois Supreme Court, while not involving the question of Bible reading specifically, does have as its core the use of public funds for sectarian purposes, and might be briefly noted at this time. The case involved the payment of public funds to Roman Catholic institutions for the education of delinquent children. Re-

ligious instruction was required of all students in these institutions. The Supreme Court of Illinois approved this program on the theory that since the sum paid to the Catholic institution was less than the actual cost of such a program, it was the state and not the church which benefited.⁹

The Maryland Supreme Court was faced in 1961 with a somewhat related problem concerning religion and the state university. In the case of *Hanauer v. Elkins*,¹⁰ the Maryland court held that the University of Maryland which requires students to take basic military training as part of its curriculum was not imposing a religious test contrary to the charter of the University of Maryland and to the First Amendment of the United States Constitution.

CHURCH CONTROL OVER PUBLIC SCHOOLS

In a number of cases the fact situation was more complicated, and the question of Bible reading and religious instruction played a subsidiary role. These arose where the school was purportedly a public school, but where, in fact, a church exercised some control over the school. In some cases, classes were held in conjunction with a religious institution or teachers were basically church people who taught religion either directly or indirectly. The supreme courts of Iowa, Kentucky, Kansas, Michigan, Missouri, Nebraska, New Mexico, and Wisconsin held that a denominational school does not become a public school simply by calling it one, and the courts felt that these schools were not entitled to state financial aid.¹¹

The case of *Knowlton v. Baumhover*¹² which went to the Iowa Supreme Court is representative of the cases which involve the mingling of a public school with a religious school. Here, in a predominantly Roman Catholic area, the board of education allowed the public school building to

fall into disuse and instead leased a room in the Roman Catholic school to serve as the public school. A nun taught in the purportedly public school room, and this room was decorated with pictures and images of the Roman Catholic faith. Religious services directed by priests were conducted in both rooms of the school and daily instructions in the Roman Catholic catechism were given by the nuns who were the teachers. In the course of time, pupils from the public and the parochial school became intermixed, with action finally being taken to place all the younger students in one room and the older ones in the other. The school authorities pointed out that if any public school pupil objected to this arrangement he would be placed in the room which was nominally the public school. There was, however, no record of this ever having occurred. After the transfer from the public school building to the parochial school had taken place, the Sister's salary for teaching was raised from fifty to seventy dollars a month.

The court ruled that the maintenance of a sectarian school as a public school, even if sanctioned by the people of a district, did not justify the appropriation of public money for its support. It felt that before the law, every church or other organization upholding or permitting any form of religion or religious faith or practice is a sect, and as such is denied the use of public funds for the advancement of religious or sectarian teaching. Of particular importance to this study, however, is the fact that the court refused to enjoin the practice of reading the scriptures without comment and the recitation of the Lord's Prayer in any rejuvenated public school.¹³ Iowa, it should be noted, does have a statute which permits Bible reading and recitation of the Lord's Prayer in the public schools.¹⁴

Speaking generally of the situation which prevailed in

this school district, the court did not feel that this condition was due to a mere irregularity, as the school board had contended. The judges felt that the board had given at least tacit support to the program by its inaction.¹⁵ Nor did the court feel that it was enough that non-Catholic pupils were not required to attend services if they did not choose to, since the "gregarious instincts of children impel them to go with the crowd." Justice Weaver said:

This principle of unfettered individual liberty of conscience necessarily implies what is too often forgotten, that such liberty must be so exercised by him to whom it has been given as not to infringe upon the equally sacred right of his neighbor to differ with him. . . . The right of a man to worship God or even refuse to worship God, and to entertain such religious views as appeal to his individual conscience without dictation or interference by any person or power, civil or ecclesiastical is as fundamental in a free government like ours as is the right to life, liberty and the pursuit of happiness.

The Iowa court felt that a program such as is questioned here:

. . . [W]ould mean sectarianism in the public schools and to put sectarianism into the schools would, according to the opinion prevailing when the Constitution was ratified, be to put venom into the body politic.¹⁶

Finally, the court pointed out to those who argued for the continuation of this program, in similar cases which had come before this court,¹⁷ it had been the Roman Catholics who had brought the action, claiming that the King James Version of the Bible was sectarian and pleading to be free from sectarian control. "They can not [now] complain if they are subject to the same rule," the court explained.¹⁸

Combining Public Schools and Religious Schools

In one of the most recent cases of this nature, the New Mexico court, after it decisively ruled that a public school combined with a religious school was illegal, skillfully sidestepped the issue of how much, if any, religious instruction might be given in the public school.¹⁹ It hoped that the issue would be settled by the United States Supreme Court in the *Doremus* case (pending at this time).

As the highest court of our land has held the provisions of the First Amendment to the United States Constitution were made applicable to the various states by the Fourteenth Amendment its decision will be binding upon this case and the State of New Mexico. We have another case pending before us which involves only one school²⁰ . . . which will serve as a vehicle for the adoption of the correct rule when it is announced by our highest court.²¹

One can almost hear the judges sigh with relief after dodging this explosive problem.

A year later, in *Miller v. Cooper*²² (which the court was holding in abeyance while waiting for the United States Supreme Court's decision in the *Doremus* case), Judge McGhee announced the New Mexico court's unhappiness over the fact that the *Doremus* case was dismissed without a ruling on the merits.²³ Lacking the sense of direction which such a handling of the case would have given it, the New Mexico court finally ruled that baccalaureate services and commencement exercises of the public high school might legally be held in a church building.²⁴ However, on the other major issue facing it, the court ruled to enjoin public school teachers from placing religious pamphlets of a sectarian nature in the classrooms so that they might be readily available to the students. The school, the court felt, can-

not be used as a medium for the dissemination of religious pamphlets.

The Missouri court in a similar case²⁵ also stressed that merely because parents acquiesced for a long period of time to the merging of the public school with a parochial school, did not mean they waived their right to protest. "The public interest cannot be waived." The constitutional provisions guaranteeing religious liberty are mandatory and must be obeyed, the court stated.²⁶ Justice Douglas of the Missouri court expostulated: "Certainly the school board may not employ its powers to enforce religious worship by children even in the faith of their parents."²⁷

Faced by a similar series of facts, the Wisconsin court²⁸ felt that the religious exercises carried on in this hybrid-type school constituted a violation of the Wisconsin constitution's provision forbidding public support of places of worship²⁹ as well as its being sectarian instruction in the public schools.³⁰ It held, however, that a suit brought to recover from the school board the money spent to maintain such a school was not justified since the taxpayers were guilty of laches by tolerating the practice for such a long period of time.³¹ The court also felt the Board might legitimately continue to rent part of the parochial school for use as a public school, so long as the religious exercises and programs common to the former were kept completely out of the public school. The school board had the right to select the site for the public school, the court pointed out.³²

Rental of Church Property

In addition to the Wisconsin Supreme Court, the highest courts of Illinois, Indiana, Kentucky, and Connecticut approved the rental of space in buildings owned and oper-

ated by churches, so long as the board of education retained the essential element of control.³³

The Illinois court was faced by a situation where the board of education had rented the basement of a Roman Catholic church to be used as the public school.³⁴ The board hired only Roman Catholics to teach in the school, and it was alleged that the children of Catholic parents and the teachers were "regularly to attend mass in the church at 8 A.M., and from 8:30 A.M. to 9 A.M. to listen to instruction in the Catholic catechism in the school room." It was also noted that the district had voted down a proposal to bond the district to erect a new schoolhouse.

The court believed that the school board had a right to obtain a building to serve as the public school from whomever it chose, especially since no public school existed. In regard to the board's hiring of all Catholic teachers, the court said: "The school authorities may select a teacher who belongs to any church, or no church, as they may think fit." In answer to the charge that Roman Catholic children were compelled to attend church to hear mass, the court felt that since no one had charged the board of education with compelling the pupils to do this, no relief could be sought from the board. The court answered the charge that such practices constituted religious and sectarian instruction by stating:

Had the board of education required any religious doctrine to be taught in the public schools, or established any religious exercises sectarian in character, and complainant's children were required to receive such religious instruction in the school, and conform to the sectarian exercises established, he might have good ground for complaint, as our public schools are established for the purpose of education. The schools have not been established to aid any sectarian denomination, or assist in disseminating any sectarian doctrine.³⁵

A critic of the court's decision might feel that the board of education's inaction (in regard to stopping such religious exercises) constituted some form of action.

In a 1945 case involving the school board's right to choose the site for a public school, the Connecticut Supreme Court felt that this right extended to renting part of a Catholic orphanage and allowing nuns to teach in the public school, so long as the exclusive control rested with the state and the school was free from sectarian instruction.³⁶ It held that even though all the children who attended the school were Roman Catholics this fact was not determinative, since any child residing in the area might attend if he wanted. To the charge that the nuns conducted religious exercises, the court replied that it did not feel these were sectarian since they occurred before the school sessions began.

The Indiana high court stated in the Johnson case that a parochial school building which was being rented for a public school and where Catholic pictures and the holy water font were displayed in the classroom could not be considered an example of sectarian control of public schools.³⁷ Nor did it believe that the children's attending mass prior to the beginning of school constituted an example of sectarian instruction.

This case arose in the late 1930's during the latter days of the depression. Religious authorities in charge of the parochial school had previously announced they would be forced to close the school because of lack of funds. This meant that parochial students would be shifted to the public school system, which was not equipped to absorb such an influx. The school board, by renting the parochial school, was attempting to forestall a situation of overcrowding. It

is possible that the court took this extraordinary condition into consideration when confronted by this case.

WEARING OF DISTINCTIVE RELIGIOUS GARB

Another question faced by the Indiana court in the Johnson case³⁸ related to the right of public school teachers to wear distinctive religious garb. This practice has caused controversy in a number of areas in the United States. Critics of such practices maintain that religious attire, such as the raiment of a nun, has a tendency to inspire respect and sympathy for the religious denomination of which it is a symbol, and is thus a sectarian influence. Here, as in other cases dealing with potential sectarian influences, there is little agreement among the states' high courts.

Some courts upheld the teacher's right to wear religious garments, as in Indiana, North Dakota, and Connecticut.³⁹ The rationale of these courts suggests that mere style of dress is not sectarian instruction, for it is simply illustrative of a church affiliation that is well known anyway. The North Dakota court noted:

We are all agreed that the wearing of the religious habit described in the evidence here does not convert the school into a sectarian school, or create sectarian control within the purview of the constitution. . . . The laws of the state do not prescribe the fashion of dress of the teachers in our schools. Whether it is wise or unwise to regulate the style of dress to be worn by teachers in our public schools, or to inhibit the wearing of dress or insignia indicating religious belief is not a matter for the courts to determine. The limit of our inquiry is to determine whether what has been done infringes upon and violates the provisions of the constitution.⁴⁰

The Pennsylvania court, which once upheld the right of teachers to wear distinctive garb,⁴¹ later sustained a

statute preventing the wearing of any dress indicating the teacher's membership in any religious order, sect, or denomination.⁴² In the earlier case no statute covered the subject. While the court agreed that religious habit might impart to the pupils the idea of membership in a sect, it felt that the religious affiliations of the teachers were well known to the pupils even without such attire. The court noted that the legislature might prohibit the wearing of such garments, but it doubted that such action would curtail the knowledge that a teacher adhered to a specific creed.

One year later the Pennsylvania legislature enacted a statute preventing public school teachers from wearing raiments which denoted membership in any religious order or denomination.⁴³ This law was upheld by the Pennsylvania high court in *Commonwealth v. Herr*.⁴⁴ The court concluded that the prohibition was directed against the actions of a teacher while in performance of her duties, and not against her beliefs.

The courts of New York, Iowa, and New Mexico have also frowned upon public school teachers wearing religious garb.⁴⁵ These courts felt that such costumes inspired sympathy and respect for the religious denomination to which the instructor belonged. To this extent, the judges argued, this constituted sectarian influence. Oregon and Nebraska have statutes forbidding teachers to wear such attire, but they have not been tested in the courts.⁴⁶

In 1951, Wisconsin State Superintendent of Public Instruction Watson cut off state financial aid to a number of schools in the western portion of that state. Superintendent Watson felt that reflections of religious influence in these schools, such as nun teachers, crucifixes and other symbols of the Catholic faith, violated the state constitution and

statutory provisions against granting public support to sectarian instruction. As a result, a number of these schools became bona fide parochial schools.⁴⁷

The right of a public school instructor to dress himself in a garb dictated by his religious belief is not absolute. The legislatures appear to enjoy a large range of discretion, if it may be reasonably assumed that sectarian inferences may be derived from an instructor's distinctive raiment.⁴⁸

RELEASED AND DISMISSED TIME

The question of "released" and "dismissed time" religious instruction has received considerable attention in recent years because of the Supreme Court's action in the *McColum*⁴⁹ and *Zorach*⁵⁰ cases. The issue of Bible reading is not necessarily of primary importance in these cases, since the religious instruction covers a much wider field than the mere reading of the Scriptures.

Certain semantic difficulties frequently cause confusion in this problem. For our purposes, "released time" will be applied to those programs in which public school pupils are released from their regular classes to attend religious exercises conducted by representatives of the different denominations *within* the school building. This instruction takes place during periods when classes would ordinarily be in session. Those who do not want to attend are placed in a separate room where they may use the time for study.

According to President Butler of Columbia University, the cooperative practices of the public schools to aid in religious instruction had their beginnings in France after the educational reforms of 1882.⁵¹ A system of "released time" was adopted by Dr. William Wirt, Superintendent of

Schools in Gary, Indiana, in 1914.⁵² The apparent success of this program convinced educators in other parts of the country that here was an answer to the often-complained-of lack of religious and moral instruction in the public schools.

The situation in Elgin, Illinois, is illustrative of the influence of the Gary plan. In 1937, the Elgin Council of Christian Education, after surveying the potential causes for increased juvenile delinquency and other youth problems, concluded that the schools' "approach to the problem of living was hopelessly inadequate." The council believed that the breakdown of character and the failure to develop character was due to the complexity of modern civilization, the breakdown of homes, a pervasive attitude of materialism, and a generally cynical attitude toward morality. The council attributed these horrors to a lack of religious training for youths. To remedy the situation it suggested weekday religious training, to be held in the public schools.⁵³ These conclusions were submitted to the board of education in the form of a report, which said in part:

It is the opinion of the committee that religion supplies the motivating force and authority for all ethical actions. In order that character may be based upon this necessary foundation, the committee respectfully suggests that the public schools dismiss all children whose parents give consent for one hour per week for the purpose of religious instruction in their respective churches, to be taught by teachers who can meet the public school requirements. In order that the children, whose parents do not consent to their dismissal, be not deprived of all character education it is suggested that the Board of Education provide opportunity for ethical instruction during the time the children are dismissed for religious instruction.⁵⁴

These proposals were accepted by the board of education in 1938. While the committee had not been entirely clear as to where this instruction was to take place, the board decided that it should be held in public school buildings with the possible exception of churches with parochial schools.⁵⁵ It should be noted that this program was inaugurated prior to the McCollum case and would now be illegal, since it is clearly within the scope of that case.

While many schools adopted the Gary plan, some made a significant alteration in the basic design: religious instruction was to be held outside the public school, with pupils dismissed from their regular classes to attend. Those who did not were required to remain in school and continue with their studies. This is the type of program generally called "dismissed time."

The educators who adopted it felt there would be fewer objections to this plan than to one of "released time," since no charge could be made that public property was being used for sectarian or religious purposes. In a number of states, however, high school credit is given for programs such as this, where responsible groups report that high school students have completed satisfactory courses of Bible study. In 1927, twenty-five of the forty-eight states, including New York and Illinois, granted credit for such programs.⁵⁶ (The Ring case, as has been noted, held Bible reading in the public schools of Illinois to be illegal.) Dr. Stokes points out that this number has increased in recent years, until interfered with by the McCollum case. The *Zorach* case, however, made it clear that religious instruction outside of public school buildings was not covered by the McCollum

case decision, and is legal. It is important to remember that the McCollum case dealt with "released time" instruction, while the Zorach case involved "dismissed time."

The McCollum Case

The McCollum case, by outlawing "released time" programs, caused a great deal of debate and has become one of the most controversial decisions in years. Mrs. Vashti McCollum, the wife of a University of Illinois professor, who was a "rationalist," objected to the "released time" program in the Champaign, Illinois, public schools. The program, suggested by a voluntary association of Roman Catholics, Jews, and Protestants, provided that the classes were to be composed of students whose parents had signed printed cards requesting that their children be permitted to attend. Classes were to be held weekly and were to last thirty minutes for the lower grades and forty-five minutes for the higher grades. The instruction was given in the public school buildings, but the instructors were employed at no expense to the school board, although they were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate groups by Catholic priests, a Jewish Rabbi, and Protestant teachers. Those pupils who did not attend were required to go to some other part of the school building and continue their secular studies.⁵⁷

Mrs. McCollum's son attended a Champaign public school. She brought a mandamus suit as a parent and taxpayer in the Circuit Court of Champaign County. She alleged that this "released time" program constituted a use of public funds for sectarian purposes contrary to the Constitution of Illinois and the state's school code. She con-

tended that the plan denied the equal protection of the laws, and more important, by segregating public school pupils into sectarian groups for religious instruction, it violated federal and state guarantees of the freedom of religion. She was supported in her suit by the Chicago Civil Liberties Committee and other groups opposed to "released time."⁵⁸

The circuit court denied the writ of mandamus and stated:

. . . So far as federal constitutional provisions are concerned, and conceding that they are binding upon the State of Illinois, and upon the defendant school board, there is nothing in any expression of the Federal Supreme Court that remotely indicates that there is any constitutional objection to the Champaign plan of religious education.⁵⁹

The Illinois Supreme Court unanimously affirmed the holding of the lower court.⁶⁰ It distinguished the Ring case, which outlawed Bible reading, by stating that released time was voluntary, that it was not part of the public school program, and that it caused no additional expense to the school board since the religious organizations bore all expenses. Any incidental expenses, the court believed, were *de minimis*. Finally, it maintained, the rule of the Latimer case⁶¹ which upheld a "dismissed time" plan in Chicago, governed the Champaign plan also. Judge Thompson stated:

Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals. . . . To deny the existence of religious motivation is to deny the inspiration and authority of the Constitution itself.⁶²

When this case came to the United States Supreme Court, Mrs. McCollum had picked up support from various church and public-service groups. Of special interest is the

brief filed by the American Civil Liberties Union. It pointed out that while the church, sectarian schools, and the home are all proper places for religious instruction, this was not the case with the public school. It explained the confusion and dangers which would result if such programs were tolerated.

[The schools] would be flooded with sectarian publications, crowded with religious teachers, many in clerical garbs. Pupils would be classified and segregated according to their diverse beliefs or lack of beliefs. There would not be enough room to hold all of the classes. The public school system for all practical purposes would cease to exist and its ideal of secular education would be a mockery [R]eligion is not a civil function or a public matter. An education which includes religious teaching is a private matter and function An approval of the Champaign plan would seriously interfere with the general welfare and the tranquility of the whole country [The] public ideal of the secular education and the inspired concept of separation of Church from State should not be tarnished by compromise. They invade the religious rights of no one. They assure freedom for all.⁶³

The Supreme Court by an eight to one vote, Justice Reed dissenting, reversed the state court. The court, speaking through Justice Black, held that this program constituted the "use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious instruction." Using the *dicta* of the *Everson* case, Justice Black rejected the argument that historically the First Amendment was intended to forbid only governmental preference of one religion over another and not impartial governmental assistance to all religions. He explained that all of the justices in the *Everson* case agreed that the "First Amendment has erected a wall between church and state

which must be high and impregnable." He went on to say, "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Justice Black concluded:

[Punctuation *sic*] Here not only are the state's tax supported public school buildings used for the dissemination of religious doctrines. The state also affords sectarian groups an invaluable aid in that it helps to provide pupils for the religious classes through use of the state's compulsory public school machinery. This is not separation of church and state.⁶⁴

In a concurring opinion written by Justice Frankfurter, with whom Justices Rutledge, Jackson, and Burton agreed, Frankfurter sought to prove that the constitution forbids "the co-mingling of sectarian instruction with the secular instruction in the public schools."⁶⁵ He agreed that many of the earliest Colonial schools devoted considerable time to religious instruction. He went on to show that following the theories of men like Madison and Horace Mann, who felt it was necessary to keep sectarianism out of the public schools, state after state had disassociated religion from the public schools. He explained:

The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom.⁶⁶

This happened before the adoption of the Fourteenth Amendment, which in this respect, "merely reflected a principle then dominant in our national life."⁶⁷

An important feature about this opinion is the unwillingness of these four justices to sweepingly declare illegal all forms and varieties of religious programs similar in any

way to the Champaign plan. Frankfurter made it fairly clear that the court was dealing with one plan of "released time," and left the door open for a different decision regarding "dismissed time." He noted:

We do not consider as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, would not withstand the test of the constitution; others may be found unexceptional.⁶⁸

Justice Jackson's concurring opinion expressed doubts whether the facts of the case authorized the court to take jurisdiction. He could not see that anyone's freedom was endangered by the Champaign plan, for he doubted that the constitution protected anyone, "from the embarrassment that always attends non-conformity, whether in religion, politics, behavior, or dress." Justice Jackson did not believe a claim to the deprivation of property could be sustained, since, "any cost of this plan to the taxpayers is incalculable and negligible." He also questioned the advisability and possibility of excluding all potential religious instruction from the public schools. He explained:

Perhaps subjects such as mathematics, physics, and chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid the exposure of youth to any religious influences.

Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete even from a secular point of view.⁶⁹

Finally, Justice Jackson felt that the order granting mandamus was too far-reaching in its terms. About the only

thing upon which Jackson agreed with the majority seemed to be the final decision. By what logical method he arrived at this conclusion is an interesting matter for speculation.

Justice Reed dissented alone, and pointed out the many instances of cooperation between church and state in American society, such as the compulsory chapel services at West Point and Annapolis. Reed had difficulty determining from the opinions of Black, Frankfurter, and Jackson exactly what was unconstitutional about the Champaign plan. He found it difficult to believe that the constitution prohibited religious instruction in the public school during regular school hours. He commented:

. . . The prohibition of enactments respecting the establishment of religion does not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together any more than other provisions of the First Amendment — free speech, free press — are absolutes A state is entitled to great leeway in its legislation when dealing with important social problems of its population The constitution should not be stretched to forbid national customs in the way courts act to reach arrangements to avoid federal taxation. Devotion to the great principles of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people.⁷⁰

The McCollum decision was a great disappointment to some religious groups. The Roman Catholics were especially up in arms about it. The National Catholic Welfare Council bitterly denounced it as an "entirely novel" interpretation of the First Amendment, as well as being a victory for "doctrinaire secularism."⁷¹ This approach was enlarged upon by James O'Neill, a Catholic layman, who modestly attacked the Supreme Court Justices' literary, logical, and legal abilities.⁷² A somewhat more restrained

view was taken by the Liberal Catholic weekly, *Commonweal*.⁷³ Stokes points out that while Protestant Evangelicals were disappointed by the results, it was praised by "most Jewish agencies, by the *Christian Century*, by Unitarians and more liberal Christian groups, and even by many Baptists who saw its importance from the standpoint of Church-State separation."⁷⁴ While he also feels that this decision of the court was expected by many constitutional lawyers, it should be pointed out that a number of well-known men in this field disagreed quite vehemently with the decision.⁷⁵

Dismissed Time

The decision in the *McCullum* case leaves little doubt that "released time" programs are unconstitutional in the United States. The question of "dismissed time" was logically the next thing to be decided. Since programs of "dismissed time" are, if anything, more common than "released time," a Supreme Court ruling on this point would be more far-reaching than the *McCullum* decision.⁷⁶ Several things that might have had a bearing on the court's opinion of "dismissed time" should be kept in mind. One is the suggestion of Frankfurter in the *McCullum* case that the rule of that case applied only to the specific type of program common in that school system. The door was thus left open to reach a different conclusion on "dismissed time." Another is that a rash of criticism resulting from the *McCullum* case flooded legal journals, newspapers, and religious periodicals. The influence of these attacks, while unreckonable, cannot be ignored in attempting to analyze the decision in the *Zorach* case.

The courts of several states had been confronted with the specific problem of "dismissed time" in the years just preceding the *Zorach* case. The New York Court of Ap-

peals in 1927 ruled that a "dismissed time" program in the White Plains school system did not violate the state Education Law or constitution.⁷⁷ The New York Supreme Court took the same view of a similar program in the New York City Schools in 1948.⁷⁸ The court emphasized that the McCollum decision applied only to a system of "released time" and had no bearing on "dismissed time" programs. The Illinois court in 1946 was unanimous in upholding a program of "dismissed time" which had existed for sixteen years in the Chicago school system.⁷⁹ In 1947, the California Court of Appeals for the Second District sustained a "dismissed time" program. It held that among other things religious education such as this would cut down juvenile delinquency by stressing moral integrity.⁸⁰

The Zorach Case

On July 28, 1948, the New York City "dismissed time" program was again challenged in the Zorach-Gluck suit. Their petition, filed in the Supreme Court of New York, County of Kings, alleged:

- (a) that the public school authorities cooperate closely with the Greater New York Coordinating Committee on the Released Time in the management of a program in promoting religious instruction;
- (b) that the administration of the program necessarily entails the use of the tax-supported public school system (use of public property);
- (c) that the state compulsory attendance laws are employed coercively to insure attendance at religious instruction;
- (d) that the released time⁸¹ program has resulted in the accentuation of differences in religious beliefs in both classrooms and community;
- (e) that the limiting of participation to the "duly constituted religious bodies" effects an unlawful censorship and preference favoring certain religious groups.⁸²

After a period of legal fencing,⁸³ the case came before the New York Court of Appeals. The court sustained Section 3210 of the New York Education Law permitting "dismissed time" over the contention that this violated the Fourteenth Amendment of the United States Constitution and Art. I, Sec. 3 of the New York constitution.⁸⁴ Judge Froessel, speaking for the majority, distinguished the rule of the *McCollum* case since it applied only to "released time," while the issue at stake in New York concerned "dismissed time" programs.

The New York Education Law permits its public schools to release students during school hours, on written requests of their parents, so that they may leave the school building and grounds and go to religious centers for devotional purposes or religious instruction. Students who do not attend these exercises stay in their classrooms and the church reports those pupils who leave the school, but do not attend the exercises.⁸⁵ The New York program, the court felt, did not involve religious instruction in the public schools or the use of public money. These were the major bones of contention in the *McCollum* case. There was no supervision or approval of religious teachers and no solicitation of pupils or distribution of cards by public school personnel. "All that the school does besides excuse the pupil is to keep a record — which is not available for any other purpose — in order to see that the excuses are not taken advantage of and the school deceived. . . ."⁸⁶

The New York Court cited Justice Frankfurter's concurring opinion in the *McCollum* case to support the view that the rule referred only to "released time" programs of the same type as that of Champaign, Illinois. It explained, "the constitution does not demand every friendly gesture

between church and state shall be discountenanced.”⁸⁷ The court pointed out that parents have the right to educate their children in places other than public schools so long as state requirements are met. Thus, if parents wish to have their children educated in the public schools, but to withdraw them from the schools once a week for religious instruction, “the school may constitutionally accede to this parental request.”⁸⁸ It was suggested that some of the teachers may have used undue pressure upon the students to take part in this program. The court explained that if such were the case, disciplinary action might surely be brought against such offenders, but this would in no way invalidate the statute.

Judge Desmond, in a concurring opinion, agreed that the *McCollum* case was not controlling. It was, rather, the New York Court’s rule in the *Lewis* case,⁸⁹ which must be followed. Furthermore, he did not see how the release of other parent’s children impinged in any way on any “right” of the petitioners. Desmond pointed out that the statute in question was defended by the then-Governor Lehman, whose devotion to constitutional liberties needs no “encomium.”⁹⁰ He denied that any total separation of church and state has ever existed in the United States.

The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the state-mandated minimum of secular learning and the right of parents to raise and instruct their children in any religion chosen by the parents.⁹¹

He disagreed with Chief Justice Fred Vinson, when he said in the *Dennis* case,⁹² “there are no absolutes” and “all concepts are relative.” Desmond went out on a limb and stated “freedom of religion is a right which is absolute and not subject to any governmental interference whatever.”⁹³

Judge Fuld dissented alone. He followed Justice Black's opinion in the *McCollum* case. He concluded that the rule of the court stated, "*That any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban.*"⁹⁴ He felt that the state offered sectarian groups an invaluable aid through the use of the state's compulsory public school machinery, thus violating the principle of church-state separation. The social pressures exerted within a school using a "dismissed time" program are enough to force otherwise reluctant students to take part in such a program. He explained that the major objections to the Champaign plan as well as the New York plan are the "utilization by state authority of the 'momentum of the whole school atmosphere and school planning' behind released time."⁹⁵ If this were not the case, the school authorities and religious groups might adopt the French system where one school day is shortened to allow all children to go where they please.

This case came on appeal to the Supreme Court of the United States.⁹⁶ On April 28, 1952, the court in a six to three decision (Black, Frankfurter, and Jackson dissenting) affirmed the decision of the highest New York court. Justice Douglas, speaking for the majority, ruled that New York's "dismissed time" program had neither prohibited the free exercise of religion nor made a law "respecting an establishment of religion within the meaning of the First Amendment, as applied to the states by the Fourteenth." The court felt, "It takes obtuse reasoning to inject any issue of 'free exercise' of religion into the present case."⁹⁷ It went on to explain the "First Amendment does not say that in every and all respects there shall be a separation of Church and State." If complete separation existed, churches could not be re-

quired to pay property taxes, nor could police and fire protection be given by the municipality to churches.⁹⁸ To show the dangerous extremes to which this logic might be extended, Justice Douglas noted: "A fastidious atheist or agnostic could even object to the supplication with which the court opens each session, 'God save the United States and this Honorable Court.'"⁹⁹

Furthermore, Douglas believed, "we are a religious people whose institutions presuppose a Supreme Being." But we are also a people tolerant of the religion of others. The government may show no partiality to any sect. However, "when the state encourages religious instruction or cooperation with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."¹⁰⁰ (It is difficult to imagine that these sentiments emanate from essentially the same court which decided the *McCullum* case).

The court felt that while the First Amendment forbade government financing of religious groups and undertaking of religious instructions, the First Amendment did not require governmental hostility to religion. Finally, when dealing with the allegation that coercion was used to get public school students into religious classrooms, the court held that there was no evidence existing to support the contention. It noted, however, that if such evidence of coercion existed, a wholly different case would be presented.¹⁰¹

In his dissenting opinion, Justice Black could see no significant difference between the illegal system which existed in Champaign, Illinois, and the New York system, held legal by the court in this case. He thought the *McCullum* case made it clear that the decision would have been the same even if the religious classes were not held in the public

school building.¹⁰² He also took note of the attacks on the court which resulted from its decision in the *McCullum* case. This may have been directed at his more sensitive and thin-skinned colleagues who, he may have felt, back-tracked on their stated principles in the *McCullum* case. He agreed with Douglas that Americans are "a religious people," but pointed out that it was for the very reason that "Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate." He pointed out the danger of government-coerced religious orthodoxy which seems inherent in the "dismissed time" program and concluded: "The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal protection under the law."¹⁰³

Justice Frankfurter in his dissent agreed with Justice Jackson, but declined to "add a few words." These relate to the intrinsic coerciveness of any "dismissed time" program. He agreed with the majority that the school might close its doors when it wished to allow its pupils to attend religious instruction. The point he objected to was that the school did not close its doors or suspend operations.

There is all the difference in the world between letting the children out of school and letting some out of school into religious classes. . . . The pith of the case is that formalized religious instruction is substituted for other school activities which those who do not participate in the released time program are compelled to attend.¹⁰⁴

It appears to this writer that this is the controlling element in the *Zorach* case. It is one which the majority studiously side-stepped. Finally, Frankfurter was critical of the majority

for its admission that if evidence of coercion existed, an entirely different case would be presented. He explained:

The court disregards the fact that as the case comes to us, there could be no proof of coercion, for the appellants were not allowed (by the New York court) to make proof of it. . . . When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established.¹⁰⁵

Justice Jackson also reiterated the indirect but extremely important aid given to religious denominations under a program of "dismissed time." He pointed out that the greater effectiveness of this system over a strictly voluntary program of religious instruction which takes place after school hours "is due to the truant officer who, if the youngster fails to go to the church school, dogs him back to the public school room." Thus the school "serves as a temporary jail for a pupil who will not go to church." Jackson felt that indirect actions violating the First Amendment are just as unconstitutional as direct actions. As an individual who sent his children to a private church school, Jackson took issue with the majority opinion for suggesting that the only opposition to such programs comes from anti-religious or atheistic groups. He explained, "It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not necessarily need to be decided and collected by Caesar." He concluded with a thought which might well be worth remembering. "The day that this country ceases to be free for irreligion, it will cease to be free for religion — except for the sect that can win political power."¹⁰⁶

The fundamental question which arises from all of this relates to the legal status of "dismissed time" and "released time" programs. One would have to be recklessly rash or a

superior soothsayer to answer this with complete certainty. The most that can be said is that the McCollum case appears to outlaw programs of "released time" while the Zorach rule upholds the rights of communities to have "dismissed time" programs of religious instruction for their public schools. Thus, the First and Fourteenth Amendments are violated if the public schools release students from classes to attend religious exercises in the public school buildings; but it is legal for the schools to dismiss their charges from classes to attend religious instruction outside of the public school physical plant.

CLASSROOM PRAYER

The Engel Case

On June 25, 1962, the Supreme Court of the United States handed down a decision of monumental importance concerning the role of religion in the public schools. In *Engel v. Vitale*¹⁰⁷ the court by a six-to-one vote struck down a state-sponsored optional program of a nondenominational prayer in the public schools of the state of New York.

The facts in the case can be briefly summarized. Acting upon a recommendation of the New York State Board of Regents, the Board of Education of New Hyde Park, New York, directed the School District's principal to cause the teachers to open each school day with the following prayer:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.

This prayer resulted from months of laborious discussion on the part of representatives of most of the religious denominations in New York, who, at the behest of the State

Board of Regents, sought to devise a nondenominational prayer acceptable to all groups.¹⁰⁸ While not all of the denominations originally involved with fashioning an acceptable nondenominational plan approved of the prayer under attack in this case, the New York Board of Regents recommended and published it as a part of their "Statement on Moral and Spiritual Training in the Schools." The Regents commented: "We believe that this statement will be subscribed to by all men and women of good will and we call upon all of them to aid in giving life to our program."

Soon after the practice of reciting the Regents' prayer was adopted by the New Hyde Park School District, the parents of ten pupils brought action in a New York court alleging that the use of this prayer in the public schools was contrary to the beliefs and religious practices of both themselves and their children.¹⁰⁹ They challenged the constitutionality of both the state law and the School District's regulation ordering the recitation of the prayer on the grounds that this official governmental action violated the First Amendment of the United States Constitution which provides that "Congress shall make no law respecting an establishment of religion."

This provision of the First Amendment was made applicable to the state of New York and all other states by the "incorporation doctrine" of the Fourteenth Amendment, first announced in 1925 in *Gitlow v. New York*¹¹⁰ and applied to the "establishment of religion" clause of the First Amendment in the *McCullum* case in 1948. The "incorporation doctrine," as devised by the Supreme Court, provides that those rights of the Bill of Rights necessary for an ordered freedom are incorporated into the clause of the Fourteenth Amendment which stipulates that no state shall "deprive

any person of life, liberty or property without due process of law." Thus the provision of the First Amendment applies to both the national and state governments.

The trial court rejected these allegations and upheld the constitutionality of the state-sponsored programs of prayer. The trial court made clear, however, that the Board of Education must set up procedures to protect those who objected to reciting the prayer. The New York court looked with favor upon that portion of the Regents' regulation making it clear that neither teachers nor any other school authority could comment on the participation or nonparticipation of pupils in the exercise. Nor could the school officials suggest or require that any posture or language be used, or dress be worn. The court held that provisions must be made for those not participating in such programs, and while suggesting several different approaches, left the final determination of the methods to be followed up to the Board of Regents.

The New York Court of Appeals, over the vigorous dissents of Judges Dye and Fuld, sustained an order of the trial court upholding the power of New York to use the Regents' prayer in the public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection.¹¹¹

The case came to the Supreme Court of the United States and Justice Hugo L. Black spoke for the majority in overruling the decision of the New York State Court.

From the outset of his discussion in the case, Justice Black left no doubt that the court agreed the "State of New York has adopted a practice wholly inconsistent with the Establishment Clause," of the First Amendment. The program of prayer is a "religious activity" and a "solemn avowal of divine faith and supplication for the blessing of the

Almighty." By its very nature, such prayer is religious and this fact was not denied by any of the respondents, the court noted.

The court agreed with petitioner's contention that the law permitting the Regents' prayer is unconstitutional because the prayer itself was composed by governmental officials and was part of a governmental program to further religious beliefs. The constitutional prohibition against the establishment of religion, the court stated emphatically, must at least mean that in this country, "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."¹¹²

Justice Black then traced the long and bitter religious and political struggle in England associated with the adoption of the *Book of Common Prayer* in 1548 and 1549, and concluded that it was because of this controversy that many early colonists left England for America. He recognized, however, that once most of these groups arrived in the New World they enacted laws establishing their own religion as the religion of their colony. It was only after the Revolutionary War that successful attacks were made on the practice of state-established churches by such men as Thomas Jefferson and James Madison, the author of the First Amendment. At the time of the adoption of the Constitution, the court felt, there was a widespread awareness among Americans of the dangers of a union of church and state. Americans of that day "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval."¹¹³ The Constitution, the court pointed out, was adopted with the intention of averting part of this danger

by placing the government in the hands of the people rather than in the hands of a monarch. But realizing that this was not a sufficient safeguard, the founding fathers added the First Amendment to insure that the content of their prayers and the privilege of praying whenever they wanted was not left to the whims of the ballot box. The First Amendment, the court explained, was designed to stand as a guarantee that, "the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office."

The court had no doubt that the New York State prayer program establishes the religious beliefs embodied in the Regents' prayer. Moreover, it rejected the argument that the practice should be upheld on the grounds that all pupils were not required to recite the prayer, but those who wished were permitted to remain silent or to leave the room. Such an argument "ignores the essential nature of the program's constitutional defects."

In discussing the difference between the Establishment Clause and the Free Exercise Clause of the First Amendment, the court noted that while the two might overlap in certain instances, they forbid two quite different kinds of governmental encroachment upon religious freedom. Then, getting to the crux of the entire issue as the court majority saw it, Justice Black said: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."¹⁴

Clearly observing a practical problem arising from a pro-

gram such as the one complained of, the court went on to explain that when the prestige, power, and financial support of government is placed behind a particular religious belief, "the *indirect* coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."¹¹⁵

Discussing the purposes underlying the Establishment Clause, the court found the first and most immediate purpose rested on the belief, "that a union of government and religion tends to destroy government and to degrade religion." Thus, the court explained (quoting from James Madison), this clause lives as an expression of principle on the part of the Founders of the Constitution that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

Another purpose behind the Establishment Clause, as the court saw it, rested on the awareness of the facts of history which show that governmentally established religions and religious persecution go hand in hand.

The court flatly rejected the argument that if it applied the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools, such action would be commonly regarded as indicating a hostility toward religion or toward prayer. "Nothing . . . could be more wrong," the court insisted, for the "history of man is inseparable from the history of religion."¹¹⁶ Nor were the men who drafted the Bill of Rights hostile to religion or prayer. The founders drafted the First Amendment, the court pointed out, "to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to

make them speak only the religious thoughts that government wanted them to speak, and to pray only to the God that government wanted them to pray to."¹¹⁷

It is neither sacrilegious nor antireligious, the court commented, to say that all government should "stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves or those the people choose to look to for religious guidance." In a footnote, however, the court made it clear that nothing in this decision should be construed as discouraging school children and others from reciting historical documents such as the Declaration of Independence, containing references to the Deity or singing "officially espoused anthems" which contain the composer's profession of faith in a Supreme Being. "Such patriotic or ceremonial occasions," the court insisted, "bear no true resemblance to the unquestioned religious exercise that the state of New York has sponsored in this instance."¹¹⁸

The majority opinion closed by refuting the argument of those who contend that since the Regents' official prayer is so brief and general there could be no danger to religious freedom in its governmental establishment. The court felt that James Madison, the author of the First Amendment, aptly came to grips with this viewpoint when he wrote:

[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?¹¹⁹

Justices Frankfurter and White took no part in the decision of this case.

The majority opinion seemed to rest primarily on the general base that an official government enactment requiring or permitting a specific religious practice violates the Establishment Clause. It suggested that government on any level in the United States has no business legislating on matters of religion. It is immaterial whether or not such governmental programs require an expenditure of public funds even to a minute extent.

Justice Douglas Concurring

In a concurring opinion, however, Justice William O. Douglas, while of course agreeing with the final action of the majority, tended to center his objections on his disapproval of the program for utilizing public funds. At the outset he explained, "The point for decision is whether the government can constitutionally finance a religion." He went on to point out that our government on all levels is "honeycombed with such financing." Nonetheless, Justice Douglas insisted, "I think it is an unconstitutional undertaking whatever form it takes."¹²⁰

He went on to point out certain things that the case does not involve, such as the coercing of anyone to utter the prayer on pain of penalty. This would clearly violate the Bill of Rights. The only person compelled to utter the prayer is the teacher, and Justice Douglas observed that no teacher was complaining in this case.

Moreover, Douglas insisted that the doctrine of the *McCullum* case¹²¹ must be distinguished from the case under consideration. The former differed from the present case

since in the latter, the teaching staff made no attempt to indoctrinate pupils and there was no attempt at exposition. The New York prayer, as Justice Douglas saw it, "does not involve any element of proselytizing as did the *McCormack* case."

Then he returned to his theme that the court here was confronted with the narrow issue of whether New York oversteps constitutionality when it finances a religious exercise. After all, Justice Douglas explained, "what New York does on the opening of its public schools is what we do when we open court." The Marshall of the United States Supreme Court traditionally announces the convening of the court by saying, "God save the United States and this honorable court." Since this may be regarded as a supplication or prayer, Douglas noted that the Justices are in the same position as the public school pupils of New York. They may join in or refrain from participating.

Furthermore, the New York program under attack is similar to the manner in which Congress opens each day's business, Justice Douglas believed, since the official chaplains of each house ask for divine guidance for the congressmen.

These situations have one thing in common, Justice Douglas felt. The New York teachers, the Marshall of the Supreme Court, and the Chaplains of the House and Senate are on the public payroll. And while the amounts of public money involved in such programs are minuscule, each situation involves a public official on a public payroll performing a religious exercise in a governmental institution. Moreover, Douglas saw a subtle element of coercion in all of the exercises since "Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given. Every such audience is in a sense a 'captive' audience."

Having reached this juncture, Justice Douglas rather paradoxically observed: "At the same time I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of the words." But, he went on, getting to what he appears to consider the crucial element in determining his decision, "once government finances a religious exercise it inserts a divisive influence into our communities."¹²²

Quoting his words in the *Zorach* case¹²³ Justice Douglas again acknowledged that "We are a religious people whose institutions presuppose a Supreme Being." But he went on to point out that "if a religious haven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government."¹²⁴ There are those who may see some inconsistency between the attitudes expressed by Justice Douglas in the *Zorach* case when compared to those expressed in the situation here.

The First Amendment, Justice Douglas emphasized, leaves government in a position of neutrality and not of hostility to religion. It teaches that government neutrality toward religion better serves all religious interests.

Then in a highly interesting and significant passage Justice Douglas commented:

My problem today would be uncomplicated but for *Everson v. Board of Education*¹²⁵ . . . which allowed taxpayers' money to be used to pay 'the bus fares of parochial school pupils'. . . . The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools — lunches, books, and tuition being obvious examples.

He concluded by quoting Justice Rutledge's dissent in the *Everson* case which calls attention to the fact that the underlying principle of religious liberty is that it be maintained

free from sustenance, and other interferences by the state. Public money assisting religious activities causes a struggle of sect against sect which can result only in the destruction of cherished freedoms. The end product of such a struggle will be that the dominant group in a society will achieve the dominant benefits, in the opinion of the late Justice Rutledge and concurred in here by Justice Douglas.¹²⁶

The Douglas concurrence raises some interesting avenues of speculation. On the one hand, in centering his objections to the constitutionality of programs of this type primarily upon the use of public monies for their support, his basis of decision appears much narrower than the decisional base of the majority. The latter appears convinced that any legislative action or administrative order or rule establishing an official religion, constitutes a violation of the Establishment Clause whether it operates directly to coerce nonobserving individuals or not. Moreover, the majority opinion suggests that the Establishment of Religion Clause is violated not only if the financial support of government is placed behind particular religious beliefs, but also if governmental *power* and *prestige* are used in such a fashion.

While moving from a narrower base, however, Justice Douglas steps out considerably further in some respects in his opinion than does the majority. Reversing his opinion in the *Everson* case in which he voted to uphold the constitutionality of state programs permitting the use of public funds for the payment of transportation of pupils to parochial schools, he now sees the *Everson* case "out of line with the First Amendment."

If Justice Black, who authored the majority opinion in both the *Everson* case and the present case agreed on this

subject, he certainly did not deem it necessary to comment on his change of viewpoint. Indeed, this may be the primary reason behind Justice Douglas' separate concurring opinion, i.e., to spotlight this substantive disagreement over the extension of the Engel doctrine to areas other than state-sponsored programs of public prayer.

Furthermore, the Douglas opinion may serve as an inducement for further attempts to challenge programs of state support of bus transportation to parochial schools, since Justice Black is the only member of the court originally hearing the *Everson* appeal still on the bench who has not disavowed the *Everson* decision. In the original case, the decision was narrowly arrived at by a five-to-four vote with Justices Frankfurter, Rutledge, Jackson, and Minton dissenting. The composition of today's court has so changed that it would be idle to speculate on the outcome if it should be faced with a second *Everson* case.

Justice Stewart Dissenting

The sole dissenter in the *Engel* case was Justice Potter Stewart. He pointed out that the court did not hold here, nor could it, that the New York practice interfered with the free exercise of anyone's religion since this was not a compulsory program. He was of the opinion that the court had misapplied a great constitutional principle, for he could not understand how an "official religion" is established by "letting those who want to say a prayer say it."¹²⁷

To deny the wishes of the pupils who want to pray is denying them the opportunity of "sharing in the spiritual heritage of our nation," Justice Stewart believed. Moreover, he insisted that what is dealt with here is not the establish-

ment of a state church, but whether public school pupils who want to begin their day by joining in prayer are prohibited from doing so. There are those who might counter this point by noting that the majority opinion would not prevent the students from such a practice if they entered into it voluntarily. What the majority opinion attacks is a governmental regulation establishing such a program, albeit on a voluntary basis.

Justice Stewart was critical of the use of such "metaphors," as the "wall of separation," a phrase that does not appear in the Constitution. And he rejected the majority's heavy reliance upon the history of religious controversies in England under an established church. He would prefer to study instead the religious traditions of our people, "reflected in countless practices of the institutions and officials of our government."

He too observed that the Supreme Court is opened each day of the session with an invocation calling for the protection of God, and called attention to the opening prayers for the daily sessions of Congress. Moreover, he observed that every President from George Washington to the present has asked the help and protection of God upon assuming office.

Justice Stewart also pointed out that the third stanza of "The Star-Spangled Banner," which was officially adopted as our National Anthem by an Act of Congress in 1931, contains the statement, "And this be our motto 'In God is our Trust.'" Furthermore, he noted that in 1954, Congress added to the Pledge of Allegiance the phrase, "one nation *under God*." And that in 1952, legislation enacted by Congress called upon the President to proclaim each year a National Day of Prayer.¹²⁸

He challenged Justice Douglas' statement that the only question before the court was whether government "can constitutionally finance a religious exercise," by pointing out that the official chaplains of Congress and in the military are paid with public money. And prison chaplains in both federal and state prisons also receive their pay from the public treasury.¹²⁹

He concluded by expressing doubt that any such practices or the prayer program in New York establishes an official religion. What they do, he explained, is to "recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our nation — traditions which come down to us from those who almost two hundred years ago avowed in the Declaration of Independence their 'firm reliance on the protection of divine providence' when they proclaimed the freedom and independence of this brave new world."¹³⁰

Whether one agrees or disagrees with the outcome of this case, it seems clear that the court in this decision did a commendable thing in taking a positive, significant step toward clarifying the meaning of the Establishment Clause of the First Amendment. The newspaper editorial comment that followed the decision tended to favor the court's position; the *New York Times* and the *New York Herald Tribune* among them.¹³¹

Some important churchmen were critical of the decision — including Cardinal Spellman of New York, Cardinal McIntyre of Los Angeles, and the Right Reverend James A. Pike, Bishop of the Episcopal Diocese of California.

On the other hand, the New York Board of Rabbis, and Dr. Dana McLean Greeley, president of the Unitarian Universalist Association, praised the ruling.¹³² The New

York Board of Rabbis, representing the Orthodox, Conservative, and Reform rabbinate of Greater New York, said, in part, "The recitation of prayers in the public schools, which is tantamount to the teaching of prayer, is not in conformity with the spirit of the American concept of the separation of church and state. All the religious groups in this country will best advance their respective faiths by adherence to this principle."¹³³

Bishop Pike was quoted by the *New York Times* as saying, "I am surprised that the Court has extended to an obviously nonsectarian prayer the prohibition against the 'establishment of religion' which was clearly intended by our forefathers to bar official status to any particular denomination or sect."¹³⁴

In the 1962 session of Congress, some sentiment was discernible toward initiating a constitutional amendment to permit governmental agencies to authorize practices of this nature. It seems fair to predict that this issue will remain prominent on the American scene for years to come.

COMMENT BY JUSTICE BRENNAN CONCERNING RELIGIOUS EDUCATION

It is interesting to note here the portion of Justice Brennan's concurring opinion in the *Schempp* and *Murray* cases in 1964 relative to the United States Supreme Court's past rulings in such cases as *Everson*, *McCullum*, and *Zorach*.¹³⁵

Justice Brennan noted that the court in past decisions had consistently recognized that the Establishment Clause embodied the framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other.

It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.

Justice Brennan explained,

' . . . our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams. . . . ' Our decisions on questions of religious education or exercises in the public schools have consistently reflected this dual aspect of the Establishment Clause. *Engel v. Vitale* unmistakably has its roots in three earlier cases which, on cognate issues, shaped the contours of the Establishment Clause. First, in *Everson* the Court held that reimbursement by the town of parents for the cost of transporting their children by public carrier to parochial (as well as public and private nonsectarian) schools did not offend the Establishment Clause. Such reimbursement, by easing the financial burden upon Catholic parents, may indirectly have fostered the operation of the Catholic schools, and may thereby indirectly have facilitated the teaching of Catholic principles, thus serving ultimately a religious goal. But this form of governmental assistance was difficult to distinguish from myriad other incidental if not insignificant government benefits enjoyed by religious institutions — fire and police protection, tax exemptions, and the pavement of streets and sidewalks, for example.

"But," Brennan was quick to explain,

even this form of assistance was thought by four Justices of the *Everson* Court to be barred by the Establishment Clause because [it was] too perilously close to that public support of religion forbidden by the First Amendment.

The *McCullum* case and the *Zorach* case, Brennan felt, must be considered together. So far as these two cases are concerned, Brennan stated,

I reject the suggestion that *Zorach* overruled *McCollum* in silence. The distinctions which the Court drew in *Zorach* between the two cases is in my view faithful to the function of the Establishment Clause. . . . However, . . . *McCollum* and *Zorach* do not seem to me distinguishable in terms of the free exercise claims advanced in both cases. The nonparticipant in the *McCollum* program was given secular instruction in a separate room during the times his classmates had religious lessons, the nonparticipant in any *Zorach* program also received secular instruction, while his classmates repaired to a place outside the school for religious instruction.

The crucial difference, in Brennan's opinion, was that the *McCollum* program offended the Establishment Clause while the *Zorach* program did not. This was not, he said, because of the difference in public expenditures involved. The *McCollum* program involved the regular use of school facilities while, under the *Zorach* program, the religious instruction was carried on entirely off the school premises, and the teacher's part was simply to facilitate the children's release to the churches. "The deeper difference," Brennan emphasized, "was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not."

Brennan summed up the differences as follows,

The *McCollum* program, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids. To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

MISCELLANY

Finally, a number of miscellaneous cases not readily categorized, should be noted here.

A New York court held in 1926 that the provisions of a private school's contract which required students to attend Sunday services in Christian churches was a violation of a Jewish student's constitutional right to freedom of conscience.¹³⁶ The New York court relied heavily upon the Ohio Supreme Court's decision in the *Minor* case,¹³⁷ and went on to explain:¹³⁸

This republic was founded by our forefathers, not to escape the injustices of political aggression, but to seek freedom in a region where every man could worship God according to his own conscience. . . . It was for this that they braved the savage wilderness. . . .¹³⁹ It is plain to me that the strenuous effort of the plaintiff to compel the defendant's son, a boy of Jewish faith, to attend the church services of various Christian churches in the village of Germantown, against his will, and in opposition to his religious faith and convictions, is clearly a violation of his constitutional rights.

In a case dealing with the issue of public support of sectarian institutions, the Wisconsin Supreme Court held in 1920 that the Educational Bonus Act of 1919, under which Wisconsin veterans received \$30 a month while attending school, was not invalid because they might attend nonpublic religious institutions.¹⁴⁰ The court pointed out that the schools are simply reimbursed for the actual increased cost to such schools resulting from the attendance of the beneficiaries of the act. "Mere reimbursement is not aid," the court concluded.¹⁴¹

Another case, while not truly related to the subject of this investigation, does give some insight into one court's

opinion of religious books as such. In 1947, the California high court held that the assessment of an *ad valorem* tax on books and pamphlets belonging to an incorporated Bible and tract society, while in storage and awaiting distribution or use by members of a religious society, is not a violation of the guarantee of religious freedom.¹⁴² The court pointed out that:

The purpose . . . is to secure equality of taxation which results from subjecting all property to the same burden. . . . There is, therefore no discrimination in the instant tax and it is not even remotely aimed at any possible restriction on the exercise of religion . . .¹⁴³

The court concluded by stating that while the power to tax may involve the power to destroy, it is certain no such result will stem from the tax in question.¹⁴⁴

On December 23, 1960, the high court of Florida, in the Brown case, followed the example of the New Jersey Supreme Court in the Tudor case, and declared a program of distributing Gideon Bibles in the public schools of Orange County to be a violation of the freedom of religion clause of the First and Fourteenth Amendments.¹⁴⁵ The fact situation in the Florida case was similar to that involved in the Tudor case, and the Florida court relied heavily on that decision in its determination of the Brown case.

The Florida court pointed out that being a Gideon required membership in a Protestant church and that the Bible in question was the King James Version. Furthermore, it explained that under even the strictest interpretation, the First Amendment forbids preferential treatment by the government, either federal or state, of one sect or religion over others.

The court went on to observe that state power is no more

to be used to handicap religions than it is to be used to favor them. But it felt that distribution of Gideon Bibles in the public schools approximated an annual promotion and endorsement of certain religious sects or groups. Moreover, this impairs the rights of the plaintiffs and their children to be free from governmental action which discriminates in the free exercise of religious belief.

The court put the shoe on the other foot by explaining that if the Gideons distributed in a strongly Protestant area, the Douay Bible exclusively, or the Koran or the Talmud, "we surmise that the Protestant groups would feel a sectarian resentment against the actions of the school authorities."¹⁴⁶ Narrowing the question even further, the court was of the opinion that if the doctrinaire books of either the Methodists, Baptists, Presbyterians, or other of the numerous Protestant groups were distributed throughout the school system to the exclusion of the other groups, "considerable legal action would justifiably ensue."

The court concluded with the words of Thomas Jefferson, one of the architects of freedom of religion in the United States:

Believing . . . that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof' thus building a wall of separation between church and state.¹⁴⁷

On this basis, the Florida court revealed no hesitancy in declaring that a program of distributing Gideon Bibles in

the public schools of Florida violated the First Amendment of the United States Constitution.

Pledge of Allegiance Problems

In 1957, a proceeding was brought in the Supreme Court of New York State to compel the Commissioner of Education to revoke a regulation recommending the use in the public schools of that section of the pledge of allegiance including the words "under God."¹⁴⁸ On June 14, 1954, Congress had amended Federal law¹⁴⁹ by inserting between the words "nation" and "indivisible," the words "under God." As amended, the pledge of allegiance to the flag reads:

I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

New York law makes it the duty of the Commissioner of Education to prepare for use in the public schools a program providing for a salute to the flag, a pledge of allegiance to the flag, for instruction in its correct use and display, and such other patriotic exercises as may be deemed by him to be expedient.¹⁵⁰ The Commissioner of Education for the state of New York promulgated a regulation providing:

It is recommended that the schools use the following pledge to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation indivisible, with liberty and justice for all.'

Following the action of Congress in 1954, the New York Commissioner of Education revised the regulation to provide for the inclusion of the words "under God" in the pledge of allegiance.

Petitioners did not object to the earlier pledge but contended that the Commissioner of Education had the duty to revoke the revised regulation deleting the words "under God" on the grounds that this violated the First Amendment to the United States Constitution and the Constitution of New York State.¹⁵¹ Lewis argued that freethinkers, nonbelievers, atheists, and agnostics should not be compelled to recite the present pledge of allegiance because it included the words "under God" and that such compulsion violated their constitutional rights.

The court, however, rejected these contentions and dismissed the petition on several grounds. It felt it was clear that in amending Regulation 150 in accordance with the New York education law and with an act of Congress, the Commissioner of Education was performing his duties. It believed that to sustain the contention of petitioners would imply that the Commissioner of Education had not only the right but the duty to determine the constitutionality of an act of the state legislature or of Congress and to refuse to perform where in his judgment such an act was unconstitutional. Clearly, the court concluded, it was in the exclusive domain of the judiciary to determine the constitutionality of an act of Congress or of the state legislature.

In response to the queries concerning the First Amendment raised by the petitioner, the court noted that as it understood the intent, design, and purpose of the First Amendment, it was conceived to prevent and prohibit the establishment of a state religion; "it was not intended to prevent or prohibit the growth and development of a *religious state*." If Lewis' contentions were sound, the court wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg

Address. Moreover, it felt that it would be questionable whether the song "America" might be sung in public schools without offending the First Amendment or whether the Presidential oath of office had a questionable constitutional status.

The court, however, was concerned about the social suasion which might operate to require, in fact, a child to recite the words "under God," even though it might violate his religious beliefs. It felt, however, that the child had a perfect right to simply omit the words "under God" in reciting the pledge. His "nonconformity," if such it be, will not in the circumstances of this particular case, set him apart from his fellow students or bring "pressure" to bear upon him in any real sense. The petitioner's right to disbelieve is guaranteed by the First Amendment, the court emphasized, and neither they nor their children can be compelled to recite the words "under God" in the pledge of allegiance. But at the same time the First Amendment afforded them no preference over those who believe in God and who, in pledging their allegiance, chose to express that belief, the court concluded. To grant Lewis' application would, in fact, be preferring those who believe in no religion over those who do believe, the court emphasized in closing.

Textbooks in Parochial Schools

In 1961, the Oregon Supreme Court outlawed the state program of providing school textbooks to parochial schools by declaring unconstitutional a state law which had existed for twenty years.

The law provided that local school districts in Oregon purchase textbooks out of state funds for use in church-sponsored and other private schools. The Oregon high court, in a six-to-one decision said, "[Roman] Catholic schools

operate only because Catholic parents feel that the precepts of their faith should be integrated into the teaching of secular subjects. Those who do not share in this faith need not share in the cost of nurturing it."¹⁵²

The court based its decision primarily on the Constitution of the State of Oregon, Article I, Section 5, which reads, "No money shall be drawn from the treasury [of the state or its subdivisions] for the benefit of any religious or theological institution . . ."

The court pointed out that the constitutional section in question was designed to keep separate the functions of state and church, thus preventing one from influencing the other. The court went on to explain that since the expenditure for such programs amounted to \$4,000 a year, this constituted a substantial benefit to the parochial schools, and brought the program within the prohibition of the constitutional restriction.

The constitutional provision, the court concluded, required the state to be neutral in its relation with believers and unbelievers.

Summary

These cases, while covering a crazy quilt of subjects and issues, do seem to have one element in common: the complete lack of agreement on what constitutes sectarian instruction, and the justification of extending public funds to sectarian institutions. In Wisconsin, for example, the courts have held Bible reading illegal. But public high school baccalaureate exercises in which various clergymen gave nonsectarian prayers and invocations were upheld by the courts of that state. In Illinois, the courts have prohibited Bible reading in the public schools, but they have taken a favorable view of religious instruction at the state university.

In a number of instances where a church exercised some control over a school, the courts of eight states have ruled that a denominational school does not become a public school simply by calling it one. These courts, as has been seen, have decided that such schools are not entitled to state financial aid. It is interesting to note that a majority of these states either permit or require Bible-reading exercises in the public schools. There is little agreement among the courts of the various states regarding the legality of public school teachers wearing distinctive religious garments. Three states permit such practices, and five states prohibit them. There is no correlation between a state's stand on this question and its attitude toward Bible reading.

"Released time" programs of religious instruction which have been fairly common in various state-supported schools have been banned by the United States Supreme Court in the *McCormack* case. However, this court has added to the confused status of religious exercises in the schools by upholding (in the *Zorach* case) "dismissed time" programs in the public schools. But the court has made clear that state-sponsored prayers in the public schools are unconstitutional even though individual students are not compelled to participate in such programs.

It seems clear from this that the Supreme Court approaches matters in this area on a case-to-case basis rather than attempting to fashion a ringing absolute principle of law. Although those seeking the "final answer" may lament this approach, it has much to commend it, pertaining as it does to our highly dynamic and rapidly changing human society. Moreover, the probability of an infinite variety of such programs seems to preclude a single, all-encompassing rule of law.