A SURVEY OF LITERATURE CONCERNING SELECTED UNITED STATES SUPREME COURT CASES DEALING WITH THE RELATIONSHIP BETWEEN RELIGION AND THE PUBLIC SCHOOLS

by

MARY L. RECORDS

B. A. Lindenwood College, 1962

A MASTER'S REPORT

submitted in partial fulfillment of the

requirements for the degree

MASTER OF SCIENCE

School of Education

KANSAS STATE UNIVERSITY
Manhattan, Kansas

1963

Approved by:

Dr. Charles Bracken
Major Professor

TABLE OF CONTENTS

INTRODUCTION

In the development of America's institutions, two basic principles concerning education and religion have emerged. First, public schools will be provided for all who wish to attend, and they will be free from sectarian domination. Second, the United States is fundamentally a religious nation, and its institutions are based on this premise.

Since World War II there has been a renewed interest in the public schools and in religion as two of the fundamental ways in which to preserve democracy in the United States. Although the majority of the people in the United States may accept this theory, this does not negate the problem of the relation that should exist between the public schools and religion.

Since 1945 several cases have been appealed to the United States Supreme Court in an effort to obtain a legal decision as to the proper relationship.

THE PROBLEM

Statement of the problem. The purpose of this study was (1) to examine the United States Supreme Court cases since 1946 that deal with the relationship between religion and the public schools, (2) to analyze the

opinions of the different Justices on the cases, and (3) to consider the interpretations of the decisions of the Court by various lay persons.

Importance of the study. The legal basis for cases appealed to the United States Supreme Court is the First Amendment of the United States Constitution which states in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." During the 1940's the Supreme Court interpreted the Fourteenth Amendment as making the First Amendment applicable to the states. The first section of the Fourteenth Amendment contains this statement:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The problem of deciding the legal relationship between the public schools and religion centers around the interpretations of the First Amendment, particularly the clause prohibiting the establishment of religion. Two main interpretations of the First Amendment have developed, (1) no special privilege or preference can be given to one church or religion, but if all churches and all religions are treated equally then states may aid

churches, and (2) government may not aid one denomination, several denominations, or all denominations. Both of these interpretations have been revealed in the Supreme Court cases examined in this study.

F. Ernest Johnson has stated that it seems the issue is between those who, pointing to the long struggle to free the schools from religious sectarianism, insist on "keeping the public schools public," and those who insist that in order to be truly "public" the schools should be more responsive to the expressed will of the community with respect to the religious phases of general education.[1] Some argue that statements such as Mr. Johnson's are socially important but legally irrelevant. This may be a valid criticism. However, it is important that the opinions of Justices and lay persons that are stated in both legal and social contexts be examined since these opinions determine the extent to which a decision of the Supreme Court, in an individual case, will be applied in different communities and by the states.

Limiting the study. The study was limited to an analysis of four pertinent cases which have been adjudicated before the Supreme Court of the United States. The

---

[1]F. Ernest Johnson, "A Guide To Group Study of Religion and Public Education," Religious Education, 48:422-430, November-December, 1953.

cases are:

1. Everson v. Board of Education, 330 U. S. 1 (1947)
2. Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203 (1948)
3. Zorach et al. v. Clauson et al., 343 U. S. 306 (1952)
4. Engel et al. v. Vitale et al., 370 U. S. 421 (1962)

Each of the four cases concerns a different school connected subject which is employed to introduce the cases in accordance with their above mentioned order.

Procedures. The procedures used in making this report were:

1. An examination of the text of the selected cases
2. A survey of the literature available in the Kansas State University library concerning the relationship of religion and the public schools, with special emphasis on the selected cases

FREE BUS TRANSPORTATION FOR PAROCHIAL SCHOOL STUDENTS

In 1947 the United States Supreme Court handed down its decision in Everson v. Board of Education, 330 U. S. 1. The Court in a five-to-four decision sustained the right of local school authorities, acting under a New Jersey statute, to provide free bus transportation for children attending parochial schools. The Court also declared that the action of authorities was

not in violation of any part of the Federal Constitution.

The New Jersey statute referred to in this case provided that a school district may make rules and contracts for the transportation of children to and from school, "'including the transportation of school children to and from school other than a public school as is operated for profit in whole or in part.'" The statute goes on to state that when a school district provides transportation for public school children to and from school, transportation "'shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part. . .'"[1]

In accordance with this statute the school board of the Township of Ewing reimbursed parents for the money they spent sending their children to school on regular buses operated by the public transportation system. By order of the board, some of the reimbursement went to parents whose children had been sent to Catholic parochial schools. A suit was filed in a New Jersey court by Everson, a taxpayer of the district. He contended that the statute and the resulting action of the school board

---

[1]Clark Spurlock, Education and the Supreme Court (Urbana: University of Illinois Press, 1955), p. 79, citing Edgar W. Knight and Clifton L. Hall, Readings in American Educational History (New York: Appleton-Century-Crofts, 1951), pp. 767, 768.

violated both the State and the Federal Constitutions. This court held that the legislature did not have the power to authorize such reimbursement under the state constitution. However, the New Jersey Court of Errors and Appeals reversed this decision. It stated neither the statute nor the resolution of the school board was in conflict with the State constitution or the provisions of the Federal Constitution in issue. Everson then appealed the case to the Supreme Court.[1]

The opinion of the Supreme Court was delivered by Mr. Justice Black.[2] He first established that the Court was not concerned with the exclusion clause of the statute because there had been no attack on the statute on this ground.

Mr. Justice Black continued with the opinion of the Court by pointing out that the only contention is that the state statute and the township's resolution violate the Federal Constitution, in as much as they authorized reimbursement to parents of children attending parochial schools. He stated there were two aspects of this contention.

First. The due process clause of the Fourteenth

---

[1]Spurlock, p. 79; Everson v. Board of Education, 330 U. S. 1, 1-4.

[2]Everson v. Board of Education, 330 U. S. 1, 3-18.

Amendment is violated because the state is authorized to take by taxation the private property of some and give it to others to be used for their own private purposes. The argument is that the children attending church schools are doing so because of the personal desires of their parents rather than to satisfy the public's interest in the general education of all children. The New Jersey legislature, however, has decided that a public purpose is served by using tax-raised funds to pay the bus fares of all school children, including those who attended parochial schools. "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individual most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need."

There have been instances when the Court has invalidated a state statute on the grounds that the purpose for which tax-raised funds were to be expended was not a public one. However, the Court has always warned against using this authority without caution, because a state's authority to legislate for the public welfare may be seriously curtailed. The Fourteenth Amendment did not strip states of the power to legislate to meet new public problems.

Second. The New Jersey statute was challenged as a "law respecting an establishment of religion." The

First Amendment, made applicable to the states by the Fourteenth Amendment, forbids the making of such a law. In order to determine whether the New Jersey law violates the First Amendment requires an understanding of the background and the environment in which this Amendment was written and adopted. Mr. Justice Black continued with the following historical review.

A large number of the people who came to this country from Europe to settle, were attempting to escape the civil strife and persecution that resulted from established sects trying to maintain their absolute political and religious supremacy. Among the offenses for which punishment resulted were nonattendance at government-established churches, expression of nonbelief in these churches' doctrines, and failure to pay taxes and tithes to support them. To a large extent these practices were transplanted to America. Various sects, such as the Catholics, Quakers, and Baptists were persecuted. All dissenters of the established church were required to pay taxes and tithes to help support the government-sponsored church. The practices became so commonplace that the "freedom-loving colonials" developed a feeling of abhorrence for such practices. It was such feelings which found expression in the First Amendment.

The movement against an established church reached its climax in Virginia. The Virginia legislature in

1784-85 was about to renew the tax levy for the established church in Virginia. It was at this time that Madison wrote his Memorial and Remonstrance. In this paper, he argued that no nonbeliever or believer should be taxed to support a religious institution, and that persecutions were the inevitable result of an established church. The tax measure was not passed, and the legislature enacted the Virginia Bill for Religious Liberty, originally written by Thomas Jefferson. The statute stated:

> . . . that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . .

The Court has previously recognized that the provisions of the First Amendment, in which Madison had a large part in the drafting and adopting, had the same objective and intended to provide the same protection as the Virginia statute.

Mr. Justice Black felt that the "establishment of religion" clause of the First Amendment meant at least this:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining

> or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation' between Church and State.

In the effort to judge the New Jersey statute, it must be done according to the limitations of the First Amendment. However, precaution must be taken to not invalidate the statute if it is within the State's constitutional powers, "even though it approaches the verge of that power . . ." New Jersey cannot give tax-raised funds directly to an institution that teaches the doctrines of any church. However, the state cannot exclude the citizens professing the belief or nonbelief of a certain faith from receiving the benefits of public welfare legislation. "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay bus fares of pupils attending public and other schools." It is true children are helped to get to church schools. If services such as police and fire protection, public highways and sidewalks, and sewage connections were withheld from church schools, it is possible parents would be reluctant to send their children to such schools. However, this is not the

purpose of the First Amendment. This Amendment requires the state to be neutral, but not an adversary of religious groups or groups of nonbelievers.

Mr. Justice Black concluded, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."

Mr. Justice Jackson wrote a dissenting opinion.[1] He felt that the Court's opinion advocating complete separation of church and state seemed completely discordant with its conclusion to permit the commingling of the two. This case reminded him of Julia who, according to Bryon's reports, "'whispering 'I will ne'er consent,'--consented.'"

Mr. Justice Jackson continued with his opinion by analyzing the case. He felt that the Township of Ewing was not actually furnishing transportation itself. It was simply reimbursing parents who sent their children to school on public transportation. This payment of tax funds in no way affected the child's safety or expedition in transit. Thus, the Court was assuming a service that did not exist.

Mr. Justice Jackson also felt that the Court was asking "us" to close our eyes to the exclusive nature of

---

[1]Everson v. Board of Education, 330 U. S. 1, 18-28.

this expenditure of tax money. "The New Jersey Act in question makes the character of the school, not the needs of the children, determine the eligibility of parents to receive reimbursement." If the state were impartial in its aid, there is no reason why children attending private schools operated in part or in the whole for profit should not also receive reimbursement. These children are often as needy or worthy of such aid as those attending public and parochial schools.

The parochial school is a vital part of the Roman Catholic Church. Its growth, loyalty, and discipline has its basis in its schools. Mr. Justice Jackson stated, "Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself."

It seemed to Mr. Justice Jackson ". . . that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected." The fireman or policeman does not have to stop and ask before he renders aid whether it is a Catholic institution or a public one. However, the school authorities must ask this question before reimbursement may be given.

In conclusion, Mr. Justice Jackson stated that the

First Amendment was so placed because it was first in the forefathers' minds. The First Amendment was intended:

> . . . not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision . . .

Mr. Justice Rutledge wrote a separate dissenting opinion[1] in which he examined the history of the First Amendment, particularly in regard to Madison's views toward church and state, in an effort to show that this Amendment was intended "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." Several important points are brought out in Mr. Justice Rutledge's review of Madison's ideas.

Madison felt that religious freedom was the crux of the struggle for freedom in general. He continually fought for this principle. He led the fight in 1779 for Jefferson's Bill for Establishing Religious Freedom. In the climax in 1784-85 over the Assessment Bill, Madison was a leader of the opposition to this Bill. Even in its final form which gave the taxpayer the privilege of

---

[1] Everson v. Board of Education, 330 U. S. 1, 28-74.

designating which church should receive his share of the taxes, or the option of giving his tax to education, Madison opposed the Bill. He was able to prevent its passage in December 1784. Madison then issued his Memorial and Remonstrance which was an "attack upon all forms of 'establishment' of religion, both general and particular, nondiscriminatory or selective." The Assessment Bill died in committee after the legislature reconvened in November 1785, and Madison was able to push the passing of Jefferson's Bill for Establishing Religious Freedom. Within a little more than three years of this victory, Madison proposed and secured the ratification of the First Amendment as the first article of the Bill of Rights of the United States Constitution.

The historical facts definitely show that Madison was opposed to every form and degree of official relations between religious and civil authority, and particularly he opposed state support or aid by taxation. "In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises."

Mr. Justice Rutledge continued with his opinion by examining the facts of this case. Transportation, where needed, is essential for bringing the child and teacher together. The cost of transportation in the total

expenditures of a school, is as essential as the cost of textbooks, equipment, school lunches, and teachers' salaries. "For me, therefore, the feat is impossible to select so indispensible an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about." Transportation is as directly related to education in a parochial school, which has a religious objective, as it is in a public school.

The majority has concluded, Mr. Justice Rutledge continued, that the New Jersey statute is simply "public welfare legislation," because it promotes education which is a public, not a private purpose. If this were the only fact, the state should allow full appropriation for religious schools, as it does for public schools.

One can be sympathetic toward the burden that our Constitutional separation places on parents who wish for their children to receive religious instruction with their secular education. They must pay for their own child's education, and at the same time pay taxes to support others' children education. However, one cannot allow such feelings to prevail. If they do, our Constitutional policy and command will end. The child attending a religious school has the same right as others to attend the public school. "But he foregoes exercising it

because the same guaranty which assures this freedom forbids the public school or any agency of the state to give or aid him in securing the religious instruction he seeks."

Mr. Justice Rutledge concluded that even if the New Jersey statute applied equally to all religious schools of any faith, it would not be valid. Persons would still be forced to furnish "'contributions of money for the propagation of opinions which he disbelieves. The Constitution requires, not comprehensive identification of state with religion, but complete separation . .'"

The affirmative decision of the Court in the Everson v. Board of Education case evoked various reactions from lay persons. An editorial in The Christian Century and an article by Edward J. Heffron in The Commonweal are examples of the two extremes in opinions expressed by lay persons.

The Christian Century felt the decision in the Everson case "should open the eyes of all American-minded citizens, and especially Protestant citizens, to the strategy of the Roman Catholic Church in its determination to secure a privileged position in the common life of this country."[1] The editorial went on to state that

---

[1]The Christian Century, 64:262-264, February 26, 1947.

the Roman Catholic Church is aiming for complete state support. The Church knows it cannot appeal for such support directly because the majority of the American people would object. Therefore, the Catholic Church is attempting "to crack a Constitutional principle where average citizens will not be aware of it." It chooses a point which is obscured by sentimental or humanitarian appeal. The Christian Century pointed out one aspect in this case that possibly the Justices overlooked. School funds raised for the specific purpose of the public schools were used for reimbursement, not general welfare funds.

Edward Heffron supported the Supreme Court decision. He stated that a child is sent to a parochial school because the parents want the child educated in a way that strengthens rather than undermines his faith. Secular education is important in the parochial school, and it serves a public purpose. Therefore, the aid religion may have received was only by the way of New Jersey's commitment to aid secular education which is a public purpose. The main point that Mr. Heffron felt had been overlooked was that "if it's Constitutional for the state to compel attendance, it should be Constitutional for the state to facilitate the attendance it compels."[1]

---

[1]Edward J. Heffron, "Supreme Court Oversight," The Commonweal, 46:9-11, April 18, 1947.

Many lay persons were more moderate in their opinion of the Everson decision, and they attempted to analyze the implications of the case. It is important to note that both the majority of the Court and the dissenting Justices recognized the "wall of separation" principle. Mr. Justice Black in his explanation of the meaning of the "establishment of religion" clause, revealed that the decision in this case did not sanction public funds for establishment of religion, rather aid to parochial school children might be given only if the benefit to religion was incidental. The dissenting Justices felt religion was directly aided even though the reimbursement was given to the parochial school child rather than specifically to the school. The main point of disagreement was what constituted aid to religion, and how far might aid go before it was in violation of the Constitution. In other words, when is the "establishment of religion" clause breached?

The Everson decision left two main questions unanswered. The principle question has already been discussed to some extent. It was, "How far may the state validly go, under the 'child benefit theory' in granting benefits to parochial school children?"[1] Harry Rosenfield

---

[1]Spurlock, p. 91, citing Robert E. Cushman, Leading Constitutional Decisions (New York: Appleton-Century-Crofts, 1950), p. 145.

felt that it would involve constant litigation to test whether a particular form of aid was general welfare legislation and whether benefits to religious institutions were merely incidental or pass beyond "'the verge.'"[1]

R. E. Cushman pointed out another important question. ". . . if a community is not forbidden to give free bus service to all school children, including parochial school children, may Catholic parents, demand such service as a Constitutional right from communities which now extend it only to public school children?. . ."[2] This question may have to be settled by the Court at some future time.

The decision in the Everson case confused the issue on what constituted an "establishment of religion." It was not long before a case came before the Supreme Court, which attempted to clarify the meaning of this clause.

RELEASED TIME FOR ON-PREMISE RELIGIOUS INSTRUCTION

Approximately one year after the Everson v. Board of Education decision by the United States Supreme Court,

---

[1]Harry N. Rosenfield, "The Supreme Court Decides the Parochial School Bus Case," The Nation's Schools, 39:41-43, April, 1947.

[2]Spurlock, p. 91, citing Robert E. Cushman, p. 145.

the Court rendered a decision in Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203 (1948). In an eight-to-one decision the Supreme Court held that religious instruction in the public school buildings during public school time as practiced in the schools of Champaign, Illinois, was invalid. Under the First Amendment of the United States Constitution it amounted to an establishment of religion.

The Champaign, Illinois, "released time" program was set up in the following way. The Champaign Council on Religious Education consisting of members of the Jewish, Roman Catholic and Protestant faiths obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four through nine. Classes consisted of pupils whose parents signed printed cards requesting that their children be permitted to attend. The cards were printed at the expense of the Council on Religious Education, and were passed out by the teachers in the public schools. The classes were conducted in the regular classrooms of the school buildings once a week for thirty minutes for the lower grades and forty-five minutes for the upper grades. Classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi. The Council employed the religious teachers at no expense to the school authorities, but the

instructors were subject to the approval and supervision of the superintendent of schools. Students who did not take part in the religious instruction classes were not excused from public school duties, and were required to leave their classroom and go to some other place in the school building to continue their secular studies. The students who were released for religious instruction were required to be present at the religious classes. Reports of their presence or absence were made to their secular teachers.

Vashti McCollum, mother of a son in attendance and a resident and taxpayer in the Champaign school district, petitioned to the Circuit Court of Champaign County, Illinois, for a writ of mandamus to compel the school board to stop permitting religious classes in the schools during regular school hours. Mrs. McCollum, an atheist, charged that this joint public-school religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The Circuit Court dismissed Mrs. McCollum's petition and this dismissal was affirmed by the Supreme Court of Illinois. Mrs. McCollum then took her case by appeal to the United States Supreme Court, which reversed the Illinois Supreme Court decision.[1]

---

[1]Spurlock, pp. 116-118; Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 203-209.

The opinion of the United States Supreme Court was delivered by Mr. Justice Black.[1] He first reviewed the facts of the case and then stated:

> The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment as we interpreted it in Everson v. Board of Education, 330 U. S. 1.

Mr. Justice Black pointed out that in the Everson case both the majority and the minority agreed that the First Amendment erected a wall of separation between Church and State. They disagreed as to the proper application of the language of the First Amendment to the facts of the case.

Mr. Justice Black stated that the counsel for the respondent recognized that the Illinois plan was barred by the First and Fourteenth Amendments if the Court adhered to the views expressed by the majority and the minority in the Everson case. Therefore, the counsel

---

[1] Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 204-212.

challenged these views as dicta and urged that the Court reconsider and repudiate them. The counsel argued that historically the First Amendment was meant only to forbid government preferring one religion over another, not an impartial government assistance of all religions. Also, the counsel asked that the Court overrule its holding in the Everson case that the Fourteenth Amendment made the "establishment of religion" clause of the First Amendment applicable as a prohibition against the States. Mr. Justice Black stated that "after giving full consideration to the arguments presented we are unable to accept either of these contentions."

Mr. Justice Black declared that a governmental hostility toward religion and religious teachings is not manifested when the state is prohibited by the First and Fourteenth Amendments from utilizing the public school system to aid any or all religious faiths. If there were such a manifestation, this would be against the national tradition of the United States as embodied in the First Amendment guaranty of the free exercise of religion. "For the 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."

In conclusion, Mr. Justice Black stated:

> 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 their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

Two concurring opinions were written in McCollum v. Board of Education. One opinion was delivered by Mr. Justice Frankfurter.[1] He noted that the four Justices joining in this opinion dissented in Everson v. Board of Education, 330 U. S. 1, because they felt the Constitutional principle requiring separation of Church and State had been violated by New Jersey. The facts in McCollum v. Board of Education indicated that Illinois "authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this."

Mr. Justice Frankfurter continued by pointing out that the McCollum case demonstrated once again that the formulation of a Constitutional principle was not the answer to a problem but only a beginning of its solution. The meaning of a principle such as separation of Church and State is unfolded as appeal is made to it from case to case. Agreement has been reached that the First Amendment erects a "wall of separation between Church and

---

[1] Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 212-232.

State." However, this agreement does not preclude a clash of views as to what the wall separates. In order to enlightenly apply the "wall of separation" metaphor, one must consider the relevant history of religious education in America, the place of the "released time" movement in that history, and its precise manifestation in the case before the Court.

Traditionally, organized education in the Western world was Church education. The people who settled in America brought this view of education with them. The development of the public school system from colonial education with a religious orientation is due to changing concepts concerning "the American democratic society, the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people."

One may recall James Madison's fight for religious liberty in Virginia. Other states such as New York and Massachusetts were scenes of efforts to dissociate religious teaching from State-maintained schools. Thus, separation in the field of education was not forced upon the States by a superior law in the form of the Fourteenth Amendment. This Amendment merely reflected a principle then dominant in the United States.

It is important to remember that the development of the Separation principle was not due to a decline in

the religious beliefs of the people. Mr. Justice Frankfurter stated:

> The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects.

Mr. Justice Frankfurter continued his opinion with a brief summary of the history of the "released time" movement. The first attempt by churches to promote religious education was the establishment of Church Schools. Many of these had difficulties, such as financial problems. Also, there were experiments with vacation schools, with Saturday as well as Sunday schools, however, these fell short of their purpose. Week-day church schools held after school hours developed, but it was difficult to maintain attendance. Leaders decided that if a week-day church school was to succeed a way had to be found to give the child his religious education during what the child conceives as his "'business hours,'" meaning during school hours.

The "released time" movement was initiated by Dr. George U. Wenner in 1905. He made a proposal at the Interfaith Conference on Federation held in New York urging that children be excused from public school on

Wednesday afternoon for religious instruction. This proposal aroused considerable objections, and it was not until a decade later before Gary, Indiana, inaugurated the movement in its school system. Since this beginning in 1914 when 619 students participated in the program, the movement in 1947 had grown to include almost 2,000,000 pupils in 2,200 communities.

Mr. Justice Frankfurter continued by pointing out that there are many different arrangements for released time programs. Therefore, it is necessary to examine the particulars of each type of arrangement in order to apply the test of the Separation principle.

The facts of the Champaign plan show religious education is patently woven into the working scheme of the school. "The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects." There are some children in the public schools who belong to sects that do not participate in the "released time" program. Therefore, the public school system is actually furthering inculcation in the religious tenets of some faiths, and in the process is sharpening the consciousness of religious differences, at least among some of the children in the public schools.

In conclusion, Mr. Justice Frankfurter stated:

> Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped . . . 'The great American principle of eternal separation' --Elihu Root's phrase bears repetition--is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. . . If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'

Mr. Justice Jackson delivered the second concurring opinion in McCollum v. Board of Education.[1] He concurred with the result reached by the Court, however he felt that some bounds should be placed "on the demands of interference with local schools that we are empowered or willing to entertain."

Mr. Justice Jackson felt that a Federal Court could interfere with local school authorities only when either personal liberty or a property right protected by the Federal Government had been invaded. There are two ways in which this may occur. First, "when a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution." In this case no legal compulsion is applied to the complainant's son and no penalty is imposed or threatened from which the Court can relieve him. ". . . we can hardly base

---

[1] Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 232-238.

jurisdiction on this ground." Second, "where a complainant is deprived of property by being taxed for unconstitutional purposes, such as directly or indirectly to support a religious establishment, we can protect the taxpayer against such a levy." This was the situation in Everson v. Board of Education. However, in the present case any cost to the taxpayer for the "released time" program is negligible.

Mr. Justice Jackson continued by stating that if "jurisdiction is found to exist, it is important that we circumscribe our decision with some care." In this case the relief asked is that writ be issued against the Board of Education "'ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools. . . and in all public houses and buildings in said district when occupied by public schools.'" In other words the plaintiff has asked the Court to not only ban the "released time" program but also to ban every form of teaching which suggests or recognizes there is a God. The Court has in a sense sustained the plaintiff's whole complaint without discriminating between any of the grounds of that complaint and without laying down any standards to define the limits of the effect of that decision. It seemed to Mr. Justice Jackson that the sweep and the detail of the complaints by Mrs. McCollum were a

"danger signal which warns of the kind of local controversy we, the Supreme Court, will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements."

The Court should and may prohibit such direct and explicit religious teaching as in the Champaign plan and in the teaching of a creed or catechism in the public schools.

Mr. Justice Jackson felt that it remained to be demonstrated whether it was possible or even desirable to comply completely to the demands of Mrs. McCollum. He continued with this statement:

> Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the role that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity--both Catholic and Protestant--and other faiths accepted by a large part

> of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared. But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry.

Mr. Justice Jackson recognized that local communities differed in racial, religious and cultural composition, and that no matter what customs were adopted there always would be a dissenting minority. Therefore, in the Court decision it must give the State court a standard by which to judge questions of the relationship between Church and State. The Court must also leave some flexibility for local communities to meet changing conditions. The Court by pronouncing a broad, sweeping constitutional doctrine seems "to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation."

Mr. Justice Reed was the only Justice who dissented with the Court decision in this case.[1] He felt the

---

[1] Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 238-256.

interpretation of the First Amendment was wrong. Mr. Justice Reed stated:

> By directing attention to the many instances of close association of church and state in American society and by recalling that many of these relations are so much a part of our tradition and culture that they are accepted without more, this dissent may help in an appraisal of the meaning of the clause of the First Amendment concerning the establishment of religion and of the reasons which lead to the approval or disapproval of the judgement below.

Mr. Justice Reed felt it was difficult to find in the Court opinion and in the concurring opinions any conclusion as to what it was in the Champaign plan that was unconstitutional. "None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional." However, Mr. Justice Reed stated that from the language of the opinions he concluded that the majority felt that religious instruction of public school children during school hours is prohibited. In Mr. Justice Reed's opinion "the history of American education is against such an interpretation of the First Amendment."

Mr. Justice Reed stated that it was evident that the free exercise of religion had not been violated by Champaign, therefore the "released time" program only needed to be examined to see if it constituted an establishment of religion. In the remainder of his dissenting

opinion Mr. Justice Reed examined this question.

Congress may have intended the "establishment of religion" clause to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, "'Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.'" Through the years the interpretation of this Amendment has broadened. Mr. Justice Reed continued:

> . . . although never until today . . . has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion.

The opinions of eminent statesmen of early United States history, which were appealed to in Everson v. Board of Education and in this case under discussion, indicate that circumstances such as the ones in the McCollum case were far from their minds. Mr. Justice Reed cited two examples. First, Thomas Jefferson was the founder of the University of Virginia which always has been under the complete control of the state. Drawing from the suggestions of Jefferson, this regulation was adopted in 1824:

> Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.

Thus, the "wall of separation between church and State" built by Thomas Jefferson at the University of Virginia did not exclude religious education from the school. Second, James Madison's Memorial and Remonstrance is not applicable in this case. This was simply a protest against taxation for support of religious institutions which was viewed as an establishment of religion. However, Mr. Madison did support Jefferson's suggestions concerning religion at the University of Virginia. In Mr. Justice Reed's opinion, the acceptance of this report gives "clearer indication of Mr. Madison's views on the constitutionality of religious education in public schools than his general statements on a different subject."

Mr. Justice Reed agreed that government could not set up a church or aid all or any religions or prefer one over another. He went on to state:

> But 'aid' must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions. 'Prefer' must give advantage to one 'over another.'

Several examples were cited by Mr. Justice Reed to

show that the 'aid' referred to by the Court in the Everson case was not meant to include the incidental advantages that religious bodies and other groups obtain as a by-product of an organized society. The affirmative decision in the Everson case was justified partly by reasons of safety for the children or for public welfare reasons. In Cochran v. Louisiana State Board of Education, 281 U. S. 370, the Court upheld a Louisiana statute allowing free textbooks to be furnished to private schools on the ground that the books were for education and not to aid religious schools. The National School Lunch Act aids all school children attending tax-exempt schools.

The statute in question in the case now before the Court is comparable to those in other states. Scores of cases concerning religion and the schools have come before state courts. Except where exercises with the religious significance of one sect were involved, the constitutionality of the practices challenged in these cases has been generally upheld.

A number of practices by the Federal government offering examples of this type of 'aid' by the state to religion were cited by Mr. Justice Reed. Both Houses of Congress have a chaplain. The armed forces have commissioned chaplains. Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry at denominational

schools. The United States Naval Academy and the United States Military Academy both have chaplains and attendance at church services is compulsory.

Mr. Justice Reed felt that in the light of the meaning given to the words of the First and the Fourteenth Amendments by the precedents, customs, and practices he had cited, he could not agree with the Court that "when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided." A nonsectarian group sponsoring a program of religious education and using school buildings should not be condemned of establishing a religion when actual church services have been permitted on government property. "The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state."

In conclusion Mr. Justice Reed stated:

> Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introduction to its text.

McCollum v. Board of Education is significant because it appears to be the first case in which either Federal or state action was declared by the Court to

result in "an establishment of religion."[1] However, the decision of the United States Supreme Court was on one hand phrased in broad general terms. On the other hand, the decision applied specifically to "released time" programs set up like the one in Champaign, Illinois. Consequently, confusion resulted as to the legal relationship between religion and the public schools.

The broad aspects of the Court's decision were revealed principally in the majorities' interpretation of the First Amendment and of the historical relationship between Church and State. David Louisell and Luther Wiegle criticized this interpretation. It seems they both agreed with Mr. Justice Reed's dissent.

David Louisell felt that the Supreme Court's interpretation represented an extremist's viewpoint. He felt that if one considered all the interrelationships between government and religion in the United States, "a doctrine of complete separation, of complete insulation of religion from the state . . . could stand neither an historical appraisal nor appraisal from the common sense viewpoint of the realities."[2]

---

[1]Spurlock, p. 116.

[2]David W. Louisell, "Constitutional Limitations and Supports for Dealing with Religion in Public Higher Education," Religious Education, 50: 285-290, September 1955.

Luther Wiegle felt the Court's interpretation of the First Amendment as an absolute doctrine of separation of Church and State was false. He quoted Professor Corwin, an authority on Constitutional Law at Princeton University, to support his statement. Professor Corwin did not give any specific examples, but he stated:

> The Court's interpretation of what the First Amendment meant to the founding fathers who propounded it and voted for it is untrue. . . a falsification of history produced by methods of handling the evidence which would shame any competent graduate student.

Professor Corwin also felt that the Supreme Court through its decision was making a law prohibiting "the free exercise" of religion. He conceded that some law making may be the function of the Supreme Court, however "'the falsification of history with which it attempts to support the new interpretation cannot command respect.'"[1]

Agnes Meyer took a different point of view of the broad aspects of the Supreme Court's decision than David Louisell and Luther Wiegle. While the latter two seemed to interpret the Court's opinion as a ban on all religious exercises and informal cooperation between religion and the public schools, Agnes Meyer felt that the Court's opinion in no way interfered "with broad religious exercises such as are still customary in many of our

---

[1]Luther Wiegle, "Crisis of Religion in Education," Religious Education, 49:73-77, March-April 1954, citing Professor Corwin.

schools . . ." In reaching this conclusion Mrs. Meyer seemed to accept the majority of the Court's interpretation of the historical development of the First Amendment and of the principal of separation as revealed both in the Everson case and in the McCollum case. Agnes Meyer noted that the significance of Jefferson's point of view for the present day is that he stressed that the commingling of secular and religious instruction and the use of the school time for sectarian worship should be prevented. "This," she felt, "is exactly the purpose of the majority opinion in the McCollum case." Agnes Meyer also emphasized what the Court implicitly pointed out in regard to the development of American secular institutions. These institutions were a product of five centuries of thoughtful statesmanship. "They emerged out of the necessity to create harmony among diverse economic, philosophical, social and religious beliefs." Although Agnes Meyer agreed with the Court's interpretation of the historical background of the First Amendment and the doctrine of separation, as already indicated, she felt that the local community was free to decide upon nonsectarian religious exercises.[1]

Some lay persons interpreted the Supreme Court's

---

[1]Agnes E. Meyer, "The School, The State, and The Church," Atlantic Monthly, 182:45-50, November, 1948.

decision by concentrating on the specific ban on a "released time" program such as Champaign's, and then attempted to find some implications of this pronouncement.

Madaline Remmlein emphasized that care must be taken in applying the Supreme Court's decision in the McCollum case to religious education programs that differed from the Champaign plan. Although she pointed out this precaution, Madaline Remmlein felt that ". . . it would seem that plans whereby pupils are released to go off school premises for religious instruction are equally unconstitutional, provided other factors are present to invalidate the plan." In fact, she felt it was possible that the decision applied to all types of religious education involving public school cooperation with sectarian groups.[1]

R. Lawrence Siegel in the implications he drew from the McCollum case decision agreed with Madaline Remmlein. Mr. Siegel felt that from the criteria developed by the majority ". . . any and all programs of religious instruction on released-time which utilize public machinery to secure enrollments and maintain attendance, fall under the constitutional ban." Mr. Siegel also felt

---

[1]Madaline K. Remmelein, "Legal Aspects of Religious Instruction," The Nation's Schools, 41:26-8, April, 1948.

that the decision implied a banning of all Federal and state funds in support of sectarian schools.[1]

It must be remembered that the above statements are implications drawn from the Supreme Court's decision. They are not explicit in the majorities' opinion concerning the McCollum case. This means there were questions left unanswered by the Supreme Court's decision in this case. Both Mr. Justice Frankfurter and Mr. Justice Jackson in their concurring opinions and various lay persons indicated that it was still uncertain how high the "wall of separation" stood. Are "released time" programs similar to the Champaign plan unconstitutional? Are all religious exercises, prayer, and Bible reading in the schools unconstitutional? As Mr. Justice Frankfurter pointed out, as other cases came before the Supreme Court, the principle of separation would be unfolded more adequately.

RELEASED TIME FOR OFF-PREMISE RELIGIOUS INSTRUCTION

Five years after the United States Supreme Court decision in the McCollum case, the Court rendered a decision in Zorach v. Clauson et al., 343 U. S. 306 (1952).

---

[1]R. Lawrence Siegel, "Church-State Separation and the Public Schools," Progressive Education, 26:103-111, February, 1949.

In this decision the Supreme Court upheld a New York statute and the action of the school board of New York City in providing a "released time" program for religious education during public school hours but away from the public school buildings as not being in conflict with the First Amendment of the Constitution.

New York City acting in accordance with a New York education law permitted its public schools to release pupils upon the written request of the parents for religious education during school hours. The children not released stayed in their classroom. The churches made weekly attendance reports to the public schools, listing those who had been released for religious instruction but who had not reported to the church that week. This program involved neither religious instruction in the public school classrooms nor the expenditure of public funds. All costs were paid by the religious organizations.

The appellants in this case were taxpayers and residents of New York City who had children attending the public schools. They contended that the New York law was in essence not different from the one involved in the McCollum case. Mr. Justice Douglas stated the appellant's arguments briefly:

> The weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on

> which the churches are leaning for support in their religious training; without the cooperation of the schools this "released time" program, like the one in the McCollum case, would be futile and ineffective.[1]

The New York Court of Appeals sustained the law against the claim of unconstitutionality. The case was then taken to the United States Supreme Court by appeal. The state court was sustained by the Supreme Court in a six-to-three decision.

Mr. Justice Douglas in delivering the opinion of the Court[2] stated that they were not concerned with the wisdom of this type of "released time" program, its efficiency from an educational point of view or political considerations that may be involved. The problem of the Court was to decide "whether New York by this system has either prohibited the 'free exercise' of religion or had made a law 'respecting an establishment of religion' within the meaning of the First Amendment."

The majority of the Court felt it was evident that there was no issue of prohibition of "free exercise" of religion in this case. No one was forced to go to religious instruction and no such instruction was brought into the public school classrooms. There was no evidence on the record before the Court that indicated coercion

---

[1] Zorach v. Clauson et al., 343 U. S. 306, 309.

[2] Ibid., 308-315.

was involved.

Mr. Justice Douglas stated that the Court did not see how the New York type of "released time" program made a law respecting the establishment of religion within the meaning of the First Amendment. He went on to explain this judgment in the light of the Court's interpretation of the First Amendment.

The First Amendment reflects the philosophy that Church and State should be separated. Separation must be complete when "free exercise" of religion and "establishment of religion" are the issues involved. However, the First Amendment does not say that in every case there must be separation of Church and State. In fact, it states the specific ways in which there can be no concerted union or dependence one on the other. "That is the common sense of the matter. Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly." Police and fire protection could not be given to religious groups by municipalities. Mr. Justice Douglas continued:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths--these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. 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.'

If this New York law were nullified, it would have long reaching effects. A teacher upon written request of the parents, permits a Catholic student to be released for mass on a Holy Day of Obligation. A Jewish student may be excused for Yom Kippur; or a Protestant student for a baptismal service. In all cases the teacher may also ask for a note from the priest, the rabbi, or the minister to make sure the student is not truant. "Whether she does it occasionally for a few students, regularly for one or pursuant to a systematized program designed to further the religious needs of all students, does not alter the character of the act."

Mr. Justice Douglas made this important statement concerning the Court's conception of the relationship between Church and State:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

In conclusion, Mr. Justice Douglas stated that this problem in constitutional law was a matter of degree. The public classrooms were used for religious

instruction in the McCollum case. Also, the force of the public school was used to promote instruction. In the Zorach case, the public schools did no more than accommodate their schedules to a program of outside religious instruction. The Court would not expand the McCollum decision to include programs such as New York's. They felt that the Bill of Rights did not mean to prevent public institutions from making adjustments to accommodate the religious needs of the people.

The three dissenting Justices in the Zorach v. Clauson case wrote separate opinions. Mr. Justice Black in his dissenting opinion[1] stated he could see no significant difference between the invalid Illinois system and that of New York which the Court sustained. The only difference he felt worthy of mention was that the school buildings were used for the religious instruction in Illinois, while in New York they were not. He continued:

> In the New York program, as in that of Illinois, the school authorities release some of the children on the condition that they attend the religion classes, get reports on whether they attend, and hold other children in the school building until the religious hour is over.

In the McCollum case, the Court stated that Illinois could not constitutionally "manipulate the compelled classroom hours of its compulsory school machinery so as

---

[1] Ibid., 316-320.

to channel children into sectarian classes." Yet, the Court by sustaining the New York law is holding that New York can do this.

In the remainder of his opinion, Mr. Justice Black reaffirmed his belief in the philosophy of separation as stated in McCollum and Everson v. Board of Education. The plan, purpose, design and consequence of the New York program was to help the religious sects get attendants at religious education classes through the use of the state's compulsory education laws. Mr. Justice Black continued:

> Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State.

Mr. Justice Black noted that it was because the Eighteenth Century Americans were a religious people divided by many fighting sects that the First Amendment was adopted. This amendment was to insure that no one sect or combination of sects could use the government power to punish dissenters. The government must remain neutral in order to insure freedom to all sects and to all nonbelievers. Mr. Justice Black felt:

> It is this neutrality the Court abandons today when it treats New York's coercive system as a program

> which merely 'encourages religious instruction or cooperates with religious authorities.' The abandonment is all the more dangerous to liberty because of the Court's legal exaltation of the orthodox and its derogation of unbelievers.

The First Amendment loses much if the believers and non-believers are no longer entitled to equal justice under the law.

Mr. Justice Black concluded with this statement, "Government should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice."

Mr. Justice Frankfurter delivered a short dissenting statement which he stated was to emphasize his agreement with Mr. Justice Jackson's dissent.[1]

Mr. Justice Frankfurter's opinion essentially dealt with two aspects of the problem in this case. First, he noted that a State can provide that classes in its school may be dismissed for various reasons. However, Mr. Justice Frankfurter felt:

> The essence of this case is that the school system did not close its doors and did not suspend its operations. There is all the difference in the world between letting the children out of school and letting some of them out of school into religion classes.

If all children were released to do as they wished with the time, there would be no conflict with the First Amendment as applied to states by the Fourteenth.

---

[1] Ibid., 320-323.

However, the school system is very much in operation during the released time. "If its doors are closed, they are closed upon those students who do not attend the religious instruction in order to keep them within the school."

Second, Mr. Justice Frankfurter felt the Court should not rely upon the absence from the record of evidence of coercion in the operation of the system. The Court disregarded the fact that when the case came to the Supreme Court, the appellants had not been allowed to make proof of coercion. The lower court said that such proof was irrelevant to the issue of constitutionality. Mr. Justice Frankfurter said:

> I cannot see how a finding that coercion was absent, deemed critical by this Court in sustaining the practice, can be made here, when appellants were prevented from making a timely showing of coercion because the courts below thought it irrelevant.

Mr. Justice Frankfurter concluded that the controversy aroused by the attempt to secure religious education for public school children would end, if the proponents of such programs would allow classes to be dismissed without discrimination. He went on to state:

> The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes--an attitude that hardly reflects the faith of the greatest religious spirits.

The final dissenting opinion was delivered by Mr. Justice Jackson.[1] He felt that the New York "released time" program was based upon the use of the State's power of coercion, and this was what made the plan unconstitutional.

Mr. Justice Jackson stated that "the plan had two stages: first, that the State compel each student to yield a large part of his time for public secular education; and, second, that some of it be 'released' to him on condition that he devote it to sectarian religious purposes." The shortening of everyone's school day would facilitate voluntary and optional attendance at church classes. This could be done if officials felt that the length of the school day injured the students by encroaching upon their religious opportunity. However, this suggestion is rejected because if all students were free, many would not go to the church. The New York system, therefore, is effective because of the check on attendance at the religious classes by the public school.

In the school, work is more or less suspended during the "released time" so that the nonreligious attendants will not forge ahead of the released students. Mr. Justice Jackson stated:

---

[1]Ibid., 323-325.

> . . . it [the school] serves as a temporary jail for a pupil who will not go to church . . . This is government constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirection as when exercised forthrightly.

Mr. Justice Jackson felt that the majority of the Court was confusing an objection to compulsion with an objection to religion. "It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." When the United States "ceases to be free for irreligion it will cease to be free for religion."

In the conclusion of his opinion, Mr. Justice Jackson stated:

> The distinction attempted between that case [McCollum v. Board of Education] and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity . . . The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

The majority of the comments by lay persons concerning the Supreme Court's decision in Zorach v. Clauson compared this decision with the one in McCollum v. Board of Education, and to some extent with the decision in Everson v. Board of Education. David Louisell pointed out that the Zorach case was significant in that there was a change of language from the Everson case and the McCollum case. The language in these latter two cases

had been that government could not aid one or all religions. In the Zorach case the language is, "'We are a religious people whose institutions presuppose a Supreme Being.'" Also, this change is revealed by the Court's opinion that government cooperation with religious authorities in religious education programs "'follows the best of our traditions.'" Mr. Louisell felt that these views were a deviation from the underlying philosophy of the interpretation of the First Amendment, implicit and explicit in the Everson and McCollum cases.[1]

Robert Drinan, like David Louisell, noted a shift in emphasis by the Supreme Court in the Zorach case from the McCollum case. He felt that in the latter case the establishment of an absolute doctrine of separation took precedence over any attempt to harmonize the contending parties. However, in the Zorach decision the Court corrected this "oversight," and it attempted to harmonize the interests of the two groups. In this respect the notion was introduced whereby the state may accommodate its public institutions to the religious needs and aspirations of the American people. Mr. Drinan felt that this notion to a large extent restored religious liberty or freedom because the absoluteness of the separation of

---

[1]Louisell, loc. cit.

Church and State was negated.[1]

Lee O. Garber pointed out another deviation from the McCollum case by the Supreme Court in its opinion in the Zorach case. He felt that the Court did not rely as heavily on the First Amendment as they had in the McCollum case. Also, the Court did not reiterate the legal concept of applying the First Amendment to the states by the Fourteenth Amendment. However, he pointed out that the Court did not reject or disavow this application.[2]

The Court's retreat from the doctrine of absolute separation may be recognized. It is difficult, however, to understand the failure of the Court to not perceive that in both the New York "released time" program and in the Champaign plan attendance was checked and reported to the public schools in the same manner. This especially true since the Supreme Court invalidated the Champaign plan partly on the basis that the compulsory school law was used to help provide pupils for religious classes. V. T. Thayer and Lee O. Garber both pointed out this fact. They felt that in the New York plan as well as in the Champaign plan the operation of the state's compulsory education system assisted and was integrated with

---

[1]Robert F. Drinan, "The Supreme Court and Religion," Commonweal, 56:554-6, September 12, 1952.

[2]Lee O. Garber, "Zorach Case," The Nation's Schools, 50:67-72, August, 1952.

the program of religious instruction carried on by separate religious sects.[1]

The Supreme Court to a certain extent clarified its position concerning the First Amendment and the "wall of separation." However, the Court's opinion in the Zorach case applied to a specific situation. It was uncertain how far a government might go in accommodating its institutions to religion. Could this accommodation extend to recitation of prayers or Bible reading in the public schools? Ten years after the Zorach decision, a case which questioned the constitutionality of a state written and recommended prayer came before the Supreme Court.

STATE COMPOSED PRAYERS FOR USE IN PUBLIC SCHOOLS

In 1962 the United Supreme Court handed down a six-to-one decision in Engel et al. v. Vitale et al., 370 U. S. 421. The Court held that because of the prohibition of the First Amendment against any law respecting an establishment of religion, state officials could not compose an official state prayer and require that it be recited in the public schools of the State.

---

[1] Loc. cit.; V. T. Thayer, "Released Time, A Crutch for Churches," The Nation, 174:130-132, February 9, 1952.

Engle v. Vitale, which originated in the state of New York, questioned the constitutionality of the use in a school district of a prayer composed and recommended by the State Board of Regents. It should be noted that the Board of Regents has supervisory, executive, and legislative powers over the State's public school system.

The prayer referred to in this case was published as part of the Board of Regents' "'Statement on Moral and Spiritual Training in the Schools.'" The prayer was:

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

In recommending this prayer the Board of Regents stated:

> 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.

In accordance with the Board of Regents' recommendation, the school district of Hyde Park, New York, directed that the Regents' prayer be said aloud by each class in the presence of the teachers at the beginning of each day.

Shortly after the practice of reciting the Board of Regents' prayer was adopted by the School District, the parents of ten pupils brought action in a New York State Court. They stated that the use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. The parents also charged that both the state law authorizing the School District to direct use

of prayer in public schools and the School District's regulation ordering the recitation of this particular prayer violated the clause of the First Amendment of the Constitution which prohibits Congress from making a law "respecting an establishment of religion," which was made applicable to the States by the Fourteenth Amendment. The New York Court of Appeals sustained the lower state courts which had upheld the power of New York to use the Regents' prayer as part of the daily procedures of the public schools as long as the schools did not compel any pupil to join in the prayer over his or his parents' objection. The United States Supreme Court granted certiorari to review this decision involving rights protected by the First and the Fourteenth Amendments.[1]

Mr. Justice Black in delivering the opinion of the Supreme Court[2] noted that there was no doubt that the use of the Board of Regents' prayer in the classrooms of the public schools was a religious activity. The religious nature of prayer had been recognized by Thomas Jefferson, by the United States Supreme Court, by a committee of the New York legislature and by many administrative officials. The Board of Regents and the school district conceded the religious nature of prayer, however they distinguished

---

[1] Engel et al. v. Vitale et al., 370 U. S. 421, 422-424.

[2] Loc. cit.

this prayer by saying it was based on American spiritual heritage.

The petitioners contended that the prayer was composed to further the Board of Regents' program of promoting religious beliefs. For this reason, its use in the public schools breached the constitutional wall of separation between Church and State. Mr. Justice Black stated that the Court agreed with this contention because the prohibition against an "establishment of religion" at least means that "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."

Mr. Justice Black continued the opinion of the Court by reviewing the history of the attempts to separate Church and State. He especially emphasized the efforts to ban state prescribed prayers. He noted it was the practice of government composing prayers for religious services that caused many persons to leave England and to come to America for religious freedom. The Book of Common Prayer, which was created under governmental direction and approved by Acts of Parliament in 1548 and 1549, prescribed in detail the accepted form and content of prayers and other religious ceremonies to be used in the established Church of England. There developed a constant struggle between the various powerful groups which

represented the different religious views of the people. These groups attempted to win favor with the government in order to obtain changes in or amendments to the Book of Common Prayer which would fit their particular religious beliefs. Some groups which lacked the political power to influence the government left England for America in order to escape the established Church of England.

Some of these groups that came to America soon found themselves sufficiently in control of the colonial government to pass laws making their own religion the official religion of their colony. Until the Revolutionary War there were established churches in at least eight of the thirteen colonies and established religions in at least four of the other five. However, after the Revolutionary War intense opposition developed to the practice of establishing religion by law. This movement became a powerful force in Virginia where in 1785-1786 under the leadership of Thomas Jefferson and James Madison the "Virginia Bill for Religious Liberty" was passed. Other such legislation was being considered and passed in other states.

A widespread awareness among the American people of the dangers of the union of Church and State had developed by the time the Constitution was adopted. These people realized that the greatest danger to personal freedom of worship lay in the government's approving one

particular form of prayer or religious service. The Constitution was intended in part to avert this kind of danger by leaving the government of the United States in the hands of the people rather than in the hands of a monarch. However, the founding fathers felt that the First Amendment was also necessary. Mr. Justice Black stated:

> The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say--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. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

The majority of the Court, Mr. Justice Black continued, felt that it was clear ". . . that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer." The prayer is not freed from the limitations of the Establishment Clause even though it may be nondenominational and students may choose to not participate in its saying.

Mr. Justice Black continued with a history of the purpose and meaning of the Establishment Clause. The Establishment Clause's ". . . first and most immediate purpose rested in the belief that a union of government and religion tends to destroy government and to degrade

religion." It is history that when a government allied itself with one particular religion it incurred the hatred and disrespect of those who held contrary beliefs. Also, a religion that relied on the support of a government lost the respect of many people. "Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." There were persecutions both in America and England of persons who refused to worship in the manner that government prescribed. Part of the reason why the ". . . Founders brought into being our Nation, our Constitution, and our Bill of Rights . . ." was to escape such persecutions. The majority of the Court felt that, "The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself."

Mr. Justice Black pointed out that by applying the Constitution in a manner which prohibited states from establishing religious services in public schools did not indicate a hostility toward religion or toward prayers. Men with a faith in the power of prayer were instrumental in the adoption of the Constitution and the Bill of Rights. These men realized that the First Amendment was intended to keep government from shackling ". . . men's tongues to make them speak only the religious thoughts

that government wanted them to pray to." Therefore, Mr. Justice Black concluded:

> It is neither sacrilegious or antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Mr. Justice Black pointed out in a footnote in the Court's opinion, that the decision in this case was not inconsistent with the fact that school children and others are officially encouraged to recite such documents as the Declaration of Independence which contains references to the Deity or by singing official anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. "Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

Mr. Justice Douglas began his concurring opinion[1] by pointing out that it was customary to treat a constitutional question in its narrowest form. However, he felt that "at times the setting of the question gives it a form and content which no abstract treatment could give." The question in Engel v. Vitale is whether

---

[1] Ibid., 437-444.

Government can constitutionally finance a religious exercise. "Our system at the Federal and state levels is presently honeycombed with such financing." In a footnote in his opinion, Mr. Justice Douglas pointed out many of the "aids" to religion that have already been brought out in the other cases discussed. He felt that such financing or "aid" was unconstitutional whatever form it took.

Mr. Justice Douglas pointed out two things that this case did not involve. First, there was no coercion involved. A student in the New York public schools is not under compulsion to recite the Regents' prayer. In fact, ". . . the only one who need utter the prayer is the teacher. . . Students can stand mute or even leave the classroom if they desire."

Second, McCollum v. Board of Education does not decide this case. The situation under question in the McCollum case involved the influence of the teaching staff which was brought to bear on the students by the fact that they either had to attend religious exercises or go to some other place in the school building for the continuance of their secular studies. Also, attendance at the religious classes was reported to the secular teachers. In Engel v. Vitale school buildings are used to say the prayer and the teaching staff is employed to lead the pupils in it, but there is no attempt at

indoctrination or exposition.

Therefore, Mr. Justice Black stated the question in Engel v. Vitale is a narrow one. "It is whether New York oversteps the bounds when it finances a religious exercise."

Mr. Justice Douglas continued by pointing out that what New York does in opening its public schools is what the Supreme Court does in opening court and what both Houses of Congress do in opening their sessions. The Court Crier after announcing the convening of the Court aids, "'God save the United States and this Honorable Court.'" Both Houses of Congress have chaplains which offer a prayer at the beginning of each day. In each instance, including that of the New Yrok public schools, the person leading the prayer is a public employee, and no open coercion is involved. However, Mr. Justice Douglas stated:

> . . . for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.

Mr. Justice Douglas felt that the authorization by New York of the prayer involved in this case did not constitute an establishment of religion in the historic sense. However, once a government finances a religious exercise it introduces a divisive influence into the community. The First Amendment, Mr. Justice Douglas felt,

meant that government must be neutral in its position in regard to religion. The philosophy is that the agnostic or the atheist is as entitled to his beliefs as those who accept a religion professing a belief in God.

In conclusion, Mr. Justice Douglas stated he felt that New York by authorizing the prayer involved in this case broke with the traditional belief inherent in the First Amendment's philosophy. This philosophy is that in order to maintain religious freedom no sustenance will be given to religion by the state, and also, religion will be free from other interferences by the state.

Mr. Justice Stewart in his dissenting opinion[1] pointed out that the Court could not say anybody's privilege of free exercise of religion had been repressed. Yet, the Court said that by permitting school children to say "this simple prayer" the New York authorities established "'an official religion.'" Mr. Justice Stewart felt the Court had misapplied "a great constitutional principle." He could not see how an "'official religion'" was established by letting those who wanted to say a prayer say it. "On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."

---

[1] Ibid., 444-450.

Mr. Justice Stewart felt no light was thrown on the case by the Court's historical review of the quarrels over the Book of Common Prayer, of the established church in England, and of the movement from established churches in America. As already implied, Mr. Justice Stewart felt that in Engel v. Vitale, the Supreme Court was not dealing with an establishment of a state church. He felt that what was relevant in this case was ". . . the history of the religious tradition of our people, reflected in countless practices of the institutions and officials of our government."

Mr. Justice Stewart gave some examples of these practices. The sessions of the Supreme Court are opened by the invocation of the Crier. Both Houses of Congress open their daily sessions with prayer. Each of the Presidents of the United States from George Washington to John F. Kennedy in his inaugural address has asked the protection and help of God.

Mr. Justice Stewart noted that the Court in Engel v. Vitale was saying that ". . . the state and Federal governments are without constitutional power to prescribe any particular form of words to be recited by any group of the American people on any subject touching religion." He gave these examples where this principle seems to have been violated by the Federal government. The "Star-Spangled Banner," made the National Anthem by Congress in

1931, contains these verses:

> 'Blest with victory and peace, may the heav'n rescued land, Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause it is just, And this be our motto 'In God is our Trust.' '

The words "under God" were added by Congress to the Pledge of Allegiance in 1954. In 1952 Congress enacted legislation calling on the President each year to proclaim a National Day of Prayer. Since 1865 the words "In God We Trust" have been impressed on United States' coins. Mr. Justice Stewart stated that he felt that the point he wished to make by citing these examples could be summed up in this sentence from Zorach v. Clauson, "'We are a religious people whose institutions presuppose a Supreme Being.'"

In conclusion, Mr. Justice Stewart stated that he did not feel that the Supreme Court, Congress and the President by their actions had established an "'official religion.'" Also, he felt New York had not in this case established an "'official religion.'" He stated:

> What each has done has been 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 their 'firm Reliance on the Protection of divine Providence' when they proclaimed the freedom and independence of this brave new world.

Lay persons' interpretations of the Supreme Court decision in Engel v. Vitale reveal a disagreement as to what may be implied from the Court's opinion in this

case. The opinions of the lay persons may be divided into two groups. (1) Those who felt the Supreme Court decision placed a ban on all religious exercises in the public schools, and (2) those who felt that the Supreme Court invalidated only state written or prescribed prayers.

Those lay persons who felt that the Supreme Court decision in Engel v. Vitale implied that all religious ceremonies provided or sponsored by the state in public schools were unconstitutional, tended to view the Court's decision in its broadest form. They seemed to view the decision as not just a negation of a state written prayer, but also, as a ban on Baccalaureate services, Christmas and Easter programs, devotional Bible reading, and the recitation of the Lord's Prayer. Lee O. Garber felt that the Supreme Court probably put a ban on such religious practices as mentioned.[1] Leo Pfeffer was more emphatic than Mr. Garber in his belief that the above-mentioned practices were now unconstitutional. He definitely felt all nondenominational religious practices were as unconstitutional as those frankly sectarian. Mr. Pfeffer felt that the decision in this case was a return to the strict separation revealed in the McCollum case.[2]

---

[1]Lee O. Garber, "Prayer Barred: What It Means," The Nation's Schools, 70:54-55, August, 1962.

[2]Leo Pfeffer, "The New York Regents' Prayer Case (Engel v. Vitale)," A Journal of Church and State, 4:150-158, November, 1962.

The tendency of some lay persons to interpret the Supreme Court decision in these broad terms caused definite opposition by some of these persons to the opinion of the Court. Ex-President Hoover stated, "'. . . the interpretation of the Constitution by the Supreme Court on prayer in our schools is a disintegration of one of the most sacred of American heritages.'"[1] Several Congressmen interpreted the Engel v. Vitale in the same manner. Senator Herman Talmadge of Georgia, accused the Court of "'reading alien meanings into the Constitution and seeking in the past to change our form of government . . . but never in the wildest excesses . . . have they gone as far as they did . . .,'" in this decision. Senator Robert C. Byrd of Virginia, asked whether this decision meant the American people were ready to embrace the "'foul concept of atheism.'" He continued, "'Is this not in fact the first step on the road to promoting atheistic and agnostic beliefs?'" Representative Henry C. Schodeberg of Wisconsin, proposed a Constitutional amendment which would allow the official recognition "'of God in prayer in schools.'"[2]

---

[1]Herbert Hoover, cited in "Religion Sponsored by the State," A Journal of Church and State, 4:141-147, November, 1962.

[2]Congressmen cited in "News in Review," The Nation's Schools, 70:80, August, 1962.

Rheinhold Niebuhr also opposed the Supreme Court decision, but his opinion was stated in more moderate language. He felt that religion in America would not "'fall by the . . . absence of the Regents' Prayer,'" but he thought the Court's decision was extravagant. "'To exclude the Regents' Prayer is to insist that schools be absolutely secular in every respect, which is not what the First Amendment intended.'" Mr. Niebuhr thought that by the Court outlawing this prayer which simply expressed "'a mood of religious reverence,'" it was practically suppressing religion, especially in the public schools.[1]

Those lay persons who felt that the Supreme Court's decision in Engel v. Vitale meant only a ban on state prescribed and state written prayers seemed to interpret the Court's opinion in a narrow form. Senator Kenneth B. Keating of New York, pointed out that the dominant fact in the ruling was a prayer composed by the New York Board of Regents. Therefore, it can be concluded that voluntary, nonsectarian school religious exercises may be permissible under this ruling as long as they are not written by state official.[2]

---

[1]Rheinhold Niebuhr, cited in The New Republic, 147:3-5, July 9, 1962.

[2]Senator Kenneth B. Keating, cited in "News in Review," The Nation's Schools, 70:80, August, 1962.

Editorial comments on this case in The New Republic and A Journal of Church and State indicated that they felt the Court decision did not prohibit public schools from allowing the saying of prayers, devotional exercises or Bible reading.[1] In The New Republic this interpretation, particularly in regard to prayer, was stated as follows:

> It [the Supreme Court decision] does not preclude public school prayers which are in use as the result of custom or conventional practice by the consent of all groups in a community--a prayer drafted, let us say, by an inter-faith committee.[2]

Different implications may be drawn from the Supreme Court decision in Engel v. Vitale. However, these implications are not fact. This was indicated by Lee O. Garber. He stated that this decision was applicable only to like or factual situations such as those found in New York. He also noted that until the constitutionality of practices such as Bible reading have been ruled upon by the Supreme Court, the decision in Engel v. Vitale will remain controversial.[3] It may be added that these religious practices that some felt were implicated as being banned by the Supreme Court in this decision, are not

---

[1]The New Republic, 147:3-5, July 9, 1962; A Journal of Church and State, 4:141-147, November, 1962.

[2]The New Republic, 147:3-5, July 9, 1962.

[3]Garber, loc. cit.

actually unconstitutional until ruled so by the Supreme Court.

SUMMARY AND CONCLUSION

The purpose of this study was to (1) examine four United States Supreme Court cases concerning the relationship between religion and the public schools, (2) to analyze the opinions of the Justices on the cases, and (3) to consider the interpretations of these decisions by various lay persons.

Under the Constitution of the United States the legal status of religion in connection with the public schools as explicitly defined by the United States Supreme Court may be summarized as follows:

1. Free bus transportation may be provided for children attending parochial schools.
2. A "released time" program in which children upon the request of their parents may attend religious instruction classes during public school hours and on public school premises is unconstitutional.
3. A "released time" program in which children are excused from school by request of the parents to attend religious instruction classes off the school premises is constitutional.
4. State officials may not write and recommend a prayer

to be used in the public schools.

This summary seems to reveal inconsistencies in the Supreme Court's view of the relationship between religion and the public schools. It must be remembered that each decision dealt with a specific situation and set of facts. Therefore, it is impossible to make a single statement which describes the legal relationship between religion and the public schools.

Although the Supreme Court decision in each case dealt with a specific situation, the Justices, whether delivering the opinion of the Court, a concurring opinion or a dissenting opinion, also elaborated on their conception of the meaning of the First Amendment and on the term "wall of separation." It was upon these opinions that lay persons based their interpretations of the Supreme Court's decision in each case.

For the most part, these lay persons chose to either interpret the opinion of the Supreme Court as simply an approval or a ban on the practice dealt with in the case, or to draw wide implications from the opinion which encompassed practices other than the one specially dealt with in the case. Some lay persons chose to accept the dissenting opinion or opinions in a case as the most accurate interpretation of the facts of the case when history and the First Amendment were applied to them.

It is important to note that none of the Justices

in their opinions dealing with a case denied the importance of religion and its influence on American institutions, specifically on the public schools. Also, the same historical facts and interrelationships between Church and State were quoted by different Justices to support varying views on the meaning and the purpose of the First Amendment. Disagreement seems to center in the question of the proper application of the historical facts and the language of the First Amendment. The Justices of the Supreme Court involved in the four cases discussed and the lay persons interpreting the Court's decision seem to disagree as to when a state passed beyond the "verge of power" constitutionally given to them by the First Amendment as applied to states by the Fourteenth Amendment.

It may be concluded that more cases concerning the relationship between the public schools and religion will come before the Supreme Court in an effort to further define this relationship. This will be true as long as the Supreme Court makes its decisions deal explicitly with only the situation in question, and the states and communities apply the decision in its narrowest form.

ACKNOWLEDGMENT

The writer wishes to express her sincere thanks to Dr. Charles Bracken for his guidance and assistance throughout the preparation of this paper.

BIBLIOGRAPHY

Books

Edwards, Newton. The Courts and The Public Schools. Chicago: University of Chicago Press, 1955.

Fellman, David. The Supreme Court and Education. Richmond, Va.: William Byrd Press, Inc., 1960.

Spurlock, Clark. Education and the Supreme Court. Urbana: University of Illinois Press, 1955.

United States Reports. Cases adjudged in the Supreme Court. Vols. 330, 333, 343, 370. Washington: Government Printing Office.

Periodicals

Allen, Roy B., and Robert Marshall. "'Child Benefit' Has Lost Its Glitter," Phi Delta Kappan, 44:77-79, November, 1962.

Bolmeier, E. C. "Legality and Propriety of Religious Instruction in the Public Schools," Educational Forum, 20:473-482, May, 1956.

Butts, R. Freeman. "The Relation Between Religion and Education," Progressive Education, 33:140-142, September, 1956.

_____. "Church and State in American Education," Teachers College Record, 52:145-157, December, 1950.

The Christian Century, 64:262-264, February 26, 1947.

Drinan, Robert F. "The Supreme Court and Religion," Commonweal, 56:554-556, September 12, 1952.

Garber, Lee O. "Prayer Barred: What It Means," The Nation's Schools, 70:54-55, August, 1962.

_____. "Zorach Case," The Nation's Schools, 50:67-72, August, 1952.

Gauerke, Warren E. "Religion and the Public Schools: Some Legal Problems," School and Society, 75:401-404, June 28, 1952.

Greenbaum, Edward S. "Released Time, The Parent's Right to Choose," The Nation, 174:128-130, February 9, 1952.

Heffron, Edward J. "Supreme Court Oversight," Commonweal, 46:9-11, April 18, 1947.

Johnson, F. Ernest. "A Guide to Group Study of Religion and Public Education," Religious Education, 48:422-430, November-December, 1953.

Lieberman, Myron. "A General Interpretation of Separation of Church and State and Its Implications for Public Education," Progressive Education, 33:129-134, September, 1956.

Ligtenberg, John. "Laws Respecting an Establishment of Religion," The American Teacher Magazine, 47:5-6, February, 1963.

Louisell, David W. "Constitutional Limitations and Supports for Dealing with Religion in Public Higher Education," Religious Education, 50:285-290, September, 1955.

Meyer, Agnes E. "The School, The State, and The Church," Atlantic Monthly, 182:45-50, November, 1948.

The Nation's Schools, 70:80, August, 1960.

The New Republic, 147:3-5, July 9, 1962.

Patterson, Cecil H. "Religion In Education: It's Status Under Federal Law," Progressive Education, 31:22-25, October, 1953.

Pfeffer, Leo. "The New York Regents' Prayer Case," A Journal of Church and State, 4:150-158, November, 1962.

Pleasants, Samuel A. "Church and State in a Public School System," Clearing House, 34:277-278, January, 1960.

Punke, Harold H. "Constitutional and Legal Aspects of the Church-State School Problem," School and Society, 89:222-226, May 6, 1961.

"Relation of Religion to Public Education," International Journal of Religious Education, 36:21-36, April, 1960.

"Religion Sponsored by the State," A Journal of Church and State, 4:141-147, November, 1962.

Remmlein, Madaline K. "Legal Aspects of Religious Instruction," The Nation's Schools, 41:26-28, April, 1948.

Rosenfield, Harry N. "The Supreme Court Decides the Parochial School Bus Case," The Nation's Schools, 39:41-43, April, 1947.

Schwartz, Bernard. "Religion in Education: A Legal Perspective," Teachers College Record, 64:363-366, February, 1963.

Siegel, R. Lawrence. "Church-State Separation and the Public Schools," Progressive Education, 26:103-111, February, 1949.

Thayer, V. T. "Released Time, A Crutch for Churches," The Nation, 174:130-132, February 9, 1952.

_____. "Public Aid to Religious Education," School and Society, 89:226-230, May 6, 1961.

Tieszen, D. W. "Legal Concepts Concerning Religious Influences in Public Education," Teachers College Record, 55:61-69, November, 1953.

Tyree, Marshall J. "Should What Is Rendered to God Be Commanded by Caesar?," Phi Delta Kappan, 44:74-76, November, 1962.

Wiegle, Luther. "Crisis of Religion in Education," Religious Education, 49:73-77, March-April, 1954.

A SURVEY OF LITERATURE CONCERNING SELECTED UNITED STATES SUPREME COURT CASES DEALING WITH THE RELATIONSHIP BETWEEN RELIGION AND THE PUBLIC SCHOOLS

by

MARY L. RECORDS

B. A. Lindenwood College, 1962

AN ABSTRACT OF A MASTER'S REPORT

submitted in partial fulfillment of the

requirements for the degree

MASTER OF SCIENCE

School of Education

KANSAS STATE UNIVERSITY
Manhattan, Kansas

1963

Approved by:

Dr. Charles Brocken
Major Professor

The purpose of this study was to (1) examine four United States Supreme Court cases concerning the relationship between religion and the public schools, (2) to analyze the opinions of the Justices on the cases, and (3) to consider the interpretations of these decisions by various lay persons.

In Everson v. Board of Education, 330 U. S. 1 (1947), the Supreme Court ruled that a state may provide free bus transportation for children attending parochial schools. Mr. Justice Black in the opinion of the Court stated that the state had not violated the First Amendment. Providing transportation for school children was part of their public welfare program, not an "aid" to religion. Mr. Justice Jackson and Mr. Justice Rutledge dissented. They felt that the state was helping certain children obtain a religious education. This violated the First Amendment. Lay persons felt that one main question was left unanswered by this decision. How far may a state validly go under the public welfare theory before it violated the First Amendment?

In Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203 (1948), the Supreme Court attempted to clarify its interpretation of the First Amendment. The Court declared unconstitutional the Champaign, Illinois, "released time" program which allowed religious instruction on public school premises during school

hours. Mr. Justice Black in the opinion of the Court, and Mr. Justice Frankfurter and Mr. Justice Jackson in concurring opinions, felt Champaign was using a tax supported institution for the furthering of religious instruction. This violated the "establishment of religion" clause of the First Amendment. Mr. Justice Reed dissented. He felt that a nonsectarian group sponsoring a program of religious instruction which used public school buildings was not violating the First Amendment. Lay persons either agreed with Mr. Justice Reed that the Court had falsely interpreted the First Amendment, or agreed with the Court's opinion. The latter group was uncertain whether the ban extended to "released time" programs that differed from the Champaign plan.

In 1952 the Supreme Court declared constitutional a New York "released time" program in which religious classes were conducted off school premises (Zorach v. Clauson et al., 343 U. S. 306). Mr. Justice Douglas delivering the Court's opinion stated, "We are a religious people whose institutions presuppose a Supreme Being." When the State cooperates with religious authorities, it follows the best of American traditions. Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Jackson dissented. They could see no significant difference between the New York and the Champaign "released time" plans. Both used the public school to get participants.

Lay persons felt that the main deviation by the Court in this case from the McCollum case was that the doctrine of absolute separation of Church and State was negated.

In Engel et al. v. Vitale et al., 370 U. S. 421 (1962), the Supreme Court held it unconstitutional for state officials to write a prayer for use in the public schools. Mr. Justice Black in the opinion of the Court stated that the "establishment" clause of the First Amendment meant government could not compose official prayers for a group of Americans to recite. Mr. Justice Douglas concurred with this interpretation of the First Amendment. Mr. Justice Stewart dissented. He felt that the state had only recognized the spiritual traditions of the United States. Lay persons disagreed as to whether this decision placed a ban only on state composed prayers or whether it also implied a ban on religious holiday programs, Bible reading and Baccalaureate services.

Each of these cases dealt with a specific situation. Therefore, it is impossible to make a single statement describing the legal relationship between religion and the public schools. It is important to note that no Justice denied the importance of religion and its influence in the United States, particularly in the public schools. As long as the Supreme Court decisions deal with specific situations, cases will appear before the Supreme Court in an effort to define the relationship between religion and the public schools.