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## THE STATE ATTORNEY GENERAL: A FRIEND OF THE COURT?

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*The judiciary, on the contrary, has no influence over either the sword or the purse . . . It may truly be said to have neither Force nor Will, but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.*

THE FEDERALIST No. 78 (A. Hamilton).

### I. FUNCTION OF THE STATE ATTORNEY GENERAL IN STATE COMPLIANCE WITH SUPREME COURT RULINGS

Enforcement of judgments usually is given only a page or two in any good text on the Supreme Court.<sup>1</sup> Discussion is held to the need for the "aid of the executive arm" by an allusion to Jackson's infamous outburst<sup>2</sup> or Lincoln's rebuttal of Taney,<sup>3</sup> and if the author associates judicial compliance with enforcement, he may add a discussion of lower

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<sup>1</sup> See, e.g., J. FRANK, MARBLE PALACE 37-41 (1958). For a few of the limited number of articles on the subject, see Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, 10 MIDWEST J. POL. SCI. 304 (1966); Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777, 784-91 (1959); Patric, *The Impact of a Court Decision: Aftermath of the McCollum Case*, 6 J. PUB. LAW 455 (1957).

<sup>2</sup> "John Marshall has delivered his opinion, now let us see him enforce it." G. MYERS, HISTORY OF THE SUPREME COURT 357 (1912).

<sup>3</sup> Message from President Lincoln to Congress, July 4, 1861, in D. SILVER, LINCOLN'S SUPREME COURT 35 (1956).

courts and their role in remanded cases.<sup>4</sup> But are there further instances of the gap between judicial theory and American practice?

The failure of analysis to penetrate deeper than these examples into the enforcement process may be explained by assumptions often made concerning the relation of the Supreme Court to the American people. Americans are thought to stand in awe of the law as explicated by any court, and most particularly by the Supreme Court.<sup>5</sup> Furthermore, there may be an overemphasis of the fact that the Court treats specific cases only. Never legislative in the proper sense, Supreme Court-made law is assumed to filter slowly downward as relevant cases arise rather than to impress itself fully on all practice at one and the same time. The Court allows time for accommodation and the people respond positively, if imperceptively, to this easy tempo. In other words, compliance is thought to be a natural sociological process.

Today, if not before, such a portrait of compliance must be refined, at least in some areas of the law. It is common knowledge that in the field of civil liberties the Supreme Court has treated a multitude of "class actions" and insisted on compliance with "all deliberate speed."<sup>6</sup> Equally well-known is the defiance of Court directives in Little Rock, Oxford, and Montgomery. There, in lieu of "historic reverence," only the force of the national guard, United States marshals, and the Department of Justice could elicit compliance with the judicial directive.

These agencies are manifestations of the federal executive power. However, the distinct executive powers of the individual states have also been exercised during the recent civil liberties conflicts. This is not unexpected as most of the practices struck down by the Court in the civil rights and liberties area have involved state, not federal, statutes.<sup>7</sup> What may be surprising is that state executives have so often used their powers in direct defiance of the Court. It is the governors, not the Presidents, who have most recently taken up Jackson's heresy.

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<sup>4</sup> Examples which illustrate the betrayal of the Supreme Court by both federal and state judges are numerous and instructive. See Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

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No one can have seen the pilgrims who fill the ornate Court room during public sessions, under the bas-reliefs of great law givers like Napoleon, without being struck by this historical reverence which is something won, not simply conferred. And the audience does answer the prayer of the usher, 'God save the United States and this honourable Court.'

D. BROGAN, *POLITICS IN AMERICA* 415 (1954).

<sup>6</sup> See, e.g., *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (public school desegregation order).

<sup>7</sup> See H. ABRAHAM, *THE JUDICIAL PROCESS* 284 (2d ed. 1968).

However, it becomes difficult in many cases to distinguish stiff resistance from good politics. The governors may realize that they must comply, but they may also feel that the office requires them to symbolize the resistance which is strongly felt among the people they represent. To meet this problem a test of the depth of commitment of state executives to a course of opposition should involve observations of administrators other than the governor. Whatever the content of gubernatorial speeches, it would be more useful to examine the degree to which a governor's administration will implement a particular decision.

Attention is thus focused on the quasi-judicial officer in the administration whose job it is to bridge the gap between law and state practice: the state attorney general. In theory, the ethics of his profession should compel the attorney general to comply with the Court, and his position should give him the necessary powers of enforcement. Of more interest is the attorney general's actual practice: how, in fact, does he seek to implement the law of the land as expressed by the Supreme Court? Since the role of the attorney general in the implementation of Supreme Court decisions depends upon the nature and powers of his office, an analysis of these functions and institutional limits should precede a discussion of how they are actually used to further or impede compliance with the Court's declarations of law.<sup>8</sup>

The attorney general does not fit neatly within the framework described by the doctrine of separation of powers, since he exercises both executive and judicial functions.<sup>9</sup> As an executive he gives legal advice to the governor and to the rest of the administration; he represents executive agencies at the bar; he conducts investigations into state practices;<sup>10</sup> and in many states he has some role in the administration of justice at the local level.<sup>11</sup> The majority of students in public

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<sup>8</sup> Unfortunately, a paucity of scholarship in this area makes even institutional analysis difficult. See B. ABERNETHY, *SOME PERSISTING QUESTIONS CONCERNING THE CONSTITUTIONAL STATE EXECUTIVE* 37-39 (1960); D. AKERS, *The Advisory Opinion Function of the Attorney General*, 38 KY. L.J. 561 (1950).

<sup>9</sup> A case could also be made that the attorney general is a legislative official. In almost one-third of the states (15), he not only advises legislators on specific questions of law, but also plays a major role in the drafting of legislation. THE COUNCIL OF STATE GOVERNMENTS, *OUR STATE LEGISLATURES* 30-31 (rev. ed. 1948).

<sup>10</sup> See *Uphaus v. Wyman*, 360 U.S. 72 (1959), and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), for interesting comments on the constitutionality of investigations by one particular attorney general pursuant to a broad mandate of the state legislature.

<sup>11</sup> Some commentators lament the fact that the state attorney general plays such a minor role in local law enforcement. They usually suggest statewide centralization of law enforcement officers as well as district attorneys, with the state attorney general's office as the focus. See W. WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 115-26 (1929).

administration emphasize these functions and therefore consider the attorney general to be the governor's attorney and administrator. Typical of their conception of his proper role is the recurring effort to have the attorney general appointed by the governor.<sup>12</sup>

Despite this popular assessment of his role, the attorney general is in fact elected or appointed independently of the governor in a vast majority of states, and this independence has been preserved in spite of an occasional wave of reform.<sup>13</sup> When queried, both governors and attorneys general saw this independence as essential in maintaining the sensitivity necessary for the correct disposition of the office:

A thin and not too easily defined thread of thought runs through all their comments which seems to say that this is not solely a ministerial post; that its responsibilities go beyond and embrace something of the judicial and perhaps even of the representative; . . . and that here is an institution about which hangs an aura of the ancient and of the common law, as well as constitutional statutory law, which marks it for special status and stature in the state governmental structure.<sup>14</sup>

This judicial function is frankly recognized in Tennessee where the attorney general is appointed by the justices of the state supreme court.<sup>15</sup> Whether or not independent selection of an attorney general emphasizes the office's judicial aspect, the duties and powers of a judicial nature which are attached to it are significant. In all states, the attorney general is empowered to issue advisory opinions which are customarily regarded as having the force of law unless and until tested in court. In some states, he can be requested by the state supreme court to submit opinions toward the explication of difficult judicial issues.<sup>16</sup>

While architects of model state constitutions feel compelled to make a choice between the administrative and judicial roles when determining proper procedures for the election or appointment of attorneys general

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<sup>12</sup> See ABERNETHY, *supra* note 8, at 42-48; J. PHILLIPS, *STATE AND LOCAL GOVERNMENT IN AMERICA* 208 (1954).

<sup>13</sup> Forty-two states elect their attorney general popularly; in Maine, he is appointed by the legislature and in Tennessee by the State Supreme Court; in New Hampshire by the governor and council; in Alaska, Hawaii, New Jersey, Pennsylvania and Wyoming, by the governor. For details on the relevant reform movements, see ABERNETHY, *supra* note 8, at 33.

<sup>14</sup> *Id.* 38; for other results of the survey, see *id.* 34-43.

<sup>15</sup> TENN. CONST. art. 6, § 5.

<sup>16</sup> Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 351, 367 (1956). Such an opinion was requested by the Florida Supreme Court when *Chamberlin v. Dade County Bd. of Pub. Instr.*, 374 U.S. 487 (1963), was remanded. The Florida court subsequently interpreted the prayer decision as inapplicable to Dade County.

to office,<sup>17</sup> for the sake of this discussion it is only necessary to acknowledge a confusion or confluence of roles. The problem of compliance with the Supreme Court decisions centers primary attention on the attorney general as author of advisory, yet effectively binding, opinions on points of law. Although as defender of state agencies and informal adviser to state courts, legislators, and governors, the attorney general may determine state compliance in subtler ways, the advisory opinion is clearly his most potent weapon.

An advisory opinion issued by an attorney general may take three forms: an oral opinion, a letter opinion, and a formal opinion.<sup>18</sup> For most purposes the first two categories may be collapsed into one simply designated "advice." It is on the formal opinions alone that the attorney general is willing to stand firm against administration and public alike. He will render a formal opinion to any state official entitled to one upon request, though there is a question in some states whether any local officials have a right to request such opinions.<sup>19</sup> The attorney general is not bound by the principle of *stare decisis*, though he often finds it useful to achieve continuity in administrative practice.<sup>20</sup> His opinion may raise state and/or federal questions and treat matters of both law and fact; that is, it can discuss the merits of a particular case as well as the relevant points of law. The attorney general's opinion thus has the scope, if not the force, of a trial court decision.

Although state "officers cannot be forced to follow a requested attorney general's opinion,"<sup>21</sup> formal opinions do seem to carry a sizable amount of legal force. Their power derives from custom and practical considerations rather than from legal compulsion. The state official who defies the advice of the attorney general does so at considerable peril, for it is the attorney general who will represent the official in court if his actions precipitate a suit. Such a suit may even be encouraged by press coverage of the formal opinions, which could themselves provide the plaintiff with a ready-made legal framework for his case. Moreover, state courts have traditionally regarded highly the wisdom of formal opinions and have seldom seen fit to overturn them. Unfortunately for the recalcitrant official, the only legal appeal from a formal opinion does lie with the courts, which are already prejudiced in favor of the opinion. Thus, fortified against attack, the

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<sup>17</sup> The model architects have generally favored an "executive" view of the office. See ABERNETHY, *supra* note 8, at 33-34.

<sup>18</sup> Larson, *supra* note 16, at 353.

<sup>19</sup> *Id.* 356-59.

<sup>20</sup> Akers, *supra* note 8, at 578-79; Larson, *supra* note 16, at 367-68.

<sup>21</sup> Larson, *supra* note 16, at 360-61.

issues treated formally by the attorney general are seldom brought before the bench.<sup>22</sup>

The attorney general of every state issues formal opinions, though several states do not publish his opinions regularly. The practice persists even in the ten states which presently allow advisory opinions to be issued by their state supreme courts.<sup>23</sup> The advisory opinions of the courts are often restricted in subject and difficult to obtain.<sup>24</sup> Most states limit the right of request to the governor and the legislature. Thus even in these states the attorneys general are important sources of advisory opinions because of the breadth of their mandate and the relative ease in securing their advice. Furthermore, the opinions issued by attorneys general do not seem to be of less legal force than advisory opinions issued by the courts.<sup>25</sup>

The power to draft such an instrument makes the state attorney general a potential vehicle for, or impediment to, the will of the Supreme Court. The time has now come to examine its use. How do attorneys general across the land utilize their power when faced with a Court decision directly relevant to state practice?

To explore this question properly a sample of representative Court decisions should be selected as stimuli and the responses of a sample representative of all state attorneys general analyzed; but such a research design is beyond the scope of this article. As a pre-test for any further empirical studies in this area, we have chosen to use the case study.

Previous studies have attempted to analyze the variance in the response pattern of one attorney general when different stimuli were introduced, though they did not consider Supreme Court decisions as relevant stimuli.<sup>26</sup> This form of analysis was not chosen here because of the length of time between Supreme Court cases likely to provoke response and the uncertainty of their occurrence. A Supreme Court decision is only occasionally so relevant to the life-style of a state that the attorney general is compelled to react. On the other hand, in the southern states where recent decisions have in fact attacked the life-style, another problem arises: little variance in response has occurred despite the matter of the decision. Resistance to the Court

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<sup>22</sup> R. MADDOX & R. FUQUAY, *STATE AND LOCAL GOVERNMENT* 95 (1962).

<sup>23</sup> Alabama, Colorado, Delaware, Florida, North Carolina, New Hampshire, Rhode Island, South Dakota, Maine and Massachusetts.

<sup>24</sup> See Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302 (1956).

<sup>25</sup> Cf. *id.* 1304.

<sup>26</sup> Akers, *supra* note 8.

has become a popular path to follow and few examples of compliance are available for comparison.

The second alternative, which we have adopted, is to study the variance of all attorneys general over a single issue. Though it may be convincingly argued that the issue we have chosen is so exceptional as to preclude generalization, we find that it creates enough variance among the population to suggest interesting hypotheses. This is the restricted, yet heuristic, goal we have set for this study.

## II. ACTIVITY OF THE STATE ATTORNEYS GENERAL FOLLOWING A SUPREME COURT RULING WITH EXTENSIVE IMPACT

On June 17, 1963, the United States Supreme Court handed down an eight-to-one decision in *School District v. Schempp* and *Murray v. Curlett*<sup>27</sup> holding the ceremonial reading of prayers and the Bible in public schools to be a violation of the establishment clause of the first amendment. Following the decision, observers found the public reaction more subdued than might have been predicted, for prior to *Schempp* over 41 per cent of the public schools conducted such exercises.<sup>28</sup> Nevertheless, however subdued the overt reaction, public opinion was strongly against the Court's action. A Gallup poll in August showed 70 per cent of those polled against the decision; only 24 per cent supported it.<sup>29</sup>

The public schools were closing when the justices handed down their decision, but as September drew near, officials pondered how the schools should respond. Would they enforce an unpopular decision within the community and if not, would any power restrain their disobedience? Many doubted whether any enforcement lacking public favor would succeed:

The question now is whether public opinion will in the end agree with the Court that the neutrality required of Government in religious matters forbids the imposition of prayers in public schools.

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<sup>27</sup> 374 U.S. 203 (1963) (the cases were decided together).

<sup>28</sup> For statistics, see R. DIERENFIELD, RELIGION IN AMERICAN PUBLIC SCHOOLS 51 (1962). One reason for the subdued response might have been the public's strong reaction to *Engel v. Vitale*, 370 U.S. 421 (1962), in which the Supreme Court held that a nondenominational prayer composed by the New York Board of Regents and required to be recited in public schools at the beginning of each day amounted to an establishment of religion in violation of the first amendment, even though pupils who wished to do so could remain silent or be excused from the room while the prayer was being recited. The public may have spent its energy on the *Engel* case. See Beaney & Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L. 475, 483-85 (1964) [hereinafter cited as Beaney & Beiser].

<sup>29</sup> Beaney & Beiser, *supra* note 28, at 484.

If not, prayers will simply go on in thousands of schools—because no parent will want to or have the courage to protest. History will tell whether the Court in these cases spoke for the conscience of the country.<sup>30</sup>

In fact, studies of school practice during the fall semester of 1963 showed widespread compliance despite several major instances of defiant reaction.<sup>31</sup> Whether or not a state complied, however, the attorney general was an active participant in many of them. Though cause-effect patterns are difficult to establish, it is nevertheless possible to explore what factors determine the activity of the state attorneys general and how their activity affects state compliance. This section and Section IV discuss the former problem; the effectiveness of the attorneys general is treated in Section V.

Prior to *Schempp*, 12 states and the District of Columbia had statutes requiring the reading of the Bible and/or the recital of prayers in the public schools, 6 states had statutes which specifically allowed such practices, and 23 states condoned the practice without specific statutory formulations.<sup>32</sup> Within a year after this landmark decision, the attorneys general of 17 states, or about 41 per cent of the states whose practice was affected, wrote opinions explicating the issues involved.<sup>33</sup> In 5 states, the attorney general became directly involved in litigation which sought enforcement of the Court's decision.<sup>34</sup> The period of one

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<sup>30</sup> Lewis, *Public Mood Plays Big Role in Court Rulings*, N.Y. Times, June 23, 1963, § 4, at 4, col. 6.

<sup>31</sup> See Beane and Beiser, *supra* note 28, at 486-91; L. Dawidowicz, Bible Reading after the *Schempp-Murray* Decision 42-50, Dec. 1963 (mimeograph issued by the American Jewish Committee) [hereinafter cited as Dawidowicz]. See also Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 WESTERN POL. Q. 189 (1968).

<sup>32</sup> The relevant statutes are listed in appendix A to this article. There are, of course, several ways to classify state practice; see, e.g., D. BOLES, *THE BIBLE, RELIGION AND THE PUBLIC SCHOOLS* 44-57 (1963); R. DIERENFELD, *supra* note 28, at 21.

We have relied heavily on the listing of state practices in the amicus brief filed by Maryland's attorney general in *Murray v. Curlett*, 374 U.S. 203 (1963). Pennsylvania seemed to require Bible reading both before and after the 1959 revision of their school code. PA. STAT. ANN. tit. 24, § 15-1516 (1962). See *School Dist. v. Schempp*, 374 U.S. 203, 205, 208 n.2 (1963).

We have placed North Dakota's statute in the "specifically allowed" category, although it differs somewhat from the Indiana formula which provides that "[t]he bible [sic] shall not be excluded from the public schools of the state." IND. ANN. STAT. § 28-5101 (1948). Under the North Dakota statute, inclusion is at the teacher's option, but the manner is prescribed. N. D. CENT. CODE § 15-38-12 (1960).

<sup>33</sup> Before *Schempp*, several attorneys general received inquiries about the practice, but only in California and Wyoming were their opinions a moving force against prayer and Bible reading in schools. See Appendix B, p. 826, *infra*.

<sup>34</sup> *Johns v. Allen*, 231 F. Supp. 852 (D. Del. 1964); *Adams v. Engelking*, 232 F. Supp. 666 (D. Idaho 1964); *Chamberlin v. Dade County Bd. of Pub. Instr.*, 160 So.2d 97 (Fla.), *remanded* 377 U.S. 402 (1964), *aff'd in part, rev'd in part*, 171 So.2d 535 (Fla. 1965); *Attorney Gen. v. School Comm.*, 347 Mass. 775, 199 N.E.2d 553 (1964); *Sills v. Board of Educ.*, 84 N.J. Super. 63, 200 A.2d 817 (1963), *aff'd* 42 N.J. 351, 200 A.2d 615 (1964).



year following the Court's decision (June, 1963, to June, 1964) was chosen for analysis of the activities of the attorneys general so that they may be considered directly responsive to the Court's action.

An examination of these aggregate statistics produces several interesting hypotheses. In those states which had statutes requiring Bible reading there was a greater tendency for the attorney general to issue an opinion: 10 of the 12 wrote an opinion or were involved in litigation related to *Schempp* or both. While this is not unexpected, it is interesting that state procedure in several states allows the attorney general to interpret the validity of a standing statute. The practice was followed even in states where courts are empowered to issue advisory opinions.<sup>35</sup> This power of review and judgment is particularly impressive since the opinions of the attorney general are seldom challenged.

In contrast, the 6 states which statutorily allowed, but did not require, Bible reading produced no opinions on the issue. The reason for this void is not clear. Perhaps the fact that the law was not mandatory allowed state officials to pass the burden of decision to the local school boards. Oklahoma and Iowa had traditionally left the question of prayer entirely up to the local communities.<sup>36</sup> The same was probably the practice in Indiana, because the school boards of Indianapolis and Bloomington took it upon themselves to revise their practice following the Court's action.<sup>37</sup> There is no evidence available

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<sup>35</sup> Of the 12 states requiring prayer, 5 sanction judicial advisory opinions. In 3 of those 5 states, the attorneys general wrote opinions; in no state, however, did a judicial advisory opinion issue. Furthermore, out of the 10 states allowing judicial advisory opinions, note 23 *supra*, all of whom at least condoned prayer in the schools, 6 attorney general opinions issued. Thus it seems clear that the attorney general, not the judiciary, was the crucial agent of compliance.

However, in March of 1967 the New Hampshire Senate did send two "prayer" bills and amendments already passed by the lower house to the New Hampshire Supreme Court for an advisory opinion. One bill proposed the placing of plaques declaring "In God we Trust" in each classroom; the second authorized a teacher to hold morning exercises and was amended to allow the use of the Bible, Lord's Prayer, or other devotional literature at the discretion of the teacher. While finding the first proposal constitutional, the Justices took issue with the amended form of the second. They upheld a "moment of silence" but found the reading from devotional literature objectionable. Opinion of the Justices, 228 A.2d 161, 164 (N.H. 1967). The need for this opinion may stem in part from the initial narrow construction of the New Hampshire Attorney General when he wrote his opinion as well as the feelings of the governor and congressmen. See text accompanying note 60 and app. C *infra*.

<sup>36</sup> Beaney & Beiser, *supra* note 28, at 488-89.

However, in September, 1966, and February, 1967 (after the period of this study, June 1963 to June 1964), the Attorney General of Oklahoma did issue opinions concerning the right of the individual teacher to initiate prayer and Bible reading in his classroom "without express permission, direction, or requirement of a superior whose authority is derived from the sovereign . . ." In finding that the Court's prohibition only extended to "laws" establishing religion, and not to the discretionary action of teachers, he made it clear that Oklahoma law does not require Bible reading or prayer, and thus approved the practice of teacher-initiated readings. Okla. Att'y Gen., Opinions 66-256 (Sep. 7, 1966), & 67-123 (Feb. 23, 1967) (mimeograph).

<sup>37</sup> Dawidowicz, *supra* note 31, at 48.

concerning the understanding in Kansas, Mississippi, and North Dakota except that the attorneys general of the latter 2 states, as well as their colleague in Oklahoma, reported to the Library of Congress that compliance in their states was minimal even a year after the decision.<sup>38</sup> In all 6 states the statutes in question presently remain unannotated in the statute books.<sup>39</sup> It is reasonable to assume that these attorneys general would have initiated some corrective action in this area if they felt that state law or custom required their formal intervention, unless, of course, a path of inaction resulted from their opposition to the Supreme Court's holding.

Finally, the attorneys general wrote opinions in 9 of the 23 states which condoned prayer and Bible reading without statutory support. The trend is slightly more pronounced in favor of the production of an opinion if the states in which courts had previously upheld Bible reading are removed from consideration (the figures then become 8 states with opinions to 10 without). In the 5 states in which court action upheld Bible reading despite the lack of specific statutory foundation, only the attorney general of Colorado wrote an opinion. (Though only two sentences in length, it indicates an affirmative attempt to comply fully with *Schempp*.<sup>40</sup>) These figures support the findings of other studies in which the attorney general has been pictured as a *deus ex machina*. When state law is in chaos due to the lack of specific judicial or legislative review, the opinion of the attorney general becomes important, if not imperative.<sup>41</sup> After describing the lack of understanding which followed *Zorach v. Clauson*,<sup>42</sup> Professor Sorauf commented: "In these circumstances the states' attorneys general, as the construers and appliers of state limitations, assume an important role in charting the

<sup>38</sup> Beane & Beiser, *supra* note 28, at 491 n.92.

<sup>39</sup> See app. A, p. 822. Only in Mississippi did the attorney general give the local officials any advice: "All principals [should] continue to recognize the supremacy and many blessings of a great and just God as we have always done in our public schools." Beane & Beiser, *supra* note 28, at 487. Nevertheless, all of these 6 states made it clear that prayer was optional under their statute. In light of Professor Boles's experience, it appears that the option has not always been exercised. Boles, *supra* note 32, at 52.

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Under the recent decisions of the U.S. Supreme Court, Bible reading in the public schools as a devotional exercise is prohibited no matter who the sponsoring or supervising agent or agency. It makes no legal difference that Bible reading as a devotional exercise is "permitted" rather than "required".

[1963-1964] COLO. ATT'Y. GEN. BIENNIAL REP. 33-34.

<sup>41</sup> It may be that uncertainty was tolerated in 10 of the 18 states due to the tradition of leaving school matters to local officials. Ohio seems to support this inference, though New Hampshire, a state with a tradition of local option which produced an opinion, does not. See Beane & Beiser, *supra* note 28, at 488-89. Information on other states is not available.

<sup>42</sup> 343 U.S. 306 (1952) (program permitting release of children from school to attend religious services is constitutional).

legal progress of released-time programs." <sup>43</sup> Professor Patric makes a similar point in his discussion of *McCollum v. Board of Education*.<sup>44</sup>

Thus the attorney general tends to act where there is a need for explanation of a particular area of the law, where judicial review is absent, and where no legislative provision has been made for defining proper state practice. It appears, then, that there is a need for state government officials to know the duties imposed on them by the law and a need for the people as a whole to understand the law if it is to be followed. The attorney general explicates the state of the law, positive and customary. Where law has been struck down, he predicts the consequences. Where it has been obscured, he clarifies its prescriptions. These legislative, judicial and executive roles blend in the office of this unique administrator, an office that may extend further if the attorney general comes to play the increased role in local enforcement suggested by some public administration theorists.<sup>45</sup>

### III. CONTENT OF THE FORMAL OPINIONS ISSUED BY THE ATTORNEYS GENERAL

In order to interpret the content of the written opinions, we have arranged them according to the narrowness of the construction of the Supreme Court's decision in *Schempp* and *Murray*. The narrowest constructions were given by the attorneys general of Delaware and Arkansas. They held that the decision was technically law only in Pennsylvania and Maryland and that, until a case was brought in their respective states, the traditional and mandatory use of prayer and Bible reading should continue.<sup>46</sup> Despite several difficulties, a suit was finally instituted involving the Delaware statute and a federal court overturned the attorney general's interpretation.<sup>47</sup> As of June, 1964 (the end of our survey period), no such action had been undertaken in Arkansas. In May the attorney general reported non-compliance in the majority of the state schools.<sup>48</sup>

The Attorney General of Georgia paid lip service to this doctrine of limited applicability, but worried over the irresponsibility of such a construction:

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<sup>43</sup> Sorauf, *supra* note 1, at 783.

<sup>44</sup> 333 U.S. 203 (1948) (religious instruction in school held unconstitutional). See Patric, *supra* note 1, at 459-63.

<sup>45</sup> See note 11 *supra*.

<sup>46</sup> Opinions of the Att'y Gen. of Del. 78, Opinion No. 63-022, Aug. 12, 1963 (unpublished mimeograph). Upon request, the Office of the Attorney General of Arkansas was unable to furnish a copy of the relevant opinion. Information concerning the content of this unpublished opinion is given in Dawidowicz, *supra* note 31, at 43-44.

<sup>47</sup> *Johns v. Allen*, 231 F. Supp. 852 (D. Del. 1964).

<sup>48</sup> Beaney & Beiser, *supra* note 28, at 491 n.92.

Although the *Murray* and *Schempp* decisions are binding only upon the parties to these cases and are not technically the "law of the land," I would be derelict in my official duty were I to advise you [the State School Superintendent] and other public officials of this state to do other than to abide by the rulings of the Supreme Court as long as they are in force and effect.<sup>49</sup>

He interpreted the Court's action to allow the voluntary gathering of students and teachers for prayer or Bible reading during "freedom of belief" periods before supervised activities are to begin. He added that such arrangements should be made by students and without the direction or supervision of the school staff in order that the State not be formally involved.<sup>50</sup> However, no further delineation of the line between legal and illegal practice was offered, and he ended with words which almost seemed to suggest disobedience:

Thus it is that religion is a personal matter, the efficacy of which is dependent upon its being a voluntary offering directed only by reason and conviction.

Without offering any apology should I be accused of indulging in religious emotionalism, it is my fervent hope, born of considered reason and deep conviction, that "In God we trust" may never be removed from the public schools, the public affairs and the governmental structure of this State.<sup>51</sup>

This failure to clarify the degree of required compliance<sup>52</sup> led the Georgia School Superintendent to believe that he was following the Attorney General's meaning when he urged local boards to continue chapel and Bible reading on a voluntary basis.<sup>53</sup> Along with Arkansas, Georgia still reported non-compliance in the majority of her schools as of May, 1964.<sup>54</sup>

The opinions issued by the attorneys general of North and South Carolina, while not denying the applicability of *Schempp* to local practice, attempted to blunt the impact of the Court's opinion. Grady L. Patterson, an Assistant Attorney General for the State of South Carolina, after several pages which quoted extensively from the *Engel*<sup>55</sup> and *Schempp* decisions, wrote:

The Supreme Court held that the reading of the Bible and repeating the Lord's Prayer in religious exercises in the

<sup>49</sup> [1963-65] GA. ATT'Y GEN. OPINIONS 263, 267.

<sup>50</sup> *Id.* 263.

<sup>51</sup> *Id.* 268.

<sup>52</sup> A later opinion to the Department of Education, dated Sept. 4, 1964, indicates that a further attempt at clarification was made as time passed. [1963-1965] GA. ATT'Y GEN. OPINIONS 573.

<sup>53</sup> Dawidowicz, *supra* note 31, at 44.

<sup>54</sup> Beaney & Beiser, *supra* note 28, at 491 n.92.

<sup>55</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

public schools *under the circumstances in these cases* is unconstitutional as violative of the First Amendment to the Constitution. The Court concluded that "in both cases the laws required religious exercises."<sup>56</sup>

The italicized phrases imply, if subtly, that under circumstances other than those precisely present in Pennsylvania and Maryland, where laws do not require the religious exercise, such practice might be permissible. In other words, the teacher who on his own opens class with a prayer, does not do so under the mandate of the legislature or local school board and does not violate the law.

The Attorney General of North Carolina leaves an even wider loophole:

The reading of the Bible and recitation of prayers in the public schools can be properly engaged in on a voluntary basis. It would be constitutionally invalid if such reading of the Bible and saying of prayers were by order of a school board or other State agency.<sup>57</sup>

This opinion can be interpreted not only as justifying the actions of the hypothetical teacher described above, but also as sanctioning an understanding of "voluntary" specifically rejected by the Court:

Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.<sup>58</sup>

Simply reading the attorney general's words, it is not clear whether he would follow South Carolina, and interpret "voluntary" as descriptive of the teacher's actions only, or would attempt a more direct subversion of the Court by condoning prayer as long as student participation is voluntary. The same ambiguity appears in the statement given the press by Governor Sanford:

We will go on having Bible reading and prayer in the schools of this state just as we always have. . . . We do not require the Bible reading and prayer, but we do these things because we want to. As I read the decision, this kind of thing is not forbidden by the Court, and indeed, it should not be.<sup>59</sup>

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<sup>56</sup> [1963-1964] S.C. ATT'Y GEN. REP. 107, 110 (emphasis added).

<sup>57</sup> 37 N.C. ATT'Y GEN. BIENNIAL REP. 19 (1964).

<sup>58</sup> 374 U.S. at 224-25.

<sup>59</sup> Speech by Gov. Sanford, Sept. 16, 1963, quoted in Beaney & Beiser, *supra* note 28, at 488.

However, despite the latitude provided by these statements, the Attorney General, when questioned in May of 1964, felt that his state was not complying with the ruling in *Schempp*. If he is consistent, this must mean that local boards continued to require prayer from both teacher and student.

In another narrow construction of *Schempp* the New Hampshire Attorney General advised that the formation of spontaneous prayer groups would be acceptable and found it permissible for state officials "to encourage and promote such voluntary prayer gatherings" and "to call regular meetings during school hours for silent prayer or for student silent reading of prayers or tracts that any such student may bring to school with them [*sic*]." <sup>60</sup>

The remaining attorneys general resisted these temptations and affirmed clearly that the active participation of a state employee, even a teacher, in the administration of prayers or Bible reading is prohibited. While only 7 of the remaining 11 opinions specifically mark out the proper stance for the individual teacher, 2 additional opinions include statements of a general nature which make clear the prohibition of such practices as prayer reading even when authorized only by the teacher. <sup>61</sup> The remaining 2 opinions, though positive in their affirmation of the Court's prohibition of Bible reading and prayer, did not broach the question of teacher initiative. <sup>62</sup>

While prohibiting the participation of teachers in religious exercises, almost all of these 11 opinions take the time to argue that the Court's ruling does not prohibit all religious activity in the public schools. Periods of silent meditation may be set aside; students may congregate before and after school or during rest and lunch periods for the purpose of prayers. Furthermore, baccalaureate services, graduation blessings, and Christmas and Easter celebrations may continue. The Supreme Court's recommendation that the academic study of all religions be taken up in public school curriculums also found its way into several opinions. Though anxious that the letter of the law be obeyed, the attorneys general seemed to want to find reasonable alternatives for the prohibited action or to encourage satisfaction with what the Court had allowed to remain rather than outrage at that

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<sup>60</sup> Letter from the Attorney General of New Hampshire to the Governor, Nov. 6, 1963. See Dawidowicz, *supra* note 31, at 46.

<sup>61</sup> The 7 specific opinions come from Connecticut, Kentucky, Maryland, Massachusetts, Pennsylvania, Vermont, and West Virginia; the 2 general opinions from Colorado and Maine. See app. A, p. 822 *infra*. For the opinion of the Attorney General of Colorado, see note 44 *supra*.

<sup>62</sup> New Jersey and Oregon. See app. A, p. 822 *infra*. This omission is not surprising in the case of Oregon as the opinion deals primarily with the constitutionality of baccalaureate services.

which had been swept away. Even the Attorney General of Massachusetts, Edward Brooke, who found the Court's decision to cover a wide variety of practices, was willing to engage in some hairsplitting in order not to leave his constituents without an alternative to traditional practice. While he objected to the setting aside of a moment of silent "prayer," he would condone a moment of silent "meditation."<sup>63</sup>

All of these opinions represent a balance, struck by the attorney general, between the law of the Court and the feelings of the people as he assesses them. While Americans may still resolve political problems into legal problems and bring them ultimately to the Supreme Court, the decisions of the Court now, if not before, must undergo a process whereby judicial reasoning is politically tempered and made acceptable to the people. If it is true, as we have implied in our introductory remarks, that a slow process of compliance will often be unacceptable, then a prerequisite of speed may be the type of mediation carried out in this case by the state attorneys general. The need for further interpretation and even compromise is often clear where the Court voids a practice in one state that is widespread among the several states. Some agency must bridge the gap between the isolated case treated by the Court and the practice of a nation. An administrative officer, the attorney general, not a lower court of law, has fulfilled this function in the case under consideration. One wonders how many similar situations exist.

#### IV. FACTORS EXPLAINING REGIONAL DIFFERENCES IN THE SCOPE AND SUBSTANCE OF ATTORNEY GENERAL ACTIVITY

The attempt to balance law and popular opinion is not always successful. Most attorneys general were able to achieve a happy medium, but 5 men compromised the law in favor of popular opinion and at least 2 were unable, without further litigation, to convince the populace that the law should be accepted. The way in which this balance is struck may be related to the personal convictions of, or the political pressures upon, an individual attorney general. Of interest in this regard are not only the 6 states in which the opinions failed to give the Court's command proper breadth, but also those states which failed to produce any opinion. We have previously indicated that the production of an opinion may depend on the traditions of local autonomy as well as the prior actions taken by the legislature or courts. Geographic and political factors may also be relevant.

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<sup>63</sup> [1963-1964] MASS. ATT'Y GEN. REP. 84, 88-89.

Again, we emphasize that a cause-effect relationship cannot be established from our data; however, it is possible to show some of the variables which place these specific acts in context and something of their relative importance.

Geography provided the clearest cleavage in the data. Southern pens were no more nor less active than those in the country as a whole: 4 of the 11 southern states<sup>64</sup> produced opinions and Florida's attorney general was involved with litigation concerning the decision.<sup>65</sup> However, the direction of the opinions and the litigation differed from those evident in the rest of the country. None of the opinions fully endorsed the Court's actions; 2 implied that the Court's decision did not reach their practice (Arkansas and Georgia). The South was not alone in its evasion of the opinion, but other centers of resistance were widely dispersed across the country. This implies that the South, while utilizing the offices of the attorney general to the same extent as the rest of the country, resolved the balance between the law and public opinion heavily in favor of the people.

Why should this be so? In addition to all the factors peculiar to southern politics, of which V.O. Key<sup>66</sup> and others have made us aware, it is in the South that the practice of Bible reading and prayer in the public schools was most widespread.<sup>67</sup> In no southern state was it prohibited, and 5 required it. Furthermore, the attorneys general of all but Virginia and Tennessee supported one or both briefs presented to the Court by a group of state attorneys general in *Engel v. Vitale*<sup>68</sup> and later in *Schempp*.<sup>69</sup> Both briefs urged the Supreme Court to uphold the right to continue prayer and Bible reading in the schools.

Political reaction to the Court's decision also appeared greater in the South than elsewhere in the country. Three governors made nationally publicized statements condemning the decision.<sup>70</sup> Two others were instrumental in the passage of a resolution at the 1962 Governors' Conference which supported a Constitutional amendment to override

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<sup>64</sup> The 11 states are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia.

<sup>65</sup> *Chamberlin v. Dade County Bd. of Pub. Instr.*, 171 So.2d 535 (Fla. 1965).

<sup>66</sup> See V. O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1st ed. 1949).

<sup>67</sup> It has been reported that 77% of the schools in the South conducted Bible reading. Dierenfield, *supra* note 28, at 51.

<sup>68</sup> 370 U.S. 421 (1962).

<sup>69</sup> See app. C, p. 827 *infra*.

<sup>70</sup> The governors of Alabama, North Carolina, and Mississippi were involved. See Beany & Beiser, *supra* note 28, at 486-88.



the Court's action.<sup>71</sup> Three southern governors allowed their names to be listed as supporters of the Constitutional Prayer Foundation, a group lobbying before Congress for such an amendment.<sup>72</sup> Moreover, while the 11 southern states constitute only 24 per cent of the House, 33 per cent of the representatives who supported the amendment by resolution or testimony were from these states.<sup>73</sup> With such a confluence of pressures, it is not unexpected that the attorneys general followed the climate of opinion expressed by other elected officials. However, to discover which factors were most important to their decisions and whether others resisted similar pressures we must turn away from the South and its peculiar characteristics.

In the West, including the Far West and Midwest, only 2 opinions were written. The Colorado opinion read *Schempp* broadly,<sup>74</sup> and although the Oregon opinion considered permissible an invocation and benediction by a member of the clergy in a public high school graduation exercise, the opinion does not appear to be motivated by an attempt to evade compliance with *Schempp* as do some of the opinions discussed earlier.<sup>75</sup> Actually, the small number of opinions is indicative of little, since Bible reading and prayer were practiced by less than 20 per cent of the schools in the Midwest and less than 12 per cent of those in the Far West.<sup>76</sup> Only one state in this whole area, Idaho, required the prohibited practice, and there the issue was settled by litigation.<sup>77</sup>

The eastern seaboard, on the other hand, is second only to the South in the extent of prayer and Bible reading in schools, and 6 of the states required the practice by law. Following the line of reasoning set forth above, it would be expected that this region would show a greater disposition toward the production of opinions.<sup>78</sup> This

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<sup>71</sup> Governor Bryant of Florida introduced the resolution and Governor Hollings of South Carolina supported it. It should be noted, however, that Governor Reed of Maine co-introduced the resolution and that it was also supported by Governor Combs of Kentucky and Governor Notte of Rhode Island. See 1962 PROCEEDINGS OF THE GOVERNORS' CONFERENCE 65-68.

<sup>72</sup> *Hearings Before the House Comm. on the Judiciary on the Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools*, 88th Cong., 2d Sess., pt. 2, at 1209 (1964) [hereinafter cited as *1964 Hearings*]. Again, this fact is collateral, since the same number of supporting governors were found in New England where no adverse opinions were produced.

<sup>73</sup> *Id.* table of contents V-XVI; Beane & Beiser, *supra* note 28, at 492-93.

<sup>74</sup> See note 44 *supra*.

<sup>75</sup> See [1962-1964] ORE. ATT'Y GEN. BIENNIAL REP. & OP. 428.

<sup>76</sup> Dierenfield, *supra* note 28, at 51.

<sup>77</sup> *Adams v. Engelking*, 232 F. Supp. 666 (D. Idaho 1964).

<sup>78</sup> We include here New England, the mid-atlantic states, and the border states of Maryland, Kentucky, and West Virginia.

expectation is more than gratified; 11 of the 13 states in the area produced opinions. That there was a much higher percentage of opinions written in the northeastern states than in the southern states is, however, quite surprising. Since the two regions are very close in both the proportion of schools practicing Bible reading and prayer, and in the number of states requiring that practice, one would have expected either more opinions in the South or fewer opinions in the Northeast. Furthermore, in contrast to the southern practice, the opinions emanating from the northern group of states, except for New Hampshire and Delaware, clearly recognized the full scope of *Murray* and *Schempp*.<sup>79</sup>

Two related explanations for the divergence are suggested which may account for the difference in the number and content of the opinions. First, despite the large percentage of schools involved, the decision in *Schempp* may not have roused the political fervor in the Northeast that was so evident in the South. If the southern citizens and officials were more politically active, one might then conclude that the attorneys general under such circumstances not only follow the prevailing winds of public opinion in drafting replies when advice is requested, but also play a necessarily diminished role in enforcing compliance, because other officials and organs of government do not deem it useful to seek their advice on the politically controversial issue. Second, differences in number and content of the opinions may be explained by the views the attorneys general and other state officials hold toward their offices. The difference in number may stem from the possibility that northern officials feel more bound to request formal opinions from their attorneys general than southern officials, who may prefer to maintain the greater political flexibility afforded by informal consultation or no consultation at all. An explanation of the substantive variation may be that the attorneys general in the Northeast feel more of a professional obligation to comply with Supreme Court rulings, whereas their southern counterparts, in abstaining from active opposition to public sentiment, to take a more political view of their role.

The evidence is inconclusive, but seems to incline more towards the explanation of a different perception of office than towards a difference in the amount of political activity. Approximately the same percentage of northern governors supported the Constitutional Prayer Foundation as supported that organization in the South. Northern representatives also supported the prayer amendments in the House in

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<sup>79</sup> See text accompanying notes 81-82 *infra*.

numbers disproportionate to the size of their delegation.<sup>80</sup> Only the fact that no governors in the Northeast made nationwide statements condemning the decision would seem to support the hypothesis of greater political reaction in the South, but this is insufficient to account for the discrepancy in the interpretations of *Schempp* found in the opinions issued in each region, or the differing number of opinions requested.

On the other hand, it is quite possible that the difference in the number of opinions sought may be explained by the attitudes of the state officials who would be in the position to ask the attorney general for advice in guiding their conduct. If the southern administrators wanted to be free to select a course of blatant defiance, such a course would obviously require no formal outline of what was essential for compliance. It may be argued that the letter of the law should be known in order to establish a semblance of legitimacy, even if the intention is to thwart its spirit; but such information could have been provided by informal consultation in the South, though this study provides no direct evidence of such consultation. Whether there was, in fact, a stronger desire of northern officials to discharge their duties in harmony with the ruling of the Supreme Court in *Schempp* and, consequently, greater activity in formally seeking the counsel of the attorney general also cannot be answered without analysis beyond the scope of this study. Moreover, it is not clear if the decision to seek a formal opinion is dependent on the personal attitudes of particular officials or on their role expectations, or both. Northern officials may generally seek more formal counsel with their attorneys general than their southern colleagues who may rely on informal access or personal acumen.

It is clear, however, that whatever determines the frequency of requests for opinions from the attorney general, the better explanation of the substantive dichotomy between southern and northern opinions (since political reaction to the Supreme Court's holding showed little variance) is the different perception the attorneys general in each region have of their office. In the North, the attorney general appears to feel bound by the norms of his position to bow to relevant legal pronouncements, whereas in the South the position may be less professional and more political. The southern attorney general may evaluate his response not against the norms of his office, but against his personal and political point of view.

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<sup>80</sup> This area constitutes 28% of the House, but contributed 31% of the resolutions and testimony in favor of the amendment. 1964 *Hearings, supra* note 72, at table of contents V-XVI.

Such an explanation is supported by a comparison of attorney general legal judgments before and after the *Schempp* decision. Before the case was decided, both groups seemed to think that prayer and Bible reading should be permissible in the public schools. Nine of the 11 southern attorneys general and 8 of their 13 northern brethren supported one or both of the briefs presented amicus curiae to the Court in *Schempp* and *Engel*.<sup>81</sup> After the case was decided, however, 6 of the 8 northern signers were able to lay aside their former point of view and pen opinions in full support of the Court's decision.<sup>82</sup> By contrast, none of the 4 southern attorneys general who joined the briefs felt obligated in later opinions to depart from his former position and support the decision unambiguously.<sup>83</sup>

The essentially "neutral" political attitude of the attorneys general in the North is borne out by the fact that they were willing to support the Court in the face of feelings of hostility which were later expressed in the legislative movement for a constitutional amendment. The attorneys general of Massachusetts, New Jersey, and Pennsylvania were apparently unmoved by the political attitudes of their respective state legislatures which culminated in resolutions in support of a prayer amendment. Unfortunately, comparable data is not available for the South. No southern attorney general clearly supported the decision; however, the attorneys general of Maine and Connecticut did so in the face of governors who strongly supported the prayer amendment. The attorneys general of Maine and West Virginia urged compliance despite the fact that 50 per cent or more of their congressional delegations introduced resolutions in support of the amendment.<sup>84</sup>

On the other hand, in the 2 northern states where the attorneys general resisted or where their opinions were ambiguous,<sup>85</sup> the governor was also a strong advocate of the prayer amendment.<sup>86</sup> Such gubernatorial support for resistance, while present in North Carolina, was not manifest in either Arkansas, Georgia, or South Carolina,<sup>87</sup> where the opinions were in direct defiance of the Court's interpretation. Un-

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<sup>81</sup> See app. C, p. 827 *infra*.

<sup>82</sup> Connecticut, Maine, Maryland, New Jersey, Pennsylvania, and West Virginia. For citations, see app. A, p. 822 *infra*.

<sup>83</sup> See text accompanying notes 46-59 *supra*.

<sup>84</sup> For a complete listing of "political" data, see app. C, p. 827 *infra*.

<sup>85</sup> Delaware defied the decision; New Hampshire was willing to have state officials create "voluntary" prayer groups. See text accompanying notes 46-47, 60 *supra*.

<sup>86</sup> See 1964 Hearings, *supra* note 72, at 1209.

<sup>87</sup> *Id.*

like several other southern states, the majority of Congressmen from Arkansas and Georgia did not introduce bills in support of an amendment.<sup>88</sup> Thus we conclude that northern attorneys general will comply despite the political climate, but that those few who do resist feel the political support of the governor a necessity. In the South, the attorneys general will follow the political mood he perceives as prevailing, and even if such a mood is not represented by statements of other elected officials, the attorney general does not feel bound to follow the Court's cue. He is willing to act on his own political acumen against the standing decision.<sup>89</sup>

#### V. EFFECT OF ATTORNEY GENERAL EFFORTS ON STATE PRACTICE

Whatever the motivation of an attorney general's action, his policy sets the tone for state response to the decision. In the vast majority of cases, his opinion was requested by the state commissioner of education who thereafter acted in full accord with that opinion.<sup>90</sup> State commissioners even followed the attorney general's lead when he advised action contrary to the face of the Court's order. The State Commissioner of Education in Georgia based his continued advocacy of prayer and Bible reading squarely on the opinion of the attorney general when quizzed by the press.<sup>91</sup> In Delaware, the action of the State Commissioner, based on the advice obtained from the attorney general, precipitated litigation.<sup>92</sup> Only in Idaho did a state commissioner act directly against the decision of the Court without specifically requesting an opinion. It should be noted, though, that the attorney general came to his aid in the pursuant litigation.<sup>93</sup> Since the attorney general might have initially advised the commissioner that he was violating the law of the land, it is a fair assumption that he agreed *sub rosa* with the practice followed.<sup>94</sup> The state commissioners of Oklahoma and Rhode Island, however, seized the opportunity pro-

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<sup>88</sup> See app. C, p. 827 *infra*.

<sup>89</sup> The independence of southern attorneys general may betray further political aspirations, possibly for the Governor's chair. Cf. Krislov, *Constituency Versus Constitutionalism: The Desegregation Issue and Tensions and Aspirations of Southern Attorneys General*, 3 *MIDWEST J. POL. SCI.* 75 (1959).

<sup>90</sup> From the only survey available on the subject, it appears that state educational officials generally favored the decision, though many were not willing to express an opinion. See Katz, *Patterns of Compliance with the Schempp Decision*, 14 *J. PUB. L.* 396, 403 (1965).

<sup>91</sup> Dawidowicz, *supra* note 31, at 44.

<sup>92</sup> *Johns v. Allen*, 231 F. Supp. 852 (D. Del. 1964).

<sup>93</sup> *Adams v. Engelking*, 232 F. Supp. 666 (D. Idaho 1964).

<sup>94</sup> Cf. OKLA. ATT'Y GEN. OPINIONS 66-256 (1966), 67-123 (1967) (mimeograph), & note 36 *supra*.

vided by the silence of their attorneys general to resist the enforcement of the decision; both states condoned, but did not require, Bible reading.<sup>95</sup>

One commissioner who was predisposed against the Court's action consulted his attorney general and subsequently followed the legal path. Kentucky's State Commissioner of Public Instruction was quoted following the *Schempp* decision as having said: "Continue to read and pray till somebody stops you. I don't want to make anybody stop."<sup>96</sup> However, the commissioner then requested a formal opinion from the attorney general who voided Kentucky's mandatory statute. When queried about a year later, the attorney general reported there was no appreciable noncompliance in his state. Nonetheless, since the initial opinion, other aspects of the issue have been raised in a subsequent opinion, implying that the department of education may have been less than effective in setting the proper standards in this area.<sup>97</sup>

The advisory opinion is not the only means by which state attorneys general influenced compliance or noncompliance with the Court's will. In 3 states, Idaho, Delaware, and Florida, all of which required prayer and Bible reading, attorneys general went to the bar in defense of traditional state practice.

Only in Delaware did the suit compel a federal court to overrule a formal opinion by the attorney general. Though the court did not strike down the opinion per se, it ruled unconstitutional the directive of the Superintendent of Schools as well as the practice of a local school board, both of which were grounded in the formal opinion.<sup>98</sup> The point of view expressed by the Attorney General of Delaware, and rejected by the court, was also expressed in the Georgia and Arkansas opinions, but no suits have been brought. In fact, at least one other case in Delaware was quashed by local pressure,<sup>99</sup> before Johns successfully brought suit.

The Idaho case was simply a successful suit brought against the state commissioner of education for relief from mandatory prayer and Bible reading in the schools. The attorney general argued the case,<sup>100</sup> but issued no formal opinion on the subject. The attorney general did report noncompliance with the Supreme Court's original decision up

<sup>95</sup> See Dawidowicz, *supra* note 31, at 44; Beaney & Beiser, *supra* note 28, at 487-88.

<sup>96</sup> Dawidowicz, *supra* note 31, at 44.

<sup>97</sup> See [1964-1968] Ky. ATT'Y GEN. OP. No. 64-111.

<sup>98</sup> Johns v. Allen, 231 F. Supp. 852, 858 (D. Del. 1964).

<sup>99</sup> Beaney & Beiser, *supra* note 28, at 491 n.91.

<sup>100</sup> Adams v. Engelking, 232 F. Supp. 666 (D. Idaho 1964).

until this case was settled. However, the interesting aspect of the case was not the action of the state officials, but the "reservations" of the court: "While members of the court may have personal reservations, we unanimously agree that the issue is settled by the United States Supreme Court ruling in *School District of Abington Tp., Pa. v. Schempp*." <sup>101</sup>

On the same day that the Supreme Court announced the *Murray-Schempp* decision, it remanded *Chamberlin v. Dade County Board of Public Instruction* <sup>102</sup> to Florida for review in accordance with the new precedent. The remand seems to have confused the Florida Supreme Court, or so they told the appellees.<sup>103</sup> As the case before them involved such practices as Christmas services and baccalaureate exercises, as well as prayer and Bible reading, the court claimed it did not know how to distinguish constitutional from unconstitutional practice. It turned to the attorney general for advice and requested a brief amicus curiae which the attorney general contributed.<sup>104</sup> Unfortunately, that brief was not made public, and upon its receipt, the court acted very peculiarly. It reaffirmed its original denial of an injunction against any of the practices involved, holding that Florida practice could escape the Supreme Court's prohibition because the intent of the Florida legislature in passing laws requiring prayer and Bible reading, among other practices, was clear:

It is our conclusion that the statute was founded upon secular rather than sectarian considerations and is to be construed as was the Sunday Closing Law in the McGowan case. The statute, designed to require moral training and the inculcation of good citizenship, does not offend the establishment clause of the Constitution as written and intended by the authors. The accommodation of religious beliefs is secondary to the intent of the Legislators.<sup>105</sup>

The Supreme Court did not accept such an interpretation and again remanded the case.<sup>106</sup> The Florida justices, still evidencing confusion, dutifully obeyed.<sup>107</sup> Whatever this case indicates about

<sup>101</sup> *Id.* at 667.

<sup>102</sup> 143 So.2d 21 (Fla. 1962), *vacated and remanded*, 374 U.S. 487 (1963), *aff'd* 160 So.2d 97 (Fla.), *rev'd in part*, 377 U.S. 402 (1964), *aff'd in part, rev'd in part*, 171 So.2d 535 (Fla. 1965).

<sup>103</sup> 160 So.2d 97, 98 (Fla. 1964). Of course, the Florida Supreme Court is famous for its "confusion" in the case of Virgil Hawkins: *see* W. MURPHY AND C. PRITCHETT, COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 606-18 (1961).

<sup>104</sup> 160 So.2d 97, 98 (Fla. 1964).

<sup>105</sup> *Id.* at 99 (footnotes omitted).

<sup>106</sup> 377 U.S. 402 (1964).

<sup>107</sup> 171 So.2d 535 (Fla. 1965).

Florida's judicial process, it demonstrates the use to which an attorney general may be put in such matters. That the attorney general created this defense is not certain, but he specifically supported the state court's position in testimony before the House Judiciary Committee.<sup>108</sup>

In 2 out of these 3 cases the courts showed great sympathy for the position defended by the attorney general, but this sympathy may be linked to the subject under consideration rather than to the fact of the attorney general's participation. In 2 of the 3 cases involving the application of the *Schempp* decision where the state attorney general was not involved, federal district courts upheld local practice. Admittedly, the issues in these cases left the courts some room for fresh interpretation; for example, one of the prayers eliminated direct mention of God.<sup>109</sup> The Courts of Appeals in both cases found the *Schempp* prohibition applicable, and the Supreme Court denied certiorari.<sup>110</sup>

The failure of these courts to fully support a broad interpretation of the Supreme Court's opinion suggests that the state attorneys general may be as good as the lower courts at securing compliance with Supreme Court law. Of the 9 cases to date involving an application of *Schempp*,<sup>111</sup> 3 were decided against the Court's interpretation, only to be overturned later, and one, the Idaho case, expressed certain "reservations," though upholding the Court's conclusions. Only 2 of 19 attorney general opinions directly rejected the Court's decision,

<sup>108</sup> 1964 Hearings, *supra* note 72, pt. 3, at 1854-63.

<sup>109</sup> See *DeSpain v. DeKalb County Community School Dist.*, 255 F. Supp. 655 (N.D. Ill. 1966).

<sup>110</sup> Both *Stein v. Oshinsky*, 224 F. Supp. 757 (E.D.N.Y. 1963), *rev'd*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965) and *DeSpain v. DeKalb County Community School Dist.*, 255 F. Supp. 655 (N.D. Ill. 1966), *rev'd*, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), upheld prayer and Bible reading in the district courts. In *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965), parents of public school children brought suit against the superintendent of schools and members of the board of education to enjoin certain religious practices as violations of the free exercise and establishment clauses of the first amendment. The court recommended that during an interim period, students who wished to say prayers could do so before school began and after it ended, provided they met somewhere other than a homeroom, the exercise began at least 5 minutes before regularly scheduled classes, no bell signified the start of the exercise, and any prayers during lunch were silent. *Id.* at 54-55.

<sup>111</sup> See apps. A-B, pp. 822 & 826 *infra*. The 9 cases here tabulated only include cases found in federal or state reporters. In only one instance do the authors know of an unreported, but related case: *Snavelly v. Cornwall-Lebanon Suburban Joint School Sys.*, Civil No. 8355 (M.D. Pa. Feb. 25, 1965). *Snavelly* asked for an injunction against the school system to stop Bible reading as well as to prohibit the teaching of a proposed course in religious studies. The disposition of the case was delayed while school officials discussed the proposed course in religious studies with the State Department of Education; the school system stopped Bible reading of its own accord. Following the delay, the school officials decided against their proposed curriculum on the advice of state educators. With these developments in mind, Judge Follmer denied the plaintiff's petition on the grounds that the activities complained of had stopped, or failed to begin.



and 4 additional ones offered a narrow interpretation. It would seem that the attorneys general cover more territory and do it more effectively.

This conclusion is even more warranted when it is noted that it is the attorney general who often directs the courts to their conclusion. A state attorney general participated in 5 of the 9 litigations on the issue and was on the winning side in 3, not to mention the recipient of "reservations" in a fourth.<sup>112</sup> We have so far described only those cases where attorneys general were opposing the Court's opinion; however, 2 attorneys general went to court to support their formal opinions which voided the relevant state statutes in favor of the Court's conclusion. Their stories provide good examples of attorney general initiative and the role of the court as "legitimatizer."

Having advised their respective commissioners of education regarding the implication of the *Schempp* decision, the attorneys general of Massachusetts and New Jersey expected statewide compliance, but this was not the case. Attorney General Sills of New Jersey was faced with the blatant refusal of Hawthorne Township to cease and desist saying prayers and reading the Bible in public schools. Hawthorne maintained that in *Doremus v. Board of Education*<sup>113</sup> the Supreme Court, by rejecting jurisdiction, had upheld New Jersey's statute, that Hawthorne's practice was still law, and therefore Bible reading could and should continue. Sills answered this challenge by taking the Board of Education to court. The judge was not impressed by the Hawthorne argument and, in fact, felt it his duty to lecture the town from the bench:

The directive by the Attorney General and the Commissioner of Education has been directly flaunted by the defendants. The impression which this made or will make on the children of Hawthorne cannot be measured with precision. Suffice it to say . . . [it] is not conducive to good moral training, strength of character and a healthy respect for the law . . . .<sup>114</sup>

Defiance in Massachusetts involved a small rural community in the western half of the state, North Brookfield. The local school

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<sup>112</sup> A fifth case, *Waite v. School Comm.*, 348 Mass. 83, 202 N.E.2d 297 (1964), could be included here because the Attorney General of Massachusetts, in his prosecution of a similar case, *Attorney Gen. v. School Comm.*, 347 Mass. 775, 199 N.E.2d 553 (1964), set the relevant precedent. On the other hand, this case could be assigned to the earlier category containing cases in which the attorney general played no part. We have left it unassigned.

<sup>113</sup> 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952).

<sup>114</sup> *Sills v. Board of Educ.*, 84 N.J. Super. 63, 67, 200 A.2d 817, 819 (1963), *aff'd*, 42 N.J. 351, 200 A.2d 615 (1964).

board, upset by the implications of the Court's decision, voted that traditional practices should continue in their community as long as possible.

Their defiance came to the attention of the Commissioner of Education when he made a routine survey of the state to check compliance and the practices substituted for the previously required prayer. After extended correspondence between the Commissioner and the School Board, and then between the Attorney General and the School Board, continued defiance forced the Attorney General to file for a writ of mandamus to compel the Board to comply. The town expended the necessary money to meet this challenge and carried the issue to the Supreme Judicial Court of Massachusetts, but there it met unanimous defeat.<sup>115</sup> Throughout, the Attorney General was helpful, but firm, with the town. He hesitated to take the issue to court as he hoped to emerge from the situation politically unscathed, but he did initiate litigation when all other avenues failed.<sup>116</sup> In fact, in both these cases, the courts were courts of last resort for the attorney general; his style was not to press litigation, but to work more quietly for compliance. Yet it is through the attorneys general that many courts received their introduction to such problems, and from them that they often take their cue.

## VI. CONCLUSION

The purpose of this case study has been to generate hypotheses concerning the role of the attorney general in the enforcement of Supreme Court decisions. Several hypotheses have developed:

(1) Attorneys general are active interpreters of Court decisions when a state statute requiring a uniform practice is unequivocally struck down, and, in the absence of such a statute, when the issue has not been dealt with by the state legislature or judiciary.

(2) The opinions of the attorney general usually attempt to create a balance between popular opinion and the law. The nature of this balance may be related to his "role expectations"—specifically, to the degree he allows political and personal pressures to influence his actions. Role expectations may vary regionally.

(3) The attorney general is at least as useful as the lower courts in the enforcement of Court opinions. In fact, the attorneys general

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<sup>115</sup> Attorney Gen. v. School Comm., 347 Mass. 775, 199 N.E.2d 553 (1964).

<sup>116</sup> For more detail on this case, see R. Benedetti, *The Leadership and the Issue: Bible Reading in North Brookfield, Massachusetts, 1964* (unpublished thesis for Amherst College).

are often the route by which such cases reach the courts. Nevertheless, the attorney general does not frequently use this avenue to accomplish his goal; his opinions are respected without judicial assistance.<sup>117</sup>

Though a further evaluation of all these hypotheses would be of interest to a student of comparative state practice as well as of the judicial process, the last two have important policy connotations as well. Compliance is probably best served via a professional attorney general. He may be more effective than the courts and less political than the governor. In any case, the attorney general should be studied in the context of his national as well as his state responsibilities. The utility of much that the Supreme Court hands down may be measured by the abilities of such officials. Their functions deserve further scrutiny.

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<sup>117</sup> A further fact supports this hypothesis. When questioned about compliance with the opinion in their states, no attorney general who had written an opinion in support of the Court, except North Carolina where the opinion had been vague, reported major instances of noncompliance. Yet in those states where the attorney general wrote an adverse opinion, or where he was involved in pending court action, he reported major noncompliance. Beaney & Beiser, *supra* note 28, at 491 n.92.

## APPENDIX A

## LEGAL DOCUMENTS RELATING TO STATES IN WHICH PRAYER &amp; BIBLE READING WAS PRACTICED IN THE PUBLIC SCHOOLS BEFORE SCHEMPP &amp; MURRAY

## PART I: STATES REQUIRING PRAYER &amp; BIBLE READING IN THE PUBLIC SCHOOLS

State	Statute	Opinions of Attorney General Within 1 Year of Schempp	Post-Schempp Cases
Alabama	ALA. CODE tit. 52, § 542 (1958)	No opinion	No cases
Arkansas	ARK. STAT. ANN. § 80-1606 (1947)	Arkansas Att'y Gen. Opinion, 1963 (unpublished) #	No cases
Delaware	DEL. CODE ANN. tit. 14, §§ 4101-03 (1953)	Opinions of the Att'y Gen. of Del. 78, Opinion No. 63-022, Aug. 12, 1963 (unpublished mimeograph)	Johns v. Allen, 231 F. Supp. 852 (D. Del. 1964)
Florida	FLA. STAT. ANN. § 231.09(2) (1961)	No opinion	Chamberlin v. Dade County Bd. of Pub. Instr., 143 So.2d 21 (Fla. 1962), <i>vacated and re- manded</i> , 374 U.S. 487 (1963), <i>aff'd</i> , 160 So.2d 97 (Fla.), <i>rev'd in part</i> , 377 U.S. 402 (1964), <i>aff'd in part, rev'd in part</i> , 171 So.2d 535 (Fla. 1965).
Georgia	GA. CODE ANN. § 32-705 (1952)	1963 GA. ATT'Y GEN. OP. 283	No cases
Idaho	IDAHO CODE ANN. § 33-1604 (1963)	No opinion	Adams v. Engelking, 232 F. Supp. 666 (D. Idaho 1964)
Kentucky	KY. REV. STAT. § 158.170 (1962)	[1960-1964] KY. ATT'Y GEN. OP. NO. 63-790; [1964-1968] KY. ATT'Y GEN. OP. NO. 64-111	No cases
Maine	ME. REV. STAT. ANN. tit. 20, § 1223 (1964)	[1963-1964] ME. REP. ATT'Y GEN. 61	No cases
Massachusetts	MASS. ANN. LAWS ch. 71, § 31 (1964)	[1963-1964] MASS. REP. ATT'Y GEN. 84	Attorney Gen. v. School Comm., 347 Mass. 775, 199 N.E.2d 553 (1964); Waite v. School Comm., 348 Mass. 83, 202 N.E.2d 297 (1964)

<p><i>State</i> New Jersey</p>	<p><i>Statute</i> N.J. REV. STAT. § 18:14-77 (Supp. 1952)</p>	<p><i>Opinions of Attorney General Within 1 Year of Schempp</i> [1960-1963] N.J. OP. ATT'Y GEN. 238</p>	<p><i>Post-Schempp Cases</i> Sills v. Board of Educ., 84 N.J. Super. 63, 200 A.2d 817 (1963) <i>aff'd</i>, 42 N.J. 351, 200 A.2d 615 (1964) School Dist. v. Schempp, 374 U.S. 203 (1963)† No cases</p>
<p>Pennsylvania</p>	<p>PA. STAT. ANN. tit. 24, § 15-1516 (1959)</p>	<p>Pa. Att'y Gen., Opinion No. 260, Aug. 26, 1963 (unpublished mimeograph)</p>	<p>No opinion</p>
<p>Tennessee</p>	<p>TENN. CODE ANN. § 49-1307(4) (1966)</p>	<p>No opinion</p>	<p>No cases</p>
<p>PART II: STATES WHICH POSSESS STATUTES SPECIFICALLY CONDONING PRAYER &amp; BIBLE READING IN THE PUBLIC SCHOOLS</p>			
<p>Indiana</p>	<p>IND. ANN. STAT. § 28-5101 (1948)*</p>	<p>No opinion</p>	<p>No cases</p>
<p>Iowa</p>	<p>IOWA CODE § 280.9 (1966)*</p>	<p>No opinion</p>	<p>No cases</p>
<p>Kansas</p>	<p>KAN. STAT. ANN. § 72-1628 (1964)*</p>	<p>No opinion</p>	<p>No cases</p>
<p>Mississippi</p>	<p>MISS. CONST. art. 3, § 18*</p>	<p>No opinion</p>	<p>No cases</p>
<p>North Dakota</p>	<p>N.D. CENT. CODE § 15-38-12 (1960)*</p>	<p>No opinion</p>	<p>No cases</p>
<p>Oklahoma</p>	<p>OKLA. STAT. ANN. tit. 70, § 11-1 (1966)*</p>	<p>No opinion ‡</p>	<p>No cases</p>
<p># Reported in Dawidowicz, <i>supra</i> note 31, at 43-44. See note 46 <i>supra</i>.</p>			
<p>† Although this is obviously not a post-Schempp case, only this case was tabulated from Pennsylvania as it is the only case published in the federal and state reporters; however, the authors also know of one unreported case in which Bible reading was involved: <i>Snavey v. Cornwall-Lebanon Suburban Joint School Sys.</i>, Civil No. 8355 (M.D. Pa. Feb. 25, 1965). See note 111 <i>supra</i>.</p>			
<p>* Not annotated in the most recent revision to include the Schempp decision.</p>			
<p>‡ An opinion did issue in 1967. See note 36 <i>supra</i>.</p>			
<p>PART III: STATES IN WHICH NO STATUTORY FOUNDATIONS EXIST FOR PRAYER &amp; BIBLE READING IN SCHOOL, BUT IN WHICH COURTS HAVE UPHOLD THE PRACTICE BEFORE SCHEMP</p>			
<p><i>State</i> Colorado**</p>	<p><i>Pre-Schempp Cases Upholding the Practice</i> <i>People ex rel Vollmar v. Stanley</i>, 81 Colo. 276, 255 P. 610 (1927)</p>	<p><i>Opinions of Attorney General Within 1 Year of Schempp</i> [1963-1964] COLO. ATT'Y GEN. BIENNIAL REP. 33</p>	<p><i>Post-Schempp Cases</i> No cases</p>
<p>Michigan</p>	<p><i>Pfeiffer v. Board of Educ.</i>, 118 Mich. 560, 77 N.W. 250 (1898)</p>	<p>No opinion</p>	<p>Read v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965)</p>
<p>Minnesota</p>	<p><i>Kaplan v. School Dist.</i>, 171 Minn. 142, 214 N.W. 18 (1927)</p>	<p>No opinion***</p>	<p>No cases</p>

New York	Lewis v. Board of Educ., 157 Misc. 520, 285 N.Y.S. 164 (Sup. Ct. 1935); Engel v. Vitale, 370 U.S. 421 (1962). <i>Engel</i> struck down the Regent's prayer, but the practice of Bible reading was upheld in the former decision.	No opinion	Stein v. Oshinsky, 224 F. Supp. 757 (E.D.N.Y. 1963), <i>rev'd</i> , 348 F.2d 999 (2d Cir.), <i>cert. denied</i> , 382 U.S. 957 (1965)
Texas	Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908)	No opinion	No cases

\*\* Little practice of prayer or Bible reading in the public schools reported in Brief for State Attorneys General as Amicus Curiae at 15, Murray v. Curllett, 374 U.S. 203 (1963).

\*\*\* No formal record of an opinion could be located though it is not impossible that such an opinion exists unpublished.

PART IV: STATES IN WHICH NO STATUTORY FOUNDATIONS EXIST FOR PRAYER & BIBLE READING IN SCHOOL,  
BUT WHICH CONDONED THE PRACTICE

State	<i>Relevant Cases Before Schempp</i>	<i>Opinions of Attorney General Within 1 Year of Schempp</i>	<i>Post-Schempp Cases</i>
Arizona**		No opinion	No cases
Connecticut		Conn. Att'y Gen. Op., Nov. 13, 1963 (unpublished)	No cases
Louisiana	Inconclusive case banning some Bible reading: Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915)	No opinion	No cases
Maryland		48 MD. ATT'Y GEN. REP. AND OFFICIAL OP. 140 (1963)	Murray v. Curllett, 374 U.S. 203 (1963)
Missouri**		No opinion	No cases
Montana**		No opinion	No cases
New Hampshire		Letter from the Attorney General of New Hampshire to the Governor, Nov. 6, 1963	Advisory opinion on state House bills related to prayer. Opinion of the Justices, 228 A.2d 161 (N.H. 1967).
New Mexico		No opinion	No cases
North Carolina		37 N.C. ATT'Y GEN. BIENNIAL REP. 19 (1964)	No cases

<i>State</i>	<i>Relevant Cases Before Schempp</i>	<i>Opinions of Attorney General Within 1 Year of Schempp</i>	<i>Post-Schempp Cases</i>
Ohio	Inconclusive case banning some Bible reading; Board of Educ. v. Minor, 23 Ohio St. 211 (1872).	No opinion	No cases
Oregon		[1962-1964] ORE. ATT'Y GEN. BIENNIAL REP. AND OP. 428	No cases
Rhode Island		No opinion	No cases
South Carolina		[1963-1964] S.C. ATT'Y GEN. ANNUAL REP. AND OFFICIAL OP. 107	No cases
South Dakota	Inconclusive case banning required Bible reading; State <i>ex rel.</i> Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929).	No opinion	No cases
Utah		No opinion	No cases
Vermont		[1962-1964] Vt. ATT'Y GEN. BIENNIAL REP. 87	No cases
Virginia		No opinion	No cases
West Virginia		50 W. VA. ATT'Y GEN. BIENNIAL REP. AND OFFICIAL OP. 466 (1963)	No cases

\*\* Little practice of prayer or Bible reading in the public schools, reported in Brief for State Attorneys General as Amicus Curiae at 15-23, Murray v. Curlett, 374 U.S. 203 (1963).

## APPENDIX B

STATES IN WHICH PRAYER & BIBLE READING WERE BANNED FROM THE PUBLIC SCHOOLS  
BEFORE THE SCHEMPP/MURRAY DECISIONS

## A. Interpretation of State Constitution by Education Officials Banned Prayer

Alaska  
Hawaii  
Nevada

## B. Interpretation by Attorney General of the State Banned Prayer

California  
Wyoming

25 CAL. ATT'Y GEN. OP. 316 (1955).

Brief for State Attorneys General as Amicus Curiae in School Dist. v. Schempp, 374 U.S. 203 (1963).

## C. Interpretation by State Courts Banned Prayer

Illinois \*\*  
Nebraska  
Washington  
Wisconsin

People *ex rel.* King v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910).  
State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902).

State *ex rel.* Clithero v. Schowalter, 159 Wash. 519, 293 P. 1000 (1930).

State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

\*\* Illinois has also had a case involving the enforcement of the *Schempp* decision where the word "God" was omitted from the prayer: *DeSpain v. DeKalb County Community School Dist.*, 255 F. Supp. 655 (N.D. Ill. 1966), *rev'd*, 384 F.2d 836 (7th Cir. 1967), *cert. denied* 390 U.S. 906 (1968).



APPENDIX C

COMPARATIVE STATE DATA RELATED TO ENFORCEMENT  
OF *MURRAY & SCHEMPP*

STATES	State courts can give advisory opinions.	Attorney general signed amicus curiae brief in <i>Engel</i> .	Attorney general signed amicus curiae brief in <i>Schempp</i> .	Governor was active member of Constitutional Prayer Foundation. <sup>d</sup>	50% or more of Congressmen testified or introduced resolutions in the House supporting the prayer amendment. <sup>e</sup>	State legislature passed resolution supporting the prayer amendment. <sup>b</sup>	Attorney general reported noncompliance, May, 1964. <sup>a</sup>
<i>A. Prayer &amp; Bible Reading Were Required by Statute.</i>							
Alabama	x		x		4 of 8		x
* Arkansas		x	x				x
*** Delaware	x			x			
** Florida	x	x	x	x	7 of 12		x
* Georgia		x	x				
** Idaho		x	x				x
* Kentucky						x	
* Maine	x		x	x	1 of 2		
*** Massachusetts	x					x	
*** New Jersey		x	x			x	
*** Pennsylvania		x				x	
Tennessee			x		5 of 9		
<i>B. Prayer &amp; Bible Reading Were Condoned by Statute.</i>							
Indiana		x			6 of 11		
Iowa							
Kansas		x	x				
Mississippi		x	x		5 of 5		x
North Dakota		x			1 of 2		x
Oklahoma							x
<i>C. Prayer &amp; Bible Reading Were Upheld in State Courts.</i>							
* Colorado	x			x			
** Michigan						x	
Minnesota							
** New York							
Texas		x					

	State courts can give advisory opinions.	Attorney general signed amicus curiae brief in <i>Engel</i> .	Attorney general signed amicus curiae brief in <i>Schempp</i> .	Attorney general signed amicus curiae brief in <i>Schempp</i> .	Governor was active member of Constitutional Prayer Foundation. <sup>d</sup>	50% or more of Congressmen testified or introduced resolutions in the House supporting the prayer amendment. <sup>c</sup>	State legislature passed resolution supporting the prayer amendment. <sup>b</sup>	Attorney general reported noncompliance, May, 1964. <sup>a</sup>
<i>D. Prayer &amp; Bible Reading Were Condoned Without Benefit of Statute.</i>								
Arizona		x	x	x				
* Connecticut		x			x			
Louisiana		x	x					
*** Maryland		x	x					
Missouri								
Montana	x				x	1 of 2		
* New Hampshire		x	x		x	2 of 2		
New Mexico		x	x		x			
* North Carolina	x		x		x	9 of 11		x
Ohio								
* Oregon								
Rhode Island	x	x	x					
* South Carolina		x	x			4 of 6	x	
South Dakota	x	x	x			1 of 2		
Utah					x			
* Vermont						1 of 1		
Virginia					x			
* West Virginia		x				3 of 5		

*E. Prayer & Bible Reading Prohibited by State Officials Before Schempp.*

Alaska								
California								
Hawaii					x			
** Illinois								
Nebraska								
Nevada		x				1 of 1		
Washington						5 of 7		
Wisconsin								
Wyoming						1 of 1		

\* An opinion was written by the attorney general.

\*\* Litigation involving the *Schempp/Murray* decision.

\*\*\* Litigation and an opinion.

a. Beane & Beiser, *supra* note 28, at 491 n.92.

b. *Id.* 501.

c. 1964 Hearings, *supra* note 72, at table of contents V-XVI.

d. *Id.* 120.