11. Why Not Recite the Navajo Invocation to Beauty?

Just as the expert witnesses were grappling with the difficult issues surrounding *Schempp*, another conflict involving school prayer was reaching a courtroom on Long Island. At this point, few people had noticed. It would not stay that way for long.

In New York, the conflict focused on a prayer that the state had composed and designated for use during the morning homeroom period. In the early 1950s, the nation was consumed by the increasing challenge posed by godless communism and its chief patron, the Soviet Union. Congress amended the Pledge of Allegiance to add the words “under God.”

In 1951, the New York State Board of Regents made its own contribution to this cold war fight. Eager to bring prayer to children in public school but mindful of the controversy engendered by sectarian offerings, the board composed a twenty-two-word prayer that it felt was universal enough for use by all students. The regents recommended to local school boards that “at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God.” The Regents’ Prayer read, “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”

Prayer in the schools had a long history in the state of New York. From 1837 through at least 1909, the state’s superintendent of common schools followed a policy that a “teacher might open his school with prayer, provided he did not encroach upon the hours allotted to
instruction, and provided that the attendance of the scholars was not
exacted as a matter of school discipline.”2 Catholic children were not
required to participate in whatever prayer the students recited.

The Board of Regents changed this policy in 1951 with its drafting
of the Regents’ Prayer, justifying it with a mixture of patriotism and
religion. Pointing to “the dangers of these difficult days,” the regents
adopted a statement saying that “the securing of the peace and safety
of our country and our State” required that children must be taught
“that Almighty God is their Creator, and that by Him they have
been endowed with their inalienable rights of life, liberty, and the
pursuit of happiness.”3

It did not take long before a group of civil liberties lawyers con-
vailed to discuss filing a lawsuit to challenge the Regents’ Prayer as a
violation of the First Amendment. On May 28, 1952, Leo Pfeffer
attended a meeting at the New York office of the ACLU. Pfeffer was
opposed to a lawsuit, writing afterward that he had “strongly advised
against the presenting of such a case because of the probabilities that
we would lose it.” Pfeffer reported that the ACLU attorney was dis-
appointed that Pfeffer and the three Jewish organizations refused to
cooperate in any lawsuit: “During the course of the presentation of
my views I emphasized the need for a public relations campaign and
the ACLU, seeing litigation go out the window, was quite prepared
to take over the public relations campaign.”4

Pfeffer wielded enough clout that, with his active opposition, the
possibility of a lawsuit collapsed. Later in the decade, though, came
another opportunity. In 1958, a majority of the Herricks school board
backed a motion to adopt the Regents’ Prayer, with the proviso that
students could be excused from participating.5 Some parents, how-
ever, opposed the new prayer requirement and vowed to fight it.

Lawrence Roth, a parent of two children in the local schools, took
the lead. “My immediate reaction was that the state and the school
board had no right to impose religion or prayers on the school chil-
dren,” he said. “My basic feeling was that if the state could tell us
what to pray and when to pray, and how to pray, that there was no
stopping.” So Roth sought help from the ACLU, which referred him
to William J. Butler, an attorney. Butler thought that the school board’s injection of a state-composed prayer into the public schools violated the First Amendment.6

Butler wanted to know if other people in the school district felt as strongly as Roth did about the Regents’ Prayer. A group of plaintiffs would make it possible for the lawsuit to survive if one or a few plaintiffs dropped out, either on their own or because the court eliminated them. (In an extended case, for example, the children of one plaintiff might graduate, making the case moot as to them.) At his own expense, Roth placed an advertisement in two local newspapers announcing that a lawsuit would soon be started and requesting interested people to call him at home. About fifty people called Roth in response to the ad. Eleven were willing to personally join in a lawsuit challenging the Regents’ Prayer under the First Amendment.7 Butler finally settled on five of them, eliminating those who did not have children in the public schools.

Meanwhile, as Butler pursued the grievance against the Regents’ Prayer, the nation’s chief strategist on church-state litigation once again wasn’t happy with the prospects of a lawsuit coming out of Long Island. After receiving what appeared to him to be a draft of a legal complaint, Pfeffer wrote to Shad Polier on November 24, 1958, the day before the expert witnesses testified in the Schempp case in Philadelphia: “I doubt very much that it will succeed and I think it may offer another opportunity for a court to become religious and patriotic.” Pfeffer briefly mentioned four alternatives that the American Jewish Congress could consider, including the one he recommended: “Urge the attorneys to drop the suit.”8

A month later, Pfeffer wrote once again to Polier, this time reminding him that the two of them had agreed that a lawsuit would be “ill advised and that I should seek to induce the Civil Liberties Union to refrain from bringing this suit.” But the ACLU refused to go along with him this time. Pfeffer reported that he had failed to convince the ACLU of his views and that it was planning to file the lawsuit without him.9 In February 1959, Pfeffer set out more clearly why he opposed litigation on the Regents’ Prayer: he felt that this
twenty-two-word prayer, as weak and watered-down as it was, would make too insubstantial a case to take before the U.S. Supreme Court. Once again, as when he tried to apply the brakes to other litigation involving religious observance in the schools, Pfeffer feared that a relatively thin case would prove an unfavorable basis for the justices’ decision on the momentous question of prayer in schools.

On February 2, 1959, Pfeffer articulated his objection to a Regents’ Prayer lawsuit: “We were consulted about the suit before it was started and we advised against the bringing of the suit. The reason for our advice is that the prayer involved is the ‘Regents Prayer’ which is as non-sectarian as a prayer can be and would be considered by the courts to be quite innocuous. We believe that the first prayer case to be brought should be based upon better facts.”

Engel v. Vitale, though, was under way. Of the five plaintiffs, two were Jewish, one was Unitarian, one was a member of the Society for Ethical Culture, and one was a nonbeliever. First alphabetically among the five plaintiffs, Steven I. Engel became the named plaintiff in the lawsuit; William J. Vitale, Jr., president of the school board, became the lead defendant.

Once filed, the case moved quickly to Nassau County Courthouse on February 24, 1959, before Justice Bernard S. Meyer of the state supreme court. Despite its lofty title, the supreme court happens to be the trial court in New York State—not the highest court, as the name implies. (The highest court of the state is the Court of Appeals.) The trial was held without a jury, because the two sides did not disagree significantly on the facts of the case. The question was one of law for the judge—specifically, whether the recitation of the Regents’ Prayer violated Engel’s First Amendment rights.

A little more than two weeks after the start of Engel v. Vitale, the Schempp trial itself resumed. With the main part of the trial over at the end of November and the pertinent evidence entered into the record, the lawyers had retired to their offices to write briefs and pre-
pare for their final oral argument before the three judges. The court scheduled the final arguments for March 12, 1959.

Meanwhile, Pfeffer was stirring in New York. Shortly after the suit was filed on February 14, 1958, Pfeffer had decided that he and the American Jewish Congress should not become actively involved in the suit, although he continued to provide advice to Sawyer and to Theodore Mann. A day after the conclusion of the trial, however, he changed his mind. As he had done in some other church-state cases around the country, Pfeffer decided to enter the case from the position of amicus curiae, providing a brief and a court appearance on the Schempp’s behalf.

On March 12, once again at the U.S. district court in Philadelphia, Judge Biggs called the session to order. Sawyer and Wayland Elsbree were there for the Schempps. Rhoads headed up a five-man legal team for the Abington school district; the team included his younger partner, Philip H. Ward III. Pfeffer waited in the wings to speak in support of the Schempps. Judge Biggs had brought his own amicus curiae, Lois Forer, to provide the court with legal assistance. Forer had been Biggs's law clerk for many years and now worked as a deputy attorney general for Pennsylvania. She was in the courtroom to help Biggs and the other two judges, not to represent Pennsylvania. Introduction of evidence was over, and the task for the lawyers now was to argue their legal points directly to the judges.

Sawyer was first up to speak, and he conceded that because Ellery had already graduated from Abington Senior High School, the case was moot for him. He also told the judges that the court would be justified in issuing an injunction to stop the prayers and Bible reading as a violation of the establishment clause if he convinced them of a key point—that both practices constituted religious observances. Beyond that, he wanted to argue that these practices were not only religious but also sectarian in nature and that because children were required to participate in a religious exercise that violated their own
beliefs, the state was interfering with the Schempp children’s practice of religion under the free exercise clause.

In starting his argument, Sawyer compared the morning exercises to commonplace pedagogical materials and courses found in the schools. In covering history or math, for example, teachers required that specific material be covered. In the case of Bible reading, however, there was no curriculum whatsoever—only the statutory requirement that ten verses of the Bible be read each day. “I contend that that is the kind of provision that is made for a ceremonial observance rather than for a pedagogical one,” he said.13

Sawyer also attacked Abington’s contention that the purpose of Bible reading was to expose children to great literature. In fact, he said, any literary purpose was secondary to the religious significance of the exercises, which was “its essential character.”14 If the purpose of the statute was to ensure that students learn great literature, why, he asked, was only the Bible specified? “And if the statute,” said Sawyer, “were only to be designed, and if it were only to insure the exposure of the children to a great work of literature and to a piece of history, we would wonder why no other work in the whole vast expanse of Western thought and literature from Homer and Herodotus to Shakespeare was ever singled out by the legislature for such exaltation and for such a requirement.” He concluded: “In fact, there is nowhere in the Public School Code, that I have been able to find, any other instance in which pedagogical material is specifically required to be taught. We grant, of course, that it is a great literature. We wonder whether or not it is indispensably great as literature.”15

Not only was the Bible the only work required to be read, but the Pennsylvania statute also required it to be read without comment. The provision against commentary had its genesis a century earlier, when Horace Mann, the school commissioner of Massachusetts, attempted to satisfy Protestant sects that wanted the schools to have Bible reading but not biblical commentary with which they might disagree. Sawyer argued that although the provision indeed helped to keep sectarian influences out of the public schools, it represented a clear indication that Bible reading amounted to a religious obser-
Sawyer said that reading the Bible without comment defeated Abington’s contention that the Bible was primarily used for literary, historical, or moral lessons, “for it is hard to think how anything could be taught, although it might have some inspirational value, without comment, particularly the book which is in today’s vernacular portions almost incomprehensible because of the antiquity of the language.”

Sawyer also reminded the judges that the Pennsylvania law specified that teachers could be fired for failing to read the Bible to schoolchildren each morning. In no other instance could teachers be so seriously disciplined for not utilizing a particular text. Sawyer observed, “This again is hardly the sort of draconic provision that a legislature would contrive if it were interested in essentially a pedagogical aspect of a work.”

Sawyer then compared the Abington situation with the U.S. Supreme Court finding in *McCollum v. Board of Education.* In *McCollum,* the U.S. Supreme Court invalidated the practice of early dismissal of public schoolchildren from their regular instruction in order to attend religious classes held by clergy inside the schools. In both *McCollum* and *Schempp,* Sawyer pointed out, the authorities used school classrooms and other facilities for the purposes of supporting a religious ceremony. He argued that one major difference, though, made the Abington Bible reading a more egregious violation of the First Amendment: the Illinois school district permitted students to participate or not in the released-time program, but Abington provided no way to opt out of its exercises. In fact, the school officials forced Ellery Schempp to participate. The coercion of religious practice denied Ellery and his siblings the right to practice their own religion.

Sawyer had to cover several bases. Most precedent indicated that a violation of the establishment clause occurred with any government endorsement of religious observance, even if it involved religion generally and without any denominational preference. But a minority view held that violation of the establishment clause required that the government prefer one denomination to another. So Sawyer argued
that Bible reading was also by nature a sectarian practice, promoting some religions at the expense of others. Reading the King James Version not only preferred Christianity to non-Christian religions but also preferred Protestantism to Catholicism. Even Weigle had agreed with that.20

Sawyer argued that the law’s requirement that the “Holy Bible” be read excluded the Jewish Holy Scriptures and the Catholic Douay Bible. Weigle himself had testified that it would be a sectarian practice to read the Jewish Holy Scriptures alone. Sawyer had confined virtually all of his argument to the Bible’s place within the Judeo-Christian tradition, but he here attempted to broaden his point. Bible reading at Abington discriminated against all non-Christian religions—not only Judaism, but also Buddhism and Islam, for example.21

Not only did the Bible favor Christianity, said Sawyer, but parts of the King James Bible offended the Jewish faith. He reminded the judges of Grayzel’s testimony about a number of passages, especially the controversial scene in Matthew in which the sealed fate of Jesus is followed by the Jewish crowd saying, “His blood be on us and on our children,” a sentence that Sawyer said was “responsible for more anti-Jewish feeling than anything else.”22 Catholics also regard the King James Version as sectarian. “The Popes have called the King James Version the chief arm of the Protestant revolt,” said Sawyer. “They say that the encouragement for individuals to read the Bible themselves and interpret it for themselves without note or comment is one of the salient features and errors of the Reformation.”23

Even within the Protestant world, said Sawyer, there remained sharp disagreement about the King James Version. Such Protestant groups as the Unitarians, Universalists, Quakers, and Mormons disagreed with parts of it. Sawyer recounted the way in which the Bible conflicted with the beliefs of Ellery Schempp and his family. Sawyer said: “The doctrines of the Trinity, of the divinity of Christ, of the ascension, of the miracles, all of these are religious concepts and religious doctrines. If they are couched in beautiful language, fine, but they are religious concepts and no reading of the Bible can fail, even
if it is at random, as it appears to be in the schools in most cases, to convey these ideas as being truth. The Book is designed to convey them as being truth.”

Sawyer criticized the practice of reciting the Lord’s Prayer after the conclusion of Bible reading. There are differences between the Protestant and Catholic wording of the prayer, and Jews believe that the word Lord as used in the King James Version implies the divinity of Jesus. Above all, Sawyer argued, recitation of a prayer can have no pedagogical purpose in a public school—it is there solely for the purposes of a religious ceremony. The juxtaposition of the Lord’s Prayer and Bible reading, he said, showed that school authorities intended the two to convey religious meaning. Sawyer argued that the violation of the First Amendment in this case was “even stronger because there isn’t any other aspect that I can conceive of to a prayer but a religious one.” He explained: “This is the meaning of ‘prayer.’ And prayer in unison, a rising thing, is perhaps a more strikingly religious ceremony than even the reading of the Bible.”

Judge Biggs was troubled. If the three-judge court invalidated Abington’s morning devotional exercise under the First and Fourteenth Amendments, how would its ruling affect other situations in which the name of God was invoked in a public place? Judges often look beyond the conflict directly before them and try to understand how their ruling may affect the larger body of law and other situations that share similar characteristics. As they anticipate additional cases coming their way, judges try to figure whether there is a principled way to distinguish among them and thereby resist extending the legal point too far.

Sawyer certainly must have anticipated the question of how a ruling in the Schempp case might affect other prayers and references to God in public forums. After all, the U.S. Supreme Court itself opens its public session each day with a marshal intoning, “God save this
honorable court”; and many legislative bodies open their sessions with a short prayer. Sawyer had a serious problem if the judges believed that invalidation of morning prayers in the schools would lead logically to throwing out all such religious references in other government venues.

To distinguish the Schempps’ situation from the others, Sawyer argued that most intrusions of religion into public life are de minimis—that is, they are of too trifling a nature for the law to notice. Biggs started a colloquy with Sawyer on the question, asking what would happen to a person who claimed that the call of the crier at the beginning of a court session violated the establishment clause. “I think he loses easily,” Sawyer said. “It is de minimis, it is noncompulsory, it isn’t required by statute, and nobody has to go and participate in it. All of those, an amalgam of reasons. . . . [A]nybody that brought a case like that I think would just be a damn fool, and I think that that is often true in the law and I think the courts have legal ways of expressing that feeling. I think that that is true in every one of the rights under the First Amendment, that there comes a point where you just simply say, ‘Well, now, this is just too ridiculous.’ . . .”

When Sawyer sat down, his argument over, he could not have felt very good about his last exchange with Judge Biggs. Saying that someone would be “a damn fool” to bring such a case was far from the careful logic and craftsmanship of his oral argument. Had he helped Biggs see his case as one with definable boundaries? He could only hope so.

Lois Forer rose to her feet next, a fortuitous event that could not have been better for Sawyer had he scripted the trial himself. Forer sensed that Sawyer had not satisfied Judge Biggs in distinguishing the morning prayers at Abington from the use of prayers in courtrooms and legislative chambers. She certainly knew Judge Biggs better than anyone else in the courtroom. A graduate of the Northwestern Uni-
versity School of Law, Forer had clerked for Biggs for four years beginning in 1942. Long before flextime became part of the American work style, Biggs had permitted Forer, who had a baby at the time, to split her work hours between home and the courthouse. Once, when they were working together on a complex case and shipping boxes of documents back and forth to each other, Biggs opened a box from her and found both the trial transcript and diapers inside. When Forer gave birth to her second child, whom she named John in honor of the judge, Biggs went to the hospital and worked on an opinion with her there.  

At just ten minutes per day, Forer said, Abington's morning devotionals would consume about thirty hours of classroom time each academic year. This amount of time, she said, was not a de minimis, or trifling, experience for students. Moreover, she argued, a religious exercise done with young impressionable children in a school classroom carried far more importance than a prayer among adults in a legislative meeting.

Next, Forer criticized Rhoads's contention on behalf of the Abington schools that the different versions of the Bible and other holy books are not in themselves sectarian works. If the Koran were read in the schools each morning, said Forer, the reading would, for non-Muslims, “certainly be a sectarian practice within the school.” She continued, “One can imagine the effect upon a Christian child, who would say, ‘And what of Jesus?’ or upon a Jewish child, who would say, ‘And what of Moses?’”

Nearing her conclusion, Forer wondered aloud why the Bible and Lord’s Prayer had been required above any other available sources. “There are many prayers,” she said. “The Egyptian Hymn to the Sun, the Navajo Invocation to Beauty, or the Rig-Vedas, which could all be recited or read for inspirational value and, as a matter of cultural interest, but none of these is required to be read every day, and we are within the stream of our own culture in calling for a reading of the Bible which can be in my opinion for no other purpose than a religious one in this ceremonial way.”
Now it was Leo Pfeffer's turn. The Lord's Prayer had been little discussed up to then, and Pfeffer made it clear that he thought it enjoyed even less justification than Bible reading for use in the public schools. He referred to one of Abington's justifications, literary value, for using the Bible. “There has been no contention,” he said, “nor can there be contention that one reads a prayer because of any literary significance in it, although the defendants here contend that the Bible is read because of its literary significance.”

Pfeffer continued: “Prayer recitation far antedates written religious documents in the history of religion and the Bible is a comparatively recent document in religious development. Prayer was thousands of years before the Bible.” The Lord’s Prayer in particular, he said, “is not deemed non-sectarian by those who do not subscribe to the Christian religion.” He added that “the whole history of the Jewish religion indicates quite clearly that the Lord’s Prayer is not accepted as within the, consistent with the doctrines and principles and mandates of the Jewish faith.”

Listening to the proceedings earlier, Pfeffer had been troubled by Sawyer’s analysis on the critical point of what differentiated Bible reading and prayers in the public schools from the prayers that open many judicial and legislative sessions. Sawyer had been wrong, Pfeffer said, in arguing that prayer invocations before government bodies were distinguishable because they were of small consequence. Instead, the answer involved history and tradition. Ever the legal scholar, Pfeffer took the three judges on a brief excursion into how prayers came to be associated with legislative sessions. This practice started in the Continental Congress, before the Constitution came along to guarantee religious freedom. The Continental Congress, Pfeffer said, passed numerous resolutions involving religious matters and began starting its sessions with a prayer because there was no First Amendment to prohibit it from doing so. Later, after ratification of the amendments to the U.S. Constitution, the prayer
invocation to start a legislative session continued on despite the objections of Madison and Jefferson. Pfeffer said, “[I]t had been so ingrained upon our [legislative] culture that it could not be dislodged.” The danger, said Pfeffer, is that such very old traditions with minor value as legal precedents could be used to justify something wholly different, such as morning devotionals given to schoolchildren who were a captive audience.33

Now Pfeffer moved on to another point. Earlier in the day, Judge Kraft had noted that the Pennsylvania law requiring Bible reading did not specify that the King James Version be used. The Abington school district purchased only the King James Version. But even if teachers could select any Bible for use in their classrooms, Pfeffer said, the abridgement of religious freedom would be the same: “If the teacher is a Protestant and selects the King James Version of the Bible, that constitutes a wrong against the Catholic and Jewish children in that class. The fact that in the room next door a Catholic teacher is committing a similar wrong against the Protestant and Jewish children in no way mitigates against the wrong committed against the Catholic and Jewish children in this class. I think the test therefore is not the fact that the statute does not prescribe the King James Version of the Bible. I think the test is the fact that any version of the Bible will be an offense to some children.” Pfeffer further explained: “I don’t think there is such a thing as nonsectarian version of the Bible. If you accept, as religious persons do, that the Bible is the word of God, then there are no two words of God. . . . But the facts of life are that we have so many religions because each is convinced that it alone is a repository of God’s one and exclusive will.”34

Having listened intently for three hours, C. Brewster Rhoads now had his opportunity to speak. Three lawyers had addressed the judges in support of Ellery Schempp, and now it was up to Rhoads to carry the full burden for Abington. Rhoads, however, enjoyed a significant advantage in going last. Like a general who is presented a
map of where his enemy has deployed his forces, Rhoads could adjust his presentation to blunt the strongest arguments of his opponents and also take advantage of any openings they presented to him.

Rhoads did have an opening to exploit, and he did so quickly. Leo Pfeffer had said that prayer at legislative sessions had survived the strictures of the First Amendment because of its long tradition, starting with the Continental Congress. Following this lead, Rhoads tried to provide a similar justification—a long history in Pennsylvania—to support the survival of Bible reading and recitation of the Lord’s Prayer in the Abington public schools.35

This statute, said Rhoads, was carefully crafted to avoid sectarian influences or, indeed, anything that could make the exercise devotional and therefore offensive to anyone’s religious conscience. The state of Pennsylvania required that the Bible must be read without comment, a critical safeguard that avoided the possibility of proselytizing and teaching the dogma of any sect. So the Bible readings were just that—nothing more than readings. Readings without comment could not amount to an establishment of religion, because, Rhoads argued, there were no trappings of religious observance in its presentation. For Abington, this was a critical argument, and Rhoads defended it by arguing: “[T]here is no instruction, there is no proselyting, there is no ceremonial, there is no suggestion ‘This shall you do,’ ‘This shall you believe,’ ‘This is the Word of God,’ or otherwise. It is merely a reading of ten simple verses from the Bible without comment.”

Judge Kirkpatrick asked: “Don’t you think there is instruction involved if the pupils of the school are read, for instance, the account of the Israelites escape from Egypt? Aren’t they being instructed in something that we might call Bible History?” Rhoads answered that state legislators had chosen the Bible for its moral truths and literary value: “And to say that the great words of St. Paul, for example, that the Sermon on the Mount, that the parables, and any number of other things to which we could advert, should not be read simply because someone might attach to them a completely sectarian, that is sect relation or connotation, I think—” Kirkpatrick interrupted: “A
devotional exercise the person takes part in and addresses himself to the Deity in some fashion, either directly or through an intermediary. But instruction is quite a different thing. He is on the receiving end of that and he can’t help learning if he listens to what is read.” Rhoads replied, “And if what is read, sir, is read in such a manner, and without comment, as to indicate only that it is a portion from the Holy Bible being read, and that it is not being read with sectarian overtones or for the purpose of convincing, proselyting or for dogma, then I suggest, sir, that there is certainly no impropriety in such reading, and that the whole intent of the legislature, as I have pointed out in my brief, indicates that that was to be the fact.”

Rhoads contrasted Bible reading to the kind of religious exercise ruled unconstitutional in the 1948 case McCollum v. Board of Education, the released-time case: “But the point was that there was definitely a religious observance; there was the wearing of the clerical garb, the kind of thing that is prevented in our own legislation, to which I have adverted. There is an attempt to prove to the person to whom the religious gentleman or person may be talking the validity of some given faith. That is what I consider to be the concept of a religious observance mandated which would fly in the face of establishment.” Judge Biggs then entered the colloquy: “You think then a simple ceremony involving religious observance, unless there was an attempt to prove the truth of the religion or reach the truth of the religion, would not fall within the interdiction of the [First] amendment?” Rhoads answered: “That, sir, may be the one end of the pole. There may be some other. One may be black and one may be white. I am thinking in the gray land of the courts.” Judge Biggs explained: “I am trying to see where these poles lie. Here is a class in chemistry; an instructor gets to his feet and reads several paragraphs about the property of certain chemicals. He reads that by way of instruction and the pupil accepts it—I assume he does, he accepts it at least as the furthermost point in that science in which he and the teacher can reach at that given day. There is, we will say, an hour later, at noon a ceremony or a period in which the King James Version or some other version of the Bible is read, and the Lord’s Prayer is recited. You say
that that is not religious instruction.” Rhoads clarified, “I would contend, sir, that it is not religious observance and at that point it did not amount to religious instruction, yes, sir.”

Rhoads was asked if proselytization was required for a religious ceremony. He responded, “No, sir, there must not be as such that but it must have in some way that objective, sir, in order to be the establishment of religion, as I view the constitutional interdiction in the First Amendment.” Judge Kirkpatrick interjected, “You say the objective, but how about the effect of it, regardless of the objective? I mean the effect is to convince the listeners, the young listeners, that these things are true; isn’t that religious instruction?” Rhoads responded: “That, sir, is the issue which Your Honors have to decide here. I think Your Honors should say no from the evidence in this case.”

Having finished that point, Rhoads went on to another critical contention on behalf of Abington—that Bible reading and recitation of the Lord’s Prayer did not violate the free exercise of the Schempp family’s religious beliefs. Rhoads maintained that what was read to Ellery Schempp in homeroom class lacked any compulsion that he believe. The First Amendment guarantees, Rhoads said, were not meant to filter out of the environment all doctrines and beliefs that are unacceptable to people. Rhoads argued that to be in violation of the free exercise of religion, Abington would have had to suggest that the children actually believe the material read to them as the word of God. Rhoads added that the requirement that students show respect and attention during the exercises was not the same thing as compelling them to agree with the readings themselves.

Finally, Rhoads focused on whether the law permitted the rights of a few in the community (in this case, the Schempps) to prevail over the wishes of the majority (who, in this case, wished to pray). The religious freedom guarantees, said Rhoads, “were not conceived to be used as weapons to enable the minority to strike down the spiritual and ethical aspirations of the majority.” When Judge Biggs called on Sawyer for a rebuttal, Sawyer didn’t want to leave unchallenged Rhoads’s final assertion—that the First Amendment did not
empower a minority of people in the community to deny the majority its desire for Bible reading and prayer in the classroom. Earlier, Forer had explained that the Bill of Rights protected the rights of individuals against the actions of a majority of people in the community. Now Sawyer added that Rhoads’s stance on protecting the rights of the majority could be used to bring all manner of religious observance and sectarian teaching into the public schools: “[It] would justify complete religious or chapel services, which might be desirable to the majority in the public schools. You could go very far, in other words, with that argument.”

Sitting in the courtroom throughout the entire day was Ed Schempp, taking notes of every argument made by the lawyers. That evening, he sat at his typewriter and wrote out a one-page, single-spaced memo to himself about what had transpired. “Sawyer’s talk was superb,” he wrote. As for Rhoads, Schempp wrote that he “got up with his flourishes and oratory, and probably did as well as possible considering he knew he was wrong!” Never lacking for confidence, Schempp concluded his memo with a prediction: “The decision of the Judges may be months away according to Sawyer. But as of now I feel they are leaning our way—definitely.”