17. Fifty-one Buddhist Children

The petition for certiorari in the *Murray* case—the formal request that the justices hear the case—arrived at the U.S. Supreme Court on May 15, 1962. The clerk assigned it the number 119, designating the order in which it arrived at the Court for the 1962 term. Just thirteen days later, Abington’s appeal of the *Schempp* case arrived in the clerk’s office and, in sequential order, got the number 142.

Once petitions and appeals arrive at the Court, the process begins for deciding which cases the justices will hear. They had little discretion on cases that came on appeal from a three-judge federal court, as *Schempp* did. But the Court retained discretion to grant or deny review of cases that arrived through the much more common process of petitions for certiorari.

Once the opposing party responded with a brief of its own, the clerk’s office circulated the documents to the nine justices. In 2000, more than nine thousand petitions competed to gain a place on the Court’s docket of only one hundred or so cases scheduled for oral argument each year. In terms of paperwork, the Court estimates that the petitions in one year amount to about 375,000 pages of filings—the equivalent of more than one volume of *War and Peace* each working day. Back in the early 1960s, when *Schempp* and *Murray* reached the Court, the number of petitions amounted to slightly more than two thousand per year, many fewer, but still too many for the justices to handle alone. That’s why the task of reading the petitions falls to the law clerks working for each justice.¹

When the *Schempp* and *Murray* petitions circulated, a law clerk for
each of the justices read them and prepared a memo on each case, summarizing the issues and the prior history and recommending either to grant a review or not. Then, at the beginning of October, the justices gathered to consider the *Schempp* and *Murray* petitions, among many others. They met around a long rectangular table in their oak-paneled conference room. A portrait of the fourth chief justice, John Marshall, hung above the fireplace, and the volumes of *United States Reports*, the official publication of Supreme Court decisions, lined the walls.²

What transpired that day inside the conference room—indeed, almost everything aside from the courtroom argument itself—was shrouded in secrecy, as are proceedings in all cases. The Court is the most secretive branch of government. The oral arguments are open to the public, and the Court makes audio recordings. But it allows no cameras and no televising of oral arguments. The deliberations, including memos and drafts of opinions, are never released to the public—never, that is, unless a justice chooses to turn his or her papers over to a research library upon retirement or death.

When the justices met early in October to decide which petitions to grant, they followed what is known as the “rule of four,” meaning that a positive vote of four of the nine justices was required for a case to be scheduled for oral argument. Earl Warren, who, as chief justice, sat at the head of the table and ran the meeting, brought with him two memos written by one of his three clerks, Timothy B. Dyk, who would later become a judge on the U.S. Court of Appeals for the Federal Circuit. Dyk recommended that the Court hear the *Schempp* case and hold *Murray* for consideration later, after *Schempp* was decided. After the intensely negative public reaction to *Engel*, Dyk was sensitive to how the cases might best play to the public. “My reason for this choice,” he wrote, “is that the result of holding that the Bible reading is unconstitutional in this case would result in an affirmance [of the Biggs court’s decision] rather than a reversal [of the Maryland court’s decision in *Murray*]—which possibly would be less controversial.”³

Warren knew where he stood on the *Schempp* case. On the first
page of Dyk’s Schempp memo, he wrote in longhand, “Affirm,” with the word underlined, meaning that he felt that the Court should summarily affirm the lower court’s decision invalidating Bible reading without even hearing an oral argument. Given the Court’s decision in Engel v. Vitale less than four months earlier, the chief justice didn’t see how the result in Schempp could be any different. “The issue is the same although it is a stronger case than Vitale,” Warren wrote. “The 3 Judge Court wrote a good opinion on our remand for consideration under the amended statute.” Dyk’s memo on the Murray case got a similarly strong response. On the first page, Warren wrote that the Court should either grant certiorari and hear the case or summarily reverse the Maryland court’s decision on the basis of Engel v. Vitale. “I find no distinction between this and Vitale on the issue of establishment,” he wrote. “This is even broader—Chapter of Bible and/or Lord’s Prayer.”

As the discussion developed, Justices Brennan and Douglas agreed with Warren that the Schempp decision of the three-judge court—prohibiting Bible reading and the Lord’s Prayer—should be affirmed without oral argument. The three justices agreed that the Court should deal summarily with Murray for the same reason, that they should simply reverse the decision of Maryland’s highest court to prohibit Bible reading there as well. That left them two votes short of summary treatment. The other justices didn’t agree with summary treatment, possibly because they felt that the two cases presented different issues that deserved briefing and argument: the Lord’s Prayer had not been composed by the state, as had the Regents’ Prayer in Engel, nor had that case involved the reading of the Bible.

John Marshall Harlan had a different idea. He argued—as had C. Brewster Rhoads to the Biggs court—that they should remand the case back to the three-judge court, this time on grounds of abstention. Under that doctrine, federal courts should not rule on the constitutional validity of a state law until the courts of that state have had an opportunity to interpret it. Here, the Pennsylvania courts had
not yet construed the new Bible-reading statute with the excusal provision. A few months earlier, his clerk, Richard J. Hiegel, had submitted, for the justice’s eyes, a draft opinion that the amended statute was unclear on several important points; consequently, he wrote, “we do not think it proper to determine now the applicability of Engel v. Vitale to this case.” Harlan got no support at all for his view.

Another justice, Potter Stewart, the lone dissenter in Engel, once again looked like the only one who at that moment would approve of the religious practices. At the end of the discussion, when the vote was taken, all eight justices who voted were in favor of hearing oral arguments in the two cases. The ninth justice, Arthur J. Goldberg, did not participate. The U.S. Senate had confirmed him as an associate justice only recently. Oral argument was set for the following February 27 and 28, with the Murray case, the earlier filer, to go first.

Finally, Leo Pfeffer knocked on the door of the U.S. Supreme Court. The Florida Supreme Court had decided Chamberlin on June 6. At that point, fast work by Pfeffer would most likely have gotten his certiorari petition before the justices for the early October meeting in which they considered Schempp and Murray and scheduled them together for oral argument.

But Pfeffer’s cocounsel had filed for a rehearing, delaying the case. The Florida court didn’t deny the rehearing until July 31. With summer vacations interfering, it appears that Pfeffer did not hear of the denial until a letter of August 20 from Bernard Mandler so informed him. With the delay, Pfeffer did not docket the Chamberlin case at the U.S. Supreme Court until October 15.

Chamberlin looked like the strongest case of the three. It had everything that the other two offered—Bible reading and the Lord’s Prayer—and many other religious practices as well. But Pfeffer had lost the race to the U.S. Supreme Court.
Not long after the justices set oral argument in the *Schempp* case, a major change took place on Abington’s legal team. C. Brewster Rhoads, who had argued twice before Judge Biggs and had guided the case for Abington for four years, decided to withdraw from the argument before the U.S. Supreme Court. Giving up an opportunity to appear before the justices, the highest achievement in the lives of many attorneys, would be akin to a star quarterback voluntarily taking the bench rather than playing in the Super Bowl. But Rhoads, now seventy years old, complained to his partner Philip Ward that he was suffering memory lapses from time to time. “I think he was really worried,” says Ward. “I think he was afraid he would sometimes lose his place. He said, ‘I know I’m not going to be able to argue it. I live in fear of maybe not being able to carry it out.’” For this proud member of the Philadelphia bar, the possibility of suffering mental confusion while under intense questioning by the justices was too great a risk to bear.

Ward had worked in lockstep with Rhoads throughout the litigation, but that didn’t necessarily make him the logical choice to argue the case at the Supreme Court. Ward’s primary expertise was corporate law. In fact, he was not even a litigator. His firm did boast a litigation department, and once Rhoads stepped aside, many lawyers there expected that a rich opportunity would naturally fall their way. Much to their surprise, though, the assignment went to Ward. He was then serving as chairman of the Committee of Seventy, a good government watchdog group in Philadelphia, and was interviewed frequently on television. Percival Rieder, the Abington school solicitor, had seen him on television and liked his demeanor. “He said, ‘I want you to argue the case,’” Ward remembers.

For the next three months, Ward stopped all his other work in order to concentrate on preparing for his *Schempp* argument. He spent most of that time at home reading and taking notes. “To prepare for one of these cases, you have to know absolutely every case, every law review article, everything, on that particular thing,” he says.
“You live in fear. I could see them saying, ‘Mr. Ward, are you familiar with the case of such and such, as written in the unpublished edition of a Bombay law review from 1912?’ I sat at home and thought up every single question that they could ask.”

At the Supreme Court, Ward would butt heads with Henry Sawyer, whom he had known from the time they were teenagers growing up in the wealthy suburbs of Philadelphia. They had gone to rival private schools and had seen each other often at social gatherings and during summers at Cape May. Sawyer ended up marrying a mutual friend of theirs, and Ward had hired Sawyer’s former secretary and employed her for twenty years. They weren’t close friends, but the prospect of their facing each other before the nation’s highest court added a bit of intrigue and personal rivalry to a situation that, for a lawyer, is already as charged as it can get.

The case posed a significant challenge for Ward. With the Court striking down the Regents’ Prayer in *Engel* by a six-to-one margin, the justices had started down a path that could easily lead them to invalidate Bible reading and recitation of the Lord’s Prayer in *Schempp* and *Murray* as well. After all, the King James Bible and Lord’s Prayer carried deep religious significance, and Sawyer had shown persuasively through his expert witness, Solomon Grayzel, that both were sectarian in nature. The same could not be said for the Regents’ Prayer, which the New York State Board of Regents had concocted in 1951 specifically for schoolchildren. Ward, though, did have a few arrows in his quiver. The fact that an arm of the state of New York had created the Regents’ Prayer represented a level of government involvement that was not present in *Schempp*. Also, Ward could argue that the Bible’s moral lessons were critical for children.

Ward, however, felt pessimistic as he prepared—during the holiday season of 1962—for his oral argument scheduled for the end of February. He felt that the justices’ decision in *Engel* had shown their cards on the application of the First Amendment to religious exercises in the public schools. “We thought nothing good could come out of that Court on something like this,” he said forty years later. Looking at the lineup of justices, he felt reasonably confident that he
would get the vote of Potter Stewart, who had been the lone dis-
senter in *Engel.* Ward also thought he had a reasonable chance to get
the votes of three other conservatives: John Harlan, Tom Clark, and
Byron White. If he did corral those four votes, which justice would
provide the critical fifth vote was unclear.17

With the argument before the justices only twenty-four hours away,
the litigants and lawyers converged on Washington, D.C., on Feb-
ruary 26. Ward took the train from Philadelphia with his wife and
son, accompanied by his colleague Rhoads and his wife. Sawyer also
took the train from Philadelphia. Ellery Schempp, now a graduate
student in physics at Brown University, drove from Providence with
his fiancée, Josephine Hallett, and picked up his sister, Donna, in
New York. Their snowy trip down the New Jersey Turnpike almost
ended tragically, when Ellery’s car spun on an icy patch and nearly
hit a truck before straightening out. They stayed overnight in Wash-
ington with a friend, sleeping on the living room floor.18

The next day, February 27, Ellery met his parents outside the
Supreme Court building, across the street from the Capitol. Before
the building opened in 1935, the justices had met in the Capitol and
did some of their work in home offices. But now the Court had its
own imposing building of Vermont marble with Greek Corinthian
columns, formally symbolizing the Court’s status as one of the three
coequal branches of government. Inside, American white oak and
marble from three continents continued the theme of a judicial tem-
ple19—one where supplicants came to plead their cases to nine life-
tenured gods from whose rulings there was no further appeal.

Inside the courtroom, Chief Justice Earl Warren announced the
next case that the Court would hear: “Number, 119, *William J. Mur-
ray III, et al. versus John Curlett, et al.*” The *Schempp* case would fol-
low right after *Murray.* Finally, the two conflicts that directly chal-
lenged Bible reading and recitation of the Lord’s Prayer in the public
schools were before the Court for oral argument. Did those two
practices violate the religion clauses of the First Amendment as applied to the states by the Fourteenth Amendment? That was a question never considered by the Court in the 172 years since ratification of the Bill of Rights. It was February 27, 1963, and the nation would likely get an answer before the Court’s term was over that June.

Over the next few hours and extending into the following morning, the justices would hear from seven attorneys. Normally, no more than two advocates argue a case, one for each side; but on this matter, the justices heard from a flock of lawyers representing the litigants from both cases, plus two high-ranking state officials—the attorney general of Maryland and the deputy attorney general of Pennsylvania, both present to defend their state statutes. Of the seven speakers, only Henry Sawyer truly distinguished himself. The others emerged from their experience with an assortment of bruises inflicted by justices who were sometimes impatient with their arguments and at other times biting and adversarial. In several instances, surprisingly, lawyers offered arguments seemingly without thinking them through to their logical conclusion—something the justices were only too happy to do for them. Sawyer got much different treatment. Professorial at times, without being condescending (a difficult balance to make when arguing to the justices), Sawyer delivered lengthy and often uninterrupted excursions into fields as disparate as First Amendment history and biblical interpretation. Advocates rarely come off looking like scholars, but Sawyer had the sound of a man who could leave for Harvard on the next plane.

First up, though, was Leonard J. Kerpelman, Madalyn Murray’s lawyer. Kerpelman had a red light at the podium that would tell him when his time was up. When it went on, he could count on finishing his sentence but nothing more. Kerpelman told the justices of his own unusual circumstances—that he himself had taught in the Baltimore public schools for six years while he was in law school and remembered well how he had read the Bible to his students each morning.

Kerpelman spent much of his time defending himself from asse-
tions by a justice (the transcripts often don’t make clear which justice was speaking) regarding the free exercise clause. The justice argued that the majority of citizens in the community, those who wanted prayer and Bible reading in the public schools, enjoyed rights under the First Amendment, too. If they were prevented from holding their morning exercises, he asked, would that not deny them their First Amendment right to the free exercise of their religion? Kerpelman struggled several times to answer, replying that prayers in the public schools would nonetheless amount to a state establishment of religion. Finally, Justice Black rescued Kerpelman by asserting that the free exercise clause did not necessarily permit the majority to engage in prayer wherever and whenever they wanted—certainly not, for example, if they started praying right at that moment in front of the justices. “And would that,” Black wondered aloud, “deprive them of their free exercise of religion, to say that they could pray on the outside, or somewhere else?” Kerpelman replied, “Thank you, Mr. Justice.”

Chief Justice Warren called a recess for lunch. All the Murray and Schempp lawyers and litigants went to the cafeteria in the lower level of the building so that they could eat and get back in time. Philip Ward sat at the same table as Madalyn Murray and remembered the experience forty years later. “She was the most profane woman I ever heard in my life,” he says. “Every third word was, ‘oh that’s a lot of shit, fuck you.’ She was at our table. I’m no blue stocking, but that was a little much for me.”

Back in the courtroom, Francis B. Burch, a lawyer for the Baltimore school board, told the justices that Bible reading in the schools had long been a tradition in Maryland, dating back to 1836 or earlier. Burch argued that the Baltimore schools used the Bible and Lord’s Prayer solely for the secular purpose of teaching moral and ethical values and establishing discipline and respect for authority. School officials enjoy the right to reasonably select whatever materials would best serve those goals, he said.

At least one justice was troubled that Burch’s use of moral and ethical values as justification provided no obvious limits to the use of
religious exercises in the public schools. If school officials were free to choose any materials to teach values, as Burch had argued, then what would constrain them from adding more religious material or even replicating an entire religious service? Burch had no ready answer. “Again I say that I think it goes again to a matter of degree,” he said. “As this Court has said, what the wall separates is a matter of degree.”

Later, when Burch’s colleague George W. Baker, Jr., addressed the Court, Justice Black brought up the problem again. “Is there any reason why if you can have three minutes [for prayer and Bible reading] you couldn’t have forty?” asked Black. “Or any reason if you could have forty, why you couldn’t have six hours?” He continued: “Well, if you can have it in the opening exercises, why can’t you continue to have it during the whole day? Why can’t you pick out all of your religious sacred documents from one particular religion or one particular sect of one religion?” Baker replied weakly that such a longer exercise “would be an abuse.” But he clearly hadn’t anticipated this obvious and troubling point and so had nothing more to offer the justices on how to limit devotional exercises in the classroom.

When Baker was finished, the next advocate was Thomas B. Finan, the attorney general of Maryland. Finan didn’t waste any time digging himself into an impressively deep hole. A minute into his argument, he asked the Court to “reevaluate”—in other words, overturn—its decision in Engel v. Vitale. Asking the justices to overturn a prior decision is not usually a winning strategy, especially when the decision had come down within a year and was agreed to with near unanimity. What troubled Finan so much was his view that the Court had rejected theism—the belief in one God who created earth and humankind—and, in its place, had elevated what he called “nontheism” in the classroom. Apparently, by “nontheism,” Finan was referring to Madalyn Murray’s atheism.

Finan’s argument was a misreading of Engel. The Court had not chosen nontheism or atheism for the nation’s schoolrooms. The justices had simply said that the government could not compose prayers for use in the public schools. Beyond that, Finan had ignored the fact
that in the four relevant cases that had come before the Court—*Engel*, *Schempp*, *Murray*, and *Chamberlin*—most of the plaintiffs challenging prayers and Bible reading were Christians and Jews whose religions were theistic. One justice observed: “Aren’t there people who are opposed to this who are just as fervently, fervent in their belief in God as those who prescribe this oath, and who yet oppose it? Why do we have to make an issue between atheism and Christianity?”

For Attorney General Finan, perhaps the most damaging exchange for his case came near the end of his argument. Finan, as well as his colleagues, had argued that use of the King James Version and the Lord’s Prayer could not violate any child’s freedom to practice his or her religion as long as the child had the right to be excused from the exercise. If this were true, one justice noted, it would set up a kind of “local option” in which different school districts could adopt religious practices according to which religious group had the majority of votes, then simply allow children from minority religions to walk out. “Then the big contest,” he said, “would be which church could get control of the school board, I suppose.”

The justice was troubled that children of minority religions all over the country would face the difficult choice of walking out during the devotionals. He challenged Finan, “Now why can’t you do that with reference to the Mormons, if they want to, where they are in the majority, or any others, where those people are in the majority?”

“Well, I will concur with the Court—”

“That’s a local option in determining which particular religion will be taught in each particular community.”

“Well, gentlemen, let’s take a very practical situation, again in Hawaii where there are a great many Buddhists. Let us say there is a school where there are 51 Buddhist children and 49 Christian children. And because of the majority of Buddhists it’s determined by the school to have a Buddhist ceremony comparable to this Christian ceremony that we have here. Would you think because they are in
the majority that the 49 percent of them that are Christians in that school would have to walk out?"

"They would have the right to, and I would —"

"And you think they would have the right to have such a ceremony as a matter of school law?"

"Yes, Mr. Justice, because I feel that it is essential that we keep away from a complete secularism in our outlook to this thing. And if the Christians who were there wanted to have the right . . . not to be subjected to it, they have that right. I see no reason why you cannot reconcile, why it is not compatible to, under our Constitution, to permit such a practice."29

The prospect of local conflicts over the control of school boards and which religious traditions would be adopted for use in opening exercises surely reminded the justices of the religious conflict that the First Amendment was supposed to prevent. In his concurring opinion in *McCollum v. Board of Education*, Justice Frankfurter had written that “the Constitution . . . prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.”30 Even if the 1844 riots over Bible reading in Philadelphia might never recur, the justices surely knew that the ostracism suffered by the Schempps and Murrays in their own communities spoke loudly of the sectarian divisions still boiling below the surface.

Philip Ward finally got his opportunity to argue on behalf of Abington late in the day on February 27. On his way to the podium to address the justices, he thought about the stakes involved in the case. He remembered that something like twenty-three million children participated in Bible-reading exercises around the United States. “I remember saying to myself, Phil, you’d better go to the whip on this one because 46 million little ears are riding on what you do today,” he said later in a *CBS News* report.31 Ward had not progressed far into
his argument when Chief Justice Warren adjourned the session for the day. So Ward began anew the next morning.

Ward started right in on his most critical argument, the familiar theme that the legislature had chosen Bible reading for the morning exercises not because of its religious message but, rather, because of its lessons in morality. “We’re teaching morality without religion, cut adrift from theology,” said Ward. “And that is proper for the people of Pennsylvania.” Ward had trouble, though, explaining a question flowing from that assertion. If the purpose of Bible reading was to teach morality, one justice wanted to know, why did Pennsylvania permit students to excuse themselves? Students could not excuse themselves from lessons in mathematics or history. Didn’t this mean that Bible reading involved something more than simply a lesson in morality? Ward could only say that the schools also excused children from dental and physical examinations if they had a religious objection—although he never made clear what that had to do with Bible reading. “But my point is this,” Ward said. “Pennsylvania has decided this is the way it wants to teach morality.” That response didn’t answer the question, but Ward had a bigger problem to solve.

The Engel decision eight months earlier, striking down the Regents’ Prayer, presented a high hurdle for Ward to leap over. That the state itself had composed the Regents’ Prayer seemed too flimsy a difference on which to argue that the Court should treat the Lord’s Prayer differently under the First Amendment. So Ward had decided to give up on any defense of the Lord’s Prayer. Ward determined that if he conceded the obvious religious nature of prayer, he could potentially buttress his argument in favor of the Bible. The only conceivable use of a prayer would be for religious purposes, but the Bible, by contrast, presented a far richer and more complex text. In fact, Ward could continue to argue, as Rhoads had in Philadelphia, that the Bible contained many lessons in virtue and morality and that the people of Pennsylvania had a right to use it for that purpose.

But the difference between a suggestion of the State that children say a prayer, a solemn avowal of faith, and the suggestion that children
listen to ten verses of the Bible, is a complete difference in kind. Suggesting the children say a prayer is suggesting they engage in a purely religious act. A prayer has no secular value. A prayer assumes that the child believes in an almighty, that the almighty can hear him and may help him. That is when you suggest to a child to say a prayer. What are we suggesting? We are suggesting the children listen to ten verses of a monumental work which, as Mr. Justice Goldberg says, is a great religious work, but in addition it is a source of moral values.34

Ward agreed that any requirement that children repeat the Lord’s Prayer would be unconstitutional under Engel. This would be true even if there were an excusal provision, he said, “because of the nature of the prayer.” He explained: “I think the prayer in Engel and Vitale and any prayer, to me, has no secular meaning; it’s a purely religious act. And I think it certainly can’t be required and I think even suggesting the children do it, there may be a compulsion on the child, he may feel he should do it.”35 Summarizing his position on the Bible, Ward argued that the Court should not prohibit use of a book that teaches morality just because it is a religious work. Great religious books can teach children valuable lessons apart from religion, he said, and schools should be free to use them as long as excusal is available: “Must the government, any time any tradition in any way reflects the fact we are a religious people, must they rip out any tradition even, even if that tradition nobody has to abide by?”36

Ward had argued well, making his points despite numerous interruptions and avoiding any egregious mistakes that could have seriously hurt his case. His central argument, though—that the Bible imparted moral lessons that transcended the religious—was a dam built with thin concrete. Henry Sawyer knew where the weaknesses were and moved quickly to exploit them.

Ellery Schempp was watching Sawyer anxiously. By then a twenty-two-year-old graduate student at Brown, he had a view of Sawyer
from the first row of seats as the latter prepared to address the justices. “He was a tall, lanky fellow,” Ellery remembers. “The suit he was wearing when he gave his Supreme Court presentation, the pants were too short. He had quite a bit of ankle showing. He was a distinguished guy, but it was really quite noticeable. I mentioned this to my father. He said, ‘I think he did this deliberately. He likes to have this Abe Lincolnesque appearance.’”

Sawyer spoke for a long time almost without interruption, a luxury that enabled him to articulate a large part of his case. In the hour he spent before the justices, he said that the Schempps objected to many doctrinal teachings of the King James Version that conflicted with their own religious beliefs. He conceded that the Bible contained moral lessons, but he argued: “[Y]ou cannot separate the moral leaven from the religious leaven in the Bible. I think the two go absolutely together.” He cited specific moral lessons that were difficult for children to comprehend without comment from the teacher (which was prohibited) or that were highly controversial, such as “an eye for an eye and a tooth for a tooth.”

The intention of the legislature, Sawyer charged, was not just to teach morality to schoolchildren. He noted, “They didn’t single out another single work in the range of the world’s literature, and there are other sources of morality; not one other book in all of the range of the world’s religious and secular literature is singled out by the Legislature of Pennsylvania to be read.” Moreover, he argued, the version of the Bible read in the Abington schools, the King James, was sectarian. He reminded the justices that even Abington’s own expert witness, Luther Weigle, had admitted that the King James Version was nonsectarian only for Protestant denominations.

Despite what Abington argued about morality lessons, Sawyer said, the primary purpose of the morning exercise was to engage the children in a religious practice normally carried out in church.

It is a religious exercise, it seems to me; it was intended to be a religious exercise. I think it’s ingenuous to suggest that the legislature had anything else in mind but that. I don’t think that you can use the
word “morality” to encompass all that is purveyed to the minds of children by this book. There will be many, many things read out of the King James version which will exclusively—if you can separate them, Gentlemen—but will exclusively concern religious concepts and ideas, without any distinguishable moral truth. Certainly citations could be multiplied endlessly in terms of ritual, in terms of many kinds of beliefs that are religious in nature and have if any but a most minor degree of morality. And if you are teaching morality, again, you would hardly provide for excuse, as has been pointed out. And secondly, why would you have no comment? Every other subject, secular subject that’s taught is taught with comment. Why not this one?41

Sawyer was asked to respond to Ward’s argument that even if the Bible-reading exercise was religious, it constituted a long tradition of practice in Pennsylvania’s schools. Sawyer replied acerbically that Ward's contention amounted to saying that “if the Legislature of Pennsylvania has traditionally had an act that violates the First Amendment, then it’s entitled to continue.” He observed:

I think that tradition is not to be scoffed at, but let me say this very candidly: I think it is the final arrogance to talk constantly about the religious tradition in this country and equate it with this Bible. Sure, religious tradition. Whose religious tradition? It isn’t any part of the religious tradition of a substantial number of Americans, of a great many, a great many things and, really, some of the salient features of the King James version or the Douay version, for that matter. And it’s just, to me, a little bit easy and I say arrogant to keep talking about our religious tradition. It suggests that the public schools, at least of Pennsylvania, are a kind of Protestant institution to which others are cordially invited.42

After the arguments concluded, the Murrays and Schempps met on the steps outside the Supreme Court building for photographs and
then ate lunch together. Ellery was in a serious mood. As he had listened to the proceedings of the last two days, he had realized just how significant it was to ask the highest court of the land to throw out a law supported by so many Pennsylvanians and other Americans. “I realized that we would have to overturn a law,” Ellery says. “I felt a little more nervous about that. By now the full consciousness of what it means to have a law declared unconstitutional had sunk in in a pretty deep way. I knew that was going to be a big step. But I did feel quite confident that we would win.”

Some of the arguments made by Abington and Maryland—that other religious references in public life would also fall if the Court prohibited Bible reading in the public schools—had given Ellery pause. “I had that little twinge of doubt whether we might be going on the right path because I didn’t want to see everything that might possibly be related to our national Christian culture dismissed,” says Ellery. “These issues about what was the role of chaplains, what about ‘In God We Trust’ on coins, all these things I recognized as being wrinkles in the arguments,” he explains. “But I was also very clear that what the Founding Fathers intended, a strict separation between church and state, was extremely valid.”

Henry Sawyer and Philip Ward talked after the oral argument was over that morning. They compared their impressions of their experience in front of the justices, and then Sawyer asked Ward for a favor. As meticulously prepared as Sawyer had been for the oral argument, he had overlooked one important detail—he didn’t have enough money to buy a train ticket back to Philadelphia. Ward lent him ten dollars to get home. “I shouldn’t have given it to him,” Ward says ruefully.