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# PRAYER AND RELIGION IN SWISS SCHOOLS

F. WILLIAM O'BRIEN\*

Within the past fifteen years, the Supreme Court of the United States has rendered four major decisions on the question of religion and the public schools of America. In 1948, in the case of *McCullum v. Board of Educ.*,<sup>1</sup> the Court ruled that the establishment clause of the first amendment of the Constitution,<sup>2</sup> as made applicable to the states by the fourteenth amendment,<sup>3</sup> was violated by allowing classes in religion to be given to students on the premises of the public schools. In the program involved in this case, teachers of the various religions taught a thirty to forty-five minute period once a week during the regular school day. Only those children participated whose parents had signed a request card for such instruction. Non-participants spent this time in their regular secular study.

In the 1952 case of *Zorach v. Clauson*,<sup>4</sup> the Court decided that the Constitution was not violated by a program whereby children were released for one hour a week to attend religion classes given away from the school premises. Students who did not participate remained in school. School officials assisted in the program to the extent of keeping records of the absences from the religion hour by children who were released from a regular period on condition that they attend.

In 1962, in *Engel v. Vitale*,<sup>5</sup> the Court held that the establishment clause of the first amendment was violated when a prayer composed by state officials was required to be recited in the public schools. The prayer was denominationally neutral, participation was

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<sup>1</sup> 333 U.S. 203 (1948).

<sup>2</sup> "Congress shall make no law respecting an establishment of religion . . ."  
U.S. CONST. amend. I.

<sup>3</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>4</sup> 343 U.S. 306 (1952).

<sup>5</sup> 370 U.S. 421 (1962).

voluntary, and the Court found no coercion in the application of the directive to the children of the plaintiffs.<sup>6</sup>

One year later, the use of the Bible and/or the Lord's Prayer in the public schools as a devotional exercise was declared unconstitutional in *Abington School Dist. v. Schempp*.<sup>7</sup> The Court expressly based its decision on the grounds that these practices were in violation of the establishment clause of the first amendment. Justice Clark, who wrote the opinion, set down the general principle controlling *all* government enactments which touch religion. He said:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.<sup>8</sup>

Since the Court found that the primary purpose of these school practices in Pennsylvania and Maryland was the advancement of religion, they were a breach of the requirement of government neutrality vis-à-vis religion which the test presupposes.<sup>9</sup> These practices were thus ruled unconstitutional.

The "primary purpose" test laid down by Justice Clark is highly interesting in view of his statement that a "study of the Bible or of religion, when presented objectively as part of a secular program of education" may be perfectly consistent with the first

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<sup>6</sup> *Id.* at 430-31. Strictly speaking, the holding of this case is that no prayer may be said if it is authorized by law and the formula is prescribed by public officials. Nevertheless, the *Engel* ruling would seem to apply also to prayers chosen by individual teachers or by the children themselves, if authorized by law. The Court's ruling is not clear on this point. In the teacher's case, however, the selection of a prayer would more than likely be the act of a "public official."

The Delaware Attorney General has said that *Engel* permits voluntary prayers and readings once the laws are abolished. *New York Times*, June 26, 1963, p. 43, c. 6.

<sup>7</sup> 374 U.S. 203 (1963).

<sup>8</sup> *Id.* at 222.

<sup>9</sup> In a general discussion of the first amendment, Clark reiterated that the purpose of the two religion clauses in the first amendment, the establishment clause and the free exercise clause, was to insure government neutrality in the matter of religion. He indicated that each clause protects against its own kind of government action, but that under particular circumstances, the two clauses may overlap. *Id.* at 222-23.

amendment.<sup>10</sup> Such a course of study would require a public school teacher with rather unusual training and extraordinary skill. Furthermore, a program of this sort would probably demand a constant and unpleasant surveillance by school or state authorities to see that the study was being presented "objectively." These difficulties, inherent in any such program, present those concerned with a dilemma. On the one hand, those best qualified to teach about religion, clerics and others specially trained in the subject, are also those from whom a loss of objectivity might most be feared. On the other hand, a public school teacher, subject to more direct pressure to be "objective," is less likely to have the grasp of the subject matter necessary for such a course. Perhaps a variation of the program struck down in *McColum* would solve this problem. Outside "experts" in the field could be allowed to teach the optional courses of religion or Bible history to children whose parents so requested. As long as the state disavowed any primary religious intention and had as its primary purpose only the imparting of religious tenets, religious movements, and Biblical lore insofar as these contribute to a person's general education and culture,<sup>11</sup> it would seem that there should be no first amendment objections. It would seem sufficient also that these avowals and disavowals be made by the state and the school authorities only. To require the same from the "expert teachers" would put the state into the dangerous business of thought control. Moreover, to assume that a man cannot teach objectively if he holds certain convictions would be an assumption destructive of academic freedom. If such thinking were carried over to other fields, the result would be that the teacher of American history who is also a convinced member of the liberal Democrats could not be trusted to treat fairly the history of the New Deal, and both Protestants and Catholics would have to be disqualified as teachers of a course in European history which includes a treatment of the Reformation. Thus, a reconsideration of *McColum* seems called for.<sup>12</sup>

In light of the rulings of the Court and the above speculation, it

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<sup>10</sup> *Id.* at 225.

<sup>11</sup> The value and usefulness of such a course was recognized by Justice Clark in *Schempp* when he said: "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization." 374 U.S. at 225.

<sup>12</sup> See text accompanying note 1 *supra*.

may be of value to study the approach which other democratic countries take to the question of religion in the public schools. Switzerland is an excellent choice for such a study not only because her social and political traditions and institutions are similar to those in America,<sup>13</sup> but also because she too has a federal system of government based on a constitution written in 1848 after its drafters had carefully analyzed that of the United States.<sup>14</sup> In reviewing the matter in the following pages, one might well ask himself whether or not the Swiss experience lends any justification for Justice Clark's warning in *Schempp* that to allow even brief school practices involving religion is to court grave dangers to religious liberty.<sup>15</sup>

The Republic of Switzerland is a federal state composed of nineteen cantons and six half cantons.<sup>16</sup> The Swiss Constitution of 1848, like its American counterpart of 1789, delegated specific powers to the central government, guaranteeing residual powers to the cantons.<sup>17</sup> Amongst the latter is authority to establish any kind of relation with a church or churches which the individual cantons may

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<sup>13</sup> An English author lists five general characteristics of the Swiss Constitution the third of which is "a concern for the rights of individuals and small groups." STEWART, *MODERN FORMS OF GOVERNMENT* 133 (1959). See also CODDING, *THE FEDERAL GOVERNMENT OF SWITZERLAND* 55 (1961); SIEGFRIED, *SWITZERLAND* 199 (1950).

<sup>14</sup> CODDING, *supra* note 13, *passim*.

<sup>15</sup> Clark's fears found expression in this rhetorical sentence: "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . ." 374 U.S. at 225.

<sup>16</sup> The latter are represented in the Federal Council of States by one instead of two representatives, but in all other respects they are equal to the nineteen full cantons.

55.3% of the population of Switzerland are Protestants; 43.3% are Catholics; and 1.4% are of other faiths or profess no religion. In thirteen cantons or half cantons, the Protestant majority is somewhat between 50.6% (Geneva) and 83.8% (Bern). In the other twelve cantons, the Catholics are in the majority; Obwalden being at the top of the list with 96%, and Solothurn at the bottom with 55.6%. The Catholics in seven of these twelve cantons or half cantons number more than 91% of the population. *ANNUAIRE STATISQUE DE LA SUISSE* 40 (1953). These figures are from the latest census of 1950, which recorded the total population of Switzerland as 4,714,192. *Id.* at 10. The estimated population as of 1960 was 5,411,000. *Journal de Genève*, January 1-2, 1961, p. 2. All references hereinafter to population statistics will be to *ANNUAIRE STATISQUE DE LA SUISSE* (1953).

It should be noted at this point that, unlike the United States, Switzerland does not have a multitude of Protestant sects.

<sup>17</sup> Article 3 reads: "The Cantons are sovereign as far as their sovereignty is not limited by the Federal Constitution, and as such they exercise all the rights which are not delegated to the federal power."

desire.<sup>18</sup> Approximately seventeen cantons maintain official state churches,<sup>19</sup> and the others engage in various practices of close cooperation with the churches.<sup>20</sup>

The Confederation itself does not maintain any national church, although the Constitution has no prohibitive clause similar to the establishment clause of the American Constitution. There are, however, certain constitutional provisions which give federal guarantees for religious freedom to the individual against possible infringement by the cantonal governments. Article 27 provides in paragraphs two and three:

The cantons provide for adequate primary education, which must be exclusively under the control of the civil authority. Such education is compulsory, and in the public schools, free.

The public schools shall be such that they may be attended by adherents of any religious sects without any offense to their freedom of conscience or belief.<sup>21</sup>

The pertinent sections of article 49 are the following:

Freedom of conscience is inviolable.

No one may be compelled to be a member of a religious association, to receive a religious education, to take part in a religious ceremony, or to suffer punishment of any sort by reason of religious opinion.

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<sup>18</sup> FEUILLE FÉDÉRALE IV, 404 (1874) [hereinafter cited as F.F.]. This decision was made by the Conseil Fédéral which is a body of seven constituting the executive branch of the Swiss government. Its members are elected by the Swiss parliament (Federal Assembly) every four years. The parliament picks one of the seven to act as President for a year. This body has jurisdiction over all school questions arising out of article 27 of the Constitution, and the Fédéral Tribunal (similar to the Supreme Court of the United States) is denied any voice in such matters. LOI FÉDÉRALE D'ORGANISATION JUDICIAIRE, arts. 84(a), 125, 126(a) (1943).

In 1929, the Tribunal Fédéral stated that state churches in the cantons did not violate the Swiss Constitution. *Römisch-Katholische Kirchengemeinde Buren v. Begierungerat Solothurn*, RECUEIL OFFICIEL DES ARRÊTS DU TRIBUNAL FÉDÉRAL 55, I, 113, 129 (1929). For a full discussion of these two decisions, see O'Brien, *The Engel Case from a Swiss Perspective*, 61 MICH. L. REV. 1069, 1071 (1963).

<sup>19</sup> CODDING, *op. cit.* *supra* note 13, at 53. SAUER-HALL, GUIDE POLITIQUE SUISSE, 136-37 (16th ed. 1955).

<sup>20</sup> This latter is true even of Geneva, the only canton where writers have said "complete" separation of church and state prevails. See CODDING, *op. cit.* *supra* note 13, at 53. The tax collectors of Geneva assist the churches in collecting church titles. *Loi Genevoise sur les Impôts*, art. 75 (March 24, 1925).

For a general discussion by the author of church-state relationships in Switzerland, see O'Brien, *Church and State in Switzerland: A Comparative Study*, 49 VA. L. REV. 904 (1963).

<sup>21</sup> All the Swiss laws quoted herein are the author's translations.

The father or guardian has the right of determining the religious education a child shall receive, in conformity with the principles stipulated above, until the child's sixteenth birthday.

Except for these limitations, the cantons are completely sovereign in the field of education. They organize their schools' regular academic programs, and distribute tax funds without dictate from the central authority. Specific practices in these areas are conditioned by the religious complexion of each canton.<sup>22</sup>

All the cantons of Switzerland provide for religious instruction in the public school, within the regular school day, and in the school building.<sup>23</sup> In eighteen cantons, this instruction is a part of the regular academic program and is "confessional," *i.e.*, sectarian.<sup>24</sup> There are thirteen Protestant cantons, and in six of these this is true, namely, Bâle-Town, Bâle-Country,<sup>25</sup> Aargau, Grisons,<sup>26</sup> Schaff-

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<sup>22</sup> See note 16 *supra*.

<sup>23</sup> LE DEPARTMENT FÉDÉRAL DE L'INTÉRIEUR, LES CONFESSIONS EN SUISSE L'INSTRUCTION RELIGIEUSE 7-10 (1956).

<sup>24</sup> These primary schools, and like ones in other cantons, whether called "confessional," "Catholic," or "Protestant," should not be confused with schools in America designated by similar terms. All these schools in Switzerland are public schools and, as demanded by Article 27 of the Constitution, "are exclusively under the control of the civil authority." Thus, ecclesiastics are not on the school board, nor do they act as superintendents or principals. Moreover, practically all teachers are laymen or laywomen, although the Tribunal Fédéral has ruled more than once that cantons need not discriminate against teachers merely because they also are members of religious sisterhoods. F.F. I, 411 (1880); F.F. II, 84 (1878).

A "confessional" public school is so called merely because all or nearly all its teachers and students are of one religion and thus the orientation is inevitable in the direction of this faith.

The strictly private and religious schools which do exist in Switzerland are not treated in this article.

<sup>25</sup> Article 27 of the school law of Bâle-Country includes the following prescriptions: "The instruction in bible history will be given by the teacher. He is so to arrange it that the children of different confessions can take part. Religious instruction will be given by the pastor of the nationally recognized church communities, viz., the Protestant, Christian-Catholic, Roman Catholic. He will be allowed from one to two hours a week in all classes.

"The syllabus for the religious instruction is drawn up by the clergy of the three confessions. They need the approval of the Board of Education.

"For giving religious instruction in the communities where the nationally recognized churches do not have their own place for instruction, a place shall be put at their disposal free of charge in the school house, if possible, during school time.

"Parents or guardians who do not wish their children to be sent to the pastor's religious instruction should deposit with the school administration, a declaration indicating this."

Article 23 of the School Law of July 13, 1946, names Bible history, moral teaching and religious instruction as required subjects in the primary school.

house,<sup>27</sup> and Appenzell Outer Rhodes.<sup>28</sup> In Aargau, for example, articles 18, 22, and 25 of the School Law list religious doctrine amongst the obligatory subjects. Article 21 demands that classrooms be provided and that appropriate hours be set aside during the ordinary scholastic day. This same article stipulates that the village parishes bear the expense for this confessional instruction, and that children be dispensed if their parents so request. Aargau carries out these provisions by permitting the three sects of the canton—Reformed Catholic, Roman Catholic, and Old Catholic—to conduct the religion classes.<sup>29</sup> They are allowed to give lessons two hours each week, within the ordinary school day.<sup>30</sup> Another example of the confessional and obligatory nature of religious instruction in these Protestant cantons is found in the School Law of Bâle-Town where it is provided that:

The offering of religious instruction in the schools is the concern of the religious communities.

The government authorities offer to the religious communities 2 hours per week within the framework of the normal curriculum from the first to the ninth school year, and turn over to them gratis the necessary classroom space. Control in details follows a regulation drawn up by the Ministry of Education with the consent of the

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In article 44, it is prescribed for students in the *realschule* (lower middle school) that they attend religious instruction and confirmation classes with the pastor where they live. Article 9 of the School Law of August 24, 1961, reads as follows: "Religious instruction in the gymnasium and the seminary division which are politically and confessionally neutral, is to be allowed, and for the recognized established churches, hours for giving religious instruction are to be provided within the regular school time."

<sup>20</sup> In certain sections of the Canton of Grisons, where the population is considerably mixed, the Canton or the communes support separate public schools of the two principle faiths, Protestant and Catholic. But in other public schools of Grisons, different classes are offered in conformity with the different beliefs represented. Article 15 of the School Law states that religious instruction is an obligatory subject, but the responsibility for imparting the instruction is assumed by the two recognized churches, who also pay the teachers.

<sup>27</sup> In Schaffhouse, in compliance with article 14, § 1 of the School Law, the teacher gives religious instruction. It is considered one of the regular subjects, but according to article 14, § 2, children may be dispensed if their parents so desire.

<sup>28</sup> In Appenzell Outer Rhodes, which is approximately 80% Protestant, the public schools provide only instruction in the Reformed religion. LE DÉPARTEMENT FÉDÉRAL DE L'INTÉRIEUR, *op. cit. supra* note 23, at 8.

<sup>29</sup> Letter from the Minister of the Department of Education, Aargau, to the author, Nov. 21, 1962.

<sup>30</sup> *Ibid.*



religious communities, and which has the approval of the Government Council.

Teachers in the public schools are permitted to give religious instruction when commissioned by the religious communities . . . .<sup>31</sup>

In the other Protestant cantons where religious instruction is a part of the regular school program, the contents of the courses are designed to conform to the majority faith in each particular locale.<sup>32</sup>

There are twelve Catholic cantons, and in all, instruction in religion is a regular part of the schools' academic program,<sup>33</sup> just as it is in the six Protestant cantons mentioned above. In some cantons where the population is almost exclusively Catholic, the public schools have practically a confessional character. Children belonging to other faiths are excused from the religion lessons, and may take courses organized by their own ministers. The Canton of Obwalden, with a Catholic majority of over ninety-six per cent, furnishes an example. Article 49 of Obwalden's School Law specifically designates the instruction in religion as one of the school faculties. Article 52 stipulates that this instruction is imparted and directed by the authorities of each religious group. But the Catholic Bible teaching is given by the teaching staff of the school under the supervision of the Catholic Church. The Canton of Zug, with a Catholic population of eighty-four per cent, permits the Protestants to establish public confessional schools which are supported with tax money raised both by the canton and by the respective community,<sup>34</sup> and a similar practice prevails in the Canton of Valais,<sup>35</sup> even though its Protestant population is less than four per cent.

The number of hours devoted each week to religion in the public

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<sup>31</sup> School Law of Bâle-Town, art. 77 (April 4, 1929).

<sup>32</sup> LE DÉPARTEMENT FÉDÉRAL DE L'INTÉRIEUR, *op. cit. supra* note 23, at 8.

<sup>33</sup> *Id.* at 7-8.

<sup>34</sup> *Id.* at 8. Also of interest are the arrangements in the Canton of Fribourg, where 87% of the population is Catholic. It permits each commune to determine what type of public school it should have. Fourteen communes have chosen Protestant schools. For a full discussion of the arrangements in Fribourg, see O'Brien, *supra* note 20, at 911-12.

Some of the cantons make provision for religious teachings in their constitutions. An example of these provisions is found in article 3, § 3, of the Constitution of St. Gall which says: "Religious instruction will be imparted by the organ appointed by each religious group. The latter have at their disposal space in the public school, and a designated time for this instruction is to be left open in the school schedule."

<sup>35</sup> LE DÉPARTEMENT FÉDÉRAL DE L'INTÉRIEUR, *op. cit. supra* note 23, at 8.

schools of the eighteen cantons belonging to the groups discussed above varies from one to three.<sup>36</sup> In the higher classes of the gymnasium or secondary school, the course in religion is replaced by studies in the history of religions, philosophy, and ethics.<sup>37</sup>

In addition to the eighteen cantons already classified, two other cantons provide for confessional teaching in their public schools, but not as part of the regular school program.<sup>38</sup> Neuchâtel, with a Protestant population of 78 per cent, provides for common neutral schools only.<sup>39</sup> These schools offer confessional instruction to children whose parents desire it. Provision for this was made in article 71 of the Constitution of Neuchâtel which reads: "Religious instruction is freely given in the public schools under the care of the recognized churches; to this end, school rooms are furnished by the communes without pay and favorable hours are provided."

The five remaining cantons provide for non-confessional religious instruction in their public schools.<sup>40</sup> In Bern (eighty-four per cent Protestant) and in Glarus (sixty-five per cent Protestant), lessons "in Christian religion according to the history of the Bible" are given by one of the teachers.<sup>41</sup> However, the local school au-

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* In this report, Bâle-Town is also included in this grouping. However, correspondence with the Dept. of Education, plus a study of school laws make it clear to this writer that the Canton of Bâle-Town belongs to the group of those eighteen cantons which make religion a part of the regular academic program. See article 77 of the School Law quoted at note 31 *supra*.

<sup>39</sup> The other canton included in this grouping is Geneva, where article 137 of the Constitution states that "the religious teaching is distinct from other parts of instruction." Article 6 of the Law on Public Instruction (Nov. 6, 1940) says "the public instruction is neutral from the standpoint of religion." Article 18 of the same law provides that "the religious instruction given on the school premises is optional." The schedule is submitted by the churchmen to the Dept. of Public Instruction for its approval. Law on Public Instruction, art. 18 (Nov. 6, 1940).

<sup>40</sup> LE DÉPARTEMENT FÉDÉRAL DE L'INTÉRIEUR, *op. cit. supra* note 23, at 9. This report includes the Canton of Aargau in this group, but it might more properly be classified with the eighteen cantons which make religion a regular part of the academic year. See the discussion at p. 797 *supra*. This point seems to be confirmed in a letter from the Minister of the Dept. of Education for the Canton of Aargau. He writes: "Religion is part of the normal study plan." Letter from the Minister of the Dept. of Education, Aargau, to the author, Nov. 21, 1962. [Perhaps, however, the "religion" referred to is non-confessional "religious doctrine," which the canton subsidizes. The statement might then not refer to the confessional instruction mentioned in article 21 of the School Laws of Aargau (Nov. 20, 1940).]

<sup>41</sup> LE DÉPARTEMENT FÉDÉRAL DE L'INTÉRIEUR, *op. cit. supra* note 23, at 9.

thorities may choose to replace Bible history with lessons in religion given by churchmen of the locality. In Glarus, where Bible history is an obligatory subject for the first six years, this substitution of the pastor is prescribed in the seventh and eighth grades and also for secondary schools.<sup>42</sup>

Zurich, Thurgau, and Vaud are seventy-two, sixty-five, and seventy-eight per cent Protestant respectively. Their school programs provide "lessons in religion and Christian morality without reference to particular faiths."<sup>43</sup> Nonetheless, even in these cantons, the laws and instructions of the government oblige the school authorities to place the classrooms, without cost, at the disposition of the recognized ecclesiastical authorities for the purpose of catechetical instruction in each faith, the lessons being offered outside the hours of class.<sup>44</sup>

It is more difficult to find groupings for all the cantons in the matter of the recitation of prayer in the public schools. Most of the cantons fall between the extremes of Geneva, where no prayer of a "religious character" is authorized or recited in the classes,<sup>45</sup> and Schwyz, which explicitly provides in the school regulations that "school will begin and end with a prayer."<sup>46</sup> In many cantons the

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Confirmed in a letter from the Dept. of Education of Glarus to the author, Nov. 15, 1962.

<sup>42</sup> *Ibid.* The letter from Glarus reads, in part, "In the seventh and eighth grades religious instruction is not a task for the teacher but for the pastor." The pastor of course, teaches his class in the public school.

<sup>43</sup> LE DÉPARTEMENT FÉDÉRAL DE L'INTÉRIEUR, *op. cit. supra* note 23, at 9.

<sup>44</sup> For instance, in Vaud, *Plan d'Études* (a manual) details a program of studies for all nine years of the primary schools including a syllabus for the optional course in Bible history. PLAN D'ÉTUDES ET INSTRUCTIONS GÉNÉRALES POUR LES ÉCOLES ENFANTINES ET LES ÉCOLES PRIMAIRES DU CANTON DE VAUD 18-21 (1960). Although the schools of Vaud are designated as "neutral" vis-à-vis religion, this school manual incorporates the following section called "Basic Principles": "In the first branch [of instruction] there belongs first of all Bible history (optional), which corresponds to the religious need inherent in the heart of man and which shows him how God has manifested Himself to humanity." *Id.* at 11.

<sup>45</sup> Letter from Le Secrétaire Général du Département de L'Instruction Publique, Geneva, to the author, Sept. 3, 1962.

<sup>46</sup> School Regulations of the Canton of Schwyz, art. 5 (May 19, 1937). This regulation also provides that "whoever comes late will say his prayer silently by himself." *Ibid.* The formula employed is not prescribed.

A like provision in Obwalden states that every instruction begins and closes with an appropriate prayer. Sec. III, number 2 of the Regulations for the primary and secondary schools. In the Canton of Nidwalden, the prayer before and after instruction is obligatory, but the school faculty is free to

option to pray or not is left with the teacher who may also prescribe the particular prayer or the religious ceremony which opens the day. Some cantons specifically authorize this option by law,<sup>47</sup> and others, without a specific law, merely allow it.<sup>48</sup> At any rate, it can safely be stated that it is very common to have prayers recited in the public

decide upon a particular formula. Letter from the Director of Education of Nidwalden to the author, Dec. 7, 1962.

<sup>47</sup> Article 281 of the School Regulations for the Protestant Canton of Vaud reads thus: "School opens in the morning with a prayer, a reading, or in any other educational manner, after which the teacher immediately records absences in the class registry."

In the Canton of Bâle-Country, article 60 of the school regulations (Nov. 30, 1948), says expressly that "the teacher has the right to begin and end the daily instruction with a prayer or a hymn." The option rests with the individual instructor, "many" of whom do make use of this right. Letter from the Director of Education of Bâle-Country to the author, Nov. 20, 1962.

Article 77 of the School Law of the Canton of Bâle-Town reads as follows: "The teachers are empowered to offer a prayer with the students or to let them sing a hymn at the beginning and at the end of the daily lesson. In this matter, however, the rights of parents and children to be able to use the school without prejudice to their constitutional freedom of faith and conscience must be safeguarded."

Article 21 of the School Law of Schaffhouse merely states that "the teacher may begin and end the instruction with prayer or song." It is reported that many teachers select a student to say the prayer, although some recite the prayer themselves. Others have class opened with a song chosen from the church hymnal. Less frequently is class concluded with prayer. Letter from the Dept. of Education of Schaffhouse to the author, Nov. 14, 1962.

<sup>48</sup> In the schools of Glarus, prayer is "often" said, but there is no prescribed formula and each teacher is left free to choose an acceptable prayer. Letter from the Dept. of Education of Glarus to the author, Nov. 15, 1962. In the Canton of Solothurn, freedom is likewise allowed the teacher to select a prayer and, if he wishes, to recite it in unison with the children before and after class. Letter from the Dept. of Public Instruction of Solothurn to the author, Nov. 30, 1962. Prayer is "generally" said in the schools of Appenzell Outer Rhodes, but the practice is not prescribed and the choice rests with each teacher. Letter from the Commission of Schools of the Canton to the author, Nov. 15, 1962. In Aargau, the "school law does not ordain any prayer and it is up to the instructor to choose one, if he wants it, but it is not often practiced." Letter from the Director of Public Schools of Aargau to the author, Nov. 21, 1962. In Grisons, "the school prayer is recited in many public schools," in accordance with decisions made on the community level. Letter from the Dept. of Education of Grisons to the author, Nov. 15, 1962. St. Gall lays down no prescription on the matter. Prayer "in many schools is customary, in others it is not," and it is the teacher and the local school board who decide what form will be used. Letter from the Minister of Public Instruction of St. Gall to the author, Nov. 15, 1962. The school law of Fribourg is silent on the subject. However, a prayer is probably recited in most public schools—"generally the Lord's Prayer or some other that could never give offense." Personal interviews with the Minister of Education of Fribourg, July, 1962.

schools of Switzerland, although it is not as common as religious instruction, which is universal. This undoubtedly accounts for the fact that the *Engel* "no prayer" decision was widely reported in Swiss newspapers and evoked considerable adverse comment.<sup>49</sup>

The practices discussed in the preceding pages raise the question of freedom of conscience for children whose convictions forbid them to participate in the common prayer or to follow the religious courses offered in the public schools. As noted above, article 27 of the Constitution provides that all children be able to attend the public schools "without any offense to their freedom of conscience or belief." Also, it is provided in article 49 that the child's father or guardian has the right to prescribe the religious education that the child receives until the child's sixteenth birthday, *i.e.*, until the end of the period of compulsory schooling. In view of these two guarantees, no public school could force students to recite a prayer or to follow religious instruction if his parents objected. The Conseil Fédéral has made this point clear. In 1887 it decided that a Catholic girl could not be forced to take the course in Catholic doctrine when her father refused his permission.<sup>50</sup> Thus, any religious program is optional with the child's parent or guardian.

In many of the school laws cited in this article, the optional feature of the religious programs is explicitly spelled out. But whether expressly stated or not, the guarantee is so well established that no canton could allow an open violation of it in the public schools. Two possible explanations exist for statements that "religious instruction is obligatory." First, if such statements are found, they generally have reference to Bible history only, and this subject is considered merely a branch of the general study of history. This view is in accord with an 1891 decision of the Conseil Fédéral where a distinction

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<sup>49</sup> One paper carried a front page editorial in which the editor asserted "the Supreme Court of the United States is covering itself with ridicule." *La Liberté* (Fribourg), July 30, 1962, p. 1, c. 2.

<sup>50</sup> F.F. IV, 83 (1887). The Conseil Fédéral pointed out that article 49 of the Constitution guaranteed parental rights in the matter and that it was not for civil authorities to probe into and question a father's motives even though it might appear that neither his nor his daughter's freedom of belief or conscience was endangered. The opinion concluded by saying: "If the state (canton) wishes to provide religious instruction in its schools and establishments of learning, it can do so only in a way that will characterize this branch of learning as absolutely optional." *Id.* at 88. See O'Brien, *supra* note 18, at 1076-77.

was made between Bible history and instruction in religion.<sup>51</sup> The ruling was that parents could not rely upon the "freedom of conscience" guarantees of article 49 in claiming exemptions for their children from Bible history class. There has been disagreement amongst federal authorities on the justification for such a distinction,<sup>52</sup> and it is submitted by this writer that today no Swiss school would compel a student to follow a course involving religion, even one in Bible history. However, it is significant that in many public schools—perhaps in all—which offer both Bible history and religious instruction, the former is taught by regular lay members of the staff, whereas the latter is conducted by the local pastors or curés.

The second explanation for the "obligatory" clause is that in most Swiss schools it is the general and the traditional practice for children to be enrolled in a religious and/or Bible history class and parents unwilling to have their children so enrolled must request the exemption. In the Catholic Canton of Obwalden, "it is understood that the children of Catholic parents are to take Catholic instruction as long as those holding parental authority give no contrary direction."<sup>53</sup> The same is true of the Protestant Canton of Schaffhouse where, after setting down "religious and moral doctrine" along with other secular subjects of instruction, article 14 of the School

<sup>51</sup> F.F. II, 286 (1891).

<sup>52</sup> LE DÉPARTEMENT FÉDÉRAL DE L'INTÉRIEUR, *op. cit. supra* note 23, at 7. This report asserts that even courses in the history of religion may not be made compulsory under article 49. The question concerning Bible history does not seem settled because of the following facts. The Conseil Fédéral has jurisdiction over all school questions arising out of article 27. See note 18, *supra*. In 1891, as noted in the text at note 53 *supra*, the Conseil Fédéral ruled that Bible history was not a religion course subject to the limitations of article 27 of the Constitution. F.F. II, 286 (1891). Later, however, a case arose concerning the right to be free from paying taxes for the ritual of a religion other than one's own (a guarantee of article 49, paragraph 6). The plaintiff sought relief from paying taxes for Bible history books. Since this was a taxpayer's suit and did not involve the schools as such, the case went before the Tribunal Fédéral which granted the relief prayed for, asserting it did not agree with the distinction of the Conseil Fédéral. RECUEIL OFFICIEL DES ARRÊTS DU TRIBUNAL FÉDÉRAL XXIII, 1361, 1369 (1897).

<sup>53</sup> Letter from the Counselor for Public Education for Obwalden to the author, Nov. 27, 1962. When parents allow their children to be enrolled for religion classes, the children are expected to attend regularly just as they attend classes in secular subjects. The Conseil Fédéral has ruled that parents can be punished for remissness in this regard, and may not use article 49 of the Constitution nor the general "optional" clause in the school laws as justification for allowing their children to take unexplained cuts from religion instruction; the formal declaration of withdrawal from the class is a prerequisite. F.F. I, 474 (1893); F.F. IV, 92 (1887).

Law provides that: "Dispensation from the subject of religious and moral doctrine is permitted by the local school authorities on demand of the one who possesses the authority of parent or guardian." In a similar manner, American schools list gym and hygiene courses as obligatory, but would probably exempt children if their parents demanded exemption on grounds of religious scruple.

Perhaps some insight into the Swiss concept of state neutrality can be gained by examining a 1930 case<sup>54</sup> in which the parents of a child under state guardianship protested against the instruction in religion (which was the same as that of the parents) that the child was receiving in a state institution. After pointing out that the guardian was the proper one to determine whether the child should receive religious instruction,<sup>55</sup> the Tribunal Fédéral answered the claim that a state institution should be neutral in the matter of religion by saying:

By trying to apply this principle [of state neutrality], the conclusion would be reached that a child placed in an establishment of this kind should not receive any religious education, a thing in itself contrary to state neutrality, and this even in opposition to the will of the parents. This is inadmissible.<sup>56</sup>

Switzerland and the United States are both splendid examples of democratic nations, but each is also vigilant lest non-conforming minorities be crushed by the sheer weight of majority decisions. This dual commitment to democracy and individualism entails the delicate balancing of competing interests, and in this process problems often arise which do not always yield to easy solutions. The problem of religion in the public schools is an excellent example of the way in which similar countries solve the same problem differently.

In Switzerland, the majority opinion is allowed to prevail, and that view would seem to be preponderately in favor of somehow in-

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<sup>54</sup> *Lany v. Genève*, 53 LA SEMAINE JUDICIAIRE 138 (1930). This case is not reported in the official reporter. LA SEMAINE JUDICIAIRE is a private law journal which often reports court cases.

<sup>55</sup> See article 49 at pp. 795-96 *supra*.

<sup>56</sup> LA SEMAINE JUDICIAIRE at 141. This decision might well give support to the view that the natural rights of parents, as guaranteed by article 49 of the federal Constitution, actually *compels* the cantons to offer religious instruction to those children whose parents wish it. Added support for this opinion might be seen in the fact that all the public schools of the cantons do offer such instruction and that some cantonal constitutions use mandatory terms in stating that classrooms are to be provided and suitable hours arranged for religious teaching.

cluding religion in the program of the schools. All the public schools do so provide. In cantons where almost all the people belong to one faith, no acute problems present themselves, and the doctrinal instruction taught canton-wide is that of those professing the nearly universal faith. In other cantons, it is the people in the communes or in small school districts who decide democratically what type of school they shall have and what religion will be taught therein. Generally speaking, even in one-faith cantons, Swiss schools provide instruction in more than one faith as the needs of the children therein enrolled may require. For children professing no religion and for those adhering to groups so small that organized school classes are impractical or impossible, the scholastic program is arranged so that justness to all prevails while the conscience of none is offended. It is impossible to mention the multitude of these arrangements throughout Switzerland. One common practice, however, is to schedule religion classes and recitation of prayer for the opening or closing hour of the day. Thus, non-participating children can absent themselves with the maximum of ease. The policy seems to parallel in all respects the American solution for children belonging to the Jehovah's Witnesses in relation to flag salutes.<sup>57</sup> That is, no child is forced to participate in an exercise which his parents allege will offend conscience, but his possible embarrassment is never a factor which controls the desires of the majority.

In America the interdiction now governs throughout the whole country that neither prayer nor religious instruction may be had within the public schools.<sup>58</sup> Thus, individual states or communities can no longer decide the question for themselves, even though all or an overwhelming majority of the concerned community may desire

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<sup>57</sup> When the Witnesses refused to allow their children to salute the flag on the grounds that in their view such action was idolatrous and hence violated their religious conscience, the Court ruled that the State could not force the children to give the salute. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). But the members of this sect did not demand that the flag exercise be dropped and that other willing children be forbidden to have this opportunity for a public manifestation of patriotism. There was no mention of the embarrassment to non-participants and no resort to the argument that the program as such must be abolished lest those excused be labelled as "odd balls" or "un-American"—testimony which found a place in the *Schempp* opinion. See 374 U.S. at 208, n.3.

<sup>58</sup> That is, if school or state law has as its *primary* purpose the advancement of religion. See note 8 *supra* and accompanying text.



these religious programs.<sup>59</sup> As before indicated, the prohibition seems to rest upon the general establishment clause rather than upon proof that religious conscience has actually been infringed. Perhaps, however, the Justices of the Supreme Court anticipate indirect infringement if embarrassment works its subtle influence upon non-conforming children.<sup>60</sup> Perhaps, then, it is really tender regard for the minority which has prompted the absolute interdiction of the wishes of the majority in this matter of religion in the public schools.<sup>61</sup>

There seems no better way to express the prevailing attitude in each of the countries here under consideration than by concluding with an observation made by the late William Rappard.<sup>62</sup> "Switzerland is actually more democratic than individualistic and the United States more individualist than democratic."<sup>63</sup>

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<sup>59</sup> A relevant comment was made by Professor Corwin in his criticism of the *McCullum* decision: "With the utmost insouciance the Court overturns or casts under the shadow of unconstitutionality the conscientious attempt of hundreds of people to deal with what they have considered to be a pressing problem in a way that they have considered to be fair and just to all." Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 21 (1949).

<sup>60</sup> This would be the case in which the free exercise clause and the establishment of religion clause "overlap." See note 9 *supra*, where the distinction is set out.

<sup>61</sup> Justice Frankfurter made a comment in a different context which, to the author, points out the result of the recent decisions involving the first amendment guarantees of religious freedoms: "[S]o long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 662 (1943) (dissenting opinion).

<sup>62</sup> Former professor and authority at the University of Geneva.

<sup>63</sup> RAPPARD, *L'INDIVIDU ET L'ÉTAT* 379 (1936).