



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WARDEN

December 29, 2015

The Honorable Sheryl Nuxoll
Idaho State Senator
PO Box 187
Cottonwood, ID 83522

Re: Repeal and Replacement of Idaho Code § 33-1604 – Our File No. 15-53353

Dear Senator Nuxoll:

This letter is in response to your recent inquiry regarding a repeal and replacement of Idaho Code § 33-1604. As provided in greater detail below, defense of the replacement language may not be possible due to the existing case law interpreting the Establishment Clause of the United States Constitution and the strict limitations of Article IX, § 6 of Idaho's Constitution.

The proposed legislation known as DRMPN062 has two sections. This first section of DRMPN062 would repeal existing Idaho Code section 33-1604, which now provides:

33-1604. BIBLE READING IN PUBLIC SCHOOLS.
Selections from the Bible, to be chosen from a list prepared from time to time by the state board of education, shall be read daily to each occupied classroom in each school district. Such reading shall be without comment or interpretation. Any question by any pupil shall be referred for answer to the pupil's parent or guardian.

The Bible readings required by the current version of § 33-1604 are unconstitutional¹ under the First Amendment, which provides: "Congress shall make no law respecting an establishment of religion"

¹ This provision of the Code was approved by the legislature as part of a comprehensive recodification of Idaho's education laws. This recodification was approved on February 15, 1963. The decision in *Abington* was released on June 17, 1963. This provision likely is of questionable constitutionality based upon Article IX, § 6 of Idaho's Constitution.

These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. ... In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 205, 83 S.Ct. 1560, 1562 (1963). The repeal of an unconstitutional statute like § 33-1604 is constitutional.

The second section of DRMPN062 would enact the following replacement:

33-1604. USE OF THE BIBLE IN PUBLIC SCHOOLS.

The Bible is expressly permitted to be used in Idaho public schools for reference purposes to further the study of literature, comparative religions, English and foreign languages, United States and world history, comparative government, law, philosophy, ethics, astronomy, biology, geology, world geography, archaeology, music, sociology, and other topics of study where an understanding of the Bible may be useful or relevant.

The issue is whether this replacement section is constitutional. The answer is that it is probably not facially unconstitutional under the First Amendment, but has a significant potential to be applied in an unconstitutional manner under the First Amendment and is almost certainly unconstitutional under Article IX, § 6, of the Idaho Constitution.

Analysis of the proposed language begins with analysis under the First Amendment. *Schempp* itself recognized that the Bible may be used to study a number of subjects consistently with the First Amendment:

In addition, it 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. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

374 U.S at 225, 83 S.Ct. at 1573.

Schempp allows use of the Bible for some purposes under the First Amendment. To take some examples from English literature and the performing arts, one cannot understand references

to commonly encountered phrases like one's "brother's keeper"² or the "writing on the wall"³ without some understanding of the stories of Cain and Abel in the fourth chapter of Genesis or of Belshazzar's feast in the fifth chapter of Daniel. One could readily devise similar examples of the use of the Bible "as part of a secular program of education" in classes teaching "literature, comparative religions, English and foreign languages, United States and world history, comparative government, law, philosophy, ethics, ... world geography, archaeology, music, [and] sociology," that would provide context and meaning for a class "as part of a secular program of education."

Use of the bible in teaching the sciences of "astronomy, biology, [and] geology" is another matter. Using Biblical accounts of creation for reference in teaching the origin of the stars, the origin of life, or the origin of the Sun, Earth, Moon or other parts of the solar system in classes in astronomy, biology or geology would violate the First Amendment. *Edwards v. Aguillard*, 482 U.S. 578, 591, 107 S.Ct. 2573, 2581 (1987) (invalidating a state law which required schools to teach creationism if they chose to include evolution in their curricula because it was motivated by "the teachings of certain religious denominations").⁴ Thus, the First Amendment would permit using the Bible for reference to teach some of the subjects listed in the revised § 33-1604, but not all of them, because the First Amendment allows use of the Bible when "when presented objectively as part of a secular program of education."

The Idaho Constitution must also be examined when analyzing use of the Bible in public education. Idaho Constitution Article IX, § 6, is more restrictive of use of the Bible (and other religious materials) than the First Amendment. Article IX, § 1, provides:

§ 6. Religious test and teaching in school prohibited. —

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. *No sectarian or religious tenets or doctrines shall ever be taught in the public schools*, nor shall any distinction or classification of pupils be made on account of race or color. *No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public*

² [https://en.wikipedia.org/wiki/My_Brother%27s_Keeper_\(disambiguation\)](https://en.wikipedia.org/wiki/My_Brother%27s_Keeper_(disambiguation)) shows the ubiquity of the phrase "brother's keeper." This webpage lists nine novels, three musical pieces, and twelve film, theater or television episodes with these words in the title.

³ [https://en.wikipedia.org/wiki/The_writing_on_the_wall_\(disambiguation\)](https://en.wikipedia.org/wiki/The_writing_on_the_wall_(disambiguation)) has thirty-eight references to "writing on the wall" in literature or the performing arts.

⁴ This is an area in which one can almost always, if not always, devise a hypothetical that is the exception to the rule. For example, an astronomy class could begin with a history of astronomy that examined belief and knowledge about the stars, planets, Sun and Moon from ancient times to the present. A reference to the battle of Gibeon in the tenth chapter of Joshua and to the Sun standing still over the Earth could illustrate ancient peoples' belief in a geocentric astronomy in which the Sun orbits the Earth.

school moneys in which the schools have not been taught in accordance with the provisions of this article.

Emphasis added.

The Guidelines for Applying the Provisions of Idaho Constitution, Article IX, § 6, Regarding Sectarian, Religious or Denominational Teaching or Materials, Prepared Under the Direction of the Idaho Public Charter School Commission and Approved by the Commission on February 11, 2010, explain the difficulty of directly using the Bible for instruction in Idaho schools. A copy of those Guidelines is attached to this memo. To begin, as the Guidelines explain, there is no one “Bible” to use “for reference purposes”:

There are at least four canons of the Christian Bible: The Protestant Old Testament contains 39 books; the Roman Catholic Old Testament contains additional books called the Apocrypha for a total of 46; the Greek Orthodox Old Testament contains up to 53 books (not all 53 books are used by all Greek Orthodox churches); and the Slavonic Old Testament also contains up to 53 books. In addition, books that have one name in one canon (*e.g.*, the Protestant canon’s 1st and 2nd Samuel and 1st and 2nd Kings) have other names in a different canon (*e.g.*, the Roman Catholic canon’s 1st, 2nd, 3rd and 4th Kings). None of the four Christian canons’ Old Testament exactly coincides with the Tanakh, which is the English transliteration of the Hebrew acronym for the Torah (“Teaching”, or the Five Books of Moses), Nevi’im (“Prophets”) and Ketuvim (“Writings”), from which the Christian Old Testament is derived.⁵

Guidelines, footnote 1, page 1.

Thus, any choice to use one Bible among various Bibles is a sectarian or denominational choice because different denominations have their own theological reasons for deciding what books are a part or are not a part of their Bible. And, even within groups of religious communities that include the same books in the Bible, there can be substantial religious differences among which translations are preferred. To take an example from American history, the Pilgrim dissenters from the Church of England who settled Plymouth and other New England colonies rejected the King James translation because it was authorized by and dedicated to a monarch whose ecclesiastical authorities were denying them religious freedom; instead they preferred to

⁵ The following Wikipedia article includes a “side-by-side” graphic showing the books of the various Christian Bibles: https://en.wikipedia.org/wiki/Books_of_the_Bible.

use the Geneva Bible, which was not translated at the King's direction.⁶

Proposed Idaho Code §33-1604 is virtually impossible to defend because it selects a specific religious text to be used as a reference over any other religious texts. This selection of text can be interpreted as an establishment of one religious preference over another, which creates an insurmountable constitutional hurdle. A defense of this provision could possibly be advanced if the title is amended to state: "Use of Religious Texts in Public Schools." Amending the statute to mirror that change would require the substitution of "religious texts" for the "Bible," each time it appears in the proposed language. As proposed § 33-1604 would invite constitutional challenge and almost certainly be held unconstitutional as applied under Article IX, § 6. Even with the amendment, the constitutional certainty of this proposal is cloudy.

Sincerely,



BRIAN KANE
Assistant Chief Deputy

BK/tjn

⁶ See https://en.wikipedia.org/wiki/Geneva_Bible for an account of the origin of the Geneva Bible used by dissenters from the Church of England and https://en.wikipedia.org/wiki/King_James_Version for an account of the origins of the King James translation. These Wikipedia articles are not cited because they are or are not authoritative or unbiased, but to show the kinds of debates that ensue over various translations of a canon. Of course, there would be more debates about the choice of one canon over another. That is why one canon should not be preferred over others for use in schools, and one translation should not be preferred over another, either.