

October 5, 1999

TO WHOM IT MAY CONCERN

Re: Constitutionality of The Bible as History and Literature (National Council on Bible Curriculum in Public Schools)

Dear Sir or Madam:

At the request of the National Council on Bible Curriculum in Public Schools (“NCBCPS”), we are pleased to offer our opinion of the constitutionality of The Bible as History and Literature, a Biblical literacy course developed through the efforts of the NCBCPS and a number of teachers who have been teaching this Bible curriculum in the public schools over the past twenty-five years. In our judgment, the Course is comfortably within the parameters of constitutionality recognized by the United States Supreme Court and applied specifically in federal district court decisions. In fact, the Course meets and exceeds the standards set by the most exhaustive judicial treatments of this issue, *Wiley v Frankli*¹ and *Crockett v. Sorenson*².

THE LAW

There is no doubt that public schools may constitutionally teach Bible courses. The United States Supreme Court has several times recognized the constitutionality of doing so³, and lower

¹ 468 F. Supp. 133 (E.D. Tenn 1979). (The manner in which the *Wiley* court applied the standards to the curriculum which it had under review is discussed below.)

²568 F. Supp 1422 (W.D. Va. 1983).

³See, e.g., *Abington School District v. Schempp*, 374 U.S. 203, 225, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963); *Epperson v. Arkansas*, 393 U.S. 97, 106, 21 L.Ed.2d. 228, 89 S.Ct. 266 (1968); *Stone v. Graham*, 449 U.S. 39, 42, 66 L.Ed. 2d 199, 101 S.Ct. 192, reh.den. 449 U.S. 1104, 66 L.Ed 2d 832, 101 S.Ct. 904 (1980).

federal courts have approved specific curricula.⁴ The Bible curriculum of the NCBCPS, alone, is taught in hundreds of public school districts, in at least twenty-nine states. Biblical courses are also taught in most, if not all, state universities within the Nation.⁵

The Supreme Court has identified many constitutionally sound reasons for public school Bible courses. As stated perhaps most succinctly by Justice Lewis Powell, “since religion permeates our history, a familiarity with the nature of religious belief is *necessary* to understanding history as well as contemporary events.”⁶ (Emphasis added.) In *Stone v. Graham* the Court said that the Bible, “may constitutionally be used in an appropriate study of history, civilization, ethics and comparative religion, *or the like*.”⁷ (Emphasis added.) “Or the like” indicates potentially an even greater range of secular subjects to which Biblical literacy – knowledge of the history, and the various literary forms and stories, in the Bible – is integrally related.

One federal judge explored the breadth of that range. The Bible is “replete” with writings relevant to such secular subject as “history, both ancient and modern, literature, poetry, music, art, government, social customs and practices, values, behavioral sciences.”⁸ Another federal court noted that our language *and* popular culture are suffused with Biblical allusions, including the symbol of the American Medical Association (the caduceus, from the Book of Numbers); the phrase “handwriting on the wall” (from the Book of Daniel), and the phrase “apple of my eye” (one of God’s Old Testament descriptions of his people, Israel).⁹

⁴See, e.g., *Wiley v. Franklin*, 474 F. Supp. 525 (E.D. Tenn. 1979) (approving an elementary school Bible Curriculum, although not in its entirety); *Gibson v. Lee County School Board* 1 F. Supp 2d 1426 (M.D. Fla. 1998) (approving Old Testament curriculum).

⁵*Wiley v. Franklin*, 468 F. Supp 133, 149 (E.D. Tenn. 1979). In his *Edwards v. Aguillard* concurring opinion (joined by Justice O'Connor), Justice Powell noted approvingly the religion courses taught at Louisiana State University, including Old Testament; New Testament; Jesus in History and Tradition. 482 U. S. 578, 608, 96 L.Ed.2d 510, 107 S.Ct. 2573 (1987)(Powell, J., concurring.)

⁶482 U.S. at 607.

⁷449 U. S. at 42, (citing *Abington School District*, 374 U.S. at 225.)

⁸*Wiley*, 468 F. Supp., at 149.

⁹*Gibson*, 1 F. Supp 2d at 1431, (citing *Crockett v. Sorenson*, 568 F.Supp 1422, 1425 (W.D.Va. 1983).)

Our laws, our form of government, and our political history are not fully understandable without reference to their Biblical foundations. “Anglo-American law as we know it today,” wrote one district court reviewing a Bible curriculum, “is heavily indebted to principles and concepts found in the Bible.”¹⁰ In *Zorach v. Clauson* the Supreme Court gave specific recognition to the proposition that “[w]e are a religious people whose institutional presupposes a Supreme Being.”¹¹ The *Schempp* Court affirmed this recognition, and further said that the “fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.”¹² *Schempp*, which invalidated public school Bible *devotions*, nonetheless conceded that “[t]his background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, ‘So help me God.’ Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.”¹³ Finally, *Schempp* relied upon what the Supreme Court has repeatedly treated as the Magna Carta of our *religious* liberty – Madison’s Memorial and Remonstrance: “It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are ‘earnestly praying, as... in duty bound, that the Supreme Lawgiver of the Universe...guide them into every measure which may be worthy of his [blessing...].”¹⁴

Statements to similar effect may be found in almost every state constitution and in the recorded sentiments of the vast majority of those who have served this country in the White House, in the Congress, in the Supreme Court, and at every level of state and local government.

In fact, the United States Congress, recognizing the “unique contribution of the Bible in shaping the history and character of this Nation”, requested that President Ronald Reagan declare 1983 “the Year of the Bible”. President Reagan did so.¹⁵ That “unique contribution” has been so great that one federal judge rested his approval of a Bible curriculum on this observation: “To ignore

¹⁰*Id* (quoting *Crockett*).

¹¹343 U.S 306, 313, 96 L.Ed 954, 72 S.Ct. 679 (1952).

¹²374 U.S. at 213.

¹³*Id*.

¹⁴Memorial and Remonstrance Against Religious Assessments, quoted in *Everson v. Board of Education*, 330 U.S. 1, 71-72 (1947)(Appendix to dissenting opinion of Rutledge, 1.).

¹⁵See 568 F. Supp. at 1428, n. 5.

the role of the Bible in the vast area of secular subjects [such as hereinabove referred to] is to ignore a keystone in the building of an arch, at least insofar as Western history, values and culture are concerned”.¹⁶ Another judge defended “the overriding importance of providing our children with a basic education in the Bible.”¹⁷ Indeed, it could plausibly be argued that to leave the Bible *out* of public schooling, would not only implicitly disparage the religion of most Americans, but would substitute a kind of non-religious ideology for objective education in secular subjects.

The Bible by itself may also be taught, and not just as part of a course in ethics, history, ‘or the like.’” As the Supreme Court said in *Schempp*, “the Bible is worthy of study for *its* literary and historic qualities.”¹⁸ (Emphasis added). “Thus the constitutional issue,” the district court said in *Wiley v. Franklin*, “...is not the Bible itself, but rather the selectivity, emphasis, objectivity, and interpretive manner, or lack thereof, with which the Bible is taught.”¹⁹ But, how should one evaluate the selection, emphasis and interpretation – and thus the objectivity – of a particular course curriculum? We turn to the Supreme Court’s current articulation of Establishment Clause standards.

An important recent development in Religion Clause jurisprudence has been the Court’s clarification of what the secular purpose prong of *Lemon*²⁰ requires. The current statement of this requirement is from *Bowen v. Kendrick*: “Under the *Lemon* standard, which guides ‘[t]he general nature of our inquiry in this area’, *Mueller v. Allen*, 463 U.S. 388, 394, 77 L.Ed. 2d 721, 103 S.Ct. 3062, a court may invalidate a statute only if it is motivated wholly by an impermissible purpose....”²¹ Accord: *Wallace v. Jaffree* (“...the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion”)²²; *Lynch v. Donnelly* (“The Court has invalidated legislation or governmental action on the ground that a secular purpose was

¹⁶*Wiley*, 468 F.Supp. At 150.

¹⁷*Crockett*, 568 F.Supp. At 1429.

¹⁸374 U.S. at 225.

¹⁹468 F. Supp. at 150.

²⁰*Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed. 745, 91 S.Ct. 2105 (1971).

²¹487 U.S. 589, 602, 101 L.Ed.2d 520, 108 S.Ct. 2562 (1988).

²²472 U.S. 38,56, 86 L.Ed.2d 29, 105 S.Ct. 2479 (1985).

lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations²³)

The first *Lemon* inquiry, as applied to a Bible curriculum, therefore asks whether the responsible public body's passage of the curriculum was *wholly* motivated by the purpose of promoting religion and not secular education. The answer to that question, with regard to the curriculum under consideration here, is certainly not.

A second important development in Religion Clause law occurred in *Agostini v. Felton*.²⁴ Five members of the Court said in that 1997 case that “[w]hat has changed since we decided *Ball* and *Aguilar* [in 1985] is our understanding of the criteria used to assess whether aid to religion has an impermissible effect”.²⁵ *Agostini* said: “[t]hree primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement.”²⁶ The *Agostini* Court thus eliminated, *as a separate inquiry*, the (former) third prong of the *Lemon* test: does the challenged practice create an “excessive entanglement.” In the case of the NCBCPS curriculum, no entanglement occurs. Public authority is entirely responsible for the program; churches and religious groups are not involved. With regard to the second of the *Agostini* criteria, there are no “recipients,” as there would be in an aid-to-churches-or-religious schools programs.

Therefore, there is only one of the *Agostini* criteria relevant to assessing the constitutionality of Bible curricula – government indoctrination. “Indoctrination”, as the Supreme Court has defined the term, refers to the more or less coercive attempt to get people to believe some particular sectarian doctrine. The following analysis demonstrates that adoption of NCBCPS curriculum in the public schools would not result in government indoctrination.²⁷

²³465 U.S. 668,680, 79 L.Ed.2d 604, 104 S.Ct. 1355 (1984).

²⁴521 U.S. 203, 138 L.Ed.2d 391, 117 S.Ct. 1997.

²⁵521 U.S. at 223.

²⁶521 U.S. at 234.

²⁷It is debatable how much force the *Lemon* test retains, given the criticisms of it voiced by a majority of the members of the current Supreme Court, and the Court's apparent movement away from the test. For purposes of this opinion, however, we assume the continuing validity of *Lemon* and conclude that the NCBCPS curriculum readily satisfies the requirements of *Lemon*.

II APPLICATION OF THE LAW TO NCBCPS CURRICULUM

The operative question is: by its “selectivity, emphasis, objectivity, and interpretive manner” does the NCBCPS curriculum “indoctrinate” students? The answer is a clear no. By its nature, a Bible course makes students aware of a divinized world, a universe full of miracles, parables, and the thoughts, acts and prayers of devout believers. But a curriculum such as the NCBCPS curriculum goes no further. It does not insist that such a world is objectively real or that the beliefs of such believers are verifiably true. It exposes students to the content of the Bible and helps them to understand the impact of that content on history, art, literature, and many other categories of human activity. A large proportion of the content of the Bible is a specifically religious content – a fact which the inquiry into the presence or absence of indoctrination must recognize. But only if students are encouraged to accept that religious content as something that they should embrace and believe in themselves has there been any constitutionally impermissible indoctrination

“Indoctrination” cannot arise from the required *text* in the NCB CPS curriculum. The (only) required text is the Bible. There are, of course, many versions of the Bible. For clarity of presentation, though, the course had to be prepared from some chosen text. NCBCPS chose what historically has been, and currently remains, the most commonly used and widely recognized English language translation: the King James Bible. (From a literary standpoint, moreover, it is undebatable that this particular text is an important and influential milestone in English prose, whose rhythms and phrases have been echoed in countless subsequent works of literature.) Schools are free to use another translation and students may use the edition of their choice. The NCBCPS course does all that is humanly possible to achieve objectivity, as far as the text is concerned.

Much “selectivity” and “emphasis”, and most (if not all) “interpretation”, can be a function of how the teacher presents the assigned material, and how the teacher leads the students through discussion of it. Constitutional problems arising out of teacher conduct are not the present concern. The course curriculum and its constitutionality are the focus of attention. Who teaches it is a matter for subsequent decision by competent public authorities.

Even so, it is indicative of the good intentions of the creators of the NCBCPS curriculum that its Policy Statement says:

The teacher is hired and paid, evaluated, and supervised by the county school administration. All state certification and renewal requirements are required and met by each teacher.

The NCBCPS recommends that school districts using the course also adopt the following policy; “[t]here shall be no requirement that a teacher shall have a particular religious belief (or non-religious belief) or persuasion in order to conduct religious studies.” Finally, the NCBCPS

“Guidelines for Implementation” state that, on “questions of interpretation, the teacher will advise students to go to their own parents and/or pastor, priest or rabbi.”

One federal court invalidated a Bible curriculum because public authority permitted local church groups – the “Bible Study Committee” – to select teachers.²⁸ There is no trace of such prospective involvement here. Another federal court, aware that teachers as well as texts deliver instruction, “expect[ed]” video monitoring of classrooms.²⁹ The NCBCPS curriculum’s “Guidelines” expressly call upon school boards to form committees “to sit in on classes at random times during the year to make sure this course is being taught appropriately.” Finally, the policy statements and “Guidelines” make abundantly clear that proselytization and indoctrination by teachers are strictly prohibited.

Does the NCBCPS curriculum give rise to any concerns of indoctrination because of its inevitable editorial selections and emphases? No. Given the large number of editorial decisions which any Bible course designer must make, and the limitless emphases – corresponding to a course’s aim to connect the Bible to history, or art, or music, or social customs, and “the like” – there cannot be one constitutionally “correct” Bible curriculum. There can be a vast array of permissible curricula.

As the court stated in *Wiley v. Franklin*:

That Bible study courses can be designed for use at all public school levels, from kindergarten to college graduate level, and can be designed to avoid violation of the First Amendment religious freedom strictures cannot be doubted. That the methodology of such teaching would vary according to grade level and that there may be differences, even strong differences, among school administrators and academicians as to the more appropriate methodology to be followed at any particular grade level is a matter that addresses itself solely to appropriate school authorities and is not within the province of this Court, the Court being concerned only with the Constitutionality of that which is taught.³⁰

²⁸*Wiley*, 468 F. Supp, at 150.

²⁹*Gibson*, 1 F.Supp.2d at 1434.

³⁰*Wiley*, 468 F. Supp at 150.

How *might* a Bible curriculum, by its selection and emphasis, cross the line of constitutionality? One way might be by skewing reading assignments towards only the most favorable depictions of the ancient Israelites, or the early Christians, and so implicitly casting an aura of approval over Judaism or Christianity, as the case may be, that is inconsistent with the Bible's overall account of those groups. Another example might be an exclusive focus upon the miracles and resurrection of Jesus, along with those passages (e.g., Peter at Caesaria Phillipi) in which witnesses attest to Jesus' divinity. Such a selection might suggest an intention to demonstrate that Jesus was not only *thought* to be the Messiah by some, but that he *truly* was the Messiah. The NCBCPS curriculum contains no such problematical emphasis.

We should note also that the Establishment Clause's required neutrality is a two-way street. It prohibits indoctrination not only into a religion, but also into a secular, or anti-Jewish, or anti-Christian, viewpoint. It would be unconstitutional therefore to omit from a Bible curriculum all of the Bible's accounts of the assertions and denials of Jesus' divinity or of Yahweh's special relationship with the Jews. Even if innocently intended, the primary effect of such a skewed course would be to misrepresent the content of the Bible, and thus to disparage the beliefs of Christians and Jews by secularizing their scriptures.

The specific texts selected for this Course fall well within the range of objectivity, and steer well clear of appearing either to promote or disparage the *truth* of the Bible. The selections are representative of the Bible as a whole. They pertain to the better known, more influential, Biblical episodes. All school children should know something about Noah, Moses, and Joseph and his coat of many colors. This Course includes them all. The Course does not paint an idealized picture of the Biblical protagonists. The ancient Israelites are realistically portrayed. The faith of Moses is contrasted with the faithlessness of his people. In one section, the course designers call for exploring Israel's "Failures", "Punishment", "Repentance." Special attention is given in another section of the course to Jewish feasts, not in order to promote Judaism but to promote students' understanding of Jewish culture and traditions.

The New Testament curriculum is similarly balanced. The infancy narratives of Luke and Matthew are included, reflecting the prominence of Christmas and the birth of Jesus in western history and art and even in modern society. The story of Jesus is told with, if anything, less emphasis upon his miracles and cures, than on his teachings in parables. The accounts of Jesus' crucifixion, death, and resurrection are included, as they must be: everything else in the the New Testament revolves around them. For example, the story of Stephen's martyrdom and the Pauline epistles – both parts of the curriculum – cannot be understood without knowing that Jesus died, and was believed to have been raised from the dead. It simply is impossible to understand the content and influence of the New Testament without an awareness of these watershed events.

This course is very much like the one specifically approved, in all but one particular, in *Wiley v. Franklin*.³¹ The *Franklin* Court excluded the resurrection story.³² One other court recently has agreed.³³ The *Wiley* Court said:

The account of the resurrection forms the central statement of the Christian religious faith. Its only reasonable interpretation is a religious interpretation. Its only reasonable message is a religious message. It is difficult to conceive how it might be taught as secular literature or secular history.”

This line of reasoning is confused, and the conclusion (to say nothing of the premises) surely mistaken. It is true that the resurrection is “central” to the New Testament and the Christian faith. But how, therefore, could one objectively teach the New Testament *without* it? So much of the New Testament refers to the resurrection – either foretelling it, or reflecting its significance after the fact – that, without it, the whole collection of writings is inexplicable. An Old Testament parallel might be exclusion of the Exodus of the Jews from Egypt. Yet no court has suggested that such an exclusion is necessary, because excluding the Exodus would make the story of ancient Israel simply incomprehensible. The *Wiley* court may have acted out of fear of encouraging Christian belief. But excluding the resurrection comes too close to disparaging Christianity. The reasonable course is to present the resurrection from the same neutral perspective that the Exodus is presented. And this is what the NCBCPS curriculum does.

Wiley was correct to say the only “reasonable interpretation” of the resurrection is a “religious interpretation” in the sense that the resurrection could have occurred only by divine intervention. But the same is true of much that is recounted in the Bible, in both the Old and New Testaments. The parting of the Red Sea, God’s bestowal of the Ten Commandments on Moses, the Creation story in Genesis, the Infancy Narratives, the many miracles of Jesus all permit only “religious interpretations”: they are comprehensible only as acts of a God intervening in history. Are they all therefore to be excluded from Bible courses? The same can be said of much of the core content of all other religious systems and stories – from the polytheistic mythologies of ancient Egypt, Greece, and Rome to the creation stories of Native American tribes. Yet knowledge of all

³¹474 F.Supp, at 530-1, n. 2.

³²*Id.* at 531.

³³*Gibson*, 1 F. Supp. 2d at 1434.

³⁴474 F. Supp. at 531

of these matters is a part of the broad exposure to the culture, history, art, and literature of different peoples that is essential to a modern liberal education.

The *Wiley* Court stumbled again in contrasting the (inescapable) “religious interpretation” of the resurrection with the “secular” message which, the court seems to have thought, was constitutionally required. The court opined that the resurrection could not therefore be taught as “secular literature or secular history.” But this is a mistake of logic. The gospels can be taught for the history (of ancient Palestine) they contain, as the unique literary genre they constitute, and for the content of the beliefs (whether true or false) that inspired Handel’s *Messiah*, Michelangelo’s paintings in the Sistine Chapel, and Bunyan’s *Pilgrims Progress* But they clearly convey a religious message: Jesus of Nazareth is the Messiah.

What the *Wiley* Court should have said, and may have been trying to say, is this: the resurrection requires a “religious interpretation” because there is no *natural* explanation for the events it relates. If the resurrection happened, it was a miracle. The resurrection conveys a “religious message”, to be sure, as does the whole Bible. What the Constitution requires, however, is not secularization of of the Bible’s “religious message”, but that the state not take a position on the truth or falsity of that message. The account of the resurrection story, like the accounts of all the miracles recorded in the Old and New Testaments, speaks for itself, and conveys a “religious message.” Schools may teach the story precisely as *what the Bible recounts*. They may not assert that the story is true or false. That judgment is left to students, their parents, and their pastors – if they care to make a judgment at all, which in many contexts they may feel neither the need nor the inclination to do. The *Wiley* Court should have seen that the resurrection, like the rest of the Bible, may constitutionally be included in a public school curriculum because of its *effect upon* and *importance to* “secular history” and “secular literature.” Those effects and that importance are undeniable; indeed, they are sufficient to justify the Bible course in the first place, and they do not presuppose or entail the truth or falsity of any of the content of the Bible.

The district court in *Crockett v. Sorenson* developed standards as ambitious as those found in *Wiley*. *Crockett* held that supervision and control of the course must lie exclusively with the school board; teachers should be certified, and they should be hired and fired by the school board as other teachers are; no religious test for teachers may be imposed; the school board should prescribe the curriculum and the teaching materials; the course should be elective; contributions to underwrite the course should have ‘no strings attached’; and, finally, no attempt to convince children of the truth or falsity of the Biblical material is permissible.³⁵

³⁵568 F. Supp. at 1431.

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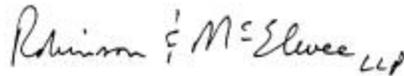
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of the truth or falsity of the Biblical material is permissible.³⁵

The NCBCPS Course recommends and adheres to all of these requirements, so long as school boards are free, as they are, to modify the curriculum and so make it their own.

CONCLUSION

On the basis of our analysis of the NCBCPS curriculum and the applicable case law, it is our opinion that the curriculum can be adopted and taught in the public schools without any violation of the Religion Clauses of the First Amendment to the United States Constitution. This opinion is offered to NCBCPS, and at the request of NCBCPS, is forwarded to you, as Attorney General of the State of Georgia, to assist you and your office in your deliberations on the issue of the constitutionality of the curriculum. This opinion is not offered as a prediction of what any particular court may conclude in a given case and it may not be relied upon as a guaranty of any particular outcome.



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³⁵568 F. Supp. at 1431.