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Sarah Barringer Gordon

University of Pennsylvania Carey Law School

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“FREE” RELIGION AND “CAPTIVE” SCHOOLS: PROTESTANTS, CATHOLICS, AND EDUCATION, 1945–1965

*Sarah Barringer Gordon**

INTRODUCTION

After World War II, Americans rededicated themselves to education and religion as keys to a strong and vibrant democracy. Almost immediately, cases involving education captured the attention of the Supreme Court and the American public. A new constitutional law of education unfolded in the decades after the conclusion of the war, and it involved controversial issues of race and religion in public schools. Legal historians have taught us much about how *Brown v. Board of Education*¹ changed the landscape of education as well as constitutional law. We know less about how the law of religion in education developed, and almost nothing about how local partisan religious battles contributed to legal change, and vice versa.²

This Article tracks one aspect of those conflicts: the ways that public schools were challenged for inculcating religion long before school prayer became such a hot button issue in the early 1960s. Many officials and educators relied on local Catholic priests and women religious to staff public schools, and often used church buildings as public elementary and secondary schools in the 1940s and 1950s. At the

* Arlin M. Adams Professor of Law & Professor of History, University of Pennsylvania. Thanks to friends and colleagues for their critique and suggestions, including (but not limited to) Christopher Eisgruber, Roger Groot, Katherine Holscher, Deborah Malamud, William Nelson, Linda Przybyszewski, Harry Scheiber, Thomas Sugrue, Winnifred Fallers Sullivan, and the participants of the Program in Law and Public Affairs at Princeton, NYU Legal History Colloquium, the Harvard Faculty Workshop, the Ad Hoc Workshop at Penn Law School, the Law and Society Workshop at Berkeley, the faculty workshop at Washington and Lee Law School, and last but not least the Center for Church-State Studies at DePaul and the editors of the *DePaul Law Review*.

1. 347 U.S. 483 (1954).

2. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001) (providing a broad overview of Establishment Clause jurisprudence and reactions to it at the national level from 1947 through 2000—especially at the political level). Professors Jeffries and Ryan discuss religious as well as legal and political strategy, and the ways that local conflict and publicity campaigns (as opposed to Supreme Court jurisprudence) created new opportunities and new dangers for Protestants, especially conservatives, in the 1950s.

same time, early Supreme Court decisions relied on sharp distinctions between religious and secular education. Given the ways that local educators cooperated with Catholic thinkers and schools, these distinctions were more theoretical than real in many jurisdictions. Especially between 1925 and 1950, these cooperative arrangements proliferated. By 1948, according to a National Catholic Welfare Conference survey, there were at least 324 "Catholic-public" schools and most likely 340 or more.³

This Article begins with an in-depth look at the history and context of the first Supreme Court case to address the relationship between public funding and religious education. It then tracks the formation and early activity of a group that was created to overturn the result in that case, and the unexpected twists and turns that followed. The story is one that involves Catholics and Protestants, usually on opposing sides, wrangling over schoolchildren and the Constitution in a pre-Vatican II world. Given the importance of Jews and Jewish organizations to the law of religion in the 1960s and beyond, the conflicts studied here are remarkable for the relative lack of Jewish voices. Instead, these early legal battles were a precursor to (even an incubator for) the development of a new and distinctly ecumenical community of interested legal actors in the 1950s and early 1960s. In the late 1940s, the combatants were divided Christians, particularly conservative Catholics and Protestants, each convinced that their own vision of education was the only valid and sustainable one for American schoolchildren.

One might be tempted to dismiss the conflicts discussed here as relics of a world long gone; doing so, however, one would miss the opportunity to track the unfolding of a new constitutional regime at ground level. Disentangling religious from secular education required courts to decide what belonged in which category, a process that was contested in courtrooms and around negotiating tables across the country from the late 1940s through the 1950s. Although today we think that we know the difference between public and parochial

3. See *Catholic-Public School*, Letter from Msgr. Howard J. Carroll of the Nat'l Catholic Welfare Conference to Am. Archbishops & Bishops (Sept. 2, 1948) (marked "confidential" and enclosing a memorandum discussing cooperation between Catholic and public educators based on a survey of 75% of Catholic dioceses, and reporting 1218 religious—up from 632 in 1937—currently teaching in approximately 340 schools) (on file with author). In 1959, POAU conducted a survey of its own, finding 2055 religious teachers and administrators in public schools in twenty-two states. C. STANLEY LOWELL, *EMBATTLED WALL* 96-97 (1966). For a discussion of the history of Catholic-public cooperation, see Katherine Holscher, "Captured!": POAU and the Campaign Against Captive Schools (unpublished manuscript) (on file with author).

schools, sixty years ago the lines were hotly contested. Everyone understood that the question was vitally important.

The legal conflicts that preoccupied both sides were not those we study in constitutional law classes in the early twenty-first century. Instead, the key battles were conducted in lower courts, and have been all but forgotten. This Article, therefore, is an excavation: it uncovers a formative and fascinating era, when "captive schools" were the central concern of both sides in conflicts over parochial school funding. The stage was set by the Supreme Court, but the action was primarily at the state level. This mixture of national and state litigation has obscured a rich story of law, religion, and education after World War II.

II. A NEW NATIONAL LAW FOR RELIGION

In the late 1940s, skirmishes between Catholics and Protestants were nothing new, but this one was different. The federal government and the Supreme Court were key players this time. The financial power of the national government and the Court's power to interpret the Constitution drew litigants like moths to a flame. The words of the Establishment Clause contained in the First Amendment are deceptively simple: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."4 It was easy to agree that these words express noble ideals; the agreement stopped there, however, especially when it came to religion, money, and schools.

The conflict over funding for parochial schools did not involve all Catholics or all Protestants. In some sense, those who took the lead harkened back to a more traditional Catholic-Protestant divide, familiar to Americans from the earliest days of settlement of the United States, and growing violent in patches, especially in the nineteenth century.⁵ From the most superficial perspective, the mid-twentieth century conflict was the last big gasp of a long-standing mistrust and suspicion between the most doctrinaire on both sides. More important to an understanding of twentieth-century religion and law, however, is the fact that this conflict produced new inquiries into how and where "sectarianism" had invaded public education. The Cold War and Soviet atheism meant that both Catholics and Protestants had a stake not only in education, but also in claiming that their strategy was the surest bulwark against communism. In this new battle, the lan-

4. U.S. CONST. amend I.

5. See, e.g., PATRICK W. CAREY, *CATHOLICS IN AMERICA: A HISTORY* 27-46 (2004); JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* 19-42 (2003).

guage tended to be legal and political as well as theological and cultural; the weapons were the tactics of litigants and their lawyers. Contact between the world of law and the world of faith had profound effects on both. The story is not one of secularists versus sectarians, but rather one of dedicated believers on both sides, with courts and judges in the middle.

Religious groups also changed the ways they interacted with government. Some historians have called the twentieth century a period of "secularization." Yet we can no longer credibly deploy the language of secularization to describe the past sixty years. If secular power grew and compromised the power of religion over the course of the twentieth century, its course was unsteady and its failures many. Certainly, religious life remained vigorous, especially in the post-World War II years. Belief has not ceded space, one might say, but its place has shifted. Law and legal thinking have been instrumental in this shift. In the 1940s and beyond, believers found themselves caught up in public life—especially law—in new ways. Law was everywhere in the powerful post-war state; to navigate this behemoth required new tactics and knowledge.⁶

In 1947, the Supreme Court decided a landmark case involving state support for religious education. The Justices, and those who passionately debated the issue, struggled to make sense of the Constitution's religion clauses. *Everson v. Board of Education*⁷ applied the federal Establishment Clause to the states for the first time, requiring all jurisdictions to conform to national standards, even though the standards themselves had not yet been fleshed out. The case is known for its extensive discussion of the history of church and state and the meaning of the Establishment Clause.⁸

Yet we know relatively little about what prompted the litigants to bring the *Everson* conflict to the courts, or how they reacted to their treatment there. They cared more about the result than the niceties of "incorporation" or the Court's reliance on history. The story begins with a lawsuit that challenged state funding for parochial school transportation in New Jersey. Although the *Everson* decision is well known to lawyers, scholarly study of the actual litigation is surpris-

6. Scholars have treated these developments indirectly. See, e.g., ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* (1988); James D. Beumler, *America Emerges as a World Power: Religion, Politics, and Nationhood, 1940-1960*, in 2 *CHURCH AND STATE IN AMERICA: A BIBLIOGRAPHICAL GUIDE: THE CIVIL WAR TO THE PRESENT DAY* 225 (John F. Wilson ed., 1987).

7. 330 U.S. 1 (1947).

8. For brief discussions of the *Everson* case, see PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 454-63 (2002) and Jeffries & Ryan, *supra* note 2, at 284-87.

ingly thin.⁹ The litigation set the stage for the "captive school" cases that followed. The *Everson* suit incorporated the enmity between a Catholic-dominated political machine and its (mainly Protestant) opponents. The result shocked and dismayed Protestants around the country. *Everson* is important, then, not only because it nationalized the constitutional law of religion. It is also important to appreciate that *Everson* exacerbated and re-shaped an already existing conflict over religion, education, and funding. It makes sense, therefore, to situate *Everson* socially and religiously as well as jurisprudentially. What follows is a relatively detailed treatment of the origin and tenor of the lawsuit itself. Additionally, this Article examines the resulting legal environment and the reactions of Catholic and Protestant leaders who embraced or rejected the result in the case.

A. *Religious Equality or a Dirty Business? A New Jersey Story*

Plaintiff Arch Everson was the vice president of the New Jersey Taxpayers Association. He and his circle were among the "Clean Republican" opponents of Democratic Jersey City Mayor Frank Hague's political machine. There were other machines in the twentieth century, but Hague's was especially brazen. In 1940, when the New Jersey legislature debated funding for parochial schools, Hague controlled much of the state. There were Hague-cops, Hague-judges, and Hague-governors.¹⁰ His vast network included schools, churches, police, and more. Everyone knew who Hague was. Biographers, like his contemporaries, refer to him as "The Boss."¹¹ Hague himself famously remarked, "I am the law."¹²

Everyone in Jersey City, which was 75% Roman Catholic in 1940,¹³ also knew that Frank Hague was a loyal son of the Church. He contributed an altar to St. Aedan's Church that cost a staggering \$50,000.¹⁴ He raised many times that amount for Catholic charities, which were supported not only by Hague's Catholic followers, but also by Jewish and Protestant members of the Hague machine, who

9. See Daryl R. Fair, *The Everson Case in the Context of New Jersey Politics*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS I* (Jo Renée Formicola & Hubert Morken eds., 1997) [hereinafter Fair, *The Everson Case*]; Daryl R. Fair, *Everson v. Board of Education: A Case Study of the Judicial Process* (1975) (unpublished manuscript, on file with New Jersey State Library) [hereinafter Fair, *A Case Study of the Judicial Process*].

10. BOB LEACH, *THE FRANK HAGUE PICTURE BOOK* (1998).

11. DAYTON DAVID MCKEAN, *THE BOSS: THE HAGUE MACHINE IN ACTION* (1940); ALFRED STEINBERG, *THE BOSSES* 10-71 (1972).

12. MCKEAN, *supra* note 11, at 224.

13. STEINBERG, *supra* note 11, at 46.

14. *Id.*

were required to sign contribution pledges: "[T]hose who fell behind in their payments received unfriendly letters from the mayor."¹⁵ Hague billed himself as a supporter of parochial schools and accused his opponents of being anti-Catholic, stoking ethnic-religious identity and prejudice.¹⁶

In the late 1930s, Hague and his opponents sparred over funding for public busing to Catholic schools. Eventually, their battle drew national attention to the relationship between government and religious organizations, especially the Catholic Church. But the beginning of the fight was local, colored by the currents that guided New Jersey's toxic politics. The Knights of Columbus, the Catholic Daughters of America, Monsignor Ralph Glover of Newark, the Newark and Jersey City newspapers, the "Hague Republicans," and others supported Hague's Parochial School Bus Bill.¹⁷ The bill directed school districts to provide transportation to all New Jersey schoolchildren "living remote from the schoolhouse."¹⁸ Because almost all private schoolchildren in the state attended Catholic parochial schools, the bill meant that parochial schools would now have state-funded transportation for their students. The legislation passed easily, no surprise to Hague-watchers.

The other side also had its flaws. In addition to the New Jersey Taxpayers Association, the League of Women Voters, the Seventh-Day Adventists, the American Association of University Women and others, two obscure, even shadowy groups formed a counterweight to the Knights of Columbus: the Junior Order United American Mechanics (JOUAM) and the Patriotic Order of Sons of America (POSA). The former had connections to the Ku Klux Klan (KKK) as late as the 1920s. The latter was a player in controversies over evan-

15. *Id.*

16. In 1944, for example, Hague opposed the draft New Jersey constitution. He framed it "as a drive against the Catholic Church and the parochial school system" and "[t]hen his Irish machine put on quite a show." RICHARD J. CONNORS, *A CYCLE OF POWER: THE CAREER OF JERSEY CITY MAYOR FRANK HAGUE* 158 (1971); accord MARK S. FOSTER, *THE EARLY CAREER OF MAYOR FRANK HAGUE* (1967).

17. CHRISTOPHER J. KAUFFMAN, *FAITH AND FRATERNALISM: THE HISTORY OF THE KNIGHTS OF COLUMBUS* 385-86 (Knights of Columbus rev. ed. 1992) (1982). For background on Monsignor Glover's involvement, see Fair, *A Case Study of the Judicial Process*, *supra* note 9, at 6 n.24 (citing an article from the *Newark Evening News* dated June 4, 1941). Professor Fair speculated that "[o]ther elements of the [Roman Catholic] hierarchy were probably more involved than the public record indicates." *Id.* at 30 n.24.

18. *Everson v. Bd. of Educ.*, 39 A.2d 75, 75-76 (N.J. Super. Ct. 1944) ("[I]ncluding the transportation of school children to and from school other than a public school, except such school as is operated for profit . . ." (quoting N.J. STAT. ANN. § 18:14-8 (West 1941))). Given that the legislative history reveals no concern among legislators over "for-profit" schools, it is not clear what this restriction was designed to accomplish.

gelism and the flag salute that saw Jehovah's Witnesses repeatedly mobbed and beaten in the 1930s and early 1940s.¹⁹ In debates over the Parochial School Bus Bill, the Knights of Columbus and "patriotic" supporters of public schools clashed repeatedly, each accusing the other of betraying American ideals.²⁰

Similar battles over funding for parochial schools occurred around the country in the late 1930s and early 1940s. By 1938, free transportation was provided to Catholic students in thirteen states.²¹ Although most state constitutions contained provisions prohibiting state funding for "sectarian religious organizations," language that clearly targeted Catholic parochial education, growing pressure for support resulted in new forms of aid.²² Increased tax burdens to support public schools in the 1930s fell on Catholics and non-Catholics alike. Even opponents of aid for parochial schools acknowledged that "the Catholic[s] must pay an enormous bounty to protect [their] children from the secular influence of the public school,"²³ because they paid school taxes like other residents but generally did not use public education. Lawsuits challenging state-supplied benefits to Catholic schools—including textbooks, teachers' salaries, and health care for students and teachers—appeared in state supreme courts with increas-

19. The JOUAM was founded in Philadelphia in 1885, the junior branch of United American Mechanics. Membership was limited to "white males, between the ages of 16 and 50, of good moral character, believers in the existence of a Supreme Being, in favor of separation of church and state, and supporters of free education through the Public School System." Records of the Junior Order United American Mechanics Harmony Council, No. 23 Cheswold, Delaware. <http://www.lib.udel.edu/ud/spec/findaids/jouma.htm> (last visited June 8, 2007). The organization, which has fallen on hard times and may no longer be extant, changed significantly in the twentieth century. It became primarily a social and life insurance organization, and openly welcomed Jews, African-Americans, Roman Catholics, and women as members. *Id.* The organization endorsed and supported the Atlanta KKK periodical *The Searchlight* in the 1920s. HAMBURGER, *supra* note 8, at 455–56. On the Patriotic Order, see SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 42 (2000).

20. As one commentator put it, "Hague doesn't need a Democratic legislature; the Republicans will always lend him theirs!" Letter from Richard Connors to Daryl R. Fair (Jan. 6, 1975) (quoted in Fair, *The Everson Case*, *supra* note 9, at 6).

21. The states were Connecticut, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, New York, New Hampshire, Oklahoma, Vermont, West Virginia, and Wisconsin. Leslie W. Kindred, Jr., *Public Funds for Private and Parochial Schools: A Legal Study* 66–67 (1938) (unpublished Ph.D. dissertation, University of Michigan).

22. The constitutions of thirty-seven states contain mini-Blaine Amendments, responding to the proposed (but never ratified) national constitutional amendment introduced in 1875 by Senator James G. Blaine. The provisions of state constitutions vary significantly; for a collection of state constitutions, see NEW YORK CONSTITUTIONAL CONVENTION COMMITTEE, *CONSTITUTIONS OF THE STATES AND UNITED STATES* (1938). The constitutionality of such amendments against a Free Exercise challenge was upheld recently in *Locke v. Davey*, 540 U.S. 712 (2004).

23. Note, *Catholic Schools and Public Money*, 50 *YALE L.J.* 917, 926 (1941).

ing regularity. Courts were divided over the constitutionality of the various aid programs, but most held that free public busing for parochial school students violated state establishment clauses or other constitutional provisions.²⁴

By 1941, when New Jersey's Parochial School Bus Bill became law, the U.S. Supreme Court had twice dodged the question whether such assistance violated the Establishment Clause.²⁵ One of these decisions had upheld a Louisiana statute that gave nonsectarian textbooks to all school students against a Due Process Clause challenge.²⁶ The Court relied on the theory that such a policy benefited individual schoolchildren rather than any particular institution, even though the vast majority of the private school students in Louisiana attended Catholic schools.²⁷ This approach became known as the "child-benefit theory." If the direct beneficiary of state aid was a schoolchild, the theory went, sectarian institutions such as parochial schools were helped only in indirect ways.

Into this maelstrom fell Arch Everson's lawsuit. It began peacefully enough, which suggests that the Ewing Township School Board welcomed the opportunity to fight back against state-imposed tax burdens. The desire to expand educational opportunities beyond the traditional cut-off point at eighth grade prompted town leaders to send students to high schools in nearby Trenton.²⁸ Beginning in 1941, the cost of transportation for students attending parochial schools was added to the responsibilities of Ewing's taxpayers.²⁹ All of the students involved attended Catholic schools.

24. See, e.g., *State ex rel. Traub v. Brown*, 172 A. 835 (Del. 1934); *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940); *Sherrard v. Jefferson County Bd. of Educ.*, 171 S.W.2d 963 (Ky. 1943); *Borden v. La. State Bd. of Educ.*, 123 So. 655 (La. 1929); *Bd. of Educ. v. Wheat*, 199 A. 628 (Md. 1938); *Chance v. Miss. State Textbook Rating & Purchasing Bd.*, 200 So. 706 (Miss. 1941); *Judd v. Bd. of Educ. of Union Free Sch. Dist. No. 2*, 15 N.E.2d 576 (N.Y. 1938); *Gurney v. Ferguson*, 122 P.2d 1002 (Okla. 1941); *Mitchell v. Consol. Sch. Dist. No. 201*, 135 P.2d 79 (Wash. 1943); *State ex rel. Van Straten v. Milquet*, 192 N.W. 392 (Wis. 1923).

25. See *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1930) (sustaining the state provision of textbooks to parochial school pupils against a Due Process Clause challenge); *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908) (holding that federal funding for schools on Indian reservations, 96% of which are Catholic, does not violate the Fifth Amendment).

26. *Cochran*, 281 U.S. 370.

27. *Id.* at 375.

28. ROBERT J. FRANCIOSI, *THE RISE AND FALL OF AMERICAN PUBLIC SCHOOLS: THE POLITICAL ECONOMY OF PUBLIC EDUCATION IN THE TWENTIETH CENTURY* (2004).

29. The schools in question were St. Mary's Cathedral High School, St. Hedwig's Parochial School, St. Francis School, and Trenton Catholic Boys High School. *Everson v. Bd. of Educ.*, 330 U.S. 1, 30 n.7 (1947) (Rutledge, J., dissenting). The cost of such transportation for the 1942-1943 school year was \$859.80. New Jersey Court of Errors and Appeals, Vol. 1786 (1945). Ewing Township students who attended public schools went to the Trenton Junior High School, the

Albert McCay represented Everson. He had appeared for both the POSA and the JOUAM before the New Jersey legislature.³⁰ Indeed, the JOUAM sponsored and paid for Everson's suit, and Everson himself was reputed to be a member of the fraternal organization.³¹ The Catholic Church "assisted" the school board in its legal defense of the statute.³² Both the plaintiff and the defendant were nominal; the litigation was conducted by organizations with broad interests in the relationship between church and state, indicating that political actors as well as courts and scholars sensed that the law was in flux.

The case was decided at the trial court level without oral argument or trial; none of the essential facts were in dispute. Almost a year after the case was submitted, a divided three-judge supreme court (then a trial court) held that the Parochial School Bus Bill violated New Jersey's constitutional mandate that no funds set aside for public education could be used "for any other purpose, under any pretense whatever."³³ Justices Charles Parker and Joseph Perskie wrote that the provision was "designed as an insurmountable barrier to giving free state aid, and to donations to private or *sectarian* schools, and should be rigidly enforced."³⁴ In dissent, Justice Harry Heher relied on the child-benefit theory from the Supreme Court's opinion in *Cochran v. Louisiana State Board of Education*,³⁵ which had guided a few majority opinions (and several dissents) in other state courts.³⁶

After some hesitation, the school board authorized an appeal.³⁷ In the Court of Errors and Appeals (as New Jersey's highest court was then called), a 6-3 majority held that it could not presume that the state's funds had been spent unconstitutionally. The state was obligated to pay only 75% of the costs of transportation. The funds for

Trenton Senior High School, and the Pennington High School. *Everson*, 330 U.S. at 30 n.7 (Rutledge, J., dissenting).

30. The Patriotic Order was very active in anti-Jehovah's Witness activity and legal tactics. See PETERS, *supra* note 19, at 42.

31. Fair, *The Everson Case*, *supra* note 9, at 7 & n.42; see also RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES* 110 (1981).

32. HAMBURGER, *supra* note 8, at 457 n.157 (citing Christine L. Compston, *The Serpentine Wall: Judicial Decision Making in Supreme Court Cases Involving Aid to Sectarian Schools* 113 (1986) (unpublished Ph.D. dissertation, University of New Hampshire)).

33. *Everson v. Bd. of Educ.*, 39 A.2d 75, 76 (N.J. Super. Ct. 1944).

34. *Id.* (emphasis added) (citing *Trs. of Rutgers Coll. v. Morgan*, 57 A. 250, 255 (N.J. 1904)); accord *In re Voorhees' Estate*, 196 A. 365 (N.J. 1938).

35. 281 U.S. 370, 374-75 (1930).

36. *Everson*, 39 A.2d at 77 (Heher, J., dissenting).

37. Fair, *The Everson Case*, *supra* note 9, at 10.

the transportation of the Catholic school students, the majority reasoned, may have come from the 25% raised by local taxation.³⁸

The three dissenters dismissed this line of reasoning with understandable contempt. The dissenters instead tackled the serious argument that had been debated in the parties' briefs and in other state courts, but elided by the majority. The so-called child-benefit theory, contended the dissenters, suffered from "vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education."³⁹ As a result, "[t]here is no logical stopping point."⁴⁰ Anything from cafeterias to health care to sports fell within the bounds of a "benefit" to the child. The "weight of judicial opinion," the dissenters pointed out, revealed this theory to be "an ingenious effort to escape constitutional limitations rather than a sound construction of their content and purpose."⁴¹

The weak majority opinion and the corrupt New Jersey political and judicial system that colored the result might have tempted the U.S. Supreme Court to reverse outright. Yet the Court reached beyond the case's tawdry history and engaged the debate between state courts on the child-benefit theory. At the hands of Justice Hugo Black, the theory roared back to life.⁴²

B. *Separation and Discrimination in Education*

Justice Black commanded a bare majority of the Court, and his opinion has long been an object of criticism, even derision. In key respects, his focus was on children: "It is much too late," he declared, "to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."⁴³ To make education available to all, Justice Black cautioned, the Supreme Court should "be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."⁴⁴ To exclude

38. *Everson v. Bd. of Educ.*, 44 A.2d 333, 336-37 (N.J. 1945). The majority was composed of Chancellor Luther Campbell, Justices Thomas Brogan, Joseph Bodine, and Ralph Donges, and Judges William Dill and John Rafferty.

39. *Id.* at 339 (Case, J., dissenting).

40. *Id.*

41. *Id.* at 340.

42. Black's law clerk in *Everson* was Louis Oberdorfer. Daniel J. Meador, *Justice Black and His Law Clerks*, 15 ALA. L. REV. 57, 63 (1962).

43. *Everson v. Bd. of Educ.*, 330 U.S. 1, 7 (1947) (citing *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1930)).

44. *Id.* at 16.

members of society "because of their faith, or lack of it" would breach the command to separate church and state just as surely as would the financial "support of an institution which teaches the tenets and faith of any church."⁴⁵ The reimbursement of transportation costs, he said, extended a general benefit to all persons, regardless of faith.⁴⁶ In this opinion, as in the flag salute case decided only a few years earlier, the Justices showed a keen interest in the flourishing of children, regardless of their parents' religion.⁴⁷

The emphasis on secular education in parochial schools, rather than on their inculcation of religious belief, was central to the briefs that supported the township's position, especially the brief written by the National Catholic Welfare Conference and submitted jointly by the National Council of Catholic Men and the National Council of Catholic Women. They labored to distinguish between secular education and religious worship, arguing that "[a] school does not lose the character of a school by virtue of [also] teaching moral principle and religious truth."⁴⁸ They embraced the metaphor drawn from Thomas Jefferson that the First Amendment created a "wall of separation" between religion and government. In their reading, however, a holding that the Parochial School Bus Bill violated the Constitution would "'wall off' some citizens from participation in ordinary educational benefits decreed by the State."⁴⁹

The *Everson* Court accepted this distinction between a benefit directed to pupils of all schools and a benefit that would "aid one religion, aid all religions, or prefer one religion over another."⁵⁰ Such aid would cross the "high and impregnable" wall between church and state, which must not be subject to "the slightest breach."⁵¹ Thus, Justice Black embraced as broad a meaning for the Establishment Clause as the Court had given to the Free Exercise Clause in earlier cases. He also claimed to have found a limiting principle for the child-benefit theory. Constitutional history, Justice Black emphasized, clearly indicated what the Framers intended.

45. *Id.*

46. *Id.*

47. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

48. Brief Amici Curiae of National Council of Catholic Men and National Council of Catholic Women at 21, *Everson*, 330 U.S. 1 (No. 52); accord *id.*, at 13 ("The presence or absence of religious instruction in non-profit private schools could well appear in the eyes of the State as an immaterial element in relation to the State's [secular educational] aim.").

49. *Id.* at 36. On this and other briefs submitted by the Church, see Jo Renée Formicola, *Catholic Jurisprudence on Education*, in *EVERSON REVISITED*, *supra* note 9, at 83, 84-87.

50. *Everson*, 330 U.S. at 15.

51. *Id.* at 18.

By emphasizing the historical roots of disestablishment, and invoking Thomas Jefferson and James Madison as sources for understanding the constitutional text, Justice Black followed what was by now tradition. The meaning of the religion clauses, the Supreme Court first held in 1879, could be discerned by understanding what motivated the "Father of Democracy" a century earlier.⁵² By 1947, when *Everson* was decided, this veneration of Jefferson was cultivated anew with the opening of the Jefferson Memorial in 1943, and by the embrace of an American exceptionalism that connected Old World ways and ideas with the spread of totalitarianism.⁵³ Catholicism of *that* sort, to be sure, Justice Black did not embrace. His opinion is laced with disdain for a Europe in which "Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews."⁵⁴ Indeed, Justice Black distrusted the Church and its power, and promised privately that *Everson* would not open the floodgates for aid to parochial schools.⁵⁵ In recent years, scholars in favor of greater government support for Catholic institutions have argued that "the main thrust" of the opinion actually limited aid to parochial schools,⁵⁶ or even that "Black . . . understood what he was doing" and deceived Catholics into thinking that they had won a lasting victory.⁵⁷

At the time, however, the criticism flowed from the other direction. The amicus brief submitted by the American Civil Liberties Union (ACLU) and liberal legal thinkers generally agreed that the "better-reasoned" view was that there was no coherence or stability to the child-benefit theory.⁵⁸ The dissenters in *Everson* hammered away at an opinion that stressed the importance of separation of church and state, and then sustained a tax to aid parochial school students. Justice Robert Jackson was the most explicit: "Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid

52. *Reynolds v. United States*, 98 U.S. 145, 162-64 (1878).

53. McGREEVY, *supra* note 5, at 176; MERRILL D. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* 355-62 (1960).

54. *Everson*, 330 U.S. at 9.

55. Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121, 127-28 (2001) (citing ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 363-64 (1994)).

56. *Id.* at 127.

57. HAMBURGER, *supra* note 8, at 461-62; accord McGREEVY, *supra* note 5, at 183-84.

58. Brief of American Civil Liberties Union as Amicus Curiae at 19, *Everson*, 330 U.S. 1 (No. 52).

to the Church itself."⁵⁹ Justice Wiley Rutledge predicted that *Everson* would be "corrosive."⁶⁰ James Madison, he maintained, "opposed every form and degree of official relation between religion and civil authority," not just those that granted a direct benefit.⁶¹ Even "three pence" was too much for a people dedicated to the perfect insulation of religion from government, and vice versa.⁶²

Newspaper coverage of the decision was extensive, and scholars quickly weighed in.⁶³ Columbia Professor John Childs accused the Court of "weakening" American democracy.⁶⁴ Others joined in, making *Everson* the most controversial case in years. Within weeks, many memorialized their contempt for Justice Black and his analysis. A piece in the *Harvard Law Review* called the majority opinion "a failure."⁶⁵ Justice Black himself received telegrams, and even hate mail, decrying the decision.⁶⁶

Yet all recognized that the case created something new in constitutional law. The relationship of the Constitution to education, and the ideals that should animate both, preoccupied the Court as it wrestled with how to understand the richer, more powerful, and far-ranging state of the post-World War II era. The idea that the Constitution protected even schoolchildren in the places where they learned about their government and its power opened new avenues for arguments involving race as well as religion. Court watchers of all stripes charged to the fresh field of combat.

The resulting history of the Establishment Clause and its application to education in Supreme Court jurisprudence is well known. What has been overlooked is the way that litigants in lower courts, especially state courts, struggled to distinguish religious from secular education in "captive school" cases. These cases reveal a little-known or understood history of cooperation between public and parochial school officials, as well as confusion at the local level about what means and institutions could be deployed to ensure all children an education.⁶⁷

59. *Everson*, 330 U.S. at 24 (Jackson, J., dissenting).

60. *Id.* at 29 (Rutledge, J., dissenting).

61. *Id.* at 39.

62. *Id.* at 40 (internal quotation marks omitted).

63. See, e.g., Lewis Wood, *High Court Backs State Right to Run Parochial Buses*, N.Y. TIMES, Feb. 11, 1947, at 1.

64. Benjamin Fine, *Religious Attack Stirs Educators*, N.Y. TIMES, Mar. 6, 1947, at 27.

65. Note, *Public Funds for Sectarian Schools*, 60 HARV. L. REV. 793, 799 (1947); accord Daniel R. Ohlbaum, Note, *Establishment of Religion Clause Applied to the States*, 33 CORNELL L.Q. 122, 128 (1947).

66. See HAMBURGER, *supra* note 8, at 465-68.

67. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007).

III. UNITED FOR CONFLICT

Everson disturbed an influential group of Protestant leaders. In the late 1930s and early 1940s, many Protestants tailored their traditional critique of the Catholic Church to suit what they believed to be a new era in Church strategy. There were many sources of friction, especially as Protestant leaders sensed that Catholics had gained strength and popular support during the war. They condemned the Catholic Church for supporting General Francisco Franco in the Spanish Civil War. They also condemned fascist tendencies at home among the likes of Father Charles Coughlin, whose thinly veiled anti-Semitism led him to embrace the infamous "Protocols of the Elders of Zion" and encourage the thugs known as "The Christian Front."⁶⁸

These same Protestants worried about President Franklin Roosevelt's "personal representative" at the Vatican.⁶⁹ They implied that the Church's virulent anticommunism was a shield for Church officials such as Archbishop Aloysius Stepinac, who was accused of collaborating with Nazis in Croatia and forcibly converting thousands of Serb Muslims.⁷⁰ They bitterly opposed the aggressive Cardinal Francis Spellman of New York, and they sparred with Church spokesmen and defenders about the real motives of the Church and its designs on American government.⁷¹

Most of all, they obsessed about education. The obsession became urgent in late 1946 and early 1947, as Congress debated a bill to provide grants to the states for education. Increasing public support for

68. ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 327-28 (rev. ed. 1964).

69. See, e.g., *U.S. Envoy to Pope Called Temporary*, N.Y. TIMES, June 12, 1946, at 11 (reporting on Bishop G. Bromley Oxnam, President of the Federal Council of Churches (the predecessor of the National Council of Churches), who called on President Harry Truman to clarify the role of Roosevelt's representative Myron Taylor after Roosevelt's death, and arguing that the presence of a representative was a violation of the separation of church and state).

70. See Alessandra Stanley, *Pope Beatifies Croat Prelate, Fanning Ire Among Serbs*, N.Y. TIMES, Oct. 4, 1998, at 13.

71. Richard E. Morgan, *Backs to the Wall: A Study in the Contemporary Politics of Church and State* 22-23 (1967) (unpublished Ph.D. dissertation, Columbia University) (on file with author). There are conflicting assessments of Catholic anticommunism and the relationship of anticommunism to fascist tendencies in the United States. See FRED J. COOK, *THE NIGHTMARE DECADE: THE LIFE AND TIMES OF SENATOR JOE McCARTHY* 289 (1971) (Spellman and "a large and powerful segment" of the Church vigorously supported McCarthy); DONALD F. CROSBY, *GOD, CHURCH, AND FLAG: SENATOR JOSEPH R. McCARTHY AND THE CATHOLIC CHURCH, 1950-1957*, at 228-51 (1978) (Catholics deeply divided on McCarthy); MARK S. MASSA, *CATHOLICS AND AMERICAN CULTURE: FULTON SHEEN, DOROTHY DAY, AND THE NOTRE DAME FOOTBALL TEAM* 57-81 (1999) (Catholics were both the strongest supporters and most trenchant critics of McCarthy); LEO PFEFFER, *CREEDS IN COMPETITION: A CREATIVE FORCE IN AMERICAN CULTURE* 13 (1958) (Catholics maintained "almost monolithic uniformity" in support of McCarthy).

education beyond eighth grade meant higher costs around the country, as the Ewing Township example demonstrates. Federal support had been proposed before, but had never passed.⁷² Protestant leaders and educators, including Harvard University President James Bryant Conant, openly declared their opposition to the parochial school system as a "threat to our democratic unity."⁷³ Columbia Professor John Childs accused the Catholic Church and its Democratic minions of blocking federal aid because they knew that many state constitutions (including New Jersey's) would prevent the diversion of federal dollars to parochial schools.⁷⁴ Only the exclusive support of public schools, argued Professor Childs, would prevent "serious religious cleavages [that would] divide and embitter the American people."⁷⁵ Two years after the end of a war that featured the horrific slaughter of religious minorities, such allusions resonated in jangled nerves.

The *Everson* decision fell plumb into these squabbles between Protestant and Catholic leaders. The case emboldened Catholic spokesmen. Protestants, they charged, created a "smoke screen for secularism" and "bigotry" when they argued that the Constitution was an obstacle to "school buses or emergency school subsidies or any other democratic aids to education."⁷⁶ Catholic educators explained that they wanted funding only to ensure the health of the parochial school system and to maintain religious liberty and constitutional balance.⁷⁷ Any other approach, they argued, was "discrimination" against Catholic parents.⁷⁸ Thanks to *Everson*, Catholic leaders could invoke the Supreme Court to support their position. Cardinal Spellman argued that even raising the question of funding for parochial schools after *Everson* was evidence that "our nation which prides itself before the whole world as an exemplar of fair play and tolerance" still shielded "bigotry . . . [that eats] into the [country's] vital organs."⁷⁹

72. On January 31, 1947 Republican Robert Taft of Ohio proposed a bill that would return a portion of federal income tax revenues to states for education, and would charge states with distribution of the funds according to state constitutional provisions. Because most states had explicit provisions banning public support for sectarian institutions, many of them explicitly targeting religious schools, such legislation had consistently and effectively been opposed by the National Catholic Welfare Conference. See Note, *supra* note 23.

73. Benjamin Fine, *Education in Review*, N.Y. TIMES, Apr. 20, 1952, at E11.

74. Fine, *supra* note 64.

75. *Id.*

76. Frank L. Kluckhohn, *Cushing Stresses Parents' Rights*, N.Y. TIMES, Apr. 10, 1947, at 18.

77. Frank L. Kluckhohn, *N.E.A. Is Assailed Before Catholics*, N.Y. TIMES, Apr. 11, 1947, at 18.

78. Kluckhohn, *supra* note 76.

79. *Spellman Charges Protestant Bias*, N.Y. TIMES, June 12, 1947 (citing Cardinal Spellman, Commencement Address at Fordham University (June 11, 1947)).

Alarm bells sounded in Protestant quarters. A “who’s who” of Protestant theorists and educators, including John Dewey and Louie Newton, wrote to the *New York Times*. They declared that the country was “troubled” by the threat to “[o]ur historic American doctrine of the separation of church and state.”⁸⁰ The Court’s decision in *Everson*, they lamented, “feeds fuel to the flame.”⁸¹ In Washington, New York, and Chicago, Protestant leaders met to discuss how to repair the tattered fabric of their vision. For a century, American Protestants had congratulated themselves on having “solved” the vexing problem of religion and government. The solution lay in the principle of voluntarism, they told themselves, an essential component of Protestant faith and democratic government. Nineteenth-century treatises on religion and government stressed that “uncoerced liberty” of belief, like the freedom from governmental power enshrined in the Constitution, married personal freedom of religion to other American virtues like democracy, patriotism, and equality.⁸² By consigning conscience to a different sphere, argued the Reverend Jesse Peck, the United States embodied a “living justice” that emancipated Americans “from the fetters of priest-craft.”⁸³ For much of American history, priestcraft meant Roman Catholicism *tout court*. By the mid-twentieth century, many Protestant scholars identified Protestantism with capitalism and American exceptionalism; Catholicism, in contrast, had a global reach and authoritarian leanings.⁸⁴ They protested that they were by no means anti-Catholic; the recent attempts of Church minions to undermine sacred American principles simply could not go unanswered, they claimed.

These newly politicized Protestants, many of whom were ordained and active within their own denominations and in ecumenical Protestant groups, met several times in 1947. The original group included Episcopalians, Presbyterians, Methodists, Quakers, Baptists, Seventh-Day Adventists, Lutherans, and Christian Scientists. There was also a

80. John D. Childs et al., Letter to the Editor, *Sectarian Education*, N.Y. TIMES, Oct. 1, 1947, at 28.

81. *Id.*

82. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 78–79 (2002); Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth Century America*, 52 AM. Q. 682 (2000).

83. JESSE T. PECK, THE HISTORY OF THE GREAT REPUBLIC, CONSIDERED FROM A CHRISTIAN STAND-POINT 205–06 (New York: Broughton & Wyman 1868).

84. Perry Miller, *Mr. Blanshard's New Book: The Vatican, the Kremlin, and Democracy*, N.Y. HERALD TRIB., June 10, 1951, at 5 (book review) (arguing that the Church, like the Soviet government of Josef Stalin, was fundamentally opposed to both democracy and liberty); see also HAMBURGER, *supra* note 8, at 449–54; MCGREEVY, *supra* note 5, at 175–88.

sprinkling of concerned politicians, educators, and lawyers, as well as a delegation from the Scottish Rite Masons.⁸⁵ Charles Clayton Morrison, editor of the *Christian Century*, drafted a "Manifesto" for a national "action agency";⁸⁶ the group chose the unwieldy name, Protestants and Other Americans United for Separation of Church and State (POAU). POAU's first president was Dr. Edwin McNeill Poteat, President of the Colgate-Rochester Divinity School. John Mackay, President of the Princeton Theological Seminary, served as the first vice president. The board included Morrison, Bishop Oxnham, the head of the National Education Association, and other prominent Protestant ministers and businessmen. At long last, they congratulated themselves, they had begun to fight back.⁸⁷

However separatist, POAU was still a religious organization. It was formed and maintained with a genuinely Protestant goal—that is, the separation of church and state as the essential foundation of a system of religious liberty. While they rigorously opposed sectarianism, which they associated primarily with Catholicism, POAU should not be confused with the secularism of the ACLU of the same era. As the founders of POAU put it, their mission was to protect and defend "religious liberty as this monumental principle of democracy has been embodied and implemented in the Constitution by the separation of church and state."⁸⁸ "Free" religion, in this sense, was carved out by Protestants who opposed what they considered to be a monolithic Catholic hierarchy, but did not themselves indulge in sectarianism. Thus, it is vital to distinguish the advocacy of separation that animated POAU in its first decades from true secularism. Early publications carefully explained that separationism and godlessness were entirely distinct. One early article in the organization's newsletter, for example, stressed that separation of church and state ensured "goodwill among the sects," but by no means undermined "public recognition of God, our dependence on His bounty, or our duty to follow His will."⁸⁹ In this view, the goal of separation was not antireligious; it was antisectarian.

Early in 1948, newspapers across the country published POAU's *Manifesto*, which declared the great political awakening of Protestants. They now understood that religious liberty was imperiled not

85. ELLIS H. DANA, REMARKS ON THE HISTORY OF POAU/PROTESTANT STRATEGY IN THE MAKING (1948).

86. *Separation of Church and State: A Manifesto by "Protestants and Other Americans United,"* CHRISTIAN CENTURY, Jan. 21, 1948, at 79, 79 [hereinafter *Manifesto*].

87. CHURCH & ST., May 15, 1948, at 1.

88. LUKE EUGENE EBERSOLE, CHURCH LOBBYING IN THE NATION'S CAPITAL 72 (1951).

89. CHURCH & ST., July 10, 1948, at 5.

just by “[a] powerful church, unaccustomed in its own history and tradition to the American ideal of separation of church and state,”⁹⁰ but also by national and state governments, including the Supreme Court. This decidedly religious approach to the question of separation fed into a long-standing distrust of both the government and the Catholic Church. Yet it was also conditioned by changes in law that destabilized the Protestants’ sense of their place in America. For the first time, government itself had become a problem, and at the highest levels. Public officials were all too likely to succumb “weakly” to “political pressure” to fund parochial schools.⁹¹ State legislatures had already buckled under this pressure. Worst of all, the Supreme Court had betrayed fundamental constitutional principles. The *Manifesto* quoted the four dissenters in the *Everson* case, predicting ominously that each breach in the wall of separation would bring on “still others . . . we may be sure.”⁹²

The *Manifesto* conceded that “[t]he free churches of America have been slow in recognizing the gravity of the situation that was developing before their eyes.”⁹³ For the first time, they saw clearly that “[t]he effect of the first amendment is to invest the makers and administrators of our laws with the ultimate guardianship of religious liberty and religious tolerance.”⁹⁴ They promised to make officials in Washington feel their presence, as well as “[t]o invoke the aid of the courts in maintaining the integrity of the Constitution.”⁹⁵ If they were not successful in purging the government of creeping “entanglement [with] a particular church,” they vowed, “shameful religious resentment and conflict . . . will inevitably ensue.”⁹⁶

The Catholic Church fought back. The *New York Times* printed a statement by John Swift, Supreme Knight of the Knights of Columbus. The statement, issued from Cardinal Spellman’s office, called POAU “absurd” and tainted by “bigotry.”⁹⁷ Far better to battle the “godlessness which is tearing away the very roots of our American political and social institutions,” and to combat the implicit advances of communist influence that such godlessness implied, than to quibble over

90. *Manifesto*, *supra* note 86, at 79; accord *New Body Demands Church Separation*, N.Y. TIMES, Jan. 12, 1948, at 1.

91. *Manifesto*, *supra* note 86, at 80.

92. *Id.* (internal quotation marks omitted).

93. *Id.*

94. *Id.* at 81.

95. *Id.* The *Manifesto* called for “a reconsideration of the two decisions of the Supreme Court upholding the use of tax funds (a) for providing the pupils of parochial schools with free textbooks, and (b) for the transportation of pupils to parochial schools.” *Id.*

96. *Manifesto*, *supra* note 86, at 80, 81.

97. *K. of C. Criticizes “Separation” Drive*, N.Y. TIMES, Jan. 13, 1948, at 1.

federal lunch money for "undernourished parochial school children."⁹⁸ Other Catholic leaders called the organization "un-American" and even procommunist.⁹⁹ Some Protestants joined them, cautioning that secularism might hide behind the group's ostensibly religious veneer.¹⁰⁰

POAU founder and Methodist Bishop Bromley Oxnam responded, charging that Catholics were ruled by "authoritarian and autocratic" leaders.¹⁰¹ Protestants, by contrast, were "organized around democratic principles." These differing "cultural traditions" meant that Catholics found it difficult to understand "our insistence that power corrupts, and that it will corrupt a church as well as a state, that it will corrupt a bishop as well as a business man."¹⁰² Baptists, Methodists, public school educators, and many more responded. Letters to the editors of leading newspapers poured in; speeches and sermons at church meetings and school boards were inflected with a new language of rights and disestablishment.

POAU began with an apparent victory. Just one year after *Everson*, the Court spoke again.¹⁰³ This time an 8–1 majority, again in an opinion written by Justice Black, held that religious instruction in public school classrooms violated the Establishment Clause. *McCullum v. Board of Education* reiterated the principles of *Everson*, while distinguishing it on the ground that "the State's compulsory public school machinery," and its property, were being used "for the dissemination of religious doctrines."¹⁰⁴ Parents could send their children to parochial schools, Justice Black stressed, but they could not import parochial education into public schools.

Although *McCullum* built on the groundwork laid by *Everson*, it involved a fundamentally different equation. This time, the question was the invasion of religious training into public education. The blending of parochial and public schools, however, was far more common than even POAU leaders had guessed. And while the Supreme Court had spoken twice, POAU had many more questions and concerns about religion and education.

98. *Id.*

99. *Denies Catholics Oppose Separation*, N.Y. TIMES, Jan. 26, 1948, at 17 (quoting John T. McNicholas, Archbishop of Cincinnati and Chairman of the National Catholic Welfare Conference); *Oxnam Says Cushing Attempted "Smear,"* N.Y. TIMES, Feb. 16, 1948, at 5 (quoting Archbishop Cushing).

100. John C. Bennett, *Editorial Notes*, CHRISTIANITY & CRISIS, Feb. 2, 1948, at 2.

101. Morgan, *supra* note 71, at 49 (quoting radio show).

102. *Id.*

103. *Illinois ex rel. McCullum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948).

104. *Id.* at 212.

Vitriolic confrontation with Catholic leaders in the press, however stimulating, was not a positive program for the new organization. Nor did POAU have any real home or even a permanent staff. One room on temporary loan in the Baptist Joint Committee headquarters in Washington and a fundraising goal of \$100,000 was hardly solid ground. They burned with conviction about the true meaning of the Constitution, but they were rudderless.¹⁰⁵

A. "God's Own for the Job"¹⁰⁶

POAU needed a leader. Dr. Charl Williams of the National Education Association, a founding member of POAU, suggested that Glenn Archer of Kansas might be available. Archer's admirers lauded his sacrifice in accepting the directorship of the new organization. In fact, Archer was a recent graduate of the Washburn Municipal University Law College, a small institution in Topeka. Archer, who attended law school at age forty, apparently had been promised the deanship of the school upon graduation. This extraordinary trajectory was based on his experience as a school administrator, Republican Party loyalist, and aide to Alf Landon in several campaigns, including Landon's 1936 run for President. Archer had also served briefly as a Washington lobbyist for the new Federal Relations and Legislative Activities Division of the National Education Association.¹⁰⁷ Here he caught Williams's attention and cultivated a taste for the corridors of power: "I was able to go up on the hill and talk to almost any Congressman or any Senator because my name was familiar," he wrote, "I had been to the White House, my name was in the *Post*."¹⁰⁸

When called to interview for the POAU post, Archer explained that in college he had "dedicated [his] life to the foreign missionary service, but, when [he] graduated from college the financial crash was on . . . [and he] was forced to look elsewhere for Christian service."¹⁰⁹ He wandered into education, politics, and finally law. Baptist J.M. Dawson assured Archer that God had called him to POAU and would

105. HAROLD E. FEY, *WITH SOVEREIGN REVERENCE: THE FIRST TWENTY-FIVE YEARS OF AMERICANS UNITED* 12 (1974). POAU loved press coverage. See EBERSOLE, *supra* note 88, at 105 (quoting a speech by Archer calling for more space in the "religious press," as secular newspapers might be "throttled by fear of boycotts and reprisals").

106. Joseph M. Dawson, *The Birth of POAU*, *Americans United for Separation of Church and State Records*, Box 1 (Pub. Policy Papers, Dep't of Rare Books & Special Collections, Princeton Univ. Library).

107. GLENN L. ARCHER & ALBERT J. MENENDEZ, *THE DREAM LIVES ON: THE STORY OF GLENN L. ARCHER AND AMERICANS UNITED* 53-55 (1982).

108. *Id.* at 55.

109. *Id.* at 62.

"bless" him for accepting the vocation.¹¹⁰ But the Catholic priest in his home town canceled the church's contract with the family lumber business when he learned of Archer's new job. As Archer wrote in his memoir, Father Keogan preached against him "before [his] employees, tenants, and relatives, as a stooge of Joe Stalin, working against God and country."¹¹¹ Thirty years later, Archer still seethed with anger.

Archer was now a true believer. As the director of POAU, he combined his administrative and public relations skills with his new legal training. Over time, he developed techniques that drew attention to the organization and its campaign against sectarianism. He gave speeches around the country, urging his audiences to form POAU chapters, and to contact Washington with stories of Catholic influence in the schools.¹¹²

Archer also enlisted Paul Blanshard in the cause. Blanshard, a union activist, editor, lawyer, ordained Congregationalist minister, and author of the best-selling *American Freedom and Catholic Power*, went with Archer on marathon lecture tours to Florida and the Midwest.¹¹³ He was a supporter and co-author of socialist Norman Thomas, as well as a tireless and bitter foe of the Catholic Church.¹¹⁴ Blanshard advised Archer on legal strategy and continually stirred the pot by issuing new books and touring the country to enlist support for POAU causes. Blanshard lent credibility to the organization; John Dewey, Bertrand Russell, and even Albert Einstein publicly admired

110. *Id.* at 65.

111. *Id.* at 67.

112. Reports to the Board by the Executive Director (1950–1951), *supra* note 106, at Box 2.

113. *American Freedom and Catholic Power* expanded several articles that Blanshard had written a year earlier in *The Nation*. See PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (2d ed. 1958). Both the magazine and the book were banned from New York public school libraries by the Board of Education. The book (and the ban) caused an explosive controversy in New York. As the *New York Times* reported in a retrospective article twenty-five years later, "in the ensuing furor a committee to defend freedom of information fought the ban, and Cardinal Spellman picked a quarrel with Eleanor Roosevelt." Israel Shenker, *At 80, Blanshard's Twins Still Back the Unpopular*, N.Y. TIMES, Aug. 28, 1972, at 31; *accord School Ban on The Nation Stays; Reversal by Court to Be Sought*, N.Y. TIMES, June 24, 1949, at 25.

114. Blanshard authored many books. See, e.g., PAUL BLANSHARD, *FREEDOM AND CATHOLIC POWER IN SPAIN AND PORTUGAL: AN AMERICAN INTERPRETATION* (1962); PAUL BLANSHARD, *GOD AND MAN IN WASHINGTON* (1960); PAUL BLANSHARD, *THE IRISH AND CATHOLIC POWER: AN AMERICAN INTERPRETATION* (1953); PAUL BLANSHARD, *PAUL BLANSHARD ON VATICAN II* (1966); PAUL BLANSHARD, *PERSONAL AND CONTROVERSIAL: AN AUTOBIOGRAPHY* (1973); PAUL BLANSHARD, *RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY* (1963); PAUL BLANSHARD, *THE RIGHT TO READ: THE BATTLE AGAINST CENSORSHIP* (1955). At the age of eighty, Blanshard embraced atheism. Steven R. Weisman, *Paul Blanshard, Writer and Critic of Catholic Church, Is Dead at 87*, N.Y. TIMES, Jan. 30, 1980, at B4.

him and his work.¹¹⁵ A second book, *Communism, Democracy, and Catholic Power*,¹¹⁶ fought back against Catholic charges that POAU supported communism. Blanshard denied these accusations; the Catholic Church, he argued, was a natural vector for authoritarianism and thus incommensurate with democracy. The book drew a review from renowned Harvard historian Perry Miller. Although he conceded that Blanshard's style was "shrill, not to say strident," Miller maintained that Blanshard's central point could not be denied: "[The Catholic Church pursues] a basic, a centuries-old and a calculated policy, which at heart is utterly and irreconcilably antagonistic to the democratic way of life"¹¹⁷

With Blanshard as POAU's propagandist, Archer found a mind that worked like his; both integrated Christian faith, legal training, and a flair for the dramatic. They embraced controversy, delighting in opposition from Catholic apologists. Scholars and prelates protested in vain that the Church was not the inquisitorial behemoth described by Blanshard and Archer.¹¹⁸ POAU tactics were supported by the *Christian Century*, which denounced "timid Protestants who fear to have this issue brought into the open," as well as the "coarse and intemperate aspersions" cast against "the distinguished personnel" of POAU by Catholic defenders.¹¹⁹

Among other charges, Catholics called POAU "a reorganized klan with the 'new look.'"¹²⁰ The white supremacist KKK embraced a virulent anti-Catholicism, separation of church and state, and support for public schools. POAU supporters strove to distance themselves from what they called "the Ku Klux and nativist level."¹²¹ Indeed, Dawson of the Baptist Joint Committee was an outspoken critic of racism and

115. For scholarly treatments of Blanshard's anti-Catholic writings, see PHILIP GLEASON, *SPEAKING OF DIVERSITY: LANGUAGE AND ETHNICITY IN TWENTIETH-CENTURY AMERICA* 213 (1992), John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 *J. AM. HIST.* 97, 97-98 (1997), and Philip Gleason, *American Catholics and Liberalism, 1789-1960*, in *CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY* 45 (R. Bruce Douglass & David Hollenbach eds., 1994).

116. PAUL BLANSHARD, *COMMUNISM, DEMOCRACY, AND CATHOLIC POWER* (1951).

117. Miller, *supra* note 84.

118. See, e.g., George H. Dunne, *Mr. Blanshard and the Catholic Church* (pts. 1-7), *AMERICA*, June 4, 1949, at 309; *AMERICA*, June 11, 1949, at 339; *AMERICA*, June 18, 1949, at 359; *AMERICA*, June 25, 1949, at 379; *AMERICA*, July 16, 1949, at 438; *AMERICA*, July 23, 1949, at 459; *AMERICA*, July 30, 1949, at 477; J.M. O'Neill, *Mr. Blanshard's New Book: The Vatican, the Kremlin, and Democracy*, *N.Y. HERALD TRIB.*, Jun. 10, 1951, at 5 (book review).

119. *Indecent Controversy*, *CHRISTIAN CENTURY*, Feb. 18, 1948, at 198, 199.

120. *Id.* (internal quotation marks omitted).

121. *Protestants United Issue Manifesto*, *CHRISTIAN CENTURY*, Jan. 21, 1948, at 68, 68.

the Klan as early as 1916.¹²² There is no record of Klan activity involving Archer, Blanshard, or any POAU founders. Indeed, POAU officials dismissed Catholics' invocation of "Know-Nothing-ism" and "Ku-Kluxism" as a desperate attempt by the conspirators to tar their critics with their own tyrannical brush.¹²³

Archer and other POAU officials were, however, Masons.¹²⁴ Representatives of the Southern Jurisdiction of the Scottish Rite Masons were active at the POAU founding, and the Masons provided essential support in that first year and beyond.¹²⁵ Well into the 1950s, Archer advised struggling local chapters to turn first to Masons for financial assistance.¹²⁶ The group's affiliation with the Scottish Rite Masons might well have roused Catholic suspicion. Earlier in the century, the Masons were instrumental in supporting Oregon legislation that required all children to attend public school. The Scottish Rite Masons, who were already committed to a campaign to limit Catholic attempts to "sap the strength of the common school," were used by the Klan as a front in Oregon in the 1920s.¹²⁷

But the KKK was unsuccessful, despite the fact that the compulsory school referendum persuaded a majority of Oregon voters. In 1925, the Supreme Court held that the Oregon statute was unconstitutional in *Pierce v. Society of Sisters*, a suit brought by the Society of the Sisters of the Holy Names of Jesus and Mary, which maintained Catholic schools as well as junior colleges and orphanages in the state.¹²⁸ The Court held that "[t]he child is not the mere creature of the State," and may not be forcibly "standardize[d]" by government.¹²⁹ This defeat was followed by others, yet the appeal of POAU demonstrated that distrust of the Catholic Church and its educational system remained

122. Biography—Joseph Martin Dawson, http://www.rootsweb.com/~txnavarr/biographies/d/dawson_joseph_martin/htm (last visited June 8, 2007).

123. *Denies Catholics Oppose Separation*, *supra* note 99 (quoting Archbishop John McNicholas).

124. FRANK J. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* 54 (1976); Memorial to Commander Cowles from POAU, *supra* note 106.

125. 1948 Report of the Executive Director, *supra* note 106, at Box 2. C. Stanley Lowell reported that the Masons supplied the funds to purchase POAU's first office building on Massachusetts Avenue in Washington, D.C., part of a "fine relationship" that was maintained at least until Lowell wrote in 1966. LOWELL, *supra* note 3, at 140; *see also* SORAUF, *supra* note 124, at 223 (noting the ongoing relationship between "Masonry, especially Scottish Rite Masonry," and POAU).

126. SORAUF, *supra* note 124, at 54.

127. David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 *AM. HIST. REV.* 74, 77 (1968).

128. 268 U.S. 510 (1925).

129. *Id.* at 535.

widespread. Opponents of parochial schools had lost again—publicly and infuriatingly—in the *Everson* case.

Inevitably, POAU attracted those whose sympathies lay further out on the spectrum of anti-Catholicism. Two decades after *Pierce*, suspicion of “the Roman Monopoly” found new resonance in the carefully crafted speeches of Blanshard and Archer.¹³⁰ It was accurate to say that none of POAU’s leaders or representatives could honestly be accused of representing the KKK. Yet it was also true that POAU’s campaign against parochial school funding appealed to those who might hesitate to utter aloud Klan-like sentiments, and POAU stepped neatly into the same legal space that Arch Everson and the JOUAM had filled in the *Everson* litigation.¹³¹ A whiff of bigotry hung in the air, despite POAU’s disclaimers.

Individual members and local chapters clustered in the South, with pockets of organization across the Midwest and along the Pacific Coast.¹³² Despite persistent efforts to build organizations in New England, local groups were likely to tell POAU that its support would get in the way of negotiations to limit funding for parochial schools. POAU officials soon understood that the same sentiments that attracted political and religiously conservative Protestants also alienated the liberal leaders whose support had been so crucial at the founding.¹³³ Some mainline Protestant organizations kept their distance. Large ecumenical organizations, such as the National Conference of Christians and Jews and the Federal Council of Churches, voiced concerns that POAU activities in New Orleans in 1953, for example, were “an excuse to attack the Catholic Church,” rather than a genuine effort to grapple with issues of church and state.¹³⁴

Such charges eroded the credibility of POAU with some audiences, especially in areas where Protestants began to work cooperatively with Catholics. By the early 1950s, the Catholic Church itself also became more effective at outreach, explaining how parochial education fit comfortably into American life. Leading Jesuit theorist John Courtney Murray wrote in ways that supported a liberal interpretation

130. Tyack, *supra* note 127, at 85 (quoting an advertisement in the *Silverton Appeal* from October 13, 1922).

131. *See supra* note 19.

132. Morgan, *supra* note 71, at 178 (Interview with John C. Mayne, Dir. of Org. (Aug. 1962)).

133. For example, Archer reported with pride to the Board of Trustees in 1951 that the Council of Bishops of the Methodist Church, Archer’s own denomination, “endorsed POAU’s principles and called on Methodists to support our work.” Report of the Executive Director (Oct. 17, 1951), *supra* note 106, at Box 2.

134. Morgan, *supra* note 71, at 84 (Interview with Glenn Archer (May 22, 1962)). NCCJ was established in 1928 as an antidote to the influence of the KKK.

of Catholics' approach to the distinction between church and state.¹³⁵ Sociologist Will Herberg's influential 1955 book *Protestant-Catholic-Jew* announced to readers that, "[i]n the last analysis, Protestant and Catholic and Jew stand united through their common anchorage in, and common allegiance to, the American Way of Life."¹³⁶ Herberg recognized Catholics as increasingly confident and reasonable. Protestants, however, were divided between a defensive and embattled minority and a "younger and more theologically concerned" group that refused to go along with "negative anti-Romanism."¹³⁷ Jews, according to Herberg, were preoccupied with public relations and appearances.¹³⁸ Only Protestantism, he said, was caught in a "paralyzing negativism" that could be traced to the likes of Paul Blanshard and his cronies at POAU.¹³⁹

To liberal Easterners, Archer, Dawson, the *Christian Century*, and the generally southern aura of POAU and its Baptist and Methodist constituency painted the world in unsophisticated shades of black and white. The group's relentlessness galled those who sought more subtle ways to explain the relationship between state and religion, and who found that the constant invocation of a repressive Catholic past got in the way of progressive interfaith strategies. Thus, a study conducted in the early 1960s concluded that POAU was an "organizational pariah," viewed with distaste by the organizations that had learned to get along with the Catholic Church.¹⁴⁰

Despite this disdain, Archer and POAU congratulated themselves on many successes. Not only were they the best funded and largest of all groups dedicated to church and state, they achieved notable success in their primary form of advocacy—litigation. POAU ferreted out and challenged the constitutionality of what they called "captive schools." The bread and butter of the organization's legal strategy was distinctively its own.

B. *Captive Schools and "Flagrant Violations"*

Archer became a widely noted and highly visible presence by the early 1950s. He led the organization brilliantly, if controversially. Captive school cases were his calling card. After two years on the job,

135. See McGreevy, *supra* note 115, at 128.

136. WILL HERBERG, *PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 258 (1955).

137. *Id.* at 254 (internal quotation marks omitted).

138. *Id.* at 256.

139. *Id.* at 257.

140. Morgan, *supra* note 71, at 318.

Archer reported that POAU had already undertaken “significant litigation . . . to curb violations so flagrant that they cry out for our intervention.”¹⁴¹ He also stressed that “negotiation” and “conferences” had produced favorable results in a number of “important cases.” These informal proceedings were just as important as litigation, Archer emphasized. He told the story of POAU’s intervention in St. Bernard, Ohio. A “brazen raid on the public treasury” was halted after a local POAU member visited the Bishop to object to the estimated \$55,000 in public funds paid annually to the diocese, which included not only the rent of church property as a “public” school, but also the salaries of teachers (all nuns and priests). During the meeting, “[t]he Bishop was informed that counsel had been employed, that POAU representatives were in Cincinnati, and that a suit would be brought if the contract favoring the Church were not canceled.”¹⁴² POAU refused to accept the Bishop’s promise that he would abandon the lucrative contract. Instead, the group stayed until the school board met, and the Bishop complied. Archer declared that “[t]he real problem in St. Bernard now is to determine whether the Bishop will permit his people to vote for the construction of a new public school building.”¹⁴³

In the 1930s and 1940s, municipalities around the country had indeed deployed parochial schools as sites of “public” education.¹⁴⁴ Although the prevalence of captive schools has not been the subject of extensive scholarly study, POAU records and newspaper reports from the Midwest and Southwest make it clear that many school districts had responded to new state and federal mandates for education by turning to local parochial schools.¹⁴⁵ In more remote areas, there had never been a distinction between Catholic schools and public education.¹⁴⁶ If *Everson* and *McCullum* established any clear line in consti-

141. Report of the Executive Director (Jan 31, 1950), *supra* note 106, at Box 2.

142. Report of the Executive Director (Oct. 17, 1951), *supra* note 106, at Box 2.

143. *Id.*

144. For example, Roger Groot of Washington and Lee Law School informed me that, in the early 1950s, he attended a public school in Texas that mixed Catholic and secular education. The students were told that the school had to change to conform to the new rules. E-mail from Roger Groot, Professor, Washington and Lee Law School to Sarah Barringer Gordon, University of Pennsylvania Law School (Feb. 24, 2004) (on file with author) (“I promised to email you about the school I attended in TX. It was ‘St. Elmo’s School’ or ‘The St. Elmo School’ in Travis County (Austin) TX, right around 1950. It was a public school, but it did have either crosses or crucifixes in the halls. If any of the teachers were nuns, they were not in habit. At least some of the teachers were married.”).

145. See, e.g., Harold E. Fey, *Preview of a Divided America*, CHRISTIAN CENTURY, May 28, 1947, at 682; Frank S. Mead, *Shadows over Our Schools*, 71 CHRISTIAN HERALD, Feb. 1948, at 1.

146. E-mail, *supra* note 144 (“[They were] told we had to have a public school that was not Catholic.”).

tutional law, however, it was that parochial schools must be differentiated from state-run schools.

Publicizing and litigating instances of "capture" was an extraordinarily successful tactic for POAU. Archer understood that allegiance to public education was a central premise for many conservative Protestants. The notion that public schools had been infiltrated by Catholic priests, women religious, or even dedicated laypeople operating under ecclesiastical supervision was a red flag to POAU members. In Cincinnati, the controversy did not produce a lawsuit, but even informal campaigns to dismantle the relationship between Catholic leaders and public schools promoted POAU's central separationist cause.

Archer capitalized on the ways that local officials cooperated with church leaders in an earlier, pre-constitutional era. Although neither he nor POAU founders anticipated that they would find such a gold mine, captive school controversies were the most valuable target for POAU activity for over a decade. The results were more satisfying than POAU's challenges to busing for parochial school students.¹⁴⁷ By the early 1950s, captive school cases were a distinct form of litigation, more common than busing, released-time, or other funding suits. They were also the special purview of POAU.¹⁴⁸

Archer matched hard-hitting legal tactics with publicity campaigns in captive school cases. In many situations, the results were not the outright victory of St Bernard, Ohio. Instead, Archer used law and legal strategy opportunistically; he saw litigation and the threat of litigation as the means of getting what POAU wanted. What they wanted was publicity and new members; victory was a bonus, and often was not necessary for success from Archer's perspective.¹⁴⁹ The combination of publicity and litigation was a successful formula; within its first year, POAU had drawn support from 600 churches and received favorable press in Protestant denominational newsletters and magazines.¹⁵⁰

The organization encouraged interested people to contact them with complaints. Indeed, POAU leaders emphasized that they only followed up on complaints, and never went "into a community unless

147. See SORAUF, *supra* note 124, at 123; C. Wayne Zunkel, *The Pennsylvania School Bus Fight*, CHRISTIAN CENTURY, Aug. 25, 1965, at 1036, 1036-37.

148. See, e.g., FEY, *supra* note 105, at 25 (1974); LOWELL, *supra* note 3, at 68-69.

149. According to one scholar, POAU lawyers were "never . . . very careful about the technical development of its cases; one has the sense that [POAU] cares more about *having* cases on particular issues in particular places than about quality and craftsmanship or even chances of success." Morgan, *supra* note 71, at 264; accord SORAUF, *supra* note 124, at 94.

150. CHURCH & ST., May 15, 1948, at 2.

we were invited in by responsible citizens.”¹⁵¹ By the early 1950s, the group had received hundreds of complaints; in almost all cases, they came to naught. Yet POAU impressed upon its members (and Catholic leaders) that it stood ready to litigate at a moment’s notice. Most cases that POAU supported were brought in state court, deploying the many provisions in state constitutions that prohibited aid to sectarian education.¹⁵² Despite the founder’s pledge to overturn *Everson*, Archer found that state courts and state constitutions were frequently friendlier territory.

The captive school cases, moreover, were popular with Protestant audiences across the country. Everyone, it seemed, could still be captivated by a dustup over Catholic infiltration of public schools and local government coffers. Archer and Blanshard capitalized on lingering doubts about Catholic bona fides and fears that schoolchildren were especially vulnerable to inculcation with religious beliefs mandated by Catholic teachings. Such children were, in fact, a “captive” audience. POAU briefs and arguments drew heavily on provisions of the canon law mandating religious education for the children of the faithful and rejecting the concept of separation of church and state.¹⁵³ The Catholic Church painted by POAU rhetoric was rigidly hierarchical, monolithic, and secretive. By contrast, and almost always through innuendo rather than direct argument, Protestants were portrayed as open, free, and public-spirited.¹⁵⁴

One early case set the stage for POAU strategy and preferred subject matter.¹⁵⁵ In northern New Mexico, a Protestant minority became increasingly vocal during the 1940s, as public support for education increased, but flowed in many towns to Catholic coffers. Lydia Zellers, a resident of Dixon, New Mexico, was already determined to sue by the time she heard about POAU, but Archer directed the litigation from Washington and designated Harry L. Bigbee, a Santa Fe lawyer and fellow Mason, as local counsel. The trial court found that in many public schools, especially those in the Archdiocese of Santa Fe, “[t]here is no separation between the Roman Catholic Church and the State of New Mexico.”¹⁵⁶ In Dixon, for example, the elementary school was simultaneously listed on state records as a pub-

151. LOWELL, *supra* note 3, at 95.

152. *See supra* note 15.

153. STANISLAUS WOYWOD, *Catholic Schools*, in *THE NEW CANON LAW: A COMMENTARY ON AND SUMMARY OF THE NEW CODE OF CANON LAW 283-84* (7th ed. 1940) (§ 1215 (Canon 1372), § 1216 (Canon 1373), § 1217 (Canon 1374), § 1224 (Canon 1381)).

154. *See SORAUF, supra* note 124, at 33-34.

155. *Zellers v. Huff*, 236 P.2d 949, 951 (N.M. 1951).

156. *Id.*

lic school and on diocesan records as a parochial school. The teachers were all Sisters of the Order of St. Francis. In fact, one outraged Baptist observer reported that several of them were "German refugees who could not even speak intelligible English—and they were teaching in a high school!"¹⁵⁷ Students attended Mass each week under the supervision of their teachers. The religious were chosen by their superiors, rather than the school board, taught Catholic morals, and wore traditional habits and insignia; the school had crosses and religious statuary throughout the building.¹⁵⁸

Zellers provided a demonstration of POAU's mettle. Although the situation in Dixon was particularly egregious, many other jurisdictions also mixed secular and sectarian influences. In Kentucky, Ohio, Indiana, Michigan, Iowa, Texas, and other states, captive schools blended parochial and public education, often with nuns teaching in full habit in church-owned buildings.¹⁵⁹ After the trial court in *Zellers* permanently enjoined 139 nuns from teaching in the New Mexico public schools, held that busing and textbooks for parochial school students violated both the New Mexico and U.S. Constitutions, and shut down public schools located on Church property, the plaintiffs and defendants both appealed.¹⁶⁰

POAU was not satisfied. Admittedly, the case brought welcome publicity and announced to the legal community that POAU had arrived. Leo Pfeffer, the highly respected legal counsel for the American Jewish Congress (AJC), wrote Archer to congratulate him. Archer, however, wanted to push for a total ban on teaching by the religious in public schools, even without religious garb and in secular subjects. Pfeffer cautioned POAU that it was "exceedingly doubtful" that the New Mexico Supreme Court would hold that religious status determined the legitimacy of a teacher's employment.¹⁶¹ Pfeffer recommended against making such an argument, counseling that POAU should be satisfied with what it had already won. Archer plowed ahead nonetheless, arguing that "the Religious [were] bound by their oaths of obedience" to place the orders of the Church above those of the school board.¹⁶² In an amicus brief, the ACLU argued that religious garb was the true issue, rather than the status of the teachers themselves.¹⁶³ Only teachers in traditional religious habits, the ACLU

157. Mead, *supra* note 145, at 2 (emphasis added).

158. *Id.*

159. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 114, at 162–67.

160. *Id.*

161. Letter from Leo Pfeffer to Harry L. Bigbee (Sept. 15, 1950), *supra* note 106.

162. *Zellers v. Huff*, 236 P.2d 949, 961 (N.M. 1951).

163. Brief Amicus Curiae American Civil Liberties Union, *Zellers*, 236 P.2d 949 (No. 5332).

maintained, could validly be prohibited from teaching in public schools. The ACLU's position persuaded the New Mexico Supreme Court and most courts around the country.¹⁶⁴

Throughout his career, Archer remained unmoved by arguments that a particular strategy would not produce a legal victory. He had little patience for the fine parsing of doctrine. POAU members and legal strategists such as Blanshard were generally comfortable with this approach. It served them well for years, highlighting POAU's opposition to all forms of religious influence in government and education. Archer learned early that filing a lawsuit, or even threatening to file, brought otherwise reluctant officials to the table. The tactics used in St. Bernard, Ohio and Dixon, New Mexico were quick, efficient, and relatively cheap. The *Zellers* litigation cost approximately \$5000—money well spent.¹⁶⁵ Newspapers around the country carried stories about the litigation often accompanied by photographs showing a smiling class of children arrayed before women religious in full habit.¹⁶⁶

Blanshard added his powerful voice to the increasingly vociferous POAU mantra: the "Catholic hierarchy," he charged in *American Freedom and Catholic Power*, had gone to great lengths to "capture public schools."¹⁶⁷ Any lingering doubts melted away with the tangible results that litigation and the threat of law produced in other jurisdictions. The translation of POAU's agenda into one dominated by legal thinking happened almost painlessly.¹⁶⁸

Another important state court victory in Missouri settled a dispute that began in 1950 and confirmed the success of captive school litigation. In the fall of 1950, Archer flew to St. Louis where he found a situation almost as widespread and complex as the *Zellers* case. As his admiring biographer put it, "Archer was the architect of the Missouri schools case."¹⁶⁹ The lawsuit was constructed out of materials similar to those that had been so important in *Zellers*. Women religious teaching in full habit, school closings on Catholic holidays, "sectarian instruction in the classroom," and more, POAU argued, "painted the

164. Missouri is the sole exception. See *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1942).

165. Morgan, *supra* note 71, at 208.

166. See, e.g., *Taos Grade School*, DAILY CAP. NEWS (Jefferson City, Mo.), Jan. 31, 1951, at 3.

167. BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER*, *supra* note 113, at 108–11.

168. Professor Richard Morgan reports one ripple of objection to Archer's program in the early 1960s, based on an interview conducted with a former POAU employee in the New York chapter. Morgan, *supra* note 71, at 202 (Interview with Paul Duling (Mar. 8, 1962)). POAU's materials downplay such dissension.

169. LOWELL, *supra* note 3, at 102.

composite picture of school systems under the total domination of a church."¹⁷⁰

Berghorn v. Reorganized School District No. 8 held in 1953 that public schools conducted in church-owned buildings next to Catholic parish churches that were leased to the Franklin County Consolidated School District were not "free" from pervasive sectarian influence.¹⁷¹ For some twenty years, three formerly Catholic primary schools had been "rented" without a lease by the school district for a small fee. Title to all the school buildings was retained by the Archbishop of St. Louis, and the local priest's house shared the grounds of one school; nuns who taught at another lived in that school building. A cross adorned the roof of one school, and all schools closed for the Feast of All Saints and the Immaculate Conception. All teachers were nuns, and were assigned by the Mothers Superior of two religious orders. All wore religious habits while teaching. They did not give religious instruction in the school buildings, but students attended Mass every morning in nearby churches, and were instructed there by the same nuns who taught secular subjects throughout the school day. According to one source, the eighteen counties involved in the suit paid "an annual flow of tax funds via teaching nuns to the Roman Catholic Church of at least \$350,000."¹⁷²

The Missouri case solidified the pattern that had begun in New Mexico and that was deployed in subsequent cases in Kansas, Texas, Illinois, and Kentucky.¹⁷³ Archer always worked with local lawyers, and gave them substantial latitude to prosecute their cases. This guaranteed deep personal involvement and encouraged the formation of new POAU chapters by local counsel. Frequently, lawyers on the scene better understood how to appeal to potential plaintiffs, politicians, and the press. Archer also kept a tight financial rein on cases, establishing himself as the decisionmaker of last resort. He frequently traveled to localities that POAU had targeted in order to raise the profile of the dispute and guide its conduct.¹⁷⁴ In one sense, Archer

170. *Id.* at 104.

171. 260 S.W.2d 573 (Mo. 1953).

172. LOWELL, *supra* note 3, at 102.

173. *Id.* at 105 ("[C]ases like those of Garden Plain, Kansas and Bremond, Texas were declared moot on the eve of trial because the defendants knew they were beaten and hastily corrected the sectarian abuses in the schools."); *see, e.g.*, *Wooley v. Spalding*, 293 S.W.2d 563 (Ky. 1956); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956); *Swart v. S. Burlington Town Sch. Dist.*, 167 A.2d 514 (Vt. 1961).

174. LOWELL, *supra* note 3, at 95-96.

created a system as centralized as the Catholic Church he so bitterly opposed.¹⁷⁵

This system also made potential allies cringe. Archer and Blanchard, although both trained as lawyers, never developed a particular regard for legal craftsmanship nor did they attend prestigious law schools. The AJC and the ACLU, both older and more scholarly in their outlook, often disagreed with POAU's tactics and arguments.¹⁷⁶ To them, POAU was a loose cannon. The "reckless litigation and substandard legal work" of POAU strained relations with the other two organizations.¹⁷⁷ One study conducted in the mid-1960s reported, for example, that "[t]he other groups . . . have more than once kept [POAU] out of 'their' sponsored litigation," primarily by delays in responding to requests for information, rather than outright confrontation.¹⁷⁸ Especially at the appellate level, both the AJC and ACLU acted out of a desire to set sustainable constitutional precedents. By contrast, POAU members and local counsel were painfully prone to file "improvident appeals."¹⁷⁹ POAU's success rate was also lower than either of the other organizations.¹⁸⁰

The discomfort was exacerbated by POAU's anti-Catholic agenda. The AJC and the ACLU opposed public funding for parochial schools as a matter of general policy, but they were far more keen to purge religious influences from public schools. As Pfeffer saw it, POAU appealed in a populist vocabulary to an audience that was passionate about purging Catholic influence from their children's schools, but less interested in the abstract principle of separation of church and state.¹⁸¹ Popular appeal, however, was purchased at the price of an anti-Catholic image and a lack of attention to the potential consequences of these court decisions.¹⁸² Charges of anti-Catholicism nur-

175. SORAUF, *supra* note 124, at 31 (noting the "centralized, even autocratic style" of POAU).

176. Other groups, such as the National Council of Churches and the National Conference of Christians and Jews, shared their discomfort. RICHARD E. MORGAN, *THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA* 52-54 (1968).

177. SORAUF, *supra* note 124, at 81.

178. *Id.* Although at the end of the period studied here, Professor Sorauf reported on a "Legal Conference on the Establishment Clause," which included POAU in its councils for the first time in 1965. *Id.* at 83. According to Sorauf, POAU's involvement was tolerated only as a means to limit its "recklessness." The organization "became a vehicle for Leo Pfeffer's judgments and preferences." *Id.* at 86.

179. *Id.* at 95.

180. AJC had the highest success rate at approximately 65%. The ACLU was next at 52%, and the AU was lowest at 44%. *Id.* at 126 tbl.5-3.

181. Mary Fowler Beasley, *Pressure Group Persuasion: Protestants and Other Americans United for Separation of Church and State, 1947-1968*, at 192 (1970) (unpublished Ph.D. dissertation, Purdue University) (on file with author) (Interview with Leo Pfeffer (May 28, 1969)).

182. See MORGAN, *supra* note 176, at 52-53.

tured Archer, Blanshard, and other POAU stalwarts, who were schooled to welcome attacks and draw strength from them, even as they claimed that they had no bias against any religion or its members.

Pfeffer's concern was one that POAU leaders should have heeded.¹⁸³ Instead, they plowed on, rooting out and publicizing support for parochial schools, especially captive schools that masqueraded as public institutions.¹⁸⁴ Pfeffer remained a warm, if distant, supporter of POAU's attempts to weed out captive schools, but he detached himself and the organizations with which he worked from POAU's attacks on busing, textbooks, and lunches for parochial school students. Pfeffer and the AJC avoided cases that he thought could raise charges of bias.¹⁸⁵ Both the AJC and the ACLU were more likely to be staffed by secularists and Democrats—products of the New Deal and supporters of tolerance and diversity. They also discussed POAU's one-issue focus, arguing that separation of church and state could not sustain a true "mass politics" or influence policymakers.¹⁸⁶

Yet POAU had a broader reach, a larger membership, and (in most years) a more generous budget. Until the 1960s, it reigned over a less sophisticated but no less dedicated constituency. In its heyday, POAU had over 100,000 individual members, and more than 1000 churches contributed funds and distributed its monthly publication, *Church and State*, to parishioners.¹⁸⁷ In 1959, POAU conducted a "survey" that revealed hundreds of captive schools were active in twenty-two states.¹⁸⁸ The group followed up the survey with a film entitled *Captured* that featured Archer and POAU as rescuing schoolchildren from

183. Pfeffer wanted to make sure that school prayer litigation did not lend itself to claims that Jews were opposed to God in schools and Jewish organizations debated whether to bring a case over the course of the 1950s. See GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* 113–45 (1995).

184. See EBERSOLE, *supra* note 88.

185. Will Maslow, *The Legal Defense of Religious Liberty—The Strategy and Tactics of the American Jewish Congress* (presented at the annual meeting of the American Political Science Ass'n, St. Louis, Mo., Sept. 6, 1961) (cited in SORAUF, *supra* note 124, at 47).

186. See, e.g., Beasley, *supra* note 181, at 185–217 (providing comments of ACLU, AJC, and NCC leaders, political scientists, and interest group strategists).

187. LOWELL, *supra* note 3, at 142; Letter from Glenn Archer to POAU Board (Aug. 29, 1959), *supra* note 106.

188. After summarizing the pamphlet and claiming that more than 2000 priests and nuns were on the public payroll, Professor Lowell offered this explanation:

A captive school is a public school that has been taken over by a sectarian group and operated for its sectarian purposes. . . . Chief, and virtually sole offender, was the Roman Catholic Church. . . . [The] school would characteristically have two listings—one in the Roman Catholic School Directory . . . and another in the public school directory of the state

LOWELL, *supra* note 3, at 96.

the clutches of Catholic oppressors.¹⁸⁹ The thirty-five-minute film was described by POAU as a "semi-documentary" that was based on actual cases.¹⁹⁰ Like these cases, *Captured* was a popular vehicle for the exploration of fears about secret plans to subvert the peace and quiet of American communities. It was shown in churches and town halls, and POAU members used the screenings to collect donations, recruit members, and answer questions about the work of the organization.¹⁹¹

A decade after its founding, POAU looked strong and poised to grow even stronger. Its active policies of litigation and publicity guaranteed substantial attention and sustained a loyal following among Protestant groups.

IV. THE TROUBLE WITH SEPARATION

Law and society, however, changed in ways that POAU and its allies did not anticipate. Their own work contributed to the erosion of legal standards that had silently, yet effectively, screened the kind of religious education that most POAU members thought should be supported by public funds. Prayer in the schools catapulted into the headlines when the Supreme Court held in 1962 that even ecumenical invocations of divine blessing violated the Establishment Clause. *Engel v. Vitale*, once again in an opinion by Justice Hugo Black, held that even nondenominational prayer violated the mandate to separate church and state.¹⁹² The Bible fell the following year in *School District of Abington Township v. Schempp*, hammering home the distinction between the secular and the religious, even if sectarianism was not present.¹⁹³

POAU helped create the atmosphere that made such long-standing practices a constitutional problem. Archer and other activists were caught in the bind that weakened the Protestant coalition when the Supreme Court applied the standards it had developed in parochial school and released-time cases to public education, purging openly religious activities from public schools altogether. The organization itself swallowed hard and declared that it was willing to live by the

189. CAPTURED (Worldwide Pictures Ltd. 1959).

190. LOWELL, *supra* note 3, at 97 ("The film was carefully prepared and its documentation was impeccable. The fact is that we eliminated some of the more objectionable items from the film even though they were strictly factual in order that no sensibilities would be offended. The film was violently attacked by the Catholics, nevertheless, and some Protestants wrote us that we ought to be ashamed of ourselves for such a bigoted attack on the Catholic Church!").

191. Holscher, *supra* note 3, at 35-38.

192. 370 U.S. 421 (1962).

193. 374 U.S. 203 (1963).

decisions, however painful its members found them.¹⁹⁴ One reporter said that Archer confided privately that POAU mail from supporters had shown grass roots opposition to the decisions. As Archer put it, "[W]e're damned if we do and damned if we don't support the decision."¹⁹⁵ There was considerable grumbling within POAU—an unusual circumstance because Archer was so profoundly admired. Yet the allegiance between school prayer and conservative Protestants ran deep. In one captive school case from the mid-1950s, for example, the local POAU lawyer, a United States congressman, initially argued that the nuns employed in a public school refused to read the required chapters from the King James Bible.¹⁹⁶ The national office altered the complaint, but many POAU supporters assumed that Protestant practice and convictions were fully consistent with a "secular" (that is, not sectarian) public education. The school prayer and Bible decisions were a twist that caught Protestants in a whipsaw.

It is difficult to overestimate the importance of *Engel* and *Schempp* to many believers. *Engel* alone produced more hate mail than the Court had ever received.¹⁹⁷ However predictable the holdings may seem decades later, they fell like a meteor into most of American society. The decisions shocked POAU supporters and many others, most of whom had never conceived of ecumenical school prayer or Bible reading as Establishment Clause concerns. To the contrary, this new regime smacked of the enforced secularism that many Americans associated with communism. Former Presidents Herbert Hoover and Dwight Eisenhower condemned the opinion; polls suggested that up to 80% of Americans agreed.¹⁹⁸

For conservative Protestants, whose involvement with law had primarily been a staunch defense of public education against a perceived Catholic onslaught, the decisions were unexpected and disastrous.

194. See Rob Boston, *One Nation Indivisible?*, CHURCH & ST., Dec. 2003, at 6, 9 (charging that the "Religious Right" is "always eager to exploit emotional 'culture war' issues for political gain," and quoting AU Executive Director Barry Lynn saying "it's clear to me that the First Amendment stands for the proposition that government may not endorse religion—either in a specific sense or a generic one").

195. Beasley, *supra* note 181, at 223 (citing Interview with David Kucharsky, Assoc. Editor, Christianity Today (Feb. 28, 1969)).

196. *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956).

197. "The Supreme Court received a record 5,000 letters . . . in the first month" after *Engel* was announced, and "13,500 copies of the decision were sold by early 1964." Bruce J. Dier-enfield, *Engel v. Vitale*, in THE PUBLIC DEBATE OVER CONTROVERSIAL SUPREME COURT DECISIONS 215, 220 (Melvin I. Urofsky ed., 2006); accord Louis H. Pollak, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62 (1963).

198. Jeffries & Ryan, *supra* note 2, at 324 n.248; Alexander Burnham, *Court's Decision Stirs Conflicts*, N.Y. TIMES, June 27, 1962, at 1; *The Court Decision—And the School Prayer Furor*, NEWSWEEK, July 9, 1962, at 43.

Charles Wesley Lowry's *To Pray or Not to Pray!*, published in 1963, was just one of thousands of outraged responses from Protestants who argued that prayer and Bible reading were the cornerstones of public education.¹⁹⁹ Methodist Bishop Fred Pierce Corson said the ruling "makes secularism the national religion."²⁰⁰ Some Southern Protestants complained that the Court had "put the Negroes in the schools, and now they've driven God out."²⁰¹ Barry Goldwater made much of the "moral . . . rot" of the Supreme Court's decisions.²⁰² Overnight, the Court had gone from a sometime friend to an incomprehensible, unpredictable, and seemingly immutable enemy. Secularism was most decidedly not a welcome presence in the classroom, however uncomfortable explicitly Catholic practices or captive schools had been.

Secularism, and particularly the ban on school prayer, was resisted throughout the country.²⁰³ Often the criticism was based in claims that secularism would sap the moral foundations of the country, reducing it to the level of the Soviet Union. Americans, so the argument went, lived in a country "under God," where religious belief was respected.²⁰⁴ School prayer amendments were introduced annually for many years in Congress.²⁰⁵ Equally important, resistance occurred at all levels of government.²⁰⁶ The battles were primarily local, but they were nonetheless widespread and powerful. Especially in the South, *Engel* was decried from countless pulpits.²⁰⁷ The growing migration from the South to California, particularly the Los Angeles

199. CHARLES WESLEY LOWRY, *TO PRAY OR NOT TO PRAY! A HANDBOOK FOR STUDY OF RECENT SUPREME COURT DECISIONS AND AMERICAN CHURCH-STATE DOCTRINE* (1963); see also CHARLES E. RICE, *THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT* (1964); Elliot H. Kraut, *An Analysis of the School Prayer Controversy Since 1962 and Its Effect on the Balance Between Church and State* (1995) (unpublished Ph.D. dissertation, University of Connecticut) (on file with author).

200. *Spellman Renews Attack on Court's Decision*, N.Y. TIMES, June 28, 1962, at 17 (internal quotation marks omitted).

201. Anthony Lewis, *Supreme Court Outlaws Official School Prayers in Regents Case Decision; Ruling is 6 to 1*, N.Y. TIMES, June 26, 1962, at 16 (quoting George Andrews of Alabama).

202. Charles Mohr, *Goldwater Hits U.S. Moral "Rot,"* N.Y. TIMES, Oct. 11, 1964, at 76.

203. Bruce J. Dierenfield, *Secular Schools? Religious Practices in New York and Virginia Public Schools Since World War II*, 4 J. POL'Y HIST. 361 (1992); H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. POL. Q. 189 (1968).

204. See William M. Beaney & Edward N. Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L. 475 (1964).

205. See, e.g., *Hearings Before the H. Comm. on the Judiciary II. of Reps. on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools*, 88th Cong., 2d Sess. (1964); *Amendment Sought on School Prayers*, N.Y. TIMES, Sept. 11, 1963, at 26.

206. See, e.g., Robert D. Smith, *Religion and the Schools: The Influence of State Attorneys General on the Implementation of Engel and Schempp*, 8 S.Q. 221 (1970).

207. George Marsden, *The Sword of the Lord: How "Otherworldly" Fundamentalism Became a Political Power*, 12 BOOKS & CULTURE 16 (2006).

area, carried resistance westward.²⁰⁸ From these churches, supporters of Goldwater's 1964 presidential campaign and Ronald Reagan's 1966 gubernatorial campaign painted the ban as the key to moral relativism, the erosion of patriotism, and the sexual revolution.²⁰⁹ The new threat emanated from Washington, not Rome, and it wore judicial rather than clerical garb.

The Catholic Church quickly and forcefully condemned the prayer decision.²¹⁰ Cardinal Spellman, long the sparring partner of POAU and its supporters, said that "America ha[d] surely traveled far from the ideals of her founding fathers" when the Supreme Court held that "the prayerful mention of God's holy name" violated the Constitution.²¹¹ Bishop Fulton Sheen, famous as a television personality for his wildly popular show *Life Is Worth Living* in the 1950s and 1960s, made the comparison between banning prayer and the atheism of the Soviet bloc: "Our schools are now officially put on the same level as the Communist schools. In neither may one pray; in neither may one acknowledge a Source whence came the liberties of the people."²¹²

As Pfeffer noted dryly, Catholics traditionally objected to religious exercises of all kinds in public schools.²¹³ Catholics opposed prayer and Bible reading in the nineteenth century because they objected to the unquestionably Protestant character of the underlying texts. In 1859, a young Catholic student at the Eliot School in Boston was whipped until he fainted for refusing to recite the Ten Commandments from the King James Bible.²¹⁴ By the mid-twentieth century, however, concern over secularism, as well as the favorable light the ban shed on parochial schools, outweighed lingering memories of

208. LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 149–63, 225–37 (2001); Kraut, *supra* note 199.

209. See MCGIRR, *supra* note 208, at 159–60.

210. Paul Hofmann, *Vatican Regrets Ruling on Prayer*, N.Y. TIMES, July 22, 1962, at 36.

211. Lewis, *supra* note 201; accord Spellman *Renews Attack on Court's Decision*, *supra* note 200.

212. *Black Monday*, BINGHAMTON PRESS, July 22, 1962, at 6 (quoted in Dierenfield, *supra* note 203, at 369).

213. LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 235 (rev. ed. 1967).

214. 2 ROBERT H. LORD ET AL., *HISTORY OF THE ARCHDIOCESE OF BOSTON: IN THE VARIOUS STAGES OF ITS DEVELOPMENT, 1604–1943*, at 585–602 (1944); Michael Grossberg, *Teaching the Republican Child: Three Antebellum Stories About Law, Schooling, and the Construction of American Families*, 1996 UTAH L. REV. 429, 454–55.

prejudice and conflict.²¹⁵ For Catholic leaders advocating support for parochial schools, prayer was a sidebar.²¹⁶

Leading Protestants were divided, with the opinions drawing more support from the elite, but the response was overwhelmingly negative among the people.²¹⁷ Even Congregationalists such as Union Theological Seminary Professor Roger Shinn "question[ed] the wisdom of this absolute prohibition."²¹⁸ Longtime POAU supporters—including the National Association of Evangelicals, the evangelist Bill Graham, and the Episcopal Bishop of San Francisco—also condemned the Court.²¹⁹ POAU, the AJC, the ACLU, and the Unitarian Universalists stood against the tide of condemnation, but they were in a small minority nationwide. Of them all, POAU was the most unexpected and unlikely supporter of the ban: it was torn apart by its decision to support the Supreme Court decisions.²²⁰

Most important was the disintegration of a unified Protestant approach to the Constitution, caused in part by POAU's own agenda. They were extraordinarily successful in purging "sectarianism," yet they traditionally turned a blind eye to generically Protestant religious practices in public schools. The organization had worked long and hard, stressing the differences between public and parochial schools, and harping on the sectarian nature of the latter. Such an emphasis inevitably drew attention to the religious dimensions of public education itself. Widespread practices in public schools, such as Bible reading and prayers, were backlit by court decisions that held that government may not fund openly religious education. In this light, POAU looked like a traitor to much of its own constituency. The disintegration of the Protestant coalition was gradual, and the battles

215. In 1953, Catholic and Jewish parents jointly challenged distribution of the Protestant Gideon's Bible in public schools, but withdrew from the case "after consultation with their priest . . . manifesting the change of position on the part of the Church." Leo Pfeffer, *Amici in Church-State Litigation*, 44 *LAW & CONTEMP. PROBS.*, Spring 1981, at 83, 96 (referring to *Tudor v. Board of Education*, 100 A.2d 857 (1953)).

216. Jeffries & Ryan, *supra* note 2, at 323-24; Pfeffer, *supra* note 215, at 96 (challenges to school prayer before *McCullum* were brought primarily by Catholic parents).

217. Compare, e.g., Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 *HARV. L. REV.* 143, 176 (1964), with MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 142-43, 146-47 (1965). See also Jeffries & Ryan, *supra* note 2, at 325-26.

218. Lewis, *supra* note 201; accord Helen Dewar, *Theologian Sees Public Revolt over School Prayer Ban*, *WASH. POST*, July 4, 1962, at A20 (quoting sociologist Will Herberg).

219. *Billy Graham Voices Shock over Decision*, *N.Y. TIMES*, June 18, 1963, at 27; C.P. Trussell, *Clergymen Split over Prayer Ban*, *N.Y. TIMES*, May 2, 1964, at 25; Wallace Turner, *Pike Sees U.S. "Deconsecrated" by Decision on School Prayer*, *N.Y. TIMES*, July 14, 1962, at 9.

220. See *supra* note 195 and accompanying text.

were often local, so it is easy to overlook how devastating it was to Protestants to have prayer excised from public schools.²²¹

In the South, POAU's traditional stronghold, the story of religious change emerges most starkly. From World War II to the early 1970s, the South went from a separate, self-identified, and even isolated region to a politically, culturally, and religiously integrated part of the nation.²²² As they confronted the broader society, especially as they absorbed the painful lessons in secularism from the hands of the Supreme Court, many Southern Protestants understood their religious culture was under siege. To preserve it, they forced themselves to enter a newly charged political atmosphere in which separation of church and state had become the enemy. As they grasped the potential for political organizing along religious principles and connected the battle for the schools to broader questions of family and sexuality by the 1970s, they met Catholics on the battlefield once again, but this time not as antagonists. In this key sense, the New Right was born in resistance to a blasphemous national government, exemplified by the nine old men in Washington who imposed godlessness on the entire country.

The story of the Southern Baptist Convention (SBC) illustrates the bitterness of the debate, and the ways that the school prayer decision became a catalyst for Protestant fission. Baptists, particularly Southern Baptists, had long been key members of POAU. They were there at the founding of the organization, had sustained it through its uncertain early days, and remained supporters throughout the 1960s.²²³ Initially, the Convention supported the result in *Engel*, primarily on the misunderstanding that the Court had prohibited only those prayers composed by the state. This interpretation was undermined by subsequent decisions; as a result, the Southern Baptists felt that the federal judiciary had betrayed the religious heritage that provided space for

221. Most historians of American religious conservatism, whose work has given us a rich picture of spiritual and social development, have only superficially treated the essential legal dimension of the battle against secularism and the political mobilization that accompanied it. See, e.g., ROBERT WILLIAM FOGEL, *THE FOURTH GREAT AWAKENING AND THE FUTURE OF EGALITARIANISM* (2000); GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* (2d ed. 2006); CHRISTIAN SMITH WITH MICHAEL EMERSON ET AL., *AMERICAN EVANGELICALISM: EM-BATTLED AND THRIVING* (1998).

222. See generally NANCY TATOM AMMERMAN, *BAPTIST BATTLES: SOCIAL CHANGE AND RELIGIOUS CONFLICT IN THE SOUTHERN BAPTIST CONVENTION* 57–59 (1990); RANDALL BALMER, *MY EYES HAVE SEEN THE GLORY: A JOURNEY INTO THE EVANGELICAL SUBCULTURE IN AMERICA* (2000); WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* (1996); Marsden, *supra* note 207, at 16–17.

223. MORGAN, *supra* note 176, at 130.

voluntary prayer within the school day.²²⁴ The SBC's position on separation of church and state was revolutionized as this painful lesson sunk in, and the SBC transformed into an opponent of POAU. The process was long and drawn out, yet in the life of the Baptist Churches in America, the change was precipitous.

In 1979, the SBC was finally transformed by what is known as the "conservative takeover" by those who favored a strict doctrine of biblical inerrancy and patriarchal authority. One perceptive critic has speculated that the emphasis on traditional authority and even inerrancy was in part a reaction "to the disturbing, revolutionary decisions of the Supreme Court under Chief Justice Earl Warren."²²⁵ The cultural revolution that so disturbed conservative Protestants in the 1960s and early 1970s was enabled by Supreme Court decisions that supported secularism and its challenges to parental authority and traditional sexuality. The SBC formally endorsed a school prayer amendment to the Constitution in 1982, becoming the first denomination to do so.²²⁶ As one delegate put it, "The atheists, humanists and secularists are against prayer in schools, and that's not the company we need to be keeping."²²⁷ Another called the ban on prayer a vital "step in the demoralizing of America."²²⁸ Charges that secularism and communism went hand in hand were a constant refrain.

The Supreme Court's prayer and Bible reading decisions had other unanticipated and even unwelcome effects for some who fell on the "liberal" side of the new divide: they brought many Catholics and conservative Protestants closer together in their outrage. *Engel* and *Schempp* created a new fault line when Catholics, who had long complained that reading the King James Bible was hardly an ecumenical approach to religion, rallied around the concept of prayer as key to education in a democracy.²²⁹

224. See, e.g., Ronnie Prevost, *SBC Resolutions Regarding Religious Liberty and the Separation of Church and State (1940-1997): A Fundamental Shift*, 34 BAPTIST HIST. & HERITAGE 73 (1999).

225. DAVID T. MORGAN, *THE NEW CRUSADES, THE NEW HOLY LAND: CONFLICT IN THE SOUTHERN BAPTIST CONVENTION, 1969-1991*, at 46 (1996); accord CARL L. KELL & L. RAYMOND CAMP, *IN THE NAME OF THE FATHER: THE RHETORIC OF THE NEW SOUTHERN BAPTIST CONVENTION* 50-62 (1999).

226. AMMERMAN, *supra* note 222, at 72-125; see also BARRY HANKINS, *UNEASY IN BABELON: SOUTHERN BAPTIST CONSERVATIVES AND AMERICAN CULTURE* 139-64 (2002); Charles Austin, *Baptist Meeting Backs School Prayer Amendment*, N.Y. TIMES, June 18, 1982, at B8.

227. Austin, *supra* note 226 (quoting the Rev. Morris Chapman of Wichita Falls, Tex.).

228. *Id.* (quoting Charles Stanley of Atlanta, Ga.).

229. SOBAUF, *supra* note 124, at 294-95; Ellis Katz, *Patterns of Compliance with the Schempp Decision*, 14 J. PUB. L. 396, 398 (1965).

To the chagrin of POAU, the wedge between Protestants was deep and long-lasting, eventually becoming the centerpiece of a division between "liberals" and "conservatives" (in its latest incarnation, the controversy over the words "under God" in the Pledge of Allegiance hammers home the rift). Those who opposed prayer in schools found themselves allied with liberals politically as well as religiously, embracing a pluralism forged by the most controversial religion cases since *Everson*.²³⁰

The turn to law thus had dire and unintended consequences. Over time, it propelled many traditional Protestants away from their long-standing embrace of separation of church and state, a doctrine that for Baptists, just to give one example, had ancient roots. The new divide galvanized a fresh phalanx of believers, as committed to the proposition that school prayer was vital to national flourishing as POAU had been convinced fifteen years earlier that aid to Catholic schools was the death knell of democracy. Almost overnight, Protestants were no longer "united" by a common vision; the very name of the organization harkened back to a more univocal (but undeniably dated) past.

POAU ossified over the 1960s. Blanshard left in 1963, taking his rhetorical fire with him into retirement. In October 1964, *Newsweek* ran a story headlined *POAU in Crisis*.²³¹ The story detailed the recent "defection" of long-time supporter Dr. Ellis Dana, who charged the group with prejudice. The ACLU appealed to other separationists who wanted to "wage the fight for their principles without overtones of anti-Catholicism."²³² A Methodist professor of church history in Chicago explained that "POAU is an illustration of Protestant culture lag."²³³ Critics said that the group depended ever more completely on "small-town, latter-day fundamentalism," despite Archer's claims that the group had always been controversial.²³⁴ He did admit that some of the group's pamphlets and circulars "seemed a little acidic" and that "[w]e probably use adjectives less and facts more."²³⁵

POAU morphed into Americans United (AU) in 1972, formally dropping the Protestant label. In practice, the group had used the Americans United name for several years and labored to shed its anti-Catholic skin. AU has embraced separation of church and state in a different religious climate, yet in ways that reflect and sustain the divi-

230. See Jeffries & Ryan, *supra* note 2, at 327-28.

231. *POAU in Crisis*. NEWSWEEK, Oct. 5, 1964, at 102, 103.

232. *Id.* at 102.

233. *Id.* (internal quotation marks omitted).

234. *Id.* at 103.

235. *Id.*

sive atmosphere surrounding the law of religion.²³⁶ By the late 1970s, AU monitored the new "religious right," including many evangelical Protestant groups that would formerly have been among POAU's supporters.²³⁷ Archer retired in 1976, and died in November 2002.²³⁸ AU is liberal, ecumenical in the broadest sense, deeply involved in lobbying and outreach, and cooperates consistently with the AJC and ACLU in lawsuits and amicus briefs.²³⁹

As historians know, there is never a unitary cause for any major event in the life of a person or an institution. Other factors played a smaller part in the erosion of POAU's position. Desegregation eroded the commitment of many white Southerners to public schools; the school prayer decisions confirmed that the Court was out to redesign the entire educational system. The election of John Kennedy, a Catholic yet determinedly secular President, undermined claims that one could not be a good American and a Catholic. Vatican II and the embrace of the principle of religious liberty by the Catholic Church, as well as the Church's role in the Civil Rights Movement in the late 1950s and early 1960s, showed that it was not the reactionary monolith painted by Blanshard.²⁴⁰ In the late 1960s, when one in three parochial schools closed in a three-year period, it became increasingly difficult to argue that Church leaders stalked the halls of government with the goal of taking over, rather than desperately seeking the help they so obviously needed just to survive.²⁴¹

In some ways, however, the issues remain familiar, if reconfigured to suit the new religious times. The child-benefit theory has reappeared, sustaining new ways to give schoolchildren access to religious as well as secular education.²⁴² Citizens for Educational Freedom, founded in 1959 to combat the "virtual monopoly" of public schools, and supported now by the Heritage Foundation, the Heartland Insti-

236. See, e.g., *THE BEST OF CHURCH AND STATE 1948-1975*, at 62-69 (Albert J. Menendez ed., 1975).

237. ARCHER & MENENDEZ, *supra* note 107, at 242-48. For contemporary perspectives on AU and the "religious right," see Americans United, Religious Right Research, http://www.au.org/site/PageServer?pagenameresources_religiousright (last visited June 8, 2007).

238. *Glenn Archer* (Obituary), *CHRISTIAN CENTURY*, Dec. 18, 2002, at 17.

239. See, e.g., Americans United for Separation of Church and State, http://www.au.org/site/PageServer?pagenamename=legal_litigation (last visited June 8, 2007). Current membership is estimated at 75,000.

240. See Ronald James Boggs, *Culture of Liberty: History of Americans United for Separation of Church and State, 1947-1973*, at 697-727 (1978) (unpublished Ph.D. dissertation, Ohio State University) (on file with author).

241. MCGREEVY, *supra* note 5, at 236-57; JOHN T. MCGREEVY, *PARISH BOUNDARIES: THE CATHOLIC ENCOUNTER WITH RACE IN THE TWENTIETH-CENTURY URBAN NORTH* 236-38 (1996); SORALU, *supra* note 124, at 320-33; cf. FEY, *supra* note 105, at 28-50.

242. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

tute, and the National Catholic Education Association, has claimed victory. In the early 1960s, the group's members were "estimated by its leaders to be 90 per cent Roman Catholic."²⁴³ They claimed that aid for parochial schools was the only way to counterbalance the government's discrimination against the constitutionally protected right to "turn to a parochial school."²⁴⁴

Like AU, this group has sloughed off its original one-religion identity. Today it frames the argument differently, primarily in terms of tuition vouchers that promote "school reform through competition," as well as constitutional freedom: "Parents defend religious liberty for all when they work to make it possible for all parents to have the choice of placing their children in God-centered schools rather than being assigned to a secular public school."²⁴⁵

AU counters stalwartly that aid to religious schools disguised as voucher programs is unconstitutional, still battling against *Everson* and aid to religious schools in any form.²⁴⁶ However constant the rhetoric, the world in which POAU fought against captive schools in the name of democracy has disappeared. Indeed, POAU and its allies did not achieve the separation of church and state, yet they were an integral part of another division—the separation of conservative from liberal Protestants.

V. CONCLUSION

This story of legalization and resistance to law in the post-World War II era and beyond highlights the importance of understanding religious and legal history as entangled, rather than separate. The resolution of an Establishment Clause question creates new connections between believers and government, even when the decision is a "separationist" one. Constitutional historian Mark DeWolfe Howe offered this observation in 1965: "Among the stupendous powers of the Supreme Court . . . there are two which in logic may be independent and yet in fact are related. The one is the power . . . to interpret history. The other is the power . . . to make it."²⁴⁷ We have long recognized that courts have been integral to the structure of American political and economic life, yet the connections to religious life have been elu-

243. Austin C. Wehrwein, *Aid for Parents of Pupils Sought*, N.Y. TIMES, Apr. 8, 1962, at 67.

244. William H. Slavick, Letter to the Editor, *Private School Aid Wanted*, N.Y. TIMES, July 15, 1961, at 18.

245. Citizens for Educational Freedom, *America's Voice for School Choice Since 1959* (on file with author).

246. Rob Boston, *Supreme Mistake*, CHURCH & ST., July-Aug. 2002, at 4.

247. HOWE, *supra* note 217, at 3.

sive. Historian Perry Miller, who admired the work of Paul Blanshard, conceived of law and religion as so distinct that they operated on entirely different planes.²⁴⁸ His conceit, itself a comfortable version of separationist theory, has obscured a far more integrated and messy history. Appreciation for the ways that believers and their faith have been affected by legal change has been all too rare.²⁴⁹

Because we have overlooked the ways that law, especially Supreme Court decisions, makes history in the lives of believers, we have missed critical trajectories in religious life. The creation and then the work of an organization of dedicated believers—POAU—was designed to repair the broken wall of separation in the interest of Protestant interpretations of religious liberty. What they found was that separation born of the fight to preserve the integrity of public education created a new impetus toward secularism. We knew that American Protestants splintered in the late twentieth century, and that important new coalitions between conservative Protestants and Catholics were one outgrowth of this reformation. And we knew that liberal Protestants found themselves aligned with many Jews and secularists. But the underpinnings were elusive. The “restructuring” of American religion along these broad and deep lines has not previously been connected to local conflicts and captive school litigation, only because historians of law have been so preoccupied with the Supreme Court.²⁵⁰ Religious historians, who have made valuable contributions to American political history in the post-War period, have overlooked the growth and importance of law in religious life. Recovery of this rich and hard-fought contest over captive schools illustrates the value of recognizing the many ways the law and religion have become intertwined over the past sixty years. The results, while unexpected to participants, teach us to appreciate how grass roots activism has set the stage for key changes in law and religion at every level.

248. PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1965).

249. One exception is the work of Professor Winnifred Fallers Sullivan. See WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005).

250. I take the word “restructuring” from the seminal work of Professor Robert Wuthnow. WUTHNOW, *supra* note 6.