GOD AND THE WARREN COURT: THE QUEST FOR "A WHOLESOME NEUTRALITY"

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I. INTRODUCTION

In 1962, Representative Alvin O'Konsinski (R. Wis.) exclaimed, "We ought to impeach these men in robes who put themselves up above God."[1] The target of his outrage was the Supreme Court, headed by Chief Justice Earl Warren. The reason for his outburst was the Warren Court's decision declaring that the Constitution forbade praying in public schools.[2] That ruling, coupled with another decision one year later, which held that classroom Bible reading also violated the First Amendment's ban on the establishment of religion,[3] "probably generated as much discussion, controversy, and criticism of the Court as its school desegregation, legislative reapportionment, and police interrogation decisions."[4] Despite the controversy aroused by the Warren

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[1] JOHN HERBERT LAUBACH, SCHOOL PRAYERS: CONGRESS, THE COURTS, AND THE PUBLIC 2 (1969).

[2] *See* Engel v. Vitale, 370 U.S. 421 (1962).

[3] *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[4] Paul G. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968). While controversial, Dean John Sexton has insisted that the

Court, these rulings have survived numerous Congressional efforts to overturn them by amending the Constitution.[5] Although the opposition was widespread and vocal, the decisions of the theoretically unrepresentative Supreme Court reflected the popular will better than did the complaints of its critics in the political branches of the government.[6] The Court outraged those who wanted government to promote religion, but in a nation that was becoming increasingly diverse and religiously divided, there was no consensus as to what faith the state should foster. Ultimately, the only policy that could command the support of a majority of the American people was governmental neutrality toward religion. That is what the Warren Court, not always with complete success, sought to achieve.

Part II of this article outlines the religious views of the Justices who comprised the Warren Court. Part III discusses the religious divisions within the nation to which they addressed their Free Exercise and Establishment Clause decisions, while Part IV sketches the development of the constitutional law of church-state relations down to the time when Earl Warren became Chief Justice in 1953. This article next discusses the Warren Court's Sunday closing law decisions and the reaction provoked by those rulings, which upheld business regulations that benefited Christians while burdening Jews and other Sab-

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Warren Court's religion clause decisions were not doctrinally important. *See* John Sexton, *The Warren Court and the Religion Clauses of the First Amendment*, *in* THE WARREN COURT: A RETROSPECTIVE 104 (Bernard Schwartz ed., 1996). Dean Sexton stated, "Quite simply, the Warren Court cases on church and state that were noteworthy political and social events added little to the jurisprudence of the First Amendment's Religion Clauses." *Id.* at 104. Sexton argued that

> [these decisions] cannot be described as pathbreaking. Only *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)] can be viewed as a seminal case, and then only if one shares my view that the Supreme Court's earlier decisions in *Schneider v. New Jersey*, [319 U.S. 105 (1943)], *Cantwell v. Connecticut*, [310 U.S. 296 (1940)], and *Murdock v. Pennsylvania* [308 U.S. 147 (1939)] did not establish a right of free exercise with sufficient doctrinal clarity. Moreover, even if one does view *Sherbert* as seminal, its doctrinal power and ultimate influence are open to serious question.

Id. at 105. Although this author is inclined to view the Warren Court's religion clause decisions as somewhat more doctrinally significant than Sexton considers them to be, this article does not address that issue.

[5] *See infra* notes 332-390 and accompanying text.

[6] The best evidence of this is the failure of those critics to persuade Congress to pass a constitutional amendment overturning those decisions. *See infra* notes 332-390 and accompanying text.

batarians. It then examines in Part VI cases in which the Warren Court held that government could no longer be permitted to place those whose religious beliefs or practices set them apart from a majority of Americans at a disadvantage. The article will demonstrate that these decisions reflected the reasoning underlying the prayer and Bible reading rulings: a conviction that government must be entirely neutral toward religion. Part VII examines the Warren Court's rulings prohibiting religious exercises in public schools. Part VIII explains that despite the outrage provoked by those decisions, all proposals to overturn them by constitutional amendment failed. It argues that this happened, not because neutrality was a popular concept, but because, although most Americans favored some sort of governmental support for religion, they could not agree upon specifics. As a principle, neutrality was flawed, but the type of cases that would reveal its weaknesses did not reach the Supreme Court until the eve of Chief Justice Warren's retirement in 1969. As Part IX explains, although disagreeing among themselves about precisely what neutrality required, the members of the Warren Court continued until 1969 to make it their objective. Until the very end they implemented, out of conviction, a policy the nation accepted out of necessity.

II. THE JUSTICES' RELIGIOUS VIEWS

The Warren Court's decisions interpreting the First Amendment were not, as critics often charged, the product of hostility toward religion. In his memoirs, Chief Justice Warren wrote, "The majority of us on the Court were religious people . . . ."[7] Although most were not active churchmen, Justice Tom Clark was. Raised in an Episcopalian family, he became a Presbyterian as an adult.[8] Justice Clark was an active Christian, who viewed himself as a man of faith.[9] Justice William J. Brennan, Jr., a Catholic, attended mass regularly.[10] The Chief Justice, on the other hand, was "[a]t best a nominal Baptist."[11] Jus-

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[7] EARL WARREN, THE MEMOIRS OF EARL WARREN 316 (1977).

[8] *See* Ellis M. West, *Justice Tom Clark and American Church-State Law*, 54 J. OF PRESBYTERIAN HIST. 387, 387-88, 400 (1976).

[9] *See id.* at 400. Justice Clark's thinking about church-state relations resembled that of contemporary Presbyterians. *See id.* at 404 n.89.

[10] *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 9 (1998). According to Horwitz, the Eisenhower administration, which appointed Justice Brennan because Francis Cardinal Spellman was pressuring the administration to nominate a Catholic, checked with his parish priest to make sure he attended Sunday Mass regularly before announcing the appointment. *See id.*

[11] ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 387 (1997).

tice Hugo Black, who had taught Sunday school at the First Baptist Church in Birmingham, Alabama as a young man, had stopped attending church services by the time of his appointment to the Supreme Court in 1937.[12] Likewise, Justice William O. Douglas, the son of a Presbyterian minister who had gone to church three times per week as a teenager, eventually began to question the virtues of organized religion and to entertain doubts about such important articles of Christian faith as the virgin birth and the resurrection of Jesus.[13] The wilderness became the place of worship for this devoted outdoors man.[14] Justice Abe Fortas had been raised as an Orthodox Jew, but even during the most religious period of his life, he viewed Judaism as primarily a matter of ritual, and it "never had much spiritual meaning for him."[15] Justice Felix Frankfurter was descended from a long line of rabbis, but his father had abandoned religion for business after suffering a crisis of faith during his last year of religious studies.[16] Justice Frankfurter was an agnostic, and his only involvement in Jewish affairs was his membership in the American Jewish Committee.[17]

Yet, while many members of the Warren Court had fallen away from organized religion, they were not hostile to it. Both Justice Black and Chief Justice Warren sent their children to Sunday school.[18] Justice Black viewed the Scriptures as a source of moral guidance, and he instructed his son to study them carefully.[19] The Chief Justice also viewed religion as a valuable source

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[12] *See* Barbara A. Perry, *Justice Hugo Black and the Wall of Separation Between Church and State*, 31 J. OF CHURCH & ST. 55, 57-59 (1989). His biographer, Roger K. Newman, reports that Justice Black and his wife, Elizabeth, did sometimes attend services at All Souls Unitarian Church in the 1960's. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 521 (1994). Newman adds, however, "A more formally irreligious man would have been hard to find." *Id.*

[13] *See* JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 23, 44-45 (1980).

[14] *See id.* at 44.

[15] LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 8 (1990).

[16] *See* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 8 (1982).

[17] *See id.* at 131.

[18] *See* CRAY, *supra* note 11, at 387; Perry, *supra* note 12, at 58.

[19] *See* Perry, *supra* note 12, at 59.

of ethical guidance, and he kept a Bible beside his bed.[20] Chief Justice Warren once said in a candid interview published after his death, "A person who has no religion of any kind is almost a lost soul."[21]

III. A RELIGIOUSLY DIVIDED NATION

Although the Warren Court was hardly hostile to religion, the abuse it received for its rulings, which prevented public schools from inculcating spiritual values, was hardly surprising. By almost any measure, when Earl Warren became Chief Justice in 1953, the United States was a very religious nation. Bible sales had escalated dramatically since 1949.[22] Church membership rose from 57% of the population to 64% during the 1950's.[23] By 1958, Americans were spending nearly one billion dollars per year building new churches, nearly twice the amount spent on public hospital construction.[24] In 1954, 96% of those interviewed by the Gallup Poll said they believed in God.[25] One decade later, 63% claimed to pray frequently while only 6% admitted never praying at all.[26] Even popular culture reflected the public's religious bent. A novel about Jesus, *The Robe*, made the fiction best-seller list in 1953, and five of the six non-fiction best sellers also had religious themes.[27] One of the country's best-liked television personalities during the 1950's was Bishop Fulton J. Sheen, whose "Life is Worth Living" show often outdrew Milton Berle's popular comedy program.[28]

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[20] *See* CRAY, *supra* note 11, at 387. Chief Justice Warren and his wife, Nina, "sent their children to Sunday school at the local Baptist Church, not for doctrinaire purposes, but to master the precept that 'if one believes in the principles learned through the Gospel and tries to abide by them, it is bound to affect one's actions and reactions.'" *Id.* at 62.

[21] *Id.*

[22] *See* JAMES GILBERT, ANOTHER CHANCE: POSTWAR AMERICA, 1945-1958 238 (1981).

[23] *See id.*

[24] *See id.*

[25] *See* 2 Gallup Poll at 1293 (1972). This poll was taken on December 18, 1954. *See id.*

[26] *See* 3 Gallup Poll at 1863 (1972). This poll was taken on February 7, 1964. *See id.*

[27] *See* GILBERT, *supra* note 22, at 238.

[28] *See id.*

Although most Americans were religious, their religious beliefs and affiliations divided rather than united them. Indeed, theologian Will Herberg argued that religion was replacing nationality, language, and culture as America's chief basis of social differentiation.[29] While ethnic intermarriages increased, religious intermarriages did not, and religion was often the most obvious basis of social cleavage in the burgeoning suburbs.[30] For example, emigrants from ethnic urban neighborhoods, where their faiths had been dominant, clung tightly to the new churches and synagogues they founded in suburban areas where they constituted a minority.[31] Catholic and Protestant children attended different schools, played on different teams, attended different social functions, and generally kept their distance from one another.[32] As adults, members of these two religious groups sometimes joined the same country clubs, but they golfed and developed close friendships mainly with those who shared their own religious backgrounds.[33] The wall between Gentiles and Jews was even higher.[34] Most country clubs catered predominantly to one religion or the other, and friendships between Christians and Jews rarely matched, in warmth, intimacy, and trust, those with other members of their own groups.[35] A 1958 study verified this phenomenon, finding that Jews and Gentiles were distinctly uncomfortable in each others' presence.[36]

The 1960 presidential campaign highlighted the seriousness of the religious divisions in America. John F. Kennedy was only the second Catholic nominated for President by a major party, and the first since Al Smith, whose Catholicism had contributed significantly to his overwhelming defeat in 1928.[37]

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[29] *See* RICHARD POLENBERG, ONE NATION DIVISIBLE: CLASS, RACE, AND ETHNICITY IN THE UNITED STATES SINCE 1938 146-47 (1980) (citing WILL HERBERG, PROTESTANT-CATHOLIC-JEW (1955)).

[30] *See id.* at 146.

[31] *See id.* at 148-49.

[32] *See id.* at 147.

[33] *See id.* at 147-48.

[34] *See id.* at 147.

[35] *See id.* at 148.

[36] *See id.* at 147.

[37] *See* DAVID BURNER, THE POLITICS OF PROVINCIALISM: THE DEMOCRATIC PARTY IN TRANSITION, 1918-1932 217-22 (1967). *But cf.* MICHAEL E. PARRISH, AMERICA IN PROSPERITY AND DEPRESSION, 1920-1941 214-16 (1992) (arguing that Smith gained as well

Some Alabama Methodists claimed Senator Kennedy's candidacy was the product of political machinations by the Papacy.[38] Sharing their fear that a Catholic President would be controlled by the Church, and would, therefore, give government money to Catholic schools and other institutions, Norman Vincent Peale and other Protestant clergy and laymen organized the National Conference of Citizens for Religious Freedom.[39] The approximately nine and one half million member Southern Baptist Convention also mobilized to defeat Kennedy.[40] A Baptist publication, the *Baptist Standard*, editorialized that a Catholic President would not be free to exercise his own judgment, an argument Kennedy soon realized he needed to answer if he did not wish to share Smith's fate.[41]

Ignoring warnings from most of his advisors, he accepted an invitation to address the Greater Houston Ministerial Association on September 12, 1960.[42] Kennedy assured a hostile crowd that he favored a United States that was officially neither Catholic, Protestant, nor Jewish, and declared, "I believe in an America, where the separation of church and state is absolute-where no Catholic prelate would tell the President (should he be Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote."[43] His speech was well received, and the next day, Senator Kennedy's Republican opponent, Vice-President Richard Nixon, agreed that religious issues should be eliminated from the campaign.[44]

Nevertheless, religion significantly influenced the outcome of the election.[45] Had he been a Protestant Democrat, Kennedy would have received about half

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as lost votes because of his Catholicism and that his defeat was due mainly to other factors).

[38] *See* POLENBERG, *supra* note 29, at 165.

[39] *See* ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960'S 22 (1984).

[40] *See id.*

[41] *See* POLENBERG, *supra* note 29, at 165.

[42] *See* MATUSOW, *supra* note 39, at 22.

[43] *Id.* at 23 (footnote omitted).

[44] *See id.*

[45] *See* POLENBERG, *supra* note 29, at 167.

of the Protestant vote; instead, he received 38%.[46] On the other hand, a Protestant Democrat would have received only an estimated 63% of the Catholic vote,[47] while Kennedy received 80%.[48] Since Protestant defections occurred mainly in Midwestern farm states, which Kennedy figured to lose anyway, and in the South, where the Democrats had a huge majority, they did not harm greatly his chances of winning the election.[49] The extra Catholic votes he garnered, on the other hand, were concentrated in hotly contested Northern industrial states, such as New Jersey, Illinois, and Michigan.[50] Thus, the religious divisions in the country contributed significantly to Kennedy's razor-thin victory over Nixon.[51]

Unfortunately, the election of America's first Catholic President did not put an end to political conflict based on religion.[52] During Kennedy's presidency, most of the battles—over issues such as the liberalization of divorce laws and the proscription of birth control devices—were fought at the state and local level.[53] President Kennedy's efforts to enact federal aid to education, however, were thwarted by a dispute over whether parochial schools should receive government money.[54]

IV. THE INTERPRETATION OF THE RELIGION CLAUSES PRIOR TO THE WARREN COURT

A. EXTENT OF PROTECTION FOR RELIGIOUS MINORITIES

The religious divisions within American society and the conflicts among

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[46] *See id.* at 168.

[47] *See* MATUSOW, *supra* note 39, at 27.

[48] *See* POLENBERG, *supra* note 29, at 168.

[49] *See* MATUSOW, *supra* note 39, at 28.

[50] *See id.*

[51] *See* POLENBERG, *supra* note 29, at 168.

[52] *See id.* at 169.

[53] *See id.*

[54] *See id.* at 169-72.

religious groups that unsettled American politics necessarily affected judicial interpretation of the First Amendment's religion clauses. The Warren Court inherited from its predecessors a body of doctrine that forbade governmental interference with religious belief and safeguarded the right of even the most unpopular minorities to teach and preach what they believed. As it had been interpreted prior to 1953, however, the First Amendment did little to prevent any sect, or combination of sects, which commanded a political majority, from utilizing governmental institutions to promote its values and even its dogma.[55] In *Reynolds v. United States*,[56] the Court had announced that "Congress was deprived of all legislative power over mere opinion,"[57] but had gone on to hold that the national legislature could prohibit Mormons from practicing polygamy, even though that practice was part of their religion.[58] *Reynolds* allowed the country's Protestant majority to use the power of government to impose its cultural values on a religious minority.[59]

During the quarter century after 1920, the Supreme Court had extended somewhat greater constitutional protection to disfavored religious minorities. In *Meyer v. Nebraska*[60] and *Pierce v. Society of Sisters*,[61] the Court used substantive due process[62] to invalidate state laws that sought to destroy the paro-

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[55] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

[56] 98 U.S. 145 (1878).

[57] *Id.* at 164. Subsequently, in a ruling inconsistent with *Reynolds*' declaration that the First Amendment protected religious belief, the Court upheld an Idaho territorial statute requiring all voters to sign an oath swearing that they were not members of any organization that taught polygamy or celestial marriage. *See* Davis v. Beason, 133 U.S. 333, 348 (1890). As Professor Laycock has pointed out, "In effect, voters had to swear that they were not Mormons." Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 417 (1986).

[58] *See Reynolds*, 98 U.S. at 166.

[59] The *Reynolds* Court noted that polygamy had "always been odious among the northern and western nations of Europe." *Id.* at 164.

[60] 262 U.S. 390 (1923).

[61] 268 U.S. 510 (1925).

[62] "Substantive due process" is a doctrinal construct that had been employed mainly to hold unconstitutional economic regulations the Justices considered unreasonable. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 374-82 (5th ed. 1995).

chial schools operated by Lutherans and Catholics.[63] Between 1938 and 1953, the Court handed down a series of decisions protecting the sometimes aggressive proselytizing of the Jehovah's Witnesses.[64] In its most famous defense of the rights of this often vilified sect, the Court held in *West Virginia Board of Education v. Barnette*[65] that Jehovah's Witness children attending public schools could not be required to salute the American flag.[66] In *Barnette*, as in most Jehovah's Witness cases, however, the Court relied upon the First Amendment's guarantee of freedom of expression, rather than on its Establishment or Free Exercise of Religion Clauses.[67] Indeed, three years before *Barnette*, the Court held that the Free Exercise Clause did not give Jehovah's Witness students the right to refuse to salute the flag.[68]

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[63] *See generally* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994).

[64] *See* Fowler v. Rhode Island, 345 U.S. 67 (1953) (holding a prohibition on conducting religious services in public parks unconstitutional); Saia v. New York, 334 U.S. 558 (1948) (holding a municipal ordinance ban on loudspeakers unconstitutional); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a tax on literature distributed by Jehovah's Witnesses); Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating prohibitions on door-to-door solicitation); Cantwell v. Connecticut, 310 U.S. 296 (1940) (overturning breach of the peace conviction of a Jehovah's Witness who disseminated anti-Catholic propaganda in a Catholic neighborhood); Lovell v. City of Griffin, 303 U.S. 444 (1938) (holding an ordinance giving a municipal official excessive discretion to determine who might engage in soliciting unconstitutional). For further discussion of constitutional litigation involving the Jehovah's Witnesses, see MERLIN OWEN NEWTON, ARMED WITH THE CONSTITUTION: JEHOVAH'S WITNESSES IN ALABAMA AND THE U.S. SUPREME COURT, 1939-1946 (1995).

[65] 319 U.S. 624 (1943).

[66] *See id.* at 642.

[67] *See* Laycock, *supra* note 57, at 419-20. An important exception to the general pattern of reliance on free speech guarantees to protect Jehovah's Witnesses is *Cantwell v. Connecticut*, where the Court held for the first time that the Free Exercise Clause was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. 310 U.S. at 303.

[68] *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591-94, 600 (1940). The Court also ruled against Jehovah's Witnesses in several other cases. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court affirmed the conviction of a Jehovah's Witness who had cursed a police officer, holding that "fighting words," such as he had used, were not protected by the First Amendment's guarantee of freedom of speech. The Court also upheld the application of child labor laws to Jehovah's Witnesses who allowed their children to help distribute religious literature in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and restrictions on the sound level of loudspeakers in *Kovacs v. Cooper*, 336 U.S. 77 (1949). In *Poulos v. New Hampshire*, 345 U.S. 395 (1953), the Court held that it was constitutional to require persons who wished to conduct religious services in a public park to comply with a

B. THE ESTABLISHMENT CLAUSE

It was not until after Fred Vinson became Chief Justice of the United States[69] that the Court provided any explication of the Establishment Clause. When it finally spoke, the Court interpreted the Establishment Clause in a way that permitted government to assist religious groups. Speaking for the majority in *Everson v. Board of Education*,[70] Justice Black explained that the First Amendment's prohibition of the "establishment of religion" meant that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[71] Although he insisted the Court had erected a "wall of separation between church and state,"[72] it held that the Board of Education of Ewing Township, New Jersey had not breached that wall when it authorized the reimbursement of parents for the costs of transporting their children to private schools, including parochial ones.[73] Although conceding that this subsidy helped Catholic students get a religious education that some of their parents might not otherwise have been able to afford, Justice Black insisted it was a neutral safety measure that benefited all children, and was, therefore, constitutional.[74]

One year later, however, the Court held in an 8-1 decision in *McCollum v. Board of Education*,[75] that a Champaign, Illinois "released time" program violated the Establishment Clause.[76] Under this program, teachers employed by religious groups would come into public school buildings twice per week during regular school hours to provide religious instruction to those students

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nondiscriminatory licensing requirement.

[69] Fred Vinson was Chief Justice of the Supreme Court from 1946 to 1953. *See generally* MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953 148-263 (1997).

[70] 330 U.S. 1 (1947).

[71] *Id.* at 15. For a detailed discussion of Justice Black's position in this and subsequent cases, as well as his religious background, see Perry, *supra* note 12, at 55-72.

[72] *Everson*, 330 U.S. at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[73] *See id.* at 17.

[74] *See id.* at 17-18.

[75] 333 U.S. 203 (1948).

[76] *See id.* at 212.

who desired it.[77] Although Justice Black refused to forsake *Everson*, his opinion for the Court effectively abandoned that case's balancing approach to the Establishment Clause, taking the absolutist position that the "wall between Church and State . . . must be kept high and impregnable."[78] The Court held that the First and Fourteenth Amendments forbade states "to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals. . . ."[79]

McCollum triggered an outraged reaction by religious groups, almost all of which operated some form of released time program.[80] To quiet this furor, the Court in *Zorach v. Clauson*[81] upheld a New York City plan under which students were allowed to leave school grounds during the school day to receive religious instruction or attend devotional exercises at religious centers.[82] Justice Douglas, who would later join Justice Black in the absolute separationist camp, wrote the opinion supporting what Professor Melvin Urofsky has characterized as the Court's first "accomodationist" decision.[83] Observing that "[w]e are a religious people whose institutions presuppose a Supreme Being,"[84] Justice Douglas emphasized that the Constitution did not require government hostility toward religion or a callous indifference to religious groups.[85] He believed that separation of church and state was a matter of degree.[86] In a dissenting opinion, Justice Black accused the majority of abandoning the neutrality toward religion that the First Amendment required.[87] He opined that "[i]t is only by wholly isolating the state from the religious sphere and com-

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[77] *See id.* at 207-09.

[78] *Id.* at 212; *see also* UROFSKY, *supra* note 69, at 233, 235 (characterizing Justice Black's change of position between *Everson* and *McCollum* as moving from absolutism to balancing).

[79] *McCollum*, 333 U.S. at 211.

[80] *See* UROFSKY, *supra* note 69, at 236.

[81] 343 U.S. 306 (1952).

[82] *See id.* at 314.

[83] *See id.* at 308; *see also* UROFSKY, *supra* note 69, at 236-37.

[84] *Zorach*, 343 U.S. at 313.

[85] *See id.* at 314.

[86] *See id.*

[87] *See id.* at 317.

pelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained."[88]

V. THE SUNDAY CLOSING CASES

A. SUNDAY CLOSING LAWS

The Warren Court eventually adopted the neutrality view, but only after holding that laws requiring all businesses to close on the Christian Sabbath were constitutional.[89] The observance of Sunday as a day of rest was probably accepted in more nations "than any other custom derived from Christianity."[90] In America, statutes dictating that worldly activities must cease on Sundays date back to the colonial period.[91] During the Nineteenth Century, authorities largely ceased to enforce them, but after World War II, the development of Sunday merchandising reawakened interest in these laws.[92] In the 1950's, forty-one of the forty-four states with comprehensive restrictions on Sunday activity amended their statutes.[93] While legislatures were adding new prohibitions, groups that observed a different Sabbath, such as Jews[94] and Seventh-day Adventists,[95] sought exemptions from the Sunday closing laws.[96] By the early 1960's, twenty-one states granted those whose religion required them to refrain from work on Saturday permission to work on Sunday instead.[97] In

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[88] *Id.* at 319.

[89] *See infra* notes 95-165 and accompanying text.

[90] ROBERT F. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 203 (1963).

[91] *See* McGowan v. Maryland, 366 U.S. 420, 433 (1961).

[92] *See* Sister Candida Lund, *The Sunday Closing Cases*, *in* THE THIRD BRANCH OF GOVERNMENT: 8 CASES IN CONSTITUTIONAL POLITICS 277 (C. Herman Pritchett & Alan F. Westin eds., 1963).

[93] *See id.*

[94] In 1963, there were five and one-half million Jews in America. *See* DRINAN, *supra* note 90, at 204.

[95] In 1960, there were 330,000 adult Seventh Day Adventists. *See id.*

[96] *See id.*

[97] *See id.* at 205.

many states, however, the exemption did not extend to retail merchants.[98] Moreover, several states with substantial Sabbatarian populations, such as New York, Massachusetts, New Jersey, and Pennsylvania, refused to grant such relief.[99] In 1958, at the urging of the Catholic weekly periodical, *America*, the New York legislature rejected the Asch-Rosenblatt Bill,[100] which would have allowed merchants in New York City, who refused to work on Saturday for religious reasons, to conduct business as usual on Sunday.[101] Shortly after this defeat, the Sabbatarians decided to take their cause to the Supreme Court.[102]

B. THE WARREN COURT'S DECISIONS

Although the Warren Court had declined to consider the Sabbatarian issue throughout the 1950's, in December of 1960, it agreed to hear oral argument on the validity of the Maryland, Pennsylvania, and Massachusetts Sunday closing statutes.[103] All three cases arose out of the attempted enforcement of Sunday closing laws against retail merchants. *McGowan v. Maryland*[104] involved an appeal brought by seven employees of a discount department store who had been convicted for making sales on Sunday.[105] *Two Guys from Harrison-Allentown, Inc. v. McGinley*[106] was a suit brought to enjoin enforcement of the Pennsylvania statute, filed by another discount house, whose salespersons had been repeatedly prosecuted for conducting business on Sundays.[107]

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[98] *See id.*

[99] *See id.*

[100] *See* S. 5673, 181st Leg., Jan. Sess. (N.Y. 1958) (Rosenblatt version); A. 533, 181st Leg., Jan. Sess. (N.Y. 1958) (Asch version).

[101] *See* DRINAN, *supra* note 90, at 206.

[102] *See id.*

[103] *See* Phillip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 83 (1961). The cases were: *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 458 (1961); *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961).

[104] 366 U.S. 420 (1961).

[105] *See id.* at 422-23.

[106] 366 U.S. 582 (1961).

[107] *See id.* at 585-86.

The Lehigh County district attorney had moved against Two Guys under pressure from one of its principal competitors.[108] The origins of *Gallagher v. Crown Kosher Super Market*[109] were similar. In *Gallagher*, a supermarket owner sued to enjoin enforcement of the Massachusetts blue law[110] after the Springfield police arrested his partner at the urging of proprietors of small kosher butcher shops, threatened by competition from their establishment.[111] Those challenging the Sunday closing laws in Massachusetts, as well as the Philadelphia clothing and home furnishing merchants who attacked the Pennsylvania statute in *Braunfeld v. Brown*,[112] were Orthodox Jews, who contended that the blue laws interfered with the free exercise of their religion.[113] In *McGowan*, the appellants also claimed their free exercise rights had been violated.[114] All four cases raised Establishment Clause challenges to state blue laws,[115] as well as claims that these laws violated the Equal Protection Clause by prohibiting some, but not all, sales on Sundays.[116]

The equal protection argument did not impress any member of the Court. Chief Justice Warren, who spoke for the majority in *McGowan* and *Two Guys* and for a plurality in *Crown Kosher* and *Braunfeld*, rejected it.[117] So did Justice Frankfurter, who, joined by Justice John Marshall Harlan, concurred in all four cases.[118] Justices Brennan and Potter Stewart, who dissented in *Braunfeld*

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[108] *See* Lund, *supra* note 92, at 283-85.

[109] 366 U.S. 617 (1961).

[110] "Blue laws" are statutes regulating entertainment, activities, work, and commerce on Sundays. *See* BLACKS LAW DICTIONARY 90 (abridged 5th ed. 1983). "Such laws have their origins in colonial New England." *Id.*

[111] *See* Lund, *supra* note 92, at 278-79.

[112] 366 U.S. 599 (1961).

[113] *See id.* at 601.

[114] *See* McGowan v. Maryland, 366 U.S. 420, 429 (1961).

[115] *See id.* at 431.

[116] *See id.* at 427-28.

[117] *See id.* at 425-28; Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 622-24 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 589-92 (1961); *Braunfeld*, 366 U.S. at 600-01.

[118] *See McGowan*, 366 U.S. at 535 (Frankfurter, J., concurring).

and *Crown Kosher*, also rejected the equal protection argument.[119] Justice Douglas, who dissented in all four cases, simply ignored it.[120]

The contention that Sunday closing statutes violated the Establishment Clause was seemingly much more tenable, but that argument did not succeed either. To Justice Douglas it seemed obvious that such laws violated the Establishment Clause, because they had the effect of putting the sanction of law behind the practices of a particular religious group by making its Sabbath a symbol of respect.[121] For him the question was, "whether a State can impose criminal sanctions on those who, unlike the Christian majority . . . worship on a different day or do not share the religious scruples of the majority."[122] According to Justice Douglas, the answer was clearly "no."[123]

The conference vote, however, went against him, 8-1.[124] Chief Justice Warren, who assigned the writing of the opinions to himself, used *McGowan* as his principal vehicle for setting forth the majority's conclusion that Sunday closing laws did not violate the Establishment Clause.[125] Included in the Chief Justice's discussion of that case was an analysis of the history of all Sunday closing statutes.[126] Chief Justice Warren conceded that religious motives had inspired the enactment of the first such laws.[127] He noted, however, that early on, non-religious arguments were made for Sunday closing statutes, and they began to lose their purely religious flavor.[128] In recent times, the Chief Justice observed that other secular justifications had been advanced for making Sunday a day when everyone could recover from the labors of the past week and

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[119] *See Braunfeld*, 366 U.S. at 610 (Brennan, J., dissenting).

[120] *See id.* at 616 (Stewart, J., dissenting). For the dissenting opinion of Justice Douglas in all four cases, see *McGowan*, 366 U.S. at 561 (Douglas, J., dissenting).

[121] *See McGowan*, 366 U.S. at 573 (Douglas, J., dissenting).

[122] *Id.* at 561 (Douglas, J., dissenting).

[123] *See id.* at 563 (Douglas, J., dissenting).

[124] *See* William J. Brennan, Jr., Docket Book entry for *McGowan v. Maryland* (folder 3, box 407, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[125] *See McGowan*, 366 U.S. at 431-35.

[126] *See id.* at 431-33.

[127] *See id.* at 433.

[128] *See id.* at 433-34.

prepare for the one ahead, had been advanced by non-religious groups, such as labor unions.[129]

According to Chief Justice Warren, the Establishment Clause did "not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[130] He had originally intended to argue that blue laws were constitutional because they did not operate predominantly to support religion, but Justice Black insisted that the Chief Justice change his opinion so that "the touchstone [would be] whether legislation does or does not aid religion."[131] Chief Justice Warren quoted at length from Justice Black's opinion in *Everson*, and concluded somewhat implausibly that like repayments for the transportation expenses of parochial school students, Sunday closing laws did not breach the "wall of separation."[132] As written and administered, the Chief Justice contended, most such statutes were secular rather than religious in character and "[bore] no relationship to the establishment of religion as those words are used in the Constitution . . . ."[133] The Court determined that Maryland's purpose in designating Sunday as everyone's day of rest was not religious in nature, reasoning that the state had simply selected a day that most people would have chosen on their own; Maryland was just taking a realistic approach to problems of enforcement.[134]

Justice Frankfurter agreed with the Chief Justice that the blue laws did not violate the Establishment Clause.[135] Nevertheless, he filed a pedantic 101 page concurrence, burdened with 143 footnotes.[136] Prior to oral argument, Justice

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[129] *See id.* at 434-36.

[130] *Id.* at 442.

[131] That Chief Justice Warren changed his opinion at Justice Black's insistence is asserted by Justice Frankfurter in his Memorandum on the changes in the Chief Justice's Sunday Law opinions. *See* Felix Frankfurter, Memorandum on Changes (March 9 and May 24) (reel 63, frames 604-606, Felix Frankfurter Papers, Harvard Law School Library, Cambridge Mass.). The quoted language appears in the memorandum. *See id.*

[132] *McGowan*, 366 U.S. at 461.

[133] *Id.* at 444.

[134] *See id.* at 450-52.

[135] *See id.* at 459-60 (Frankfurter, J., concurring).

[136] *See id.* at 459 (Frankfurter, J., concurring). Justice Frankfurter did not actually call his opinion a concurrence, styling it instead "separate opinion of Justice Frankfurter." *Id.* Since he was in fact agreeing with Chief Justice Warren as to the judgments, this opinion is

Frankfurter had circulated a massive memorandum on the four Sunday closing law cases, and he probably wrote separately because of disappointment that this memorandum had not been made the basis of the Court's opinion.[137] He claimed, however, that it was necessary for him to publish his own opinion so that he could discuss at length the history of Sunday closing laws and object to Chief Justice Warren's reliance on Justice Black's opinion in *Everson*.[138] Although acknowledging to the Chief Justice that "some will find little difference between the course of [his] analysis and that of Felix's separate opinion," Justice Harlan joined Justice Frankfurter, insisting there was "a wide difference between the two."[139]

Neither Justice Harlan nor Justice Frankfurter questioned the Chief Justice's contention that the blue laws met the demands of the Establishment Clause. Nor did they dispute his failure to hold that such statutes did not violate the Free Exercise Clause.[140] In *McGowan* and *Two Guys*, the Chief Justice denied that the appellants even had standing to raise this issue.[141] He also seemed to have doubts about whether Crown Kosher Supermarket could assert the free exercise rights of its Orthodox Jewish customers, but concluded that it did not matter, because on the basis of the Court's decision in *Braunfeld*, the store would lose on the merits.[142]

In *Braunfeld*, Chief Justice Warren conceded that the Pennsylvania Sunday closing law burdened Orthodox Jewish merchants, but reiterated the well-established proposition that, while freedom to hold religious beliefs was abso-

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treated below as a concurring opinion.

[137] *See* Felix Frankfurter Memorandum on *McGowan v. Maryland, Gallagher v. Crown Kosher Super Market, Two Guys from Harrison-Allentown, Inc. v. McGinley*, and *Braunfeld v. Brown*, (Dec. 8, 1960) (reel 63, frames 607-715, Felix Frankfurter Papers, Harvard Law School Library, Cambridge, Mass.). Justice Frankfurter explained how this memorandum was prepared in a letter to Chief Justice Warren. *See* Felix Frankfurter Letter to Chief Justice Warren (Dec. 8, 1960) (reel 64, frame 177, Felix Frankfurter Papers, Harvard Law School Library, Cambridge, Mass.).

[138] *See McGowan*, 366 U.S. at 459-60 (Frankfurter, J., concurring).

[139] Letter from Justice Harlan to Chief Justice Warren (May 26, 1961) (reel 65, frame 5, Felix Frankfurter Papers, Harvard Law School Library, Cambridge, Mass.).

[140] *See infra* note 147 and accompanying text.

[141] *See McGowan*, 366 U.S. at 429-30; Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 592 (1961).

[142] *See* Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 630-31 (1961).

lute, freedom to act in accord with those beliefs was not.[143] In any event, the Chief Justice concluded, the state had not regulated appellants religious activity; it had merely made the practice of their religion more expensive by the way it regulated secular conduct.[144] In a nation with almost three hundred denominations, legislators could not be expected to enact only regulations of behavior that did not economically disadvantage any sect.[145] On the other hand, a statute whose purpose or effect was to impede religious observances or to discriminate among religions would be unconstitutional, even if it burdened faith only indirectly.[146] "But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals," the Chief Justice asserted, "the statute is valid despite its indirect burden on religious observances unless the State may accomplish its purpose by means which do not impose such a burden."[147]

The Jewish Justice Frankfurter concurred with Chief Justice Warren's refusal to hold that the Free Exercise Clause required states to exempt Jews from their Sunday closing requirements.[148] In light of the enforcement problems that would exist if there were different days of rest for various groups he wrote, "[A] blanket Sunday ban applicable to observers of all faiths cannot be held unreasonable."[149] Invoking judicial self-restraint, Justice Frankfurter added, "However preferable, personally, one might deem . . . an exception [for Sabbatarians], I cannot find that the Constitution compels it."[150]

Justice Brennan strongly disagreed with Justice Frankfurter's opinion. Dis-

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[143] *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

[144] *See id.* at 605-06.

[145] *See id.* at 606.

[146] *See id.* at 603. According to Justice Frankfurter's Memorandum on the changes in the Chief Justice's Sunday Law opinions, Chief Justice Warren originally said that some legislation affecting religion was permissible, only later introducing the belief/conduct distinction and taking the position that some legislation regulating conduct which affected religion was unconstitutional. *See* Felix Frankfurter, Memorandum on Changes, *supra* note 131.

[147] *Braunfeld*, 366 U.S. at 607.

[148] *See* McGowan v. Maryland, 366 U.S. 420, 512-22 (1961) (Frankfurter, J., concurring). For Chief Justice Warren's resolution of this issue, see *Braunfeld*, 366 U.S. at 607.

[149] *McGowan*, 366 U.S. at 520 (Frankfurter, J., concurring).

[150] *Id.*

senting on the free exercise issue in *Braunfeld*, Brennan argued that Pennsylvania's blue law prohibited the free exercise of religion because it forced an Orthodox Jew to choose between his business and his faith.[151] He insisted that only a compelling governmental interest could justify the state's actions and that the convenience of having everyone rest on the same day was not compelling.[152] The First Amendment was designed to ensure the preservation of personal liberty, not to facilitate the fulfillment of such collective goals.[153]

Justice Stewart also dissented in *Braunfeld*.[154] He agreed with Justice Brennan and accused Pennsylvania of putting an Orthodox Jew to a "cruel choice" between "his religious faith and his economic survival."[155] Both Justice Brennan and Justice Stewart also dissented in *Crown Kosher*,[156] while Justice Douglas took the position that there had been a Free Exercise Clause violation in all four cases.[157]

C. THE REACTION TO *BRAUNFELD*, *CROWN KOSHER*, *MCGOWAN* & *TWO GUYS*

As Sister Candida Lund observed, "It is possible that the Sabbatarian cases might have fared better had they not been linked with the discount house cases."[158] The discount house cases highlighted the economic character of the struggles provoked by the Sunday closing laws and perhaps diminished the sympathy that justices such as Warren and Black normally displayed for those made to suffer for their convictions.[159] Most members of the Court also failed

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[151] *See Braunfeld*, 366 U.S. at 611 (Brennan, J., concurring in part and dissenting in part).

[152] *See id.* at 613-14 (Brennan, J., concurring in part and dissenting in part).

[153] *See id.* at 610.

[154] *See id.* at 616 (Stewart, J., dissenting).

[155] *Id.*

[156] *See* Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 631 (1961).

[157] *See* McGowan v. Maryland, 366 U.S. 420, 561 (1961) (Douglas, J., dissenting). This dissent applies to *Two Guys*, *Braunfeld*, and *Crown Kosher*. *See id.*

[158] Lund, *supra* note 92, at 307. The discount house cases were *Two Guys* and *McGowan*.

[159] Cases in which Chief Justice Warren displayed sympathy for those made to suffer for their convictions include: *Greene v. McElroy*, 360 U.S. 474 (1959) (overturning revo-

to grasp the extent to which even the rather mild governmental support for the practices of some religions that they had sanctioned could exacerbate religious tensions.

Battles over the enforcement of blue laws and litigation that went as far as the highest courts of Illinois and Missouri followed the Court's Sunday closing decisions.[160] Additionally, there were political battles over exemptions in states such as Maine, Mississippi, Texas, and Massachusetts.[161] In Massachusetts, for example, the Senate adopted an amendment offered by a Jewish member that would have allowed Sabbatarians to open their businesses on Sunday, only to abandon this proposal when the newspaper of the Catholic archdiocese of Boston denounced it as an "Assault on Sunday."[162]

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cation of security clearance for alleged association with Communists); *Watkins v. United States*, 354 U.S. 178 (1957) (overturning contempt citation against witness who refused to answer questions about alleged subversive activities before House Committee on Un-American Activities); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (overturning contempt conviction of witness who refused to answer questions about alleged subversive activities posed by Attorney General of New Hampshire, acting on behalf of state legislature); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (overturning state sedition conviction of Communist Party leader); *Peters v. Hobby*, 349 U.S. 331 (1955) (overturning the discharge of a government employee under the federal loyalty-security program). Cases in which Justice Black displayed sympathy for persons made to suffer for their convictions include: *Yates v. United States*, 354 U.S. 298, 339 (1957) (Black, J., concurring) (arguing that convictions of Communist Part leaders should be overturned because statute under which they had been convicted violated freedom of speech, press, and assembly); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 234 (1957) (holding applicant could not be denied admission to the bar on grounds that his past membership in the Communist Party raised substantial doubts about his good moral character); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (holding state bar could not refuse to admit applicant for refusal to answer questions about his political affiliations); *Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting) (protesting decision upholding sedition conviction against leaders of Communist Party).

[160] *See* Lund, *supra* note 92, at 302.

[161] *See* DRINAN, *supra* note 90, at 216.

[162] *See* Lund, *supra* note 92, at 302-04.

VI. ABANDONING FAVORITISM FOR THE MAJORITY

A. *TORCASO V. WATKINS*[163]

While upholding the constitutionality of laws that, in effect, required Jews to conform their conduct to Catholic dogma, Chief Justice Warren included a caveat in his *McGowan* opinion: Sunday closing laws might violate the Establishment Clause if it could be demonstrated that their purpose was to "use the State's coercive power to aid religion."[164] Less than a month after the *McGowan* decision, the Court decided *Torcaso v. Watkins*, which offered proof that it would not tolerate this resort to governmental coercion to promote the religious views of the majority.[165]

Mr. Torcaso had been denied a notary public commission because he would not declare that he believed in God, as the Maryland Constitution required.[166] During a conference discussion of this case, the possibility that it might be moot received more attention than the question of whether Torcaso's constitutional rights had been violated; no member of the Court expressed any doubt that a violation had occurred.[167] Justice Black emphatically declared that "an atheist has a constitutional right to hold state or federal office."[168] Moreover, Chief Justice Warren proclaimed that despite the reference to the Diety in the Declaration of Independence, a belief in God was not a prerequisite to full citizenship and that individuals did not lose their constitutional rights because they were not Christians.[169]

There was some uncertainty, however, about which of the religion clauses

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[163] 367 U.S. 488 (1961).

[164] McGowan v. Maryland, 366 U.S. 420, 453 (1961).

[165] *See Torcaso*, 367 U.S. at 488.

[166] *See id.* at 489.

[167] *See* William O. Douglas, Conference Notes (Apr. 28, 1961) (box 1234, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.); Tom C. Clark, Conference List (Apr. 28, 1961) (box A-102, Tom C. Clark Papers, Tarlton Law Library, The University of Texas School of Law, Austin, Tex.).

[168] William O. Douglas, Conference Notes, *supra* note 167.

[169] *See id.*

the State had violated by denying Mr. Torcaso's commission.[170] Justice Black's opinion for the Court did not explicitly state which provision of the Constitution had been violated, holding merely that Maryland had invaded "the appellant's freedom of belief and religion."[171] Justice Black quoted at length from the *Everson* opinion, and "repeat[ed] and reaffirm[ed] . . . that neither a State nor the Federal Government can constitutionally force a person to 'profess belief or disbelief in any religion' . . . or impose requirements which aid all religions as against non-believers . . . ."[172] Justice Black's opinion outraged one man, who wrote to him to express the view that, although it "might appear to be of small importance to some, to a Christian it is a drastic step."[173]

B. REQUIRING ACCOMMODATION OF MINORITY PRACTICES

Although it kindled less passion than *Torcaso*, *Sherbert v. Verner*[174] was actually a more radical departure from the Court's previous jurisprudence. In *Sherbert*, the governmental action that the Court found unconstitutional was not deliberate discrimination on the basis of religious beliefs, but rather, a failure to structure a social welfare program to accommodate the religious practices of the Sabbatarian minority. Sherbert, a Seventh-day Adventist, had been fired by her South Carolina employer because she would not work on Saturdays, and was then denied unemployment compensation benefits by the state because of her unwillingness to accept another job that would require working on her Sabbath.[175] The conference vote was 7-2 in her favor, with only Justice Harlan and Justice Byron White in opposition.[176]

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[170] *See id.*

[171] Torcaso v. Watkins, 367 U.S. 488, 496 (1961). The only two Justices to identify which religion clause they thought Maryland had violated were Justice Tom Clark and Justice Potter Stewart, both of whom thought the state's requirement constituted an establishment of religion. *See* William O. Douglas, Conference Notes, *supra* note 167; Tom C. Clark, Conference List, *supra* note 167.

[172] *Torcaso*, 367 U.S. at 495.

[173] Letter from W.B. Baughan to Justice Hugo L. Black (June 27, 1961) (box 351, Hugo L. Black Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[174] 374 U.S. 398 (1963).

[175] *See id.* at 399-400.

[176] *See* William J. Brennan, Jr. Docket Book entry for *Sherbert v. Verner*, (folder 3, box 409, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C.); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME

In a dissenting opinion (written by Justice Harlan), these two justices insisted that because the South Carolina Supreme Court had consistently held that no one was eligible for benefits whose unemployment was caused by personal circumstances, there was nothing unconstitutional about refusing to pay benefits to Sherbert.[177] The Constitution did not require the state to create an exception for her because of her religious beliefs.[178] The dissenters argued further that by creating an exception for Sherbert, the majority was, in effect, overruling *Braunfeld v. Brown*.[179]

Apparently recognizing the problem with its position that Justice Harlan's opinion highlighted, Justice Brennan attempted to author a narrow opinion of the Court that would limit the holding to those who, like Sherbert, had lost their jobs because their employers altered work schedules to conflict with the requirements of their religions.[180] Only Justice Clark agreed to this limited holding.[181] Therefore, Justice Brennan wrote that forcing a person to choose between the precepts of her faith and unemployment benefits imposed a burden on the free exercise of her religion that only a compelling governmental interest could justify.[182] Since South Carolina had failed to demonstrate that paying Sherbert unemployment benefits would endanger some "paramount interest," the Court found the state's action unconstitutional.[183] Justice Brennan's opinion appeared to apply the test announced by Chief Justice Warren in *Braunfeld*, distinguishing the two cases on the basis of their facts.[184]

Justice Stewart did not find the majority's opinion persuasive.[185] Further-

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COURT: A JUDICIAL BIOGRAPHY 468 (1983).

[177] *See Sherbert*, 374 U.S. at 419-23 (Harlan, J., dissenting).

[178] *See id.* at 422-23 (Harlan, J., dissenting).

[179] *See id.* at 421 (Harlan, J., dissenting).

[180] *See* SCHWARTZ, *supra* note 176, at 468-69.

[181] *See id.* at 468.

[182] *See Sherbert*, 374 U.S. at 403, 406.

[183] *See id.* at 409-10.

[184] *See id.* at 403-09. In *Braunfeld*, the Chief Justice had declared that if a statute serving secular goals imposed an indirect burden on religion, that law was not valid if the state could accomplish its purpose by means that did not impose such a burden. *See supra* text accompanying note 147.

[185] *See Sherbert*, 374 U.S. at 413 (Stewart, J., concurring).

more, Justice Stewart argued in a concurring opinion, the majority was interpreting the Free Exercise Clause to require South Carolina to pay unemployment benefits to Sherbert because she refused to work on Saturdays for religious reasons that the state could have withheld from her if her reasons had been non-religious.[186] Making South Carolina favor someone on account of that person's religion was "clearly to require the State to violate the Establishment Clause as construed by this Court."[187]

Justice Douglas also concurred in *Sherbert*.[188] He would have simply held that depriving someone of something to which she would otherwise have been entitled because of her religion violated the Free Exercise Clause.[189]

C. CONSCIENTIOUS OBJECTORS AND THE CONSTITUTION

Two years later, in 1965, the Court decided *Seeger v. United States*,[190] which presented the very problem Justice Stewart had highlighted in *Sherbert*.[191] In *Seeger*, the facts indicated that Congress had exempted from military service religiously-motivated conscientious objectors, but not those who were conscientiously opposed to war in any form for non-religious reasons.[192] In conference, most of the Justices expressed the view that such discrimination was unconstitutional.[193] Justice Harlan, who eventually concluded the statute was valid, thought the Court should reach the constitutional questions raised by this law.[194]

The Court, however, managed to avoid deciding whether the law violated

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[186] *See id.* at 414-17 (Stewart, J., concurring).

[187] *Id.* at 415 (Stewart, J., concurring).

[188] *See id.* at 410 (Douglas, J., concurring).

[189] *See id.* at 412-13 (Douglas, J., concurring).

[190] 380 U.S. 163 (1965).

[191] *See Sherbert*, 374 U.S. at 414-15 (Stewart, J., concurring).

[192] *See Seeger*, 380 U.S. at 164-66.

[193] *See* William J. Brennan, Jr., Conference Notes (folder 3, box 411, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[194] *See id.*; *see also* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 230 (1992).

the Establishment Clause, and also whether failure to accommodate religious pacifists would violate the Free Exercise Clause, by giving the statute a tortured and implausible reading.[195] Even Justice Harlan ultimately went along with interpreting a statute that clearly required one to believe in a Supreme Being in order to be classified as a conscientious objector in such a way as to allow an agnostic an exemption that the words used by Congress seemed to make available only to those who opposed war for religious reasons.[196] In a concurring opinion, Justice Douglas insisted that the Court had to read the statute this way, otherwise, it would violate the Free Exercise Clause, as interpreted by *Sherbert*.[197]

VII. THE ADOPTION OF NEUTRALITY

Although the opinion required to justify *Seeger* made little sense, the decision was completely consistent with the overall stance that the Warren Court was taking by 1965 on the relationship between church and state. The conscientious objector statute did nothing more than accommodate those members of America's religious majority who could not in good conscience submit to the military draft. By the time the Court decided *Seeger*, however, it had moved away from the position that the government could accommodate the practices of some religious groups, exemplified by the Sunday closing law decisions, to the view that the state must be completely neutral, neither discriminating against nor assisting in the promotion of any particular faith or of religion in general.

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[195] *See Seeger*, 380 U.S. at 164-66. The Court held that someone could qualify for exemption from military service under section 6(j) of the Universal Military Service and Training Act, *see* 50 U.S.C. App. § 456 (j) (1958), which exempted those who by virtue of religious training and belief were conscientiously opposed to war in any form and defined religious training and belief as belief in the individual's relation to a Supreme Being, if his belief was sincere and meaningful and occupied a place in his life parallel to that filled by the orthodox belief in God in the life of one who clearly qualified. *See id. See generally* Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 122-25 (1998).

[196] *See* William J. Brennan, Jr., Conference Notes, *supra* note 193; YARBROUGH, *supra* note 194, at 230-31.

[197] *See Seeger*, 380 U.S. at 188 (Douglas, J., concurring).

A. THE SCHOOL PRAYER DECISION

1. DEBATE OVER THE REGENTS' PRAYER

The Court first embraced the neutrality principle in *Engel v. Vitale*.[198] In *Engel*, the Court held that a New York school district's policy requiring that a prayer, composed by the State Board of Regents, be read in every class at the beginning of each school day with the teacher present was unconstitutional.[199] The storm of controversy provoked by the Regents 1951 policy statement recommending daily recitation of the prayer at issue in *Engel* had already demonstrated how derisive even such a non-sectarian show of governmental support for religion could be. Major Jewish organizations objected to the Regents' recommendation.[200] Protestant and Catholic leaders generally supported their policy, but spokesmen for a Peekskill Lutheran congregation accused them of blasphemy for omitting Christ's name to "mollify non-Christian elements."[201] *The Christian Century*, a weekly Protestant publication, considered the prayer requirement an empty formality, without spiritual significance.[202]

Chief Justice Warren agreed with *The Christian Century*'s assessment.[203] Yet, the Chief Justice was troubled by the insistence of the school board's counsel that his client was only promoting morality, ethics, and traditional American values as well as by the lawyer's reluctance to acknowledge that the Hyde Park schools were teaching religion.[204] The school board's brief maintained that there had been no violation of the Constitution because "[r]ecognition of Almighty God in public prayer is an integral part of our na-

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[198] 370 U.S. 421 (1962).

[199] *See id.* at 422-24. The prayer stated, "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

[200] *See* Leo Pfeffer, *The New York Regents Prayer Case*, 4 J. OF CHURCH & ST. 150, 151 (1962).

[201] *Id.* at 150.

[202] *See id.*

[203] *See* SCHWARTZ, *supra* note 176, at 440. "He [Chief Justice Warren] could not get excited about the official prayer which to him seemed as venial as the pledge of allegiance recited each school day." *Id.*

[204] *See id.*

tional heritage."[205] The school board emphasized that no child was required to participate in the daily exercise, and that any student who wished to be excused could be.[206] Further, it maintained that "[t]he Constitution of the United States is incapable of being so interpreted as to require that the wall of separation between church and State become an iron curtain."[207]

2. THE COURT'S DECISION IN *ENGEL*

The board's emotional appeal to tradition earned it just one vote.[208] Only seven justices participated in *Engel*.[209] Six of them thought the board had violated the Establishment Clause. Justice Black wrote for a majority of the Court, which included liberal stalwarts Warren, Douglas, and Brennan, but also conservatives Harlan and Clark. Justice Clark shared the views of early American Presbyterian's about church-state relations and considered the use of prayer for secular purposes, such as promoting civic morality, a threat to the integrity of religion.[210] Justice Harlan feared the political friction that could be caused by mixing the religious with the secular.[211]

Justice Black, who asked Chief Justice Warren to let him write the opinion, had a different concern. He saw his task as protecting individual impulses

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[205] Brief for Respondents at 124, Engel v. Vitale, 370 U.S. 421 (1962) (No. 468).

[206] *See id.* at 137-38.

[207] *Id.* at 126.

[208] The majority consisted of Justices Black, Douglas, Brennan, Clark, and Harlan and Chief Justice Warren. Justice Stewart dissented. *See infra* notes 208-27 and accompanying text.

[209] *Engel* was argued on April 3, 1962, and the decision was announced on June 25, 1962. 370 U.S. 421, 421 (1962). Justice Frankfurter suffered a sever stroke in April 1962 and was absent from the Court for the rest of the term. *See* MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 173 (1991). Justice Charles Whittaker retired on March 31, 1962. *See* MELVIN I. UROFSKY, THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 533 (1994). His replacement, Justice Byron White, was nominated by President John F. Kennedy on April 3, 1962 and did not take his seat until April 16, 1962. *See id.* at 517. Consequently, neither Frankfurter nor White participated in *Engel*. 370 U.S. at 421.

[210] *See* West, *supra* note 8, at 394.

[211] *See* YARBROUGH, *supra* note 194, at 227.

against state compulsion.[212] The fact that students who wished to remain silent or leave the room during the prayer might do so did not matter to Justice Black, because as he stated, "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[213] As far as Justice Black was concerned, the fact that the prayer was denominationally neutral did not "free it from the limitations of the Establishment Clause . . . ."[214] He declared, "[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[215]

Justice Douglas agreed with Justice Black that it was unconstitutional for the State of New York to sponsor religious exercises, although he conceded that his position was inconsistent with the historic meaning of the words used in the First Amendment.[216] Justice Douglas did not, however, accept the major premise of his colleague's argument. "As I see it," he wrote to Justice Black, "there is no penalty for not praying, no coercion . . . ."[217] In his concurring opinion in *Engel*, Justice Douglas claimed that the issue in the case was "whether the Government [could] constitutionally finance a religious exercise."[218] He believed that this question should be answered in the negative because the philosophy of the First Amendment was that, with regard to religion, government must be neutral.[219] Government became a divisive force when it

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[212] *See* NEWMAN, *supra* note 12, at 521.

[213] *Engel*, 370 U.S. at 431.

[214] *Id.* at 430.

[215] *Id.* at 425.

[216] *See id.* at 441-43 (Douglas, J., concurring).

[217] Note from Justice Douglas to Justice Black (May 28, 1962) (box 354, Hugo L. Black Papers Manuscript Division, Library of Congress, Washington, D.C.). In concurrence, Justice Douglas stated that "there is no element of compulsion or coercion in New York's regulation requiring that public schools be opened each day with the . . . prayer." *Engel*, 370 U.S. at 438 (Douglas, J., concurring).

[218] *Id.* at 437 (Douglas, J., concurring).

[219] *See id.* at 443 (Douglas, J., concurring).

intervened in spiritual matters.[220] Justice Douglas also argued that the use of public money to pay religious costs was bound to spark squabbling among sects, with each one seeking more for itself.[221] Therefore, he concluded that this practice should be considered unconstitutional.[222] Both in private correspondence and in a concurring opinion, however, Justice Douglas admitted that many state and federal practices, including the prayer with which the Supreme Court opened its own sessions, were inconsistent with what he claimed the Establishment Clause demanded.[223]

Justice Stewart viewed these official expressions of religious faith as evidence of what the Establishment Clause did not prohibit.[224] To him, such practices proved the Court had "misapplied a great constitutional principle."[225] Dissenting in *Engel*, he stated, "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."[226] All the board had done, Justice Stewart thought, was to allow school children to participate in the nation's spiritual heritage.[227]

3. THE COUNTRY'S REACTION TO *ENGEL*

Francis Cardinal Spellman viewed the Regents' prayer at issue in *Engel* in much the same way as Justice Stewart did. Spellman expressed shock at the Supreme Court's decision, which in his opinion, struck at the godly tradition in which America had raised her children.[228] Billy Graham also denounced the

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[220] *See id.*

[221] *See id.* at 444 (Douglas, J., concurring) (citing Everson v. Board of Educ., 330 U.S. 1, 53-54 (1947) (Rutledge, J., dissenting)).

[222] *See id.* at 443 (Douglas, J., concurring).

[223] *See id.* at 439-44 (Douglas, J., concurring); Letter from Justice Douglas to Justice Black (June 11, 1962) (box 354, Hugo L. Black Papers Manuscript Division, Library of Congress, Washington, D.C.).

[224] *See Engel*, 370 U.S. at 446-50 (Stewart, J., dissenting).

[225] *Id.* at 445 (Stewart, J., dissenting).

[226] *Id.*

[227] *See id.*

[228] *See* WILBUR G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 35-36 (1964); LAUBACH, *supra* note 1, at 2.

Court which he accused of secularizing America,[229] while Dean Erwin Griswold of Harvard Law School faulted it for depriving the Christian majority of the opportunity to maintain its religious traditions through public institutions.[230] Their complaints were among the calmer and more rational condemnations of *Engel*. Chief Justice Warren vividly recalled "one bold newspaper headline saying 'Court outlaws God.'"[231] The Supreme Court received five thousand letters denouncing the *Engel* decision, and a Gallup Poll showed eighty percent of Americans favored prayer in the public schools.[232] Representative George W. Andrews (D. Ala.) exclaimed, "They put the Negroes into the schools and now they have driven God out of them,"[233] and Senator Herman Talmadge (D. Ga.) blasted what he called "an outrageous edict."[234]

Within days after the *Engel* decision, senators introduced five proposed constitutional amendments to overturn it, and the House received twenty-nine proposals to revoke the Supreme Court's ruling.[235] Critics both in and out of Congress accused the Court of promoting Communist atheism with its *Engel* decision,[236] and Episcopal Bishop James A. Pike of San Francisco charged that the Justices had "deconsecrated the nation."[237] The National Council of Churches, although expressing support for the separation of church and state,

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[229] *See* LAUBACH, *supra* note 1, at 1.

[230] *See* KATZ, *supra* note 228, at 41.

[231] WARREN, *supra* note 7, at 316.

[232] *See* Thomas M. Mengler, *Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case*, 6 CONST. COMMENTARY 331, 337 (1989). Mengler reports on both the letters and the Gallup Poll results. *See id.* With respect to the poll results, it should be noted that a study by Kenneth M. Dolbeare and Phillip E. Hammond found that nearly half of those favoring prayer nevertheless approved of the *Engel* decision. *See* KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 15 (1971).

[233] Mengler, *supra* note 232, at 336.

[234] *Id.*

[235] *See* Joseph A. Fisher, *The Becker Amendment: A Constitutional Trojan Horse*, 11 J. OF CHURCH & ST. 427 (1969).

[236] *See* Mengler, *supra* note 232, at 336; *Editorial: Religion Sponsored by the State*, 4 J. OF CHURCH & ST. 141, 141-42 (1962).

[237] *Religion Sponsored by the State*, *supra* note 236, at 142.

insisted that adherence to this principle should not prevent recognition of the role of religion in the public schools.[238]

There were also many who defended *Engel*. The National Association for the Advancement of Colored People (NAACP) joined the American Civil Liberties Union (ACLU) and the American Humanist Association in vigorously supporting the decision, which also elicited a favorable reaction from the National Education Association.[239] While the Hearst press and the conservative *Los Angeles Times* and *Chicago Tribune* denounced *Engel*, the decision received editorial endorsements from such leading newspapers as the *New York Times*, *New York Herald Tribune*, *Washington Post*, and *St. Louis Post-Dispatch*.[240] The Catholic hierarchy and its spokesmen overwhelmingly condemned the Court's ruling, but the official publications of Kansas City, Missouri and Portland, Maine dioceses expressed support.[241] The Protestant clergy was divided, but the country's leading Protestant publication, *The Christian Century*, supported the Court's decision, as did the Methodist Church's official organ, *The Christian Advocate*, and the Baptist Joint Committee on Public Affairs.[242] In addition, most Jewish rabbis supported *Engel*.[243] About a month after the decision, a Presbyterian minister wrote to Justice Black from Bethesda, Maryland claiming, "It is fairly evident by now . . . that the great majority of American churchmen heartily endorse the 'prayer' decision."[244]

A Vancouver, Washington woman, who thought "that we must teach our religion to our children and not leave this to someone else," also supported the

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[238] *See id.*

[239] *See id.* at 142-43. The National Education Association adopted a resolution which declared, "The Court has ruled that a prayer cannot be mandated by law. This decision does not diminish in the least the freedom of religion or the right of prayer in public schools." Letter from Mrs. C.G. Hickman to Justice Brennan (Aug. 31, 1963) (box 95, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[240] *See* Philip Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . .",* 1962 SUP. CT. REV. 1, 2 n.4 (1963).

[241] *See Religion Sponsored by the State*, *supra* note 236, at 142.

[242] *See id.*

[243] *See id.*

[244] Letter from James G. Macdonnel to Justice Black (July 22, 1962) (box 354, Hugo L. Black Papers, Manuscript Division, Library of Congress, Washington, D.C.).

Court.[245] Moreover, President Kennedy expressed similar views. He asserted that *Engel* should be seen as a welcome reminder to American families to pray more at home, attend church with greater frequency, and "make the true meaning of prayer much more important in the lives of our children."[246] The President also reminded Americans that the maintenance of constitutional principles required supporting "Supreme Court decisions, even though we may not agree with them."[247]

4. THE COURT'S RESPONSE TO THE COUNTRY'S REACTION

Undoubtedly, President Kennedy's supportive remarks comforted the Court, but the justices found disturbing the intensity of the public's response to *Engel*.[248] They did not consider themselves hostile to religion, but agitated by the media, whose interpretation of the decision combined incompetence with intemperance, many Americans concluded that the justices were indeed hostile to religion. In August of 1962, Justice Clark took the unusual step of denouncing the press' misinformed treatment of the case in a speech to an American Bar Association convention.[249] The following year, he authored a majority opinion in *School District of Abington Township v. Schempp*,[250] which was designed to influence positively the public's perception of the Court.[251]

B. BANNING BIBLE READING

The issue in *Schempp* was whether Bible reading in public schools was constitutional.[252] Such religious exercises were taking place in 42% of American

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[245] Letter from Mrs. Delores E. Rayfield to Justice Black (July 3, 1962) (box 354, Hugo L. Black Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[246] PAUL MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969 394 (1972).

[247] *Id.*

[248] *See* Mengler, *supra* note 232, at 338.

[249] *See id.* Chief Justice Warren and Justice Harlan biographer, Tinsley Yarbrough, offer further insight into the erroneous nature of the charges that the Justices were hostile towards religion, as well as into their reaction to charges that they were hostile to it. *See* WARREN, *supra* note 7, at 316; YARBROUGH, *supra* note 194, at 227-28.

[250] 374 U.S. 203 (1963).

[251] *See* Mengler, *supra* note 232, at 338-46.

[252] *See Schempp*, 374 U.S. at 205.

school districts in 1960.[253] Half of all public schools had some kind of home-room devotional exercises, and subsequent to the *Engel* decision, eleven states, mainly in the South, passed laws mandating Bible reading.[254] In *Schempp*, a Unitarian family challenged a Pennsylvania statute that required the recitation of at least ten verses without comment at the beginning of each day.[255] In the Abington school district, participation in this exercise, which also included recitation of the Lord's Prayer, was voluntary.[256] Although the district furnished only the King James version of the Bible, the Revised Standard and Douay versions, as well as the Jewish Holy Scriptures had also been read.[257] In the companion case of *Murray v. Curlett*,[258] the plaintiffs were a well-known atheist, Mrs. Madalyn Murray, and her son, William.[259] The Murray's were attacking a rule adopted by the Baltimore, Maryland school board, which mandated the reading of a chapter from the Bible and/or recitation of the Lord's Prayer each morning.[260] They had lost in the Maryland state courts,[261] while a federal district court had held the practices of the Abington school district and a similar Pennsylvania statute unconstitutional.[262]

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[253] *See* DOLBEARE & HAMMOND, *supra* note 232, at 29.

[254] *See id.*

[255] *See Schempp*, 374 U.S. at 205.

[256] *See id.* at 207.

[257] *See id.*

[258] 374 U.S. 203 (1963).

[259] *See id.* at 211. Henry J. Abraham and Barbara A. Perry provide information on both Mrs. Madalyn E. Murray (later Madalyn Murray O'Hair) and her son, and on the latter's conversion to Christianity two decades later. *See* HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND CIVIL LIBERTIES IN THE UNITED STATES 272-73 (6th ed. 1994).

[260] *See Schempp*, 374 U.S. at 211.

[261] *See* Murray v. Curlett, 179 A.2d 698 (Md. 1962).

[262] *See* Schempp v. School Dist. of Abington Township, 201 F. Supp. 815 (E.D. Pa. 1962).

1. THE COURT'S DECISIONS

The Supreme Court affirmed the decision in *Schempp* and reversed *Murray*, both by 8-1 margins.[263] When the Justices discussed the two cases in conference on March 1, 1963, only Justice Stewart opposed resolving them that way.[264] He wanted to remand both cases "so that states can give every sect a chance to have religious exercises in schools including atheists."[265] Justice Stewart considered establishment an obsolete concept and believed the states had an affirmative duty to create a religious atmosphere in their schools so that everyone who wished to pray and worship could do so.[266]

Although no other member of the Court agreed with him, the majority was less united than the vote suggests. Justice Clark actually shared Justice Stewart's view that it would be constitutional to open the schools to religious exercises conducted by all religious groups.[267] Justice Harlan, who had asked counsel during oral argument to distinguish *Torcaso* and *Engel*,[268] recognized that a different result was possible only if the Court reexamined those precedents, but characterizing his vote in *Murray* as tentative, he told his colleagues he was prepared to look at the whole subject "de novo."[269] Chief Justice Warren agreed with Justice Harlan that unless the Court was prepared to overturn *Engel*, only one result was possible in *Schempp*.[270] The Chief Justice and Justice Arthur Goldberg argued, however, that *Schempp* presented an even more obvious violation of the Establishment Clause than had the school prayer case.[271] Their view prevailed, although what Justice Harlan would ultimately

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[263] 374 U.S. 203 (1963).

[264] *See* Conference Notes on *Murray v. Curlett* (Mar. 1, 1963) (box 1280, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[265] *Id.*

[266] *See id.*

[267] *See id.*

[268] *See* SCHWARTZ, *supra* note 176, at 467.

[269] *See* Conference Notes on *Murray v. Curlett*, *supra* note 264. Justice Harlan stated, "This may in the end come out differently." *Id.*

[270] *See id.*

[271] *See id.*

do remained unclear for some time.[272]

Chief Justice Warren assigned the case to Justice Clark, probably because Justice Clark had a more conservative reputation than Justice Black, whose *Engel* opinion had created such a furor.[273] This proved to be a good choice because Justice Clark's opinion ultimately minimized the public's reaction to the decision.[274] Bent on achieving that result, he made the Unitarian Edward Schempp the captioned plaintiff, even though the Murray case had been docketed first.[275] Indeed, Justice Clark apparently toyed with the idea of hiding the Murrays' atheism entirely; an early handwritten draft of his opinion contains no discussion of the facts of their case, to which he never did devote as much attention as he did to those of *Schempp*.[276] Additionally, Justice Clark was careful to avoid writing anything that might be read broadly by the public as prohibiting all interaction between government and religion.[277] He carefully pointed out what the Court had not held and highlighted constitutional ways in which those who wished to incorporate the study of religion into public education might do so, for example, by offering instruction in religious history or comparative religion.[278]

Justice Clark made it clear, however, that "[i]n light of the history of the First Amendment and of our cases interpreting and applying its requirements, . . . the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause."[279] While he acknowledged that religion had been closely identified with the history and government of the United States, Justice Clark stressed that religious freedom was also strongly embed-

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[272] *See* William J. Brennan, Jr. Docket Book entry for *Murray v. Curlett* and *School Dist. of Abington v. Schempp* (box 409, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[273] *See* SCHWARTZ, *supra* note 176, at 467-68. Henry J. Abraham and Barbara A. Perry suggest that Chief Justice Warren may have assigned the opinion to Justice Clark because he was "a devout Presbyterian active in his church . . . ." ABRAHAM & PERRY, *supra* note 259, at 273.

[274] *See* Mengler, *supra* note 232, at 339; West, *supra* note 8, at 395.

[275] *See* Mengler, *supra* note 232, at 339-40.

[276] *See id.* at 340-41.

[277] *See id.* at 344-45.

[278] *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

[279] *Id.* at 205.

ded in American life.[280] The Court's previous decisions regarding the Establishment and Free Exercise Clauses indicated that the government was required to maintain a "wholesome neutrality" toward religion.[281] Neutrality was necessary, because without it there was a danger that powerful sects or groups might fuse governmental and religious functions in a way that would place official support "behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits."[282] Justice Clark further noted that the Free Exercise Clause guaranteed each person's right freely to choose his or her own religious course, free from state compulsion, and supported governmental neutrality toward religion.[283] He argued that excusing those who did not want to participate in public school religious exercises could not make those exercises constitutional.[284] Justice Clark denied that the concept of neutrality, by forbidding government to require a religious exercise "even with the consent of the majority," deprived the majority of its free exercise rights.[285] He maintained that in America, with regard to the relationship between man and religion, the government must be "firmly committed to a position of neutrality."[286]

Justice Brennan concurred, asserting that there was "no escape from the conclusion" that the religious exercises challenged in *Schempp* were unconstitutional.[287] Sensitive to the criticism the Court was receiving, however, even before Chief Justice Warren assigned the case to Justice Clark, Justice Brennan had informed his colleagues that he intended to write separately in order to distinguish those actions that the First Amendment permitted from those that it prohibited.[288] When he circulated the first draft of his seventy-four page opinion on May 2, 1963, Justice Brennan explained that he wished the opinion

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[280] *See id.* at 212-14.

[281] *Id.* at 217-22.

[282] *Id.* at 222.

[283] *See id.*

[284] *Id.* at 224-25.

[285] *See id.* at 225.

[286] *Id.* at 226.

[287] *Id.* at 231-32 (Brennan, J., concurring).

[288] *See* SCHWARTZ, *supra* note 176, at 467.

to be an expression of his own views, signed only by him.[289] In it he asserted, "Our holding does not declare that the First Amendment manifests hostility to the practice or teaching of religion," and added that "not every involvement of religion in public life is unconstitutional."[290] According to Justice Brennan, "[T]he First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion."[291]

He understood the Constitution to enjoin only "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."[292] For example, the Establishment Clause reserved to individual parents, rather than a majority of voters, the choice of whether their children received a secular or sectarian education.[293] In Justice Brennan's judgment, "[T]he First Amendment forbids the state to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures."[294] "Of the four members of the *Schempp* majority who filed opinions," Yale Law School's Louis Pollak believed, "Brennan . . . came much the closest to providing a constitutional framework adequate to [resolve] the problems . . . ."[295]

Justice Douglas also concurred in *Schempp*.[296] He agreed with Justice Clark that public school prayers violated "the 'neutrality' required of the State by . . . the First Amendment," and reiterated the argument he had made in *Engel* that any use of public funds to finance religious exercises violated the

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[289] *See id.*

[290] *Schempp*, 374 U.S. at 232 (Brennan, J., concurring).

[291] *Id.* at 295 (Brennan, J., concurring).

[292] *Id.* at 231 (Brennan, J., concurring).

[293] *See id.* at 242 (Brennan, J., concurring).

[294] *Id.*

[295] Louis Pollak, *Forward: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 69 (1963).

[296] *See Schempp*, 374 U.S. at 227 (Douglas, J., concurring).

Establishment Clause.[297]

Justice Goldberg, joined by Justice Harlan, also concurred.[298] They too seemed anxious to reassure the public about the limited nature of the Court's decision.[299] Justice Goldberg observed that the actions the Court was holding unconstitutional lay outside of "any sensible or acceptable concept of compelled or permitted accommodation" and "involve[d] the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude."[300] Although he agreed "that the attitude of government toward religion must be one of neutrality," Justice Goldberg warned that "untutored devotion to the concept of neutrality" could lead to "a brooding and pervasive devotion to the secular and a passive or even active hostility to the religious."[301]

Justice Stewart, on the other hand, believed that banning religious exercises from public schools should be viewed "not as the realization of state neutrality, but rather as the establishment of a religion of secularism."[302] He thought neutrality required letting those who wanted such exercises have them.[303] For awhile it appeared that *Schempp* might be a unanimous decision, but in the end, Justice Stewart filed a lone dissent.[304] He saw "in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible."[305] As long as government designated no particular book or denominational prayer, Justice Stewart believed that government was only accommodating religion.[306] Religious exercises became unconstitutional, he contended,

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[297] *Id.* at 229 (Douglas, J., concurring).

[298] *See id.* at 305 (Goldberg, J., concurring).

[299] *See id.*

[300] *Id.* at 307 (Goldberg, J., concurring).

[301] *Id.* at 306 (Goldberg, J., concurring).

[302] *Id.* at 313 (Stewart, J., dissenting).

[303] *See id.*

[304] *See id.* at 308 (Stewart, J., dissenting); *see also* SCHWARTZ, *supra* note 176, at 467.

[305] *Schempp*, 374 U.S. at 312 (Stewart, J., dissenting).

[306] *See id.* at 315 (Stewart, J., dissenting).

only if they were administered in such a way as to place "secular authority behind one or more particular religious or irreligious beliefs."[307] Since the records in these cases were inadequate to establish whether there had been coercion of any student who did not wish to participate, he concluded that the cases should be remanded for further proceedings.[308]

2. THE REACTION TO *SCHEMPP*

This time Justice Stewart did not enlist the support of an outraged public. As Pollack pointed out in November of 1963, "*Schempp* provoked far less furor than *Engel*."[309] He astutely warned, however, that this did not mean "many school systems will adhere to *Schempp* with alacrity."[310] In 1964, the Supreme Court found it necessary to overturn a decision of the Florida Supreme Court approving prayer and devotional Bible reading,[311] and by 1968, courts in eight other states had addressed Bible reading cases.[312] In the North, when "school boards attempted to continue religious practices"[313] in the classroom, state attorneys general usually ordered that such practices cease, but in the South, public officials promoted resistance.[314] For example, Alabama Governor George Wallace prodded his State Board of Education to command that Bible reading continue in all public schools.[315] In Tennessee, only fifty-one of one hundred and twenty-one districts surveyed made any changes in their policies following *Schempp*, and only one of those completely eliminated Bible reading and devotional exercises.[316] A survey conducted by political sci-

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[307] *Id.*

[308] *See id.* at 318 (Stewart, J., dissenting).

[309] Pollak, *supra* note 295, at 62.

[310] *Id.*

[311] *See* Chamberlin v. Dade County, 377 U.S. 402 (1964).

[312] *See* LAUBACH, *supra* note 1, at 98.

[313] Fisher, *supra* note 235, at 440.

[314] *See id.* at 440-41.

[315] *See id.*

[316] *See* Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the* "Schempp" *Decision*, *in* 1 PRAYER IN THE PUBLIC SCHOOLS 444 (Robert Sikorski ed., 1993).

entist Frank Way determined that the percentage of classrooms in which prayers were being recited decreased from 60% before 1962 to 28% in the 1964-1965 school year, and the percentage in which Bible reading was taking place declined from 48% to 22%, but the survey also identified a pattern of resistance in the South.[317] Another study found that devotional Bible reading, which occurred in approximately 41.8% of schools in 1960, was taking place in only thirteen percent by 1966, but this study too identified a far higher incidence of noncompliance in the South than in other parts of the country.[318]

Although Southerners resisted the prayer and Bible reading decisions more vigorously than other Americans, *Schempp* was not really popular anywhere. The Gallup Poll found that 70% of a national sample opposed the decision.[319] Seventy-four percent of those interviewed by the Survey Research Center of the University of Michigan just before the 1964 elections expressed approval of school devotions.[320] Yet, the volume of critical mail received by the Court and by the Attorney General's office was far less than what it had been after *Engel*.[321] While average Americans would have preferred that school prayer and Bible reading continue, such individuals normally did not concern themselves with Supreme Court rulings.[322]

Judicial decisions were almost exclusively the object of elite attention, and elite reaction to *Schempp* ranged from muted to positive.[323] In a series of lectures at the Northwestern University School of Law, the University of Wisconsin's Professor Wilbur G. Katz expressed a "strong preference" for the principle of state neutrality toward religion.[324] A study of newspaper editorials published in thirty-five states and the District of Columbia found that 61% of

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[317] *See* H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. POL. Q. 191, 199, 203-04 (1968).

[318] *See* FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 296-98 (1976).

[319] *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, 484 (1964).

[320] *See* LAUBACH, *supra* note 1, at 138.

[321] *See* Beaney & Beiser, *supra* note 319, at 484.

[322] *See* DOLBEARE & HAMMOND, *supra* note 232, at 23.

[323] *See id.*

[324] KATZ, *supra* note 228, at 39.

these papers approved of the *Schempp* decision, a marked shift, particularly in the Northeast and Midwest.[325] The reaction of church spokesmen was especially notable. Jewish organizations supported *Schempp*, as they had *Engel*,[326] while the Greek Orthodox Church and the Roman Catholic leadership opposed *Schempp*.[327] Several Catholic archbishops and bishops, however, issued statements calling for restraint, and Father Robert F. Drinan, S.J., a distinguished legal scholar and dean of the Boston College Law School, echoed Professor Katz's view that government should remain neutral in the area of religion.[328] Such major Protestant denominations as the Baptists, Presbyterians, and Lutherans went on record as supporting *Schempp*.[329]

Reaction to the Bible-reading decision differed from the school prayer one in part, because *Engel* made *Schempp* predictable, depriving it of its capacity to shock.[330] Also significant, however, was the strongly Southern flavor of resistance to the school prayer ruling.[331] The fact that many of *Schempp*'s most severe critics were staunch opponents of the Supreme Court's desegregation stance made many church leaders reluctant to join them in weakening the Court's moral authority.[332]

VIII. THE UNSUCCESSFUL CAMPAIGN TO AMEND THE CONSTITUTION

A. THE 1962 HEARINGS

Southerners were at the forefront of efforts to overturn the Bible reading and school prayer decisions by amending the Constitution, which began soon

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[325] *See* Beaney & Beiser, *supra* note 319, at 483.

[326] *See id.* at 485.

[327] *See* Fisher, *supra* note 235, at 436.

[328] *See* Beaney & Beiser, *supra* note 319, at 484-85.

[329] *See id.* at 484.

[330] *See id.* at 485.

[331] *See id.* at 486.

[332] *See id.* at 485.

after *Engel*.[333] More than one-half of the proposed constitutional amendments were submitted by Senators and Congressmen from southern states.[334] Emanuel Celler, the Jewish liberal Democrat from New York who headed the House Judiciary Committee, did not approve of the proposed constitutional amendments, but his senatorial counterpart, James Eastland (D. Miss.), scheduled two days of hearings in July and August of 1962, chaired by another Southerner, Olin D. Johnson (D. S.C.).[335] Senator Eastland and Senator Johnson were co-sponsoring a constitutional amendment that would not only protect prayer and Bible reading in schools and other public places, but would also give states the right to decide questions of "decency and morality" on the basis of their own "public policy;" the proposed amendment seemed to critics to be designed to restore state control over race relations.[336]

Most of the Senators and Representatives participating in Johnson's hearings were Southerners, and therefore, it is not surprising that the tone of the proceedings was anti-*Engel*.[337] The committee received written statements from a few groups such as the ACLU, the Anti-Defamation League, and the Baptist Joint Committee on Public Affairs supporting *Engel*, but the witnesses who testified all condemned the school-prayer decision.[338] Led by Bishop Pike, these critics accused the Court of making a concerted attack on God and religion in American life.[339] They aimed much of their fire at Justice Douglas' concurring opinion in *Engel*, which did suggest that the Court might be hostile to religion.[340] Senator Willis Robertson (D. Va.) proposed "to recognize the existence of God officially," implausibly insisting that this could be done with an amendment that also preserved the separation of church and state.[341] The committee did not report Senator Robertson's proposal or any other; indeed, it

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[333] *See id.* at 479-80.

[334] *See id.* at 479.

[335] *See id.* at 492.

[336] *See* Fisher, *supra* note 235, at 429.

[337] *See id.* at 429-30.

[338] *See* Beaney & Beiser, *supra* note 319, at 483.

[339] *See id.*

[340] *See id.* at 478-80.

[341] Fisher, *supra* note 235, at 430.

did not even issue a report.[342] William Beaney and Edward Beiser observe that "[a]part from allowing opponents of the Court and the *Regents Prayer* decision to vent their spleen, the hearings accomplished nothing."[343]

B. THE BATTLE OVER THE BECKER AMENDMENT

The campaign for a school prayer constitutional amendment continued after the *Schempp* decision, led by one of the last witnesses to testify at the 1962 hearings, Representative Frank J. Becker (R. N.Y.). Becker first introduced his own proposed addition to the Constitution, and then became the tireless champion of an amendment developed by six members of Congress designated to perform that task following a meeting of amendment supporters in late August of 1962.[344] The latter proposal, which came to be known as the "Becker Amendment," had three substantive sections.[345] The first section provided that nothing in the Constitution should be deemed to prohibit "the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place."[346] The second section stated that nothing in the Constitution should be taken to forbid referring to a belief in or invoking the aid of God in any governmental document or activity or upon U.S. money.[347] Finally, Representative Becker's proposed amendment declared that it did not "constitute an establishment of religion."[348]

Realizing that Representative Celler would never let such a measure out of his committee unless compelled to do so, Representative Becker began collecting signatures on a discharge petition.[349] By April of 1964, he had nearly

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[342] *See* ROBERT S. ALLEY, SCHOOL PRAYER: THE COURT, THE CONGRESS AND THE FIRST AMENDMENT 111-17 (1994).

[343] Beaney & Beiser, *supra* note 319, at 480.

[344] *See id.* at 494-95; ALLEY, *supra* note 342, at 123-24.

[345] *See* Hearings on School Prayers Before the House Committee on the Judiciary 88th Cong, 2d Sess. 2008 (1964).

[346] Beaney & Beiser, *supra* note 319, at 494.

[347] *See id.* at 494-95.

[348] *Id.* at 495.

[349] *See id.* at 495-96. A discharge petition permits a majority of the members of the House of Representatives to force floor consideration of a bill that is bottled up in committee. *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND

170 of the 218 signatures needed to bring his amendment to the House floor without committee approval.[350] Representative Becker's success is hardly surprising since 113 House members had introduced their own proposed amendments.[351] Despite the milder public reaction to *Schempp*, nearly twice as many

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POLITICAL PROCESS 155 (2d ed. 1997). The discharge procedure is authorized by House Rule XXVII(4). It provides in pertinent part:

> 4. A Member may present to the Clerk a motion in writing to discharge a committee from consideration of a public bill or resolution which has been referred to it thirty days prior thereto . . . . The motion shall be placed in the custody of the Clerk, who shall arrange some convenient place for the signature of Members. A signature may be withdrawn by a Member in writing at any time before the motion is entered on the Journal. When a majority of the total membership of the House shall have signed the motion, it shall be entered on the Journal, printed with the signatures thereto in the Congressional Record, and referred to the Calendar of Motions to Discharge Committees.
>
> On the second and fourth Mondays of each month except during the last six days of any session of Congress, immediately after the approval of the Journal, any Member who has signed a motion to discharge which has been on the Calendar at least seven days prior thereto, and seeks recognition, shall be recognized for the purpose of calling up the motion.
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> After twenty minutes debate, one-half in favor of the proposition and one half in opposition thereto, the House shall proceed to vote on the motion to discharge . . . . If the motion prevails to discharge one of the standing committees of the House from any public bill or resolution pending before the committee, it shall then be in order for any Member who signed the motion to move that the House proceed to the immediate consideration of such bill or resolution . . . and such motion is hereby made a high privilege; and if it shall be decided in the affirmative, the bill shall be immediately considered under the general rules of the House . . . . Should the House by vote decide against the immediate consideration of such bill or resolution, it shall be referred to its proper calendar and be entitled to the same rights and privileges that it would have had the committee to which it was referred duly reported the same to the House for consideration . . . .

ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 143-44 (1995). There are considerable pressures against the use of motions to discharge, for supporters of such motions are second-guessing the decisions of their colleagues on a committee and may themselves be similarly second-guessed in the future. Consequently, motions for discharge rarely succeed. *See id.* at 144-45.

[350] *See* Beaney & Beiser, *supra* note 319, at 495.

[351] *See id.* at 492.

Senators and Representatives felt impelled to sponsor such measures as had done so after *Engel*.[352] The biggest reason for the increased popularity of the idea of amending the Constitution appears to have been an orchestrated letter writing campaign that deluged Capitol Hill with mail.[353] Also important were the efforts of Representative Becker, a zealot who was not running for re-election, and thus had the time as well as the determination to turn the campaign for the prayer amendment into a personal crusade.[354] He even threatened to come into the districts of those colleagues who failed to support his proposed constitutional amendment to campaign against them.[355] Fearful of being attacked as anti-God in an election year, even Congressmen with serious reservations about the amendment and/or the use of discharge petitions, climbed on to Becker's bandwagon.[356] Facing imminent defeat, Representative Celler announced in late March of 1964 that the House Judiciary Committee would commence hearings on the Becker Amendment on April 22.[357] He managed, however, to keep the hearings going into early June, thereby leaving insufficient time for floor action and Senate passage before Congress adjourned for the Republican National Convention.[358]

Although they had been held only because of pressure from proponents of the Becker Amendment, the hearings provided its opponents with an effective forum for making the case against it. A study published by the Judiciary Committee's staff on March 24, 1964, provided these opponents with plenty of ammunition, pointing out with great detail the difficulties presented by various proposed prayer amendments, including Representative Becker's.[359] Nevertheless, politicians lined up to testify on behalf of these proposals, with two governors and a state attorney general joining ninety-seven House members.[360]

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[352] *See id.* at 494.

[353] *See id.* at 495.

[354] *See id.* at 494.

[355] *See id.* at 496.

[356] *See id.*

[357] *See id.* at 497.

[358] *See id.* at 499.

[359] *See id.* at 498.

[360] *See* Fisher, *supra* note 235, at 439.

An *ad hoc* committee of groups opposing prayer amendments, coordinated by Reverend Dean M. Kelley of the National Council of Churches, managed to mobilize an even more impressive collection of witnesses.[361] These critics sought to sway wavering Congressmen by raising questions, such as which version of the Bible would be used and who would decide what prayers would be said.[362]

The witnesses opposing the proposed amendments included constitutional law scholars Paul Freund of Harvard, Philip Kurland of the University of Chicago, and Paul Kauper of the University of Michigan.[363] Additionally, Freund, Katz, Drinan, and Leo Pfeffer, General Counsel of the American Jewish Congress, submitted a statement of opposition signed by 223 of the nation's best known law school deans and professors.[364] The fact that a number of these legal academics were from Catholic institutions helped create the impression that members of that faith were joining Protestants and Jews in opposing the school prayer amendment.[365]

Even more significant was the testimony of a parade of distinguished theologians, including Dr. Eugene Carson Blake, chief officer of the United Presbyterian Church, and former president of the National Council of Churches; Methodist Bishop John Wessley Lord; Dr. Edwin Tuller, General Secretary of the American Baptist Convention; Dr. Fredrik Schiotz, President of the American Lutheran Church; and Presiding Protestant Episcopal Bishop Arthur Lichtenberger.[366] Of thirty-eight clergy and laymen representing religious organizations, twenty-eight opposed amending the Constitution.[367] Some of the strongest opposition to the proposed amendments came from the deeply religious, who feared the establishment of a state religion and the harm that rote prayers could do to the personal relationship between individuals and their Creator.[368] It is likely that the religious spokesmen created an exaggerated im-

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[361] *See* Beaney & Beiser, *supra* note 319, at 497-98.

[362] *See id.* at 500.

[363] *See id.*

[364] *See id.*; 1964 House Hearings, *supra* note 345, at 2483-85.

[365] *See* Beaney & Beiser, *supra* note 319, at 500.

[366] *See id.* at 500 n.118.

[367] *See* Fisher, *supra* note 235, at 439.

[368] *See id.* at 453-54. According to Fisher,

pression of the extent to which the denominations they represented opposed the amendment, but their testimony enabled those seeking to prevent tampering with the First Amendment to capitalize on the prestige of organized religion.[369]

The opposition's tactics worked. Congress received an increasing amount of mail opposing the Becker Amendment.[370] When the hearings began, opponents believed a majority of the Judiciary Committee would vote for the amendment;[371] however, by late May 1964, twenty of the committee's thirty-five members were probably opposed to it.[372] Chairman Celler still had no intention of letting Representative Becker's amendment reach the floor,[373] and Becker's discharge petition drive had stalled.[374] Indeed, a number of members who had signed earlier indicated they would remove their names if the petition appeared likely to succeed.[375] By August 5, the Becker Amendment was doomed.[376] Its sponsor had to find solace in getting the Republican National Convention to adopt a platform plank pledging support for a constitutional amendment permitting religious exercises in public places.[377]

> They feared the establishment of a state religion in *Regent's Prayers* and the damage done by rote prayers to the true meaning of prayer, a personal relationship between the child and his creator. The religious convictions of the devout were in jeopardy when they were subjected to the prayers of the majority.

Id.

[369] *See* Beaney & Beiser, *supra* note 319, at 500.

[370] *See id.* at 492.

[371] *See id.* at 502.

[372] *See id.*

[373] *See* ALLEY, *supra* note 342, at 151.

[374] *See* Beaney & Beiser, *supra* 319, at 502.

[375] *See id.*

[376] *See* LAUBACH, *supra* note 1, at 94.

[377] *See* ALLEY, *supra* note 342, at 150-51; LAUBACH, *supra* note 1, at 94-95.

C. THE DIRKSEN AMENDMENT

On March 22, 1966, the GOP's Senate leader, Everett Dirksen (R. Ill.), introduced just such a measure. Senator Dirksen's proposed amendment stated that nothing in the Constitution prohibited those running schools and other public buildings from providing or permitting voluntary participation in prayer.[378] It would not have permitted authorities to prescribe the form or content of any prayer.[379] The amendment received endorsements from over 3,900 Protestant Ministers for School Prayers and Bible Reading, the Greek Archdiocese of North and South America, the National Association of Evangelicals, and Dr. Carl McIntre's American Council of Christian Churches,[380] and eventually, forty-seven other senators signed on as its co-sponsors.[381]

The Dirksen Amendment also aroused substantial opposition, however, Spokesmen for the National Council of Churches, the Lutheran Church in America, the Lutheran Church, Missouri Synod, the Seventh-day Adventists, and the United Presbyterian Church appeared at hearings of a Senate Judiciary Committee subcommittee, chaired by Birch Bayh (D. Ind.) to testify against the amendment.[382] They were joined by Professors Freund, Kauper, and Drinan.[383] Critics of the Dirksen Amendment, focusing on the obscurity of the amendment's language as well as on the problems to which it could give rise,[384] received support from an analysis prepared by the non-partisan American Law Division of the Legislative Reference Service of the Library of Congress that pointed out that in light of several Supreme Court decisions, one of the amendments key terms, "voluntary," was highly ambiguous.[385] Although

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[378] *See* 112 CONG. REC. 23536 (1966).

[379] *See* LAUBACH, *supra* note 1, at 141.

[380] *See id.* at 143.

[381] *See id.*

[382] *See id.*

[383] *See id.* at 143-44, 146.

[384] *See id.* at 145-46.

[385] *See id.* Provisions of the Dirksen Amendment purported to make participation in the religious exercises it authorized voluntary. Yet, the amendment's method of ensuring voluntariness was to require those who did not want to take part to absent themselves. The American Law Division pointed out that this did not square with law dictionary definitions of "voluntary," according to which that word denoted "unconstrained" and "unimpelled by another's influence." The American Law Division also noted that several Supreme Court deci-

the Judiciary Committee did not report the amendment, Dirksen managed to get it to the Senate floor by offering it as a substitute for a resolution endorsing UNICEF.[386] The vote was forty-nine yeas, thirty-seven nays, with fourteen not voting, well short of the two-thirds majority needed to pass a constitutional amendment.[387] Dirksen made another attempt in 1967, by offering a substantially different amendment, and then altering it when his own supporters objected to the language.[388] Ultimately, his new proposal died due to lack of support.[389]

D. DEFEATED BY DIVERSITY

Support for a prayer amendment was also decreasing in the House, where the number of members sponsoring such proposals declined from one hundred and fifteen in 1964 to fifty-five in 1966.[390] The movement to overcome *Engel* and *Schempp* with a constitutional amendment failed because of "the religious differences of a nation of some 250 sects."[391] While there was overwhelming public support for acknowledging and honoring God in schools and other public places, proponents of a constitutional amendment could not formulate language that would accomplish their objective without precipitating endless sectarian bickering in communities across the country.

IX. STRIVING TO MAINTAIN NEUTRALITY

The only way to avoid conflict between denominations was for government to maintain the complete neutrality toward religion, which the Warren Court had held that the First Amendment required. The Court continued to interpret

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sions had rejected the proposition that voluntariness could be preserved by excusal procedures. *See id.* It concluded, "In sum, it seems to us that it might perhaps be argued that 'voluntary participation' (at least in the context of public school prayers), is, if not a contradiction in terms, a phrase that could be subject to wide differences of opinion." *Id.* at 146.

[386] *See id.* at 147.

[387] *See* 112 CONG. REC. 23556 (1966).

[388] *See* LAUBACH, *supra* note 1, at 149-50.

[389] *See id.*

[390] *See id.* at 150-51.

[391] Fisher, *supra* note 235, at 433.

the Establishment Clause as dictating neutrality until Chief Justice Warren's retirement in 1969.[392] It refused to permit the use of public schools to promote religion, but on the other hand, also avoided mandating the total separation of church and state that Justice Douglas had advocated in *Engel*.[393]

A. PREVENTING THE BANNING OF EVOLUTION FROM PUBLIC SCHOOLS

In *Epperson v. Arkansas*,[394] the Warren Court unanimously invalidated a statute that made it unlawful for any teacher in a tax-supported school or university to teach the theory of evolution or to employ a textbook that taught evolution.[395] The Arkansas Supreme Court declined to express an opinion as to whether this law prohibited explaining the theory or only forbade instructing students that it was valid; therefore, confusion arose as to what conduct the law punished.[396] Chief Justice Warren, Justice Black, Justice Douglas, Justice Brennan, and Justice White wanted to find it void for vagueness, but Justice Stewart was troubled by that rationale.[397] He believed the statute violated the First Amendment's free speech guarantee, and Chief Justice Warren agreed.[398] Justice White, however, had reservations about Justice Stewart's approach, while Justice Abe Fortas opposed it.[399] On the day of oral argument, Justice

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[392] Chief Justice Warren informed President Lyndon B. Johnson on June 13, 1968 of his intention to retire. *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 307 (1982). President Johnson accepted his resignation, effective upon the confirmation of a successor. *See id.* The President's choice to replace Warren as Chief Justice, Justice Abe Fortas, failed to win Senate confirmation. *See id.* at 308-11. Warren then agreed to stay on until the end of the October 1968 term, finally stepping done in June of 1969. *See id.* at 311-13.

[393] *See infra* notes 393-437 and accompanying text.

[394] 393 U.S. 97 (1968).

[395] *See id.* at 109. Justice Black concurred separately, arguing that the statute was unconstitutional on void-for-vagueness grounds, rather than because it violated the First Amendment. *See id.* at 112 (Black, J., concurring).

[396] *See* State v. Epperson, 416 S.W.2d 322 (Ark. 1967).

[397] *See* William O. Douglas, Conference Notes (box 1429, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.); William J. Brennan, Jr., Conference Notes (box 416, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[398] *See* William O, Douglas, Conference Notes, *supra* note 397; William J. Brennan, Jr., Conference Notes, *supra* note 397.

[399] *See* William O. Douglas, Conference Notes, *supra* note 397; William J. Brennan,

Fortas suggested basing the decision on *Meyer v. Nebraska*, contending that the Arkansas statute violated the Due Process Clause because it was arbitrary and unreasonable.[400] Chief Justice Warren liked this approach, but the idea of relying on substantive due process outraged Justice Black.[401] Justice Harlan contended that the Establishment Clause was at issue in *Epperson*, and Justice Fortas, Justice Douglas, and Justice Marshall all indicated their willingness to rest a decision on that ground.[402]

Justice Fortas, an advocate of a secular national culture, who believed that the Court should intervene if public schools did not pursue religious neutrality, wrote the *Epperson* opinion.[403] Noting that Arkansas sought to prevent its teachers from discussing the theory of evolution because it was contrary to the Book of Genesis, Justice Fortas declared, "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[404] Although Justice Black and Justice Harlan also concurred, only Justice Stewart objected to deciding the case on establishment of religion grounds, insisting that the statute contravened the First Amendment's "guarantees of free communication."[405]

B. PERMITTING PUBLIC ASSISTANCE TO PAROCHIAL SCHOOLS

The remainder of the Court was willing to say that excluding a theory about the origins of life from public schools because it conflicted with the Book of Genesis did violate the Establishment Clause.[406] To hold otherwise would have been an obvious departure from the governmental neutrality toward religion that the Warren Court had come to insist the First Amendment required. The more difficult issue, however, was whether making governmental resources

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Jr., Conference Notes, *supra* note 397.

[400] *See* KALMAN, *supra* note 15, at 274.

[401] *See* SCHWARTZ, *supra* note 176, at 754.

[402] *See* William O. Douglas, Conference Notes, *supra* note 397.

[403] *See* KALMAN, *supra* note 15, at 273-75.

[404] Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

[405] *Id.* at 116 (Stewart, J., concurring).

[406] *See id.* at 103.

available to religious schools violated the neutrality principle. For government to give aid only to parochial schools would clearly involve it in promoting religion, but *Everson* and *Zorach* suggested that giving those schools the same kind of assistance that the state provided to public schools and their students might not violate the Establishment Clause.[407] Catholics, whose large parochial school system was imposing a heavy financial burden on the Church, tested this theory by pressing Congress and state legislatures for many types of financial assistance.[408] In *Schempp*, the Supreme Court studiously avoided discussing the constitutionality of such grants, and of the many cases that eventually addressed the issue, only two were decided before Chief Justice Warren retired in 1969,[409] but even those decisions offered little support for the contention that the Warren Court was hostile to religion.[410]

1. GIVING OPPONENTS STANDING

Flast v. Cohen[411] did give opponents of parochaid a procedural victory.[412] Seven taxpayers filed suit to enjoin the "expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965,"[413]

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[407] In *Everson* and *Zorach*, the Court rationalized decisions that the challenged governmental programs did not violate the Establishment Clause on the basis that, while these programs might indirectly benefit religion, government money was not being used to aid religion directly. *See* NOWAK & ROTUNDA, *supra* note 62, at 1235-36, 1267. Legislation that, for example, provided textbooks for secular subjects to all students, whether they attended public schools, secular private schools, or parochial schools, would, under this line of reasoning, be analogous to the non-discriminatory subsidization of bus transportation at issue in *Everson*.

[408] *See* LEO PFEFFER, CHURCH, STATE, AND FREEDOM 520-21 (1967). As of 1967, there were five and one-half to six million children attending Catholic parochial schools. *See id.* at 510. By contrast there were about 50,000 in Jewish schools. *See id.* As of 1960, there were an estimated 310,000 in Protestant parochial schools, half to two-thirds of them attending institutions run by Lutherans. *See id.* at 509.

[409] *See* Board of Educ. v. Allen, 392 U.S. 236 (1968); Flast v. Cohen, 392 U.S. 83 (1968). *See generally* NOWAK & ROTUNDA, *supra* note 62, at 1235-51.

[410] *See* Leo Pfeffer, *The* Schempp-Murray *Decision on School Prayers and Bible Reading*, 5 J. OF CHURCH & ST. 165, 173 (1963).

[411] 392 U.S. 83 (1968).

[412] *See id.* at 101.

[413] Pub. L. 89-10, 79 Stat. 27 (current version codified at 20 U.S.C. § 6301 *et seq.* (1994)).

which provided money for instruction in reading, arithmetic, and other subjects in religious schools, as well as for the purchase of textbooks and instructional materials to be used in such schools. The plaintiffs claimed that they had standing to challenge this legislation because they were taxpayers,[414] but the Supreme Court had previously held in *Frothingham v. Mellon*[415] that a federal taxpayer lacked standing to challenge the constitutionality of a federal statute.[416]

In *Flast*, Chief Justice Warren created an exception to the *Mellon* rule by announcing that a taxpayer would have standing if he could establish both a logical link between his taxpayer status and the type of legislative enactment he was attacking and a nexus between that status and the infringement of some constitutional limitation on the congressional taxing and spending power, such as the Establishment Clause.[417] Only Justice Harlan dissented in *Flast*,[418] but both Justice Stewart and Justice Fortas wrote concurring opinions in which they interpreted the Court's decision as only holding that taxpayers had standing to challenge federal expenditures that allegedly violated the Establishment Clause.[419] Even Chief Justice Warren indicated, in conference, that he hoped for a narrow opinion that would not open a "Pandorian box."[420] Although the Chief Justice based *Flast* on a purported general principle, not once since 1968 has the Court found that rule applicable to any case not involving an alleged violation of the Establishment Clause.[421]

2. ALLOWING THE LENDING OF TEXTBOOKS

On the very same day that it decided *Flast*, thereby assisting opponents of parochaid, the Court also upheld a law beneficial to parochial education. In

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[414] *See Flast*, 392 U.S. at 85.

[415] 262 U.S. 447 (1923).

[416] *See id.* at 487-88.

[417] *See Flast*, 392 U.S. at 103.

[418] *See id.* at 116 (Harlan, J., dissenting).

[419] *See id.* at 114 (Stewart, J., concurring); *id.* at 115 (Fortas, J., concurring).

[420] William O. Douglas, Conference Notes (box 1420, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C).

[421] *See* NOWAK & ROTUNDA, *supra* note 62, at 75.

Board of Education v. Allen,[422] a New York statute that required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including those attending private institutions, was challenged. Writing for the majority, Justice White acknowledged that "the line between state neutrality to religion and state support of religion is not easy to locate."[423] According to him, neutrality was a matter of degree.[424] In order to pass constitutional muster, he declared, "[A] law [must have] a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[425] According to Justice White, the New York law passed this test because its purpose was to further educational opportunities for all children, and it gave neither money nor books to parochial schools.[426] Rather, it aided students and their parents.[427]

Justice White's opinion in *Allen* reflected the position Chief Justice Warren had taken in conference. The Chief Justice viewed *Allen* as "a welfare case for students and not a violation of establishment."[428] He likened *Allen* to *Everson*.[429] Justice Black disagreed and contended that when government began supplying books to religious schools it violated the Constitution.[430] Justice Douglas supported him, arguing that while there was nothing ideological about a school lunch or a bus, supplying textbooks smacked of establishment.[431] Justice Fortas joined Justices Black and Douglas in voting against the New York law; he found "offensive" the fact that parochial schools could designate which books were bought with the appropriated funds.[432] Justice Fortas stated,

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[422] 392 U.S. 236 (1968).

[423] *Id.* at 242.

[424] *See id.* (citing Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

[425] *Id.* at 243.

[426] *See id.*

[427] *See id.* at 243-44.

[428] William J. Brennan, Jr., Conference Notes (box 415, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C.).

[429] *See id.*

[430] *See id.*

[431] *See id.*

[432] *See id.*

"That to me is clearly an establishment of religion."[433] He filed a dissenting opinion, as did Justices Black and Douglas. While some might say this statute made "but a small inroad and does not amount to complete state establishment of religion," Justice Black declared, "[T]hat is no excuse for upholding it."[434] He saw a dangerous breach in the wall of separation that could be widened in the future, making constitutional many types of government aid to parochial schools.[435]

Professor Katz had observed in 1964 that "the 'no aid' view is held by a large majority . . . of non-Catholic lawyers."[436] Yet, this was not the position that prevailed five years later in *Allen*. Although excoriated for prohibiting prayer and Bible reading in public schools, the Warren Court allowed New York to ease the financial burdens on parochial education. The Court was committed to the position that government must be neutral toward religion, but as Justice Harlan observed in a concurring opinion, "Neutrality is . . . a coat of many colors."[437] To him it meant that government must show no favoritism among either sects or between religion and nonreligion.[438] Thus, according to Justice Harlan, New York had acted in a neutral manner.[439] Justice Black, on the other hand, viewed New York's actions very differently. Despite having himself upheld in *Everson* a nondiscriminatory program that indirectly benefited church schools, he insisted that the textbook law, at issue in *Allen*, violated the Establishment Clause because it compelled unwilling taxpayers to assist religious organizations.[440]

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[433] *Id.*

[434] Board of Educ. v. Allen, 392 U.S. 236, 253 (1968) (Black, J., dissenting).

[435] *See id.* at 253-54 (Black, J., dissenting).

[436] KATZ, *supra* note 228, at 73.

[437] *Allen*, 392 U.S. at 249 (Harlan, J., concurring).

[438] *See id.* Justice Harlan wrote:

> [Neutrality] requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion and that it work deterrence of no religious belief.

Id. (internal quotes omitted).

[439] *See id.* at 249-50 (Harlan, J., concurring).

[440] *See id.* at 251 (Black, J., dissenting).

X. CONCLUSION

Allen suggested that, at least where parochaid was concerned, neutrality might not be a viable concept. Even when parochial schools received no more benefits than public ones, the Court itself acknowledged, after Chief Justice Warren's 1969 retirement, governmental assistance could lead to excessive and politically divisive entanglements between church and state.[441] Yet, while true neutrality might not be possible, it was the position that Americans supported. A majority of them would have preferred that government acknowledge religion and promote religious values. As the struggles over the Becker and Dirksen amendments made clear, however, in a country as religiously diverse as the United States and beset by serious sectarian divisions, there was no way this could be done that would satisfy all believers. Although politicians pandered to proponents of prayer and Bible reading amendments, Congress could find no language that satisfied even all church leaders, let alone all lawyers. Neutrality was not inherently appealing, but it was the most upon which Americans could agree. In interpreting the Establishment and Free Exercise clauses, the Warren Court gave the country, if not what most people wanted, at least what most could accept.[442] Although accused of putting itself above God, the Court was not guilty even of defying the popular will.

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[441] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). For a recent discussion of *Lemon* and aid-to-religious schools cases decided under the rule it announced, see Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 357-82 (1998).

[442] The Warren Court's neutrality contrasts with the position which the Supreme Court adopted between 1970 and 1990. *See* Barbara M. Yarnold, *The U.S. Supreme Court in Religious Freedom Cases, 1970-1990: Champion to the Anti-Religion Forces*, 40 J. OF CHURCH & ST. 661, 668 (1998). According to Barbara M. Yarnold, during those years, the Court took a generally "anti-religion direction." *Id.*