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Religion and First Amendment Protections: An Analysis of Justice Black’s Constitutional Interpretation

DR. CONSTANCE MAUNEY*

Justice Hugo L. Black served on the United States Supreme Court over a period of thirty-four years, encompassing Supreme Court terms from 1937 to 1971. During this period, the subject of the constitutional limitations of the freedom of religion was increasingly subjected to intense social pressures.

Justice Black figured prominently in the development of constitutional law as the Supreme Court attempted to give meaning to the establishment and free exercise clause of the first amendment. He wrote the majority opinions which dealt with the establishment clause in the Everson, McCulloch, Engel and Torcaso cases. Yet, on later occasions, Justice Black strongly criticized the Court for ignoring his legal reasoning and breaching the wall of separation of church and state. During his early years on the bench, Justice Black voted to uphold convictions of Jehovah’s Witnesses in the Cox, Chaplinsky, Minersville and Prince cases. Although his record was marred by these early votes and later by his votes to uphold Sunday closing laws, Justice Black, in most of the cases dealing with free exercise of religion earned well-deserved praise for expansion of the constitutionally protected freedom of religion.

I. INTRODUCTION

Justice Hugo LaFayette Black was highly instrumental in giving meaning to the short but terse mandate of the first amendment that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof...”1 He was classified by scholars as an absolutist,2 and he frequently affirmed

1. U.S. CONST. amend I.
that the first amendment's phrase "no law" should be interpreted according to its plain meaning. Except in cases where the issues of speech and conduct were intermingled, Justice Black seldom veered from that high standard in cases which dealt with speech and press issues. Analysis of his opinions and votes in free exercise and establishment of religion cases illustrates, however, that Justice Black deviated from his self-imposed standard of "no law." On occasion, he voted to uphold governmental regulation despite a litigant's complaints that unconstitutional limitations had been placed on religious freedoms guaranteed by the first amendment. In several cases concerning the establishment of religion, Justice Black appeared unimpressed with claims that the constitutionally mandated separation of church and state had been infringed. For example, despite the claim that the first amendment had been violated by the erection of a string of lights in the shape of a cross on the county courthouse in Miami, Florida, Justice Black remained conspicuously silent when the Supreme Court, over the objection of Justice William O. Douglas, voted to deny certiorari.

Justice Black, whose family roots were in the Bible belt, was no stranger to organized religion or the content of the Bible. When he practiced law in Birmingham, Alabama, he actively partici-


4. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941). In Cox, the Court upheld a statute requiring persons using the public streets for parade or procession to procure a special license despite petitioners' claim that the law abridged their freedom of religious worship. The Court noted, however, that the freedom of worship issue was ancillary to the central issue of whether a municipality has the authority to impose regulations which promote public safety and convenience without violating civil liberties. Id. at 574; Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) (conviction of Jehovah's Witness who had violated statute prohibiting use of profanity in public affirmed despite defendant's objections that his statements were religiously motivated); Minersville School Dist. v. Gobitis, 310 U.S. 580 (1940) (expelling pupils who refused to salute the flag because of their own beliefs did not constitute a violation of their due process rights); Prince v. Massachusetts, 321 U.S. 158 (1944) (a state may prohibit adults from providing minors with religious materials when the adult knows the child intends to sell or distribute the material in a public place); McGowan v. Maryland, 366 U.S. 420 (1961) (rejected a claim that a statute prohibiting all but certain businesses from operating on Sundays was a violation of the establishment clause of the first amendment); Braunfeld v. Brown, 366 U.S. 599 (1961) (upheld a Pennsylvania statute banning work on Sunday despite claims that the statute violated the equal protection clause and constituted a law relating to the establishment of religion); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961) (upheld a Massachusetts Sunday closing law); Two Guys v. McGinley, 366 U.S. 582 (1961) (approved a Pennsylvania Sunday closing law).

imated in the activities of the Baptist Church. His twenty years as a Sunday school teacher\(^6\) acquainted him with Scriptures which appear in at least four of his Supreme Court opinions.\(^7\) His affiliation with the fundamentalist denomination might have molded his attitude toward rejection of practices such as school prayers composed by public officials. However, an examination of a number of his legal positions in cases dealing with conscientious objectors, and those relating to religious exercises in public school buildings, including Bible reading and recital of the Lord's Prayer, indicates that the Justice was strongly sympathetic toward litigants who professed no belief in God or in doctrines of organized churches. This attitude may be explained, in part, by the fact that Justice Black experienced a significant change in philosophy after he left Birmingham. Jerome Cooper, his first Supreme Court law clerk, observed that Justice Black did not attend formal worship services, and described Justice Black as a "reverent agnostic."\(^8\)

Charles Maples, a Baptist minister, together with a group of ministers, met privately with Justice Black in 1964, and discovered that the Justice was no longer active in the church. In an interview with Charles Maples on May 21, 1975, it was revealed that as early as the 1950's, Justice Black had begun to support a number of tenets of the Unitarian Church.\(^9\) Yet in a letter to W.

\(^6\) FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS 16 (1949).
\(^7\) See MEADOR, MR. JUSTICE BLACK AND HIS BOOKS 27 (1947); Griffin v. Ill., 351 U.S. 12, 16 (1955) (Black writing for the majority held that Illinois denial to an indigent defendant a copy of the transcripts of his trial without charge to the indigent constituted violation of the due process and equal protection clauses of the fourteenth amendment); In re Groban, 352 U.S. 330, 341 (1957) (Black dissenting from majority opinion which upheld Ohio statute allowing fire marshals to conduct compulsory investigatory interviews where interviewee is denied right to counsel); Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black dissenting from decision denying the right to a writ of habeas corpus to German citizens convicted of war crimes by American military tribunal); In re Summers, 325 U.S. 561, 575 (1945) (Black dissenting from majority opinion holding that Illinois State Bar could properly deny the admission of a conscientious objector on the grounds that he could not swear allegiance to Illinois State Constitution without denying the applicant any rights under the first and fourteenth amendments). For example, in Summers, Justice Black's dissent contained an examination of the teachings of Christ, including quotations from St. Matthew 5:38, 39, 44. 325 U.S. at 575 n.1.
\(^8\) Cooper, Mr. Justice Hugo L. Black: Footnotes to a Great Case, 24 ALA. L. REV. 1, 9 (1971). The term "reverent agnostic" was used by Felix Frankfurter when describing himself as one who was interested in theological matters, yet uncommitted to ceremony or a particular denomination. See FRANKFURTER, FELIX FRANKFURTER REMINISCES 291 (1960).
\(^9\) Interview with Charles Maples (May 21, 1975).
Howard Bramlette, one of the ministers who attended the 1964 private session, Justice Black indicated that he still retained an admiration for the principles of the Baptist Church.¹⁰

Justice Black sat on the Supreme Court for thirty-four years,¹¹ a period which provided a remarkable opportunity for him to participate in defining the meaning of the first amendment. The Justice uniformly seized such opportunities with great enthusiasm. His opinions reveal that he spent a considerable amount of time studying history in order to support his reasonings¹² and persuade colleagues and future courts that his interpretations regarding the first amendment were legally correct. He strongly identified with the stance taken by Thomas Jefferson with regard to the constitutional separation between church and state. However, during his tenure on the bench, Justice Black sometimes admittedly faltered in his interpretation of the free exercise clause of the first amendment,¹³ and at other times, his judicial craftsmanship was defective, and he refused to acknowledge it. His position was contradictory on occasion, but on the whole, Justice Black played a significant role in determining the demarcations between church and state and in expanding the boundaries of the free exercise of religion.

During Justice Black's long tenure, the Supreme Court was inundated with cases which touched upon religion in one way or an-

₁₀. Letter from Hugo L. Black to Mr. H. Howard Bramlette (April 3, 1964), Black files, Manuscript Division, Library of Congress.
₁¹. Justice Black had one of the longest tenures on the Court, serving 34 years, from 1937 to 1971. Justice Field served for 34 years and 196 days. However, on October 27, 1973, Justice Douglas surpassed Justice Field's prior record of tenure and continued on the Court until he retired on Nov. 12, 1975. V. COUNTRYMAN, THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS vi (1974); W.O. DOUGLAS, THE COURT YEARS ix (1980).
₁³. See, e.g., Jones v. City of Opelika, 316 U.S. 584, 623-24 (1942) (Black, J., dissenting) (Black admits his faulty reasoning in Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940)). “Since we joined in the opinion in the Gobitis case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided.” 316 U.S. at 623-24.
In many of these cases, Justice Black’s “silent votes” deserve special analysis in order to supplement data collected from his majority, concurring, and dissenting opinions. Opinions written by other justices with whom Justice Black concurred are also important sources for a complete analysis of his interpretation of the first amendment. Understanding the complexity of Justice Black’s position on major legal issues necessitates an exploration into a multiplicity of cases concerning the following broad categories: violation of law by marching Jehovah’s Witnesses; antagonism caused by religious zealots; governmental funds which directly or indirectly aided parochial schools; use of public property for religious instruction; laws which adversely affect the economic welfare of individuals who practiced their religion; prosecutions of conscientious objectors; suits filed by

14. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962) (school prayers); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (minor plaintiffs were prohibited from attending school because of their refusal to salute the national flag based upon their personal religious philosophy).  

15. Cox v. New Hampshire, 312 U.S. 569 (1941). Five Jehovah’s Witnesses who marched with sixty-three others were convicted for violation of a state statute prohibiting a parade or procession upon a public street without a special license. The Court found the statute to be a reasonable time, place and manner restriction which had been applied on a nondiscriminatory basis and sustained the conviction. The state had the right to prevent unscheduled parades for traffic and safety purposes. See supra note 4.  

16. Cantwell v. Connecticut, 310 U.S. 296 (1940). Cantwell was convicted of violating a Connecticut statute prohibiting the solicitation of money without prior approval of the Secretary of Public Welfare and for inciting a breach of the peace. Although Cantwell had aroused the animosity of two passing pedestrians by playing a record which embodied a general attack on all religion as an instrument of Satan, his conduct was found not to have amounted to a breach of the peace. “[I]n the absence of a statute narrowly drawn ... the petitioner’s communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable....” 310 U.S. at 311.  

17. Board of Educ. v. Allen, 392 U.S. 236 (1968). The Court held that the government may lend state approved textbooks to all students, including those attending parochial schools. The statute was not a “law respecting an establishment of religion, or prohibiting the free exercise thereof” and, therefore, was not in violation of the Constitution. 392 U.S. at 238.  


churches against other churches;\textsuperscript{21} oaths required for public employment;\textsuperscript{22} taxation of church property;\textsuperscript{23} distribution of religious literature and sermons on public streets;\textsuperscript{24} activities in classrooms which conflicted with religious beliefs;\textsuperscript{25} religious exercises in classrooms which were offensive to one or more students;\textsuperscript{26} and the academic freedom of teachers who were prohibited from teaching evolution.\textsuperscript{27}

II. PUBLIC DISSEMINATION OF RELIGIOUS BELIEFS

During Justice Black's early years on the bench, the Supreme Court often considered questions dealing with the Jehovah's Witnesses, an active and aggressive minority sect.\textsuperscript{28} The controversial style of their evangelism resulted in a substantial number of cases being appealed to the Court. In their zeal to quickly convert large numbers of persons to their religious doctrine, the sect members sometimes overstepped the boundaries set by good taste, custom, or law. Not only were breach of peace convictions commonplace,\textsuperscript{29} but the Jehovah's Witnesses often ignored local ordinances which required licenses or permits to carry on evangelistic activities.\textsuperscript{30} These cases set the pattern for judicial thought and analysis to the extent that much of the interpretation

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\item \textsuperscript{21} Presbyterian Church v. Hull Church, 393 U.S. 440 (1969) (although Court recognized legitimate interest in resolution of disputes involving property rights, recognized that disputes which require courts to interpret church doctrine are not within role of civil courts).
\item \textsuperscript{22} Torcaso v. Watkins, 367 U.S. 488 (1961).
\item \textsuperscript{23} Walz v. Tax Comm'n, 397 U.S. 664 (1970). (New York's policy of granting property tax exemption to religious organizations held constitutional; goal of government with respect to religion is benevolent neutrality).
\item \textsuperscript{24} Kunz v. New York, 340 U.S. 290 (1951) (Court reversed conviction for violation of ordinance which prohibited public worship meeting in the street without first obtaining permit); Lovell v. Griffin, 303 U.S. 444 (1938) (ordinance prohibiting distribution of literature of any kind without obtaining prior permit found unconstitutional on its face as restraint on first amendment rights).
\item \textsuperscript{25} Engel v. Vitale, 370 U.S. 421 (1962) (school prayers).
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Epperson v. Arkansas, 393 U.S. 97 (1968).
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of the first amendment in the 1940's and early 1950's was the result of this minority sect's conflict with local and state officials. While Justice Black's position was contrary to contentions of that sect in at least four cases, his support for their rights was demonstrated in numerous other decisions. Regardless of Justice Black's personal views about the Jehovah's Witness' movement, he was among the members of the Court who generally interpreted the first amendment in a manner which resulted in increased protection for religious practices.

In *Schneider v. Irvington*, Justice Black voted to strike down convictions for violations of anti-littering regulations. The stance was taken to protect free speech and press rights of individuals who desired to communicate their ideas through the distribution of leaflets. The petitioner, Clara Schneider, was originally convicted because she failed to obtain a permit from the chief of police as required by local ordinance before handing out pamphlets describing the philosophy of the Jehovah's Witnesses. In *Schneider* and three companion cases, the Court chose to focus upon the freedom of speech and freedom of press rights rather than the free exercise clause. These first amendment rights had been found to be applicable to state and local governments in the cases of *Gitlow v. New York* and *Near v. Minnesota* pursuant to the fourteenth amendment. But as of 1939, Justice Black had not yet adopted this conclusion himself. His famous and controversial *Adamson v. California* dissenting opinion had not yet been written at this point.

Justice Black ultimately agreed with the majority of the Court

33. 308 U.S. 147 (1939). Justice Black generally maintained an “absolutist” position with regard to constitutional questions; the first amendment was a prime example. “My view is, without deviation, without exception, without any ifs, buts, or whereas that freedom of speech means that government shall not do anything to people, either for their views they have or the views they express or the words they speak or write.” *H. Black, A CONSTITUTIONAL FAITH* 45 (1968); *see also H. Ball, THE VISION AND THE DREAM OF JUSTICE HUGO L. BLACK* 142 (1975). See *supra* note 2.
34. *Schneider* held that the freedom of speech and press secured by the first amendment against violations by the federal government are also protected from violation by state governments pursuant to fourteenth amendment. 308 U.S. at 160.
35. 268 U.S. 652 (1925).
36. 283 U.S. 647 (1931).
that both the free exercise\textsuperscript{38} and establishment clauses\textsuperscript{39} were applicable to state and local governments through the fourteenth amendment. The Court did not completely accept Black's incorporation theory, but nevertheless continued to broaden the protections of the first amendment on a case by case basis. Even after each first amendment freedom was incorporated into the fourteenth amendment, the Supreme Court continued to play an active role in determining the extent of the particular freedom challenged by accepting review of selected court cases.

In the 1941 case of \textit{Cox v. New Hampshire},\textsuperscript{40} Justice Black voted to uphold criminal sanctions imposed on Jehovah's Witnesses when issues of freedom of religion, expression, and conduct were intermingled. \textit{Cox} involved a peaceful march by members of a small group of Jehovah's Witnesses who had not secured a parade permit. The Supreme Court held that the state had the right to regulate conduct upon the streets even at the expense of the freedom of expression. One year later, in \textit{Chaplinsky v. New Hampshire},\textsuperscript{41} Justice Black voted to uphold the breach of peace conviction of an overly enthusiastic Jehovah's Witness who had cursed a policeman. It was held that "fighting words" lacked the protection of the first amendment.\textsuperscript{42} The decision most likely came as a surprise for the defendant and his lawyers, because two years earlier another Jehovah's Witness had a similar conviction overturned in the landmark case of \textit{Cantwell v. Connecticut}.\textsuperscript{43}

On April 26, 1938, Jesse Cantwell went to a predominantly Catholic neighborhood with his books and a portable phonograph rec-
ord player and asked two men if he could play a record for them. The men agreed, but soon became infuriated by the denunciation of the Catholic Church presented on the recording. After several threats from the listeners, Cantwell left the area without argument.44

In Cantwell, the Court struck down the conviction of the defendant which was based upon a violation of a statute requiring a certificate to distribute legally religious publications. The statute was found to grant undue discretion to public authorities without establishing sufficient standards. This unlimited discretion allowed for the possibility of governmental censorship and thus violated the first amendment. The Court found no "clear and present danger" by the defendant's conduct, and overturned petitioner Cantwell's breach of peace conviction.45 Writing for the majority, Justice Owen Roberts maintained, "[T]he First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."46

Justice Roberts essentially stated that the meaning of freedom of religion included the lack of compulsion to accept or practice a particular religious doctrine, freedom to participate in any religious organization, and the freedom to hold any individually chosen religious belief.47 The first amendment "safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second can-

44. 310 U.S. at 303.
45. Id. at 311. The Court noted that "[W]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious." Id. at 308. The test for determining when a "clear and present danger" occurs was first stated by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919), as follows: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id. at 52. The test was later modified by Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357 (1927), by adding the requirement of "imminence."

The Court found that "[s]uch a censorship of religion ... is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." Cantwell 310 U.S. at 305.
46. 310 U.S. at 303.
47. Id.
not be. This guideline fashioned by Justice Roberts was similar to Justice Black's ideas relative to concepts which had absolute protection under the first amendment such as speech or passive belief. Thus, it was the opinion of both men that neither action nor conduct was given absolute protection by the Constitution.

Justice Black consistently attempted to overturn convictions of members of the Jehovah's Witness sect who chose distribution of leaflets as their method of evangelizing a neighborhood or town. According to Justice Black, passing out leaflets and playing religious records fell within the range of first amendment protections. Accordingly, it was his position that when city officials imposed a license tax effectively acting upon rights granted by the Constitution, they invaded freedom of press, speech and religion guarantees. In 1943, writing for the majority in *Murdock v. Pennsylvania*, Justice Douglas analogized distribution of religious literature with worship and preaching in church buildings. Justice Douglas believed that selling church literature was similar to passing the collection basket, and therefore held that a license fee could not be imposed on a Jehovah's Witness who went from door to door passing out tracts. Justice Black basically agreed and believed that most activities interrelated with religion were protected by the first amendment guarantees. To that end he felt that the Constitution precluded, among other things: taxation of persons whose entire living was earned from the sale of religious literature; mechanisms to keep door bells silent during the day in a mill town; laws applied to ban religious literature from company owned towns and federally controlled villages; and other devices used to keep the Jehovah's Witnesses and other distributors of leaflets off the streets.

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48. *Id.* at 303-04.
49. "Conduct remains subject to regulation for the protection of society." *Id.* at 304.
51. See *supra* note 50. Justice Black emphasized the importance of first amendment rights but he was also careful to recognize "the consequences of speech and press accompanied by conduct that was anarchic ...." H. BALL, *supra* note 33, at 198.
52. 319 U.S. 105 (1943) (license tax imposed by city officials pursuant to local statute upon the selling of religious pamphlets was found to violate first amendment guarantees of freedom of press and free exercise of religion). *Id.* at 117.
53. *Id.* at 108-09.
54. Black concluded that the state's interests in certain activities were insufficient to allow circumvention of first amendment guarantees. See, e.g., *Tucker v.*
In United States v. Ballard,55 the question presented was whether the free exercise of religion was in jeopardy. The leaders of the “I Am” religious movement claimed special revelations and special powers from God.56 It was alleged that they used the mails to defraud the public. The Supreme Court held that a jury lacked the power to examine the beliefs of an individual and punish him for preaching a message which was based upon the individual's espoused ostensible relationship with God.57 Justice Douglas, writing for the majority, stated that to allow this punishment to stand would end religious freedom in the United States.58 He noted that many religions are based upon the New Testament with its emphasis on miracles, revelations, life after death, and other beliefs that could not be proven in a courtroom before a jury. The Court, with Justice Black concurring, chose to interpret the first amendment in such a way that bizarre as well as traditional religious beliefs were within the scope of the free exercise clause.59

In 1955, Justice Black concurred in the Court's reversal of judgment in favor of two preachers who had discussed their religious beliefs in places where such activity was restricted by local statute. In Kunz v. New York,60 the petitioner had preached on the streets in New York City without a license from the city police
commissioner. In *Niemotko v. Maryland*, petitioner preached in a public park without proper clearance from the Park Commissioner. These opinions indicated that factors such as whether a law contained a provision for an administrative approval in order to address the public, or whether the practice of such prior approval was based on custom, carried little weight upon the Court's interpretation of the first amendment and its protection of the rights of individuals who wished to discuss their religious views with others.

In *Fowler v. Rhode Island*, a five dollar fine was imposed upon a minister of the Jehovah's Witnesses for preaching a sermon in a public park to a large gathering of both members and non-members of his sect. With Justice Douglas, again writing for the majority, the Supreme Court reversed the judgment against the minister because the city ordinance had been applied in such a fashion as to discriminate against one religious service, while allowing the performance of worship services by more acceptable denominations as defined by informal local standards. The practice of governmental evaluation of the content of sermons in order to determine which minister could preside over a service was held to violate the first amendment. Justice Black's vote in this case, as in others which upheld the rights of people to express their religious beliefs regardless of the degree of popularity of those beliefs in the community, was similar to the stance he maintained during the nineteen-fifties when cases dealing with personal beliefs and political advocacy came before the Court. Justice Black staunchly defended the rights of an individual to believe and speak about religion and politics without being penalized for the content of such speech.

61. 340 U.S. 268 (1951). The appellants in this case applied to a city council for permits to use a city park for Bible talks. The permits were denied for no apparent reason other than prejudice. However, appellants conducted their meetings and were convicted on charges of disorderly conduct, threat of violence or riot, and for not conducting themselves in a manner beyond reproach. The Supreme Court held that appellants were denied equal protection of the laws with regard to freedom of speech and religion pursuant to the first and fourteenth amendments and reversed the convictions. *Id.* at 273.

62. *Id.* Black described the courts as "havens" for those who suffered because they were "helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." *Id.* at 241. See also Note, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 774-75 (1981).


64. *Fowler* was similar to *Niemotko*, 310 U.S. 268 (1951). A city ordinance prevented religious meetings in public parks that involved any form of public address. As in *Niemotko*, the Supreme Court found a violation of first amendment guarantees.
Subsequent to the Fowler decision the Court upheld the conviction of another minister in Poulos v. New Hampshire.65 Poulos attempted to speak at a religious gathering in a public park despite the denial of a license for that purpose and was subsequently arrested and fined for the violation. The Supreme Court, over the objection of Justice Black, upheld the conviction and the ordinance which gave city officials the authority to prohibit the meeting of the Jehovah's Witnesses.66 Justice Black's dissenting opinion reaffirmed his position that the state did have the power to regulate streets for traffic purposes, and therefore, could also regulate the kind of street parades that were at issue in the early Cox case. Justice Black also stated that the time, place, and manner of activities in the streets and parks could be regulated.67 In the Poulos case, however, Justice Black found an element of arbitrariness in the refusal to allow the preacher to speak. He ended his short dissent with a firm admonition:

... The First Amendment affords freedom of speech a special protection, I believe it prohibits a state from convicting a man of crime whose only offense is that he makes an orderly religious appeal after he has been illegally "arbitrarily and unreasonably" denied a "license" to talk. This to me is a subtle use of a creeping censorship loose in the land.68

III. CONSTITUTIONAL RIGHTS INVOLVING RELIGION WITHIN EDUCATIONAL PARAMETERS

A. Transportation of School Children

Educational policy-making by the Supreme Court began to dominate the Court's activity following the major "Jehovah's Witness" cases. This subtle shift in first amendment emphasis became even more pronounced after Earl Warren was appointed Chief Justice,69 and was especially revealed in the analysis of pol-

65. 345 U.S. 395 (1953). The Court distinguished Poulos from Kunz, 340 U.S. 290 (1951), which involved the complete discretion of officials to refuse licenses. See also Cantwell v. Connecticut, 310 U.S. 296 (1940), where the Court said "[e]ven the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury." 310 U.S. at 306.

66. Justice Black's dissent referred to the result in Poulos as "a subtle use of a creeping censorship loose in the land." 345 U.S. at 422.

67. Justice Black distinguished between a man who refused to obtain a license to start a business or purchase firearms, and the unique quality the first amendment affords freedom of speech and religion. Id. at 421-22.

68. Id. at 422. See supra note 66.

69. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962), see also Strickland, supra note 2; Epperson v. Arkansas, 393 U.S. 97 (1968) (statute prohibiting teaching of evolution in public schools held invalid); School Dist. of Abington v. Schempp, 374 U.S. 389
icies dealing with public and parochial schools and religious activities. The Court had already heard a number of questions pertaining to religion in schools, including the “flag salute” cases which were decided early in Justice Black's judicial career. Other cases involved parochial schools and parents who argued that they were financially penalized by sending their children to such schools, particularly in their efforts to provide their children with transportation to and from school.

In New Jersey, lawmakers were successfully influenced to approve reimbursement to church schools for bus fares. The highly controversial question of the use of tax money to reimburse parents for students' bus fare to Catholic schools came before the Court in 1947. Justice Black authored the opinion of the Court in *Everson v. Board of Education* and meticulously described the types of state supported activities that were acceptable within the confines of the first amendment. These activities included normal public services ranging from sewage connection to police protection. The significant common factor used in labeling these activities as non-infringing was the neutrality of the state in the exercise of the questioned activity and its even-handed relationship with believers, as well as non-believers. Accordingly, the transportation of all school children was a service that might be publicly financed. Justice Black's opinion in *Everson* was the product of careful consideration, but the Court was divided on the issue and four dissenters vigorously attacked Black's judicial reasoning, which was based upon a historical analysis interrelated with his interpretation of the first amendment. In dissent, Justice Jackson urged that no funds from the public purse could be channeled for religious purposes, even indirectly, because the establishment clause was an absolute prohibition of this type of

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203 (1963) (reading from Bible at beginning of the school day was found to be religious practice).


73. 330 U.S. 1, 17-18 (1947). Other acceptable state-supported activities described were ordinary police and fire protection as well as maintenance of public highways and sidewalks.

74. *Id.* at 18. With regard to the first amendment, the opinion states the following:

[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

*Id.*

75. The four dissenters in *Everson* were Justice Jackson, Justice Rutledge, Justice Frankfurter and Justice Burton.
disbursement.\textsuperscript{76}

Justice Black and four other justices\textsuperscript{77} agreed that a high wall of separation between church and state must be maintained, but held under the circumstances in \textit{Everson} that New Jersey had not breached that wall. Justice Black's intense interest in history supplied him with a great deal of background knowledge about early legal dissatisfaction over the intermingling of church and state, either by law or custom. Protestants, Catholics and Jews suffered persecution under such systems, and colonial history is replete with instances in which government-sponsored religions were forced upon people who desired to determine their own fate, consequently, the founding fathers drafted the first amendment. In \textit{Everson}, Justice Black articulated a black-letter definition of the establishment clause that listed precisely which activities would violate the Constitution:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”\textsuperscript{78}

The \textit{Everson} opinion classified the transportation of students as an activity falling within the public welfare.\textsuperscript{79} Justice Black maintained that providing bus transportation to parochial schools was similar to police and fire protection.\textsuperscript{80} \textit{Everson v. Board of Education} was also a landmark case because the establishment clause of the first amendment was incorporated to the states through the fourteenth amendment.

\begin{itemize}
\item \textsuperscript{76} 330 U.S. at 26-27.
\item \textsuperscript{77} Chief Justice Vinson, Justice Douglas, Justice Reed, and Justice Murphy.
\item \textsuperscript{78} 330 U.S. at 15-16 (quoting in part Reynolds v. United States, 98 U.S. 145, 164 (1878)).
\item \textsuperscript{79} 330 U.S. at 15-17. The application of the child benefit theory appeared in cases from 1968 through 1971 which dealt with state aid.
\item \textsuperscript{80} Id. at 17.
\end{itemize}
B. The Use of Public Property for Religious Instruction

Justice Black once again spoke for the Court when it rejected the practice of allowing religious classes taught by non-public school faculty instructors during specified hours in public school buildings. The case of *McCollum v. Board of Education*, 81 which involved "released time" programs, 82 was decided in 1948. Mrs. Vashti McCollum, a taxpayer whose child attended a public school where religious classes were conducted, challenged that practice as a violation of the establishment clause of the first amendment. Justice Black, in his majority opinion, supported the contentions of Mrs. McCollum. 83 The practice of sectarian teachers coming to public schools during school hours each week for thirty to forty-five minutes of instruction centered on specific religious doctrines was found to violate the first and fourteenth amendments. 84

The program challenged in *McCollum* was devised by the Champaign Council on Religious Education, an inter-religious organization comprised of Catholics, Protestants and Jews. Parents signed a card to authorize the enrollment of their children in the classes and their attendance was thereafter required and accounted for by a report to the regular classroom teachers. The non-participating students were sent to other sections of the building for ostensibly secular instruction which was actually no more than a method of marking time until the religious classes were dismissed. In order for this type of system to operate effectively, the public school faculty had to cooperate with the visiting religious personnel. 85

Justice Black and the majority agreed that this scheme of mandatory public school attendance and the use of public prop-

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82. *Id.* at 223-32. "Released time" programs allowed a child to attend church classes after public school hours, usually for one afternoon during the week. The released time movement evolved from the week-day church school. The thrust of the released time proposals was that the "public school unduly monopolized the child's time and that the churches were entitled to their share of it." *Id.* at 222 (Frankfurter, J., separate opinion). Rather than infringing upon the children's "play time," the church schools sought to reach the children "during what the child conceived to be his 'business hours.'" *Id.* at 222. See Sorauf, *The Impact of a Supreme Court Decision*, in LAW, POLITICS AND THE FEDERAL COURTS (1967).
83. 333 U.S. at 212. The Court said:
Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the State's compulsory public school machinery. This is not a separation of Church and State.
84. *Id.* at 211.
85. *Id.* at 207-09.
erty for religious instruction served to propagate certain religious sects, and found that this situation traversed the wall of separation between church and state. Citing Everson's first amendment guidelines, Justice Black struck down this religious practice. Although Justice Black used the same rationale in McCollum as in Everson, he reached a diametrically opposite conclusion.

Four years later, in Zorach v. Clauson, a case similar to McCollum, Justice Black was astonished when the Court virtually ignored his McCollum opinion by allowing schools to schedule dismissal time during the school day so that children might attend religious classes in nearby churches and other non-public buildings. Attendance records were required and children who did not attend denominational religious instruction again had to mark time during those periods. Justice Black rejected the idea expressed by Justice Douglas and the majority in Zorach that such religious instruction did not violate the Constitution because the people in this country are "a religious people whose institutions presuppose a Supreme Being." Based on his awareness of the historical lessons relating to the abuse of such conjunctive exercise of government and religion, Justice Black was convinced that people who desired first amendment protections were the same people who wanted to keep a wall of separation between church and government. The released time program in the Zorach case appeared to be based on coercion. Justice Black opposed governmental intrusion into religious worship by school children.

State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persec-

86. The operation of the States's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. Id. at 209-10.

87. See supra note 83, distinguishing Everson and McCollum. The approach is basically the same: in each case, Justice Black relies upon his definition of the establishment of religion clause of the first amendment. 330 U.S. at 15-16.

88. 343 U.S. 306 (1952) (Black, J., dissenting). In a bitter dissent Justice Black appeared astonished because to him, the only difference between the two cases was that the McCollum religious classes were held in the school building, whereas the Zorach classes were still using the State's machinery for compulsory public school attendance. Id. at 316.

89. Id. at 313.
tion for persuasion. Government should not be allowed, under cover of the soft euphemism of "co-operation," to steal into the sacred area of religious choice.90

C. School Prayers and Bible Readings

During the Warren era, the most highly publicized and controversial cases regarding the first amendment and religion involved issues of school prayer and Bible reading.91 Numerous amendments were proposed in the United States Congress to overturn judicial policies.92 Religious zealots felt that the Supreme Court had overreacted to the demands of a minority of nonbelievers.93 Commentators strongly criticized the legal reasoning in school prayer cases.94 In the midst of this controversy Justice Black authored what would become an often maligned opinion in Engel v. Vitale,95 wherein the Court outlawed a one sentence prayer that was required by state education policy-makers to be repeated each morning in the classrooms.

The prayer in Engel was written as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."96 Justice Black asserted that when school authorities composed any prayer and required its daily repetition, they violated the policy behind the establishment clause of the first amendment.97 Justice

90. Id. at 320.
92. Opposition to the prayer decisions led to an enormous mail campaign demanding that members of Congress introduce constitutional amendments to permit prayer and Bible reading in the public schools. During the 88th Congress, through the third week of March 1964, 146 proposals for such constitutional amendments were introduced in the House and sent to the House Judiciary Committee. A group of House members supporting amendments met to join forces behind a single proposal. The result was the Becker Amendment, named for representative Frank Becker of New York who had sponsored the first prayer amendment bill in the 88th Congress. [1964] Cong. Q. Rep. 881-85.
94. See Kauper, Prayer, Public Schools and the Supreme Court, in THE SUPREME COURT AND CONSTITUTIONAL RIGHTS: READINGS IN CONSTITUTIONAL LAW (1967).
96. Id. at 422.
97. Id. at 430.
Black stated:

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say — that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.98

In *Engel*, Justice Black elaborated upon his interpretation of the establishment clause, illustrating a consistency with his position in earlier opinions by again emphasizing the heavy restrictions placed upon government in its relationships with religious institutions. Justice Black defined the establishment clause and its purpose:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operated directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. 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. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.... Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmental established religions and religious persecutions go hand in hand.99

The Justice cited James Madison's warning that governments which favor the Christian religion in general may eventually decide to condone and authorize one sect of the Christian religion, even to the point of forcing monetary support of that religion.100

Parents who had brought similar questions before the Court be-

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98. *Id.* at 429-30.
99. *Id.* at 430-32. Government and religion were closely connected in most of the colonies and several states after 1776. Rhode Island, Maryland, Virginia, Pennsylvania, and Massachusetts led the way toward increased religious freedom in this country before the Bill of Rights was ratified. *Abernathy, Civil Liberties Under the Constitution* 272-74 (1977).
100. 370 U.S. at 436. Madison warned against the intermingling of Church and State. (Justice Black derives this warning from J. Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *The Writings of James Madison* 183, 185-86 (1901)).
cause of a dissatisfaction with public school policies regarding religious devotions, saw the Engel victory in the Supreme Court as reason to be optimistic when their cases were reviewed by the Court a short time later. Their optimism was justified when the Court held in Abington School District v. Schempp\textsuperscript{101} that recitation of the Lord's Prayer and the reading of ten Bible verses by public school children were unconstitutional. The students in this case were given the opportunity to excuse themselves from the classroom, but in the view of the Court that was not enough to legitimize the early morning devotions conducted for the rest of the students who either condoned the exercises or passively accepted them. Justice Black had previously supported the interpretation of the Court that such practices violate the establishment clause.\textsuperscript{102} Justice Clark wrote the majority opinion "with considerably less bluntness, and much more of an eye toward soothing the public,"\textsuperscript{103} propounding the easy logic of having the state assume a position of neutrality.\textsuperscript{104}

In 1952, Donald Doremus filed a taxpayer suit questioning the constitutionality of a daily school Bible reading authorized by a New Jersey law. In Doremus v. Board of Education,\textsuperscript{105} the Court held that the taxpayer lacked standing to sue.\textsuperscript{106} The student had not been compelled to participate or even stay in the room while the Bible was being read.\textsuperscript{107} Justice Black agreed with the majority which held that the case was not justiciable since no actual injury was shown.

\begin{itemize}
\item \textsuperscript{101} 374 U.S. 203 (1963).
\item \textsuperscript{102} Although Justice Black authored no opinion in the Abington decision, his rationale regarding application of the establishment clause to school prayer articulated in Engel, see supra notes 95-100 and accompanying text, was utilized extensively by the majority in support of its conclusion to strike a mandatory prayer and Bible reading.
\item \textsuperscript{103} H. Abraham, The Judiciary: The Supreme Court in the Governmental Process 101 (1980).
\item \textsuperscript{104} [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented as part of a secular program of education, may not be effected consistently with the First Amendment.
\item 374 U.S. at 225.
\item \textsuperscript{106} "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure." \textit{Id.} at 433.
\item \textsuperscript{107} The appeal was dismissed because there was no finding that the taxpayer had the requisite interest and injury necessary for standing in a taxpayer case. \textit{Id.} at 434-35.
\end{itemize}
Unlike the great debate that developed among citizens and members of Congress following the *Engel* and *Schempp* decisions, the *Doremus* opinion attracted little public attention. The general public outcry and a legislative flurry in Congress\(^\text{108}\) did not discourage the Court in the succeeding several years from considering subsequent questions involving governmental and religious policy-making in the educational field.

### D. Direct Aid to Parochial Schools

Tax money allocations to support phases of private and parochial school systems were a source of conflict in different localities, and, as in *Everson*,\(^\text{109}\) were a basic issue leading to the instigation of litigation. In *Flast v. Cohen*,\(^\text{110}\) Florence Flast alleged that tax money allocations for educational materials in parochial schools violated the Constitution. Thus posed, the persistent question of whether a taxpayer could contest expenditures of a governmental agency was reconsidered by the Supreme Court in 1968. With Chief Justice Warren as its spokesman, and Justice Black joining the majority in a landmark decision, the Court found standing on the part of the taxpayer.\(^\text{111}\)

The *Flast* decision effectively nullified the case of *Frothingham v. Mellon*\(^\text{112}\) without formally overruling it. *Frothingham* was a politically oriented case in which the Court ruled that a federal taxpayer lacked standing to question whether Congress had invaded state powers guaranteed by the tenth amendment. The Court held that the complaining litigant failed to show a direct injury as a result of the federal maternity law.\(^\text{113}\)

On the same day *Flast* was decided, the Supreme Court, in *Board of Education of Central School District v. Allen*,\(^\text{114}\) handed down a decision concerning a state law that authorized purchase of textbooks for parochial and private schools at state expense. According to the majority, the statute under scrutiny did not offend the Constitution.\(^\text{115}\) Justice Black wrote a dissenting opinion

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109. *See supra* note 73.
111. *Id.* at 106.
112. 262 U.S. 447 (1923).
113. The Court held that if the defendant had been able to show an injury, there would be a "justiciable controversy." *Id.* at 480.
115. *Id.* at 245-48.
in which he called the law:

[A] flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law “re-
specting an establishment of religion....” This, I am confident, would be in
keeping with the deliberate statement we made in Everson v. Board of Ed-
ucation ... and repeated in People of State of Illinois ex rel. McCollum v.
Board of Education....

The Justice detected governmental compulsion in using tax funds to buy textbooks for parochial schools. He pointed out that where certain religious groups were politically strong, they could have a predominant influence upon the type of laws concerning under-
writing costs of religious educational endeavors. He labeled such efforts as “insidious approaches that the citadels of liberty are most successfully attacked.”

Justice Black was dismayed to see his Everson opinion cited by the lower court judges as authority in the “textbook” cases. He failed to see any parallels between bus fares for students, and textbooks furnished to parochial schools. According to Justice Black, books are the heart of the educational system. Propaganda and religious viewpoints are transmitted through books, while rid-
ing on buses to and from school did not affect a child's religious belief one way or another. Justice Black asserted that the establish-
ment clause had been violated where the state was underwrit-
ing traditional educational costs of parochial schools. It was his belief that the religious peace in the country would be in jeopardy if the trend of allocation of public tax funds continued to be earmarked for private sectarian purposes.

116. Id. at 250 (citations omitted).
117. Id. at 252.
118. See Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979) (plaintiffs sued Board of Education and their members for declaratory judgment and injunctive relief because of Board’s permission and sponsorship of Bible study and instruc-
tion in city and county elementary schools; Bible study program constituted an ex-
cessive entanglement between government and religion); Wolman v. Essex, 417 F. Supp. 1113 (S.D. Ohio 1976) (Ohio statute made certain services and materials available to non-public schools; Court held that secular materials were incapable of diversion to religious use); Commission for Pub. Educ. and Religious Liberty v. Levitt, 342 F. Supp. 439 (S.D.N.Y. 1972) (New York statute authorizing payment of certain public funds to non-public schools held unconstitutional where school im-
posed religious restrictions on admissions, required attendance of all pupils at religious activities, and was integral part of the religious mission of the supporting church); Protestants, Etc. United for Separation of Church and State v. United States, 435 F.2d 627 (6th Cir. 1970) (an action to enjoin a law authorizing federal grants for library and instructional materials for parochial schools, lower court granted summary judgment for defendants; decision reversed and remanded by United States Court of Appeals).
119. “The First Amendment’s prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny.” Board of Educ. v. Allen, 392 U.S. 236, 254 (1968).
In *Lemon v. Kurtzman*, the Court invalidated state statutes that authorized financial supplements to parochial school teachers out of public funds. Justice Black joined in the concurring opinion of Justice Douglas. The teachers taught secular subjects, but were under state scrutiny to ensure that the specified standards were observed. The *Lemon* majority viewed the arrangement as an impermissible entanglement of state and church activities.

The concurring opinion by Justice Douglas presented statistics illustrating the degree of state involvement in the parochial education field within Catholic parishes. Justice Douglas pointed out that many of the parochial schools were founded in the nineteenth century because of dissension and conflict over what religious instruction could be introduced into the public school system. His opinion noted that, for years, the custom had been to ban the use of tax money to promote parochial school activities, but that the rule had gradually changed until nine billion tax dollars were being funneled into sectarian schools in any one year. A form of surveillance by state government was already in effect because of the transfer of money from the public purse to the church treasury for other endeavors. The amount of policing required if parochial teacher salaries became supplemented by state tax funds would necessarily increase. If taxpayers would begin to pay for part or all of the expenses of private parochial school programs, then prayers, the content of the curriculum, and discussions within the classrooms of schools supporting sectarian ideas would all be subject to censure. However, because the purpose of a parochial school is to teach specific religious doctrine, religiously zealous teachers would be capable of implementing church dogma in even the most neutral subjects. State officials attempting to enforce secular educational norms and ensure that the parochial teachers and school administrators abided by secular guidelines would create dissension which could eventually lead to open academic conflict. A teacher who disregarded the secular approach would be accountable to the religious hierarchy who placed religious instruction in a primary position. If teachers

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120. 403 U.S. 602 (1971).
122. *Id.* at 609.
123. *Id.* at 630 n.13.
who taught most of the secular subjects in religious schools were subsidized by the state, the result would be that government, in effect, would be underwriting a substantial portion of the school's budget. This would leave the small remainder financed by the church to be channeled for the promotion of a particular faith. The Court agreed that such an arrangement negated the first amendment and ignored the intent of the founding fathers. Justice Black supported Douglas' concurring opinion in Lemon. Douglas and Black were both strongly opposed to state funding of church school activities.

On the same day that the Lemon decision was announced, the Court decided Tilton v. Richardson, a case considering parochial colleges and the federal financing of construction of buildings specified for secular purposes at such colleges for the buildings' first twenty years. A majority of the justices reasoned that there was no violation of the first amendment. Justice Douglas authored the dissent and Justices Black and Marshall concurred with the opinion. The Tilton case differed from Everson in that the monetary aid given at public expense went directly to the student and was therefore classified as indirect state aid of religion. Erecting expensive buildings on a parochial school campus where the federal government paid up to half the cost, however, constituted direct aid to a religious instrument. Federal

124. Id. at 640-41.
125. "[T]he use of taxpayers' money to support parochial schools violated the First Amendment, applicable to the States by virtue of the Fourteenth." Id.
126. Id. at 625-42.
127. 403 U.S. 672 (1971).
128. The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in Bradfield v. Roberts, 175 U.S. 291 (1899). . . . The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion....

The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. Id. at 679.

129. Justice Douglas wrote the dissent, with Justices Black and Marshall concurring in separate dissenting opinions.

The plurality's distinction is in effect that small violations of the First Amendment over a period of years are unconstitutional . . . while a huge violation occurring only once is de minimus. I cannot agree with such sophistry.

[A] parochial school operates on one budget. Money not spent for one purpose becomes available for other purposes. Thus the fact that there are no religious observances in federally financed facilities is not controlling because required religious observance will take place in other buildings. Id. at 693.
law provided for the buildings to become the property of the parochial college only after twenty years, and the dissenters felt that such an arrangement violated the establishment clause.\textsuperscript{130} It would be impossible to assure that sectarian activities would never be introduced into any such buildings on a church-supervised college campus. Even if all activities held within the financed buildings actually were restricted to secular activities, the government grant made it possible for the enhanced budget of the institution to be directed toward structures used for religious purposes.\textsuperscript{131} This, of course, would be in contravention of the basic constitutional premise that any federally subsidized activity must be governed by federal laws. This is represented by the ban on prayer required by the \textit{Engel} decision,\textsuperscript{132} which made operative the establishment and free exercise clause.

For Justices Douglas and Black, the \textit{Tilton} decision created a problem involving state authorities enforcing their policies upon the church, thereby necessitating a constant state examination of the use of the buildings. The two justices warned of the increasing wealth of churches, the ever-enlarging intrusion of church financed enterprises into the secular business world, and the preferred position of church property as a result of the tax exemption.\textsuperscript{133} They cautioned that the trend could not continue without causing unacceptable governmental intrusion into sectarian activity.\textsuperscript{134} Justice Douglas, with Justice Black's approval, concluded that "[t]he million-dollar grants sustained today put Madison's miserable 'three pence' to shame. But [Madison] even thought, as [Justices Douglas and Black did], that even a small amount coming out of the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal."\textsuperscript{135}

\textbf{E. Regulation of Student and Teacher Expression}

A study of Justice Black's judicial interpretation of the first amendment should necessarily include his remarks regarding the content of discussions led by teachers and the role students play

\begin{footnotesize}
\begin{enumerate}
\item[130.] 403 U.S. at 683.
\item[131.] \textit{Id.} at 680-81.
\item[132.] \textit{See supra} note 95 and accompanying text.
\item[133.] "The religiously used real estate of the churches today constitutes a vast domain.... Their assets total over $141 billion and their annual income at least $22 billion." 403 U.S. at 696 (quoting \textit{Walz} v. \textit{Tax Comm'n}, 397 U.S. at 714).
\item[134.] 403 U.S. at 697.
\item[135.] \textit{Id.} at 697.
\end{enumerate}
\end{footnotesize}
in the public classroom. Justice Black’s definite ideas relating to the regulation of student-teacher expression emerged in his opinions and his votes in cases concerning school administrative policy, school policy-makers, teachers and students. In 1940, Justice Black took the position in *Minersville School District v. Gobitis*¹³⁶ that children could be punished if they rebelled against school authorities and refused to salute the flag, even if it violated their religious principles.¹³⁷ The following year, in *Jones v. Opelika*, Justice Black admitted that *Minersville* was incorrectly decided and later voted to overturn that decision.¹³⁹

In the Vietnam War era, Justice Black was unimpressed by the student’s reasons for wearing black armbands during school hours in *Tinker v. Des Moines Indep. Community School Dist.*¹⁴⁰

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¹³⁷ 310 U.S. at 598-99. Speaking for the majority, Justice Frankfurter upheld the expulsion of two children, practicing Jehovah’s Witnesses, from a Pennsylvania public school on the ground that the court should not exercise censorship over a legislative program designed to promote traditional ideals of democracy in public schools. In Justice Stone’s dissenting opinion, he stated that the Constitution did not demand that “compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion.” *Id.* at 605. The majority opinion was subject to considerable criticism by commentators. *See*, e.g., *Note, Constitutional Law — Compulsory Flag Salute Sustained*, 18 N.Y.U. L. Rev. 124 (1940-41).

¹³⁸ 316 U.S. 584 (1942). In *Opelika* the issue was the constitutionality of city license taxes in Alabama, Arkansas and Arizona on the sale of printed materials. The petitioners were Jehovah’s Witnesses who were convicted of violating the various ordinances for not possessing the required licenses. A divided Court (5-4), upheld the license taxes against freedom of religion, speech and press challenges. *Id.* at 598. Justice Stone again dissented. *Id.* at 600-11. In a separate dissent, Justice Black, joined by Justices Douglas and Murphy, admitted that the *Minersville* case had been incorrectly decided and stated that the “Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be.” *Id.* at 624. For a discussion of *Opelika*, *see* Note, *Use of Taxation and Licensing in the Suppression of Freedom of Religion and the Press*, 52 Yale L.J. 168 (1942).

¹³⁹ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The majority opinion, written by Justice Jackson, upheld the district court opinion which restrained enforcement against members of the Jehovah’s Witness faith of a West Virginia State Board of Education resolution requiring that students in public schools salute the national flag under threat of expulsion. The Court explicitly overruled *Minersville* and held that the compulsory flag salute violated the principles and freedoms of the first amendment. *Id.* at 642. Justice Black concurred, stating that a statute compelling children to salute the flag in violation of their religious principles becomes a “handy implement for disguised religious persecution.” *Id.* at 644. The “flag-salute” cases have elicited extensive commentary. *See* Note, *Constitutional Implications of Compulsory Flag Salute Statutes*, 12 Geo. Wash. L. Rev. 70 (1943).

¹⁴⁰ 393 U.S. 503 (1969). The Court held that a school policy requiring suspension of any student refusing to remove a black armband signifying disapproval of the Vietnam War was an unconstitutional denial of the students’ right of expression. *Id.* at 514. In a strongly worded dissent, Justice Black relied upon the testimony of school authorities in stating that the students, who wore armbands in violation of school policy were engaging in a practice which distracted other stu-
Rather, he relied on the school authorities’ testimony that the few students who wore the armbands were engaging in a practice that distracted other students. Although the students in *Tinker* were children of a Methodist minister, the issue was not one of religion, but of speech. Justice Black rejected the idea that symbolic speech was on the same level with pure speech. In his dissenting opinion in *Tinker*, Justice Black emphatically rejected an absolute freedom of speech for teachers who taught at either the primary or secondary levels:

The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semitic carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. . . . It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. . . . In my view, teachers in state controlled public schools are hired to teach there ... certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public.

One year prior to *Tinker*, a teacher challenged an Arkansas law that forbade teaching evolution in public schools in the case of *Epperson v. Arkansas*. The Supreme Court, with Justice Black concurring, voided the historically effective anti-evolution statute. Justice Black’s vote was welcomed, but remarks in his dissent. *Id.* at 517-18. To Justice Black, allowing students this type of freedom of expression would compel “teachers, parents, and elected school officials to surrender control of the American public school system to public school students.” *Id.* at 526.

141. The Court stated that the problem involves direct, primary first amendment rights akin to “pure speech” which, according to the Court, “is entitled to comprehensive protection under the First Amendment.” *Id.* at 505-06. See *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965). See also *Divine, A Note on Tinker*, 7 WAKE FOREST L. REV. 539 (1971).

142. Relying upon Justice McKenna’s opinion in *Waugh v. Mississippi Univ.*, 237 U.S. 589 (1915), Justice Black analogized the “armband” situation to the opinion in *Waugh* which held that the states’ public schools have the right to curtail freedom of assembly when it interrupted the educational process. 393 U.S. at 522-24.

143. 393 U.S. at 521-22 (citations omitted).

144. 393 U.S. 97 (1968). Under the anti-evolution statute in question, it was unlawful for a teacher in a state supported school to teach the Darwinian theory, or to use a textbook which taught that theory. A conviction under the statute resulted in a misdemeanor fine and dismissal. *Ark. Stat. Ann.* §§ 80-1627, 80-1628 (1960).

145. Justice Fortas wrote the majority opinion. Justices Black, Stewart and Harlan concurred separately.
concurring opinion overshadowed his vote. The case centered upon an unenforced law challenged by a school teacher and parents of certain children in the teacher's school. The law had never been enforced. Thus Black wrote, "I am by no means sure that this case presents a genuinely justiciable case or controversy." Since the teacher was no longer in this profession, and the students were no longer in the school system, Justice Black thought the lawsuit should perhaps be dismissed as moot. Ultimately, however, Justice Black voted to strike down the statute on grounds of vagueness.

The majority voided the statute involved in Epperson because they believed it violated the establishment clause. Justice Black thought that the subject of evolution was controversial and that school policy-makers had the right to withdraw from the school's curriculum controversial subjects. He felt that the Court, by denying school authorities the ability to exclude the teaching of evolution, infringed on "the religious freedom of those who consider evolution an anti-religious doctrine." In this situation, the Supreme Court was apparently ignoring the first amendment norm of state neutrality. Justice Black displayed his attitude toward public education and academic freedom when he stated that:

I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . . I question whether it is absolutely certain, as the Court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

The Justice rejected the notion of the Supreme Court supervising the curriculum on the state and local levels, just as he condemned

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146. 393 U.S. at 109. The Arkansas anti-evolution statute had not been enforced during its 40 years on the books. The evidence did not show that the teacher who brought the action, seeking a declaratory judgment, was currently teaching in the Arkansas school system, nor did it show that the intervenor's sons, students in the Arkansas public schools, were taught the Darwinian theory. Id. at 109-10.

147. Justice Black believed that by holding the statute unconstitutional on grounds of vagueness, the Court would not only be following precedent and avoiding the task of determining the scope of state law, but would also avoid violating the principle that the States are "absolutely free to choose their own curriculums for their own schools so long as their action does not palpably conflict with a clear constitutional command." Id. at 112.

148. The Court held that the statute violated the principles of religious neutrality required by the state in accordance with the first amendment. Id. at 109.

149. Justice Black took issue with the majority's holding that Arkansas sought to exclude the evolution theory from public education because it was contrary to the Book of Genesis. Justice Black felt that the State may exercise its right to withdraw material from school curriculum if it was controversial. Id. at 112-13.

150. 393 U.S. at 113.

151. Id. at 113-14.
the Court's policy-making in first amendment obscenity cases.\textsuperscript{152}

Despite Justice Black's disagreement with the Court's supervision of activities in the classroom, he played a significant role in deciding that educational policies designating school authorized prayer,\textsuperscript{153} the Lord's prayer,\textsuperscript{154} and Bible reading\textsuperscript{155} violated the first amendment. Justice Black stated that school authorities could not designate release time for religious studies taught in public school buildings\textsuperscript{156} or in other nearby buildings.\textsuperscript{157} As to fiscal matters, he approved an allocation of tax funds for the transportation of parochial school students since it was the child who was benefiting and not the church.\textsuperscript{158} However, he took a different stance when tax money was allocated for textbooks,\textsuperscript{159} school buildings on parochial campuses,\textsuperscript{160} and teacher salaries in


\textsuperscript{154} Murray v. Curlett, 374 U.S. 203 (1963). In an opinion by Justice Clark, a rule promulgated by the Board of School Commissioners of Baltimore requiring the reading of a chapter of the Bible and/or the Lord's Prayer was held to violate the establishment clause. Justice Black voted with the majority.

\textsuperscript{155} Abington School Dist. v. Schempp, 374 U.S. 203 (1963). Schempp was a companion case to Murray; both opinions were written by Justice Clark with Justice Black voting with the majority. A similar Bible-reading/Lord's Prayer rule in Schempp was held unconstitutional on the same grounds as in Murray. See supra note 154.

\textsuperscript{156} McCollum v. Board of Educ., 333 U.S. 203 (1948).

\textsuperscript{157} Zorach v. Clauson, 343 U.S. 306 (1952) (statute did not constitute establishment of religion within meaning of first amendment). Justice Black dissented on the basis of his opinion in McCollum. See Reed, Church-State and the Zorach Case, 27 Notre Dame Law. 529 (1952).


\textsuperscript{159} Board of Educ. v. Allen, 392 U.S. 236 (1968). The majority opinion, written by Justice White, held that a New York statute requiring school districts to lend textbooks to all public, private and parochial students did not violate the establishment or free exercise clauses of the first amendment. Justice Black dissented, stating that a state law requiring the use of tax funds to buy books for parochial schools was a "flat, flagrant, [and] open violation" of the establishment clause. \textit{Id.} at 250. Distinguishing his \textit{Everson} opinion, Justice Black believed that a statute which allowed public taxes to be used to buy books for parochial students "bodes nothing but evil to religious peace in this country." \textit{Id.} at 254. See Note, \textit{Constitutional Law — Establishment Clause of the First Amendment — Free Textbook Loans to Pupils in Private Schools Held Constitutional}, 37 Fordham L. Rev. 123 (1969).

\textsuperscript{160} Tilton v. Richardson, 403 U.S. 672 (1971). At issue in \textit{Tilton} was the ques-
Educational policy-making by Justice Black and his ideas about students, teachers, curriculum, early morning devotions, and the use of tax money reflected several aspects of his personal background. In his youth he attended a country school where the severity of discipline sometimes exceeded the nature of the mischief. Yet he respected teachers and administrators in the small schools he attended in Alabama. It seems likely that Justice Black's opinions about academic freedom and student expression of unpopular ideas may have had their roots in the old-fashioned approach to education that he had experienced as a child.

IV. Recurring Conflicts in the Church-State Context

A. Sunday Closing Laws

A comparison of Justice Black's position in cases dealing with the constitutionality of federal building and construction aid for church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, Pub. L. No. 88-204, 77 Stat. 368, as amended at 20 U.S.C. §§ 711-721 (Supp. 1974). The Act specifically excluded federal funding for church-related purposes of the schools. 20 U.S.C. § 751(a)(2)(c) (1964 & Supp. IV). The appellants were citizens and taxpayers in the state of Connecticut. They brought suit seeking injunctive relief, contending that four church-related colleges and universities were receiving federal funding under Title I. The Court, in an opinion by Chief Justice Burger, held that the Higher Education Facilities Act did not violate the free exercise or establishment clauses except for § 754(b)(2), which placed a 20-year limitation on the religious use restriction in § 751(a)(2). 403 U.S. at 689. Justice Black joined in a concurring and dissenting opinion written by Justice Douglas, which stated that invalidation of the religious use limitation clause did not "cure the constitutional infirmities of the statute as a whole." Id. at 692. See Giannella, Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 SUP. CT. REV. 147. See also supra notes 120-25 and accompanying text. Both the majority and concurring opinions carefully distinguished the case of Walz v. Tax. Comm'n, 397 U.S. 664 (1970), wherein the Court held that tax exemptions for places of religious worship did not violate the establishment clause. See also infra note 202.


The majority opinion, written by Chief Justice Burger, held that both state statutes were invalid under the establishment clause. 403 U.S. at 613-14. Justice Black joined in Justice Douglas' concurring opinion. Justice Douglas felt that the surveillance necessary to enforce the religious restrictions in the state statutes constituted an excessive government entanglement with religion. Id. at 627. See supra notes 120-25 and accompanying text. Both the majority and concurring opinions carefully distinguished the case of Walz v. Tax. Comm'n, 397 U.S. 664 (1970), wherein the Court held that tax exemptions for places of religious worship did not violate the establishment clause. See also infra note 202.


163. See Dunne, supra note 162, at 89-90.
the juxtaposition of work-days and church laws provides an interesting contrast. Religious beliefs often make it difficult for individuals to work with clear consciences on the day designated as a holy one, particularly in the case of members of the Hebrew faith. The first cases to reach the Supreme Court concerning Jewish litigants and their observance of the Jewish sabbath day were decided in 1961.164 The problem concerned Sunday closing laws, which were enforced to the point that Jews who normally observed a sabbath on Saturday instead of Sunday, and who were in retail business, were financially penalized. Four cases were remarkably similar, and Justice Black indicated by his position in those cases that Sunday closing laws did not invade the constitutional rights of the Jewish litigants.165 Justice Black concluded that concepts of due process, equal protection, lack of free exercise of religion, or establishment of religion could not be relied upon to strike down these laws. The ostensible legislative purpose of Sunday closing laws was to provide citizens one day each week for rest and relaxation166 and the majority of the Court, including Justice Black, found that purpose acceptable and within the bounds of the Constitution.167

Under the Sunday closing laws, Jewish citizens were left in the precarious position of either closing their businesses on Saturday and Sunday, thereby incurring heavy financial losses, or remaining open for business on Saturdays, a practice which would directly conflict with their principles of faith.168 A second problem was the inability to shop for a period of two consecutive days for specially prepared foods required by Jewish dietary laws. This inconvenience would occur whenever the kosher businesses could not economically stay open for a short period of time on Sunday, as permitted by some states.169 Justice Black supported Chief Justice Warren's reasoning when he wrote that, despite the fact that Sunday closing laws stemmed from religious dictates,
they were secular in actuality, and did not affect beliefs or opinion. He concluded that the burden placed on the exercise of a person's religion by the imposition of such laws was indirect.170

Abraham Braunfeld's first amendment interpretation differed from the court interpretation. He believed it was his duty to obey God and refrain from doing business from sundown on Friday to Saturday evening. Braunfeld also believed that he was obligated to obey the state and close his store on Sunday.171 The result of this conflict was the financial loss of his investment. A similar case had been earlier decided involving a young Jehovah's Witness who was also financially penalized by a state law against selling literature upon the streets. In the earlier case of Prince v. Massachusetts,172 a law forbade children under eighteen years from selling literature on the streets. The Supreme Court disregarded the petitioner's argument that she had violated the law in order to practice religion.173 Although Justice Black simply voted to support Chief Justice Warren's opinion in Braunfeld v. Brown, the content of a subsequent letter indicates that he seemed to accept Warren's historical analysis dealing with Sunday closing laws. In a letter to Edmond Cahn in 1961, he stated:

As you are aware, probably no two justices would write precisely the same opinion in any single case. I thought the Chief did a very good job in showing the historical changes that had occurred in the basis for Sunday legislation throughout the years. Certainly if his historical summary of the laws in question is correct, one could say that those laws do not attempt to establish any religion. So far as the free exercise of religion is concerned, they would have to be approached differently if they required people to work in violation of the commands of their religion.174

Two years later, the precise question Justice Black posed in his letter to Edmond Cahn was brought before the Supreme Court in Sherbert v. Verner.175 Interestingly, Justice Black was in the majority when the Court decided the plight of a person who was financially penalized because she asserted religious reasons for not working on Saturday. Adell Sherbert was a member of the Seventh Day Adventist Church, and since she refused to work on Saturday because of religious limitations, she was unable to secure employment. The situation was complicated further when

171. Id. at 601.
173. Id. at 167-71.
175. 374 U.S. 398 (1963). Adell Sherbert, a textile worker, was employed by Sparton Mills, Beaumont Division, for approximately 35 years. When the work week was extended to include Saturday employment, she failed to report for work for six successive Saturdays and was subsequently discharged. Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737 (1962).
she was disqualified from receiving unemployment compensation because she would not accept employment that required her to work on her religious day of worship. The Supreme Court decided that the denial of unemployment compensation for the petitioner amounted to a violation of the free exercise clause since the state failed to show a legitimate interest which outweighed Ms. Sherbert’s right to practice her belief. The denial of unemployment benefits was held to be unconstitutional.

The *Braunfeld* and *Sherbert* cases were similar in that both litigants were penalized for observation of their particular days of worship. Justice Black’s 1961 letter to Cahn, quoted in part above, concisely explained why Sherbert’s plea was acceptable to Black, while arguments by earlier litigants of the Jewish faith had failed

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176. The South Carolina Unemployment Compensation Act, S.C. Code Ann. § 68-1-404 (Law Co-op. 1962), provided in pertinent part that:

§ 68-114. Disqualification for benefits. - Any insured worker shall be ineligible for benefits: ... (3) Failure to accept work. - (a) If the Commission finds that he has failed, without good cause, (i) either to apply for available suitable work, when so directed by the employment office or the Commission, (ii) to accept available suitable work when offered him by the employment office or the employer or (iii) to return to his customary self-employment (if any) when so directed by the Commission, such ineligibility shall continue for a period of five weeks....

Id.

South Carolina expressly protected the Sunday worshipper from having to make a choice analogous to the one in *Sherbert* where the Court held that making Saturday a mandatory work day infringed the Sabbatarian’s religious liberty. Even in times of national emergency, when the textile plants are authorized by the State Commissioner of Labor to operate on Sunday:

no employee shall be required to work on Sunday ... who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious or physical objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner.

S.C. Code Ann. § 64-4 (Law Co-op. 1962) (emphasis added). In this respect, disqualification of a Sunday worshipper for benefits is not likely to arise since an employer would not discharge the employee in violation of the statutory language. *Sherbert*, 374 U.S. at 406.

177. The Court recognized that:

This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”

374 U.S. at 410 (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (emphasis in original)).

178. 374 U.S. at 410. The Court emphasized that the state interest asserted in *Sherbert* was “wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld*....” Id. at 408.
to convince him that their constitutional rights were being violated.

B. Conscientious Objectors

During the period that Justice Black served on the High Court, American fighting forces engaged in combat in World War II, the Korean War, and the Vietnam War. During these conflicts, the general population expected a willingness on the part of eligible men to serve in the armed forces. Oaths to support the Constitution became a common part of the routine of obtaining employment or entering a profession. Sometimes religious scruples prevented individuals from taking such oaths or serving in the armed forces. Several cases illustrated Justice Black's concern over the conflict of individual religious scruples and governmental requirements.179

In re Summers180 involved a Quaker who planned to practice law in Illinois but was denied admission to the bar because of the state's fear that a Quaker's oath to use force to protect the state constitution could not be relied upon due to the Quaker's religious principles. The Court upheld the denial of admission. Justice Black wrote a dissenting opinion in which he expressed his belief that a conscientious objector had the right to think, believe, and worship without being penalized.181 In 1955, a Jehovah's Witness found a more receptive Court when he claimed to be a conscientious objector and thus failed to appear when he was drafted. Accordingly, Justice Black was among the majority in Sicurella v. United States182 who concluded that the decisions by the selective service appeal board and the lower federal courts holding the petitioner as a "draft dodger" were erroneous. Justice Black did not use the first amendment as a basis for relief even though the petitioner was found to be motivated by religious

179. See infra note 180.
180. In re Summers, 325 U.S. 561 (1945). The Court emphasized:
   It is impossible for us to conclude that ... Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship.  
   Id. at 573 (citing United States v. Macintosh, 283 U.S. 605 (1931)); see also United States v. Schwimmer, 279 U.S. 644 (1929).
181. Justice Black vehemently argued that a state should not be allowed to "bar from a semi-public position a well-qualified man of good character solely because he entertains a religious belief...." 325 U.S. at 578 (Black, J., dissenting).
182. 348 U.S. 385 (1955). The selective service appeal board had determined that Sicurella would "fight under some circumstances, namely in defense of his ministry, Kingdom Interests, and in defense of his fellow brethren." Id. at 392.
ideals.\textsuperscript{183}

Justice Black's opinion in \textit{Welsh v. United States}\textsuperscript{184} received support from Justices Douglas, Brennan, and Marshall, and overturned the conviction of a conscientious objector whose objections were based upon moral standards rather than upon religious beliefs. Constitutional religious issues were omitted in Justice Black's opinion, and instead he based his reasoning on the previous case of \textit{United States v. Seeger}, which allowed conscientious objection without a true belief in God.\textsuperscript{185} Justice Black noted the similarities of the two cases and compared the backgrounds of both litigants. He found that although Seeger and Welsh were reared in a religious environment, they did not carry into their adult lives a continuation of church affiliation. They both registered for the draft and later decided they could not bring themselves to fight in a war. When they filled out the application for a draft deferment which required a statement of reasons why they were conscientious objectors, neither could sign the standard form because they could not honestly base their objection upon their religious training or a belief in a Supreme Being.\textsuperscript{186} Both young men altered that part of the form in order to be truthful about the source of their pacifist beliefs. Ethical considerations

\begin{footnotes}
\textsuperscript{183} \textit{Id.} at 391, \textit{cf.} Simmons v. United States, 348 U.S. 397 (1955) (failure to provide conscientious objector with fair resume of all adverse information in Federal Bureau of Investigation report deprived him of "hearing" provided by § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456(j) (1981)).


\begin{quote}
Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.
\end{quote}


\textsuperscript{185} 380 U.S. 163 (1965). In \textit{Seeger}, the Court explicitly adopted the following test for evaluating conscientious objector claims: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." \textit{Id.} at 176.

\textsuperscript{186} 398 U.S. at 336-37.
\end{footnotes}
and moral attitudes rather than a specific religious belief were the primary reasons for their newly formed opinions, but the Selective Service System rejected these contentions.\footnote{187} In both the \textit{Welsh} and \textit{Seeger} cases the Supreme Court accepted a broad base upon which serious conscientious objectors could file for military exemption. In \textit{Welsh}, Justice Black stated that “\cite{187} because his beliefs function as a religion in his life, such an individual is as much entitled to a ‘religious’ conscientious objector exemption under Section 6(j) as is someone who derives his conscientious opposition to war from traditional religious conviction.”\footnote{188} But he did leave a qualification for future reference:

We certainly do not think that Section 6(j)’s exclusion of those persons with “essentially political, sociological, or philosophical views or a merely personal moral code” should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.\footnote{189}

One year after \textit{Welsh}, Justice Black wrote the majority opinion in \textit{Gillette v. United States.}\footnote{190} There the Court rejected the contention that the first amendment protects a draftee whose conscientious objection is to a \textit{particular} war — \textit{not all wars}. Gillette said that he could participate in a “just” war; however, he felt that the Vietnam War was unjust.\footnote{191} This unique, self-contradicting contention was refuted because the majority of the justices, including Justice Black, decided that the government interest in exercising the military power outweighed any claim which was made concerning either the violation of the establishment clause or the free exercise clause.\footnote{192}

\footnote{187. Id. at 337.} \footnote{188. Id. at 340.} \footnote{189. Id. at 342-43.} \footnote{190. 401 U.S. 437 (1971). The companion case of Negre v. Larsen was also decided by the Court in the same opinion. “Gillette sought exemption from the draft, while Negre sought discharge from the Army.” Id. at 441 n.3.} \footnote{191. Id. at 439-41.} \footnote{192. The majority rejected the petitioners’ establishment claim on the ground that § 6(j) of the Military Selective Service Act simply did not discriminate on the basis of religious affiliation or religious belief. 401 U.S. at 450. The majority, addressing the free exercise claim, found that governmental interests existed “of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.” Id. at 461. Justice Black only concurred in Part I of the Court’s opinion, failing to recognize the majority’s rationale concerning the establishment clause and the free exercise clause. Id. at 463. (Black, J., concurring).}
C. Taxation of Church Property

Organized religions in the United States own a tremendous amount of property in addition to buildings designed for worship. In the 1970 case of *Walz v. Tax Commission*, Justice Douglas wrote a dissenting opinion in which he presented statistics to show the real estate value of church property: "[t]he religiously used real estate of the churches today constitutes a vast domain . . . . Their assets total over $141 billion and their annual income at least $22 billion . . . . And the extent to which they are feeding from the public trough in a variety of forms is alarming . . . ." Church ownership of property led to a wide array of problems that were eventually presented to the Court while Justice Black was on the bench. For example, Black rejected the provisions in the California Constitution providing for a tax exemption on religious property if an oath was sworn rejecting the overthrow of government by unlawful methods. Justice Black maintained that "California, in effect, has imposed a tax on belief and expression." He felt that penalizing individuals and churches by requiring oaths illustrated continued digression of this country from the first amendment and its protections.

The issue of taxes and religion came before the Court in 1970. In *Walz v. Tax Commissioner*, Justice Black voted with the majority to sustain a New York City tax exemption for properties owned by religious organizations which were used for worship activities, religious education, or charitable purposes. According to the appellant, the crux of the matter was that the tax exemptions "indirectly require[d] the appellant to make a contribution to religious bodies and thereby violate[d] the provisions prohibit-
ing establishment of religion under the First Amendment. . . .

199 Chief Justice Burger, writing for the majority, indicated that Justice Black's opinions in *Everson* and *Engel* sufficiently covered the historical background of the first amendment's establishment and free exercise clauses. The thrust of Burger's opinion advocated both the neutrality of the state toward religious bodies and a lack of partiality. In short, the Court restated the position that government must not interfere with or attempt to control religious endeavors. Justice Burger emphasized these points by quoting Justice Black's statement in *Everson* that the first amendment "means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." 200 The Chief Justice continued to rely on Justice Black's opinions and finally concluded that tax money for bus transportation of parochial students actually may have helped some students attend school, while without that money they might have been prohibited by financial burdens. Bus transportation, police protection, and textbooks were a form of "aid" that was held not to violate the establishment clause. 201 Thus, the churches remained autonomous, 202 and with Justice Black's supportive vote, church properties continued to be tax exempt.

D. Inter-Ecclesiastical Actions

In *Kedroff v. Saint Nicholas Cathedral*, 203 a New York statute aimed at transferring hierarchical control from the Russian Orthodox Church (the Patriarch of Moscow and Holy Synod) to the Russian Church of America came under the Court's scrutiny. Justice Black struck down the law as a violation of the free exercise of religion. 204 The Court concluded that determination of cler-

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199. 397 U.S. at 667.
200. *Id.* at 670 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)).
201. 397 U.S. at 671.
202. The Court enunciated:
With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a "tight-rope" and one we have successfully traversed.

*Id.* at 672.
203. 344 U.S. 94 (1952). For a complete discussion of the history and organization of the Russian Orthodox Church, see *Saint Nicholas Cathedral of the Russian Orthodox Church in North America v. Kedroff*, 302 N.Y. 1, 96 N.E.2d 56 (1950).
204. N.Y. Relig. Corp. Law § 107.3 (McKinney 1952) provided in relevant part:

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the
ical control was an ecclesiastical matter and not for the government to decide.\textsuperscript{205}

Eight terms after \textit{Kedroff}, in 1960, the Supreme Court reconsidered the question of whether an appointee of the Patriarch of Moscow could use and occupy Saint Nicholas Cathedral which was located in the United States.\textsuperscript{206} The New York Court of Appeals said that under this situation the North American Archbishop of the Russian Orthodox Greek Catholic Church could not continue his cleric duties in the church.\textsuperscript{207} The Court reversed the lower court decision because the question was not a matter for state decision, but was an ecclesiastical matter and should be settled within the church.\textsuperscript{208}

The Court's refusal to become involved in ecclesiastical "politics" was again enunciated in the 1970 case of \textit{Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg}.\textsuperscript{209} The Court, with Justice Black's support, refused to become involved in a property dispute between the regional General Eldership of the Church of God and the two local congregations that had withdrawn from that organization. The Court maintained that there was no federal question. One year prior to that decision, a similar case had come before the Court in \textit{Presbyterian Church v. Hull Presbyterian Church},\textsuperscript{210} where two local Presbyterian congregations withdrew from the general hierarchal organization because of differences in theological doctrines. When the local congregations had relied on trespass laws to protect church property from being taken over by the general church organization, that organization filed a cross-claim for injunctive relief based upon the premise that civil courts should not enter into controversies concerning doctrinal questions.\textsuperscript{211} Justice Black voted to support the Court's holding that civil courts could not de-

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\item same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America.  
\item 344 U.S. at 99; \textit{see also} N.Y. Relig. Corp. Law §§ 105, 107(1) (McKinney 1952).
\item 205. 344 U.S. at 120-21.
\item 206. \textit{Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America}, 363 U.S. 190 (1960) (per curiam).
\item 208. 363 U.S. at 191.
\item 209. 396 U.S. 367, 368 (1970) (per curiam).
\item 210. 393 U.S. 440 (1969).
\item 211. \textit{Id.} at 443.
\end{enumerate}
termine property disputes when the question centered upon whether a church had departed from the original ecclesiastical doctrines. In short, the Court found that the first amendment was violated when civil courts entered into ecclesiastical questions such as the ones advanced by the local Presbyterian churches and their relationship with the general church hierarchy.212

E. Oaths Required for Public Employment

Dating from the colonial period, customs in this country have included reference to God in traditional activities of public institutions and public mottos. For example, God is mentioned on coins, currency, over school house doors, at the commencement of Supreme Court sessions, in administering the oath of the President of the United States, and so on. A controversy was eventually brought before the Court involving the Maryland Constitution, which required a declaration of faith in God as a prerequisite to an appointment to the office of notary public.213 Roy Torcaso was one appointee who decided not to make such a declaration and instead, appealed to the courts for his commission.214 He sought the commission through a writ of mandamus, but the lower state court dismissed the action.215 Justice Black wrote the Court's opinion which struck down the Maryland requirement of an oath professing a belief in God. The Court held that the procedure was a violation of the first and fourteenth amendments.216

Justice Black referred to colonial history in his Torcaso opinion. He equated the Maryland oath with the despised “religious test oaths and declarations [which compelled] a great many of the early colonists [to leave] Europe.”217 The colonists tried to effect

212. Id. at 449. The Court took notice that “not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment . . . . But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.” Id.

213. Article 37 of the Declaration of Rights of the Maryland Constitution provides “[n]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God....” Md. Const., Declaration of Rights, art. 37 (1961).


215. Id. at 489; see 223 Md. 49, 162 A.2d 438 (1960).

216. 367 U.S. at 495-96. Torcaso also advanced the claim that the state's test oath requirement violated the provisions of article six of the Federal Constitution that “no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States.” U.S. Const. art. VI, cl. 3. The Court found it unnecessary to decide the issue of whether or not this provision applied to state as well as federal offices since the Court was reversing the judgment on other grounds. 367 U.S. at 489 n.1.

217. 367 U.S. at 490.
a conformity of the people by requiring religious test oaths that agreed with the politically dominant group's brand of faith. As a result, non-believers and non-conformists were placed at a great disadvantage in the colonies. In particular, John Calvert felt anguish and consternation when he abstained from oaths that violated his conscience and his Catholic creed. He established the colony of Maryland and hoped that this new government would function without the oaths. The trend against religious test oaths increased until they were banned in the United States under Article VI of the Constitution.218 The first amendment to the Constitution was added as a further protection of religious freedom. As Justice Black noted, "[the first] amendment broke new constitutional ground in the protection it sought to afford to freedom of religion, speech, press, petition and assembly."219

In Torcaso, Justice Black pointed to the concepts of free exercise and establishment of religion explained in the cases of Cantwell and Everson. He refuted the reasoning of the Maryland Court of Appeals, which had relied on the comments made by Justice Douglas in Zorach, which indicated that some practices could be continued based upon the religious nature of people and traditions in the United States.220

We repeat and again reaffirm that neither a State nor the Federal government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions based on a belief in the existence of God as against those religions founded on different beliefs . . . . This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.221

F. Interactions Between Justice Black's Views and the Public Sentiment

It is interesting to compare Justice Black's position in Abington School District v. Schempp222 with remarks in a speech he probably made while he was a Sunday school teacher at the First Baptist church in Birmingham, Alabama. In a two-page essay, with the words First Baptist Church typed on the upper right-hand corner of the second page, Black wrote:

218. Id. at 491.
219. Id. at 492.
220. Id. at 494-95.
221. Id. at 495-96.
222. See supra notes 101-02 and accompanying text.
Religion is a vital part of the warp and woof of our national existence. Its glowing, burning truths inspired the hearts of American pioneers. Its sacred precepts established on [sic] home life, shaped our infant institutions and nourished a spirit of equality and democracy. The voice of Roger Williams and his followers played no small part in impressing the principles and policies that molded our traditions and crystallized our sentiments into written Constitution and Laws. The Bible penetrated the trackless forests with the pioneers and strengthened the sturdy character of our early settlers. In the name of Religion and Freedom of Religion laws were resisted to cross a tempestuous ocean to an unknown land. Our country has grown great, wealthy [sic] and prosperous [sic] beyond the wildest dreams of avarice [sic], under a government instituted by readers and lovers of the Bible.

Today, there are those who say that no longer do we need religion; no longer is the Bible essential. Like an ungrateful and overgrown child, we are urged by some to renounce the old-time religion to which many attribute the stability of our institutions and therefore the cause of our greatness. With the pride and boastfulness of the Prodigal Son, we are asked to leave the safety of our Fathers [sic] House to wander in search of happiness and glory into distant lands and other climes.

Justice Black was apparently speaking to members of his church about the Bible's place in America. It is not clear whether he continued to retain these ideals about the priority of religion during the period when he took part in determining the constitutional guidelines concerning when and where religion will be allowed in educational institutions.

Justice Black's stance in the Engel224 and Schempp cases prompted many people to write the Justice in order to relate their own viewpoints. Correspondence ranged from admiration for his stance on the issue, to polite explanation of why they felt that he was wrong. "Hate mail" was generally ignored by Justice Black, although on rare occasions he did dictate a letter to an irate correspondent. One woman accused the Court of supporting the 1950's atheist, Madelyn Murray, simply because she had money and generated publicity. In his response to this woman, Justice Black explained that the Supreme Court only adjudicated "cases and controversies" brought before it. He suggested that she read Article III of the Constitution to better understand the duties of the Court.225

When Justice Black received a long letter from an elderly woman who incorrectly thought he had uniformly voted to uphold prayer in the classroom, he broke his own self-restraint in discussing cases with correspondents who either praised or criticized him. The woman praised the Justice, telling him she was sure God spoke through him. She wrote on the back of the envel-

224. See supra notes 95-100 and accompanying text.
ope — "Sealed with a Prayer." Justice Black responded in a kind manner, explaining the problems presented in Engel and acknowledging that there were two sides to the question. He suggested that she read the opinion, giving her the proper references, and ended his letter observing, "[t]he are many people who do not want their prayers written for them by state politicians."226

Justice Holmes once wrote, "[i]f a thing has been practised [sic] for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ."227 Detractors may say that Justice Black did not measure up to the standard set by Justice Holmes when he supported the prayer and Bible reading decisions. These cases made traditional early morning devotions in public school classrooms obsolete. Yet admirers will maintain that Justice Black had courage when he relied on the language of the Constitution to guide his votes, rather than reliance upon tradition and custom.

V. Conclusion

During his tenure on the Supreme Court, Justice Black was instrumental in tearing down a number of the traditional bridges which had sprung up between the church and state. In Torcaso, his majority opinion struck down state requirements for public officials to profess their faith in God.228 Justifying the use of public money for transportation costs to parochial schools was another of Justice Black's contributions to a new judicial direction in constitutional law.229 Yet, when the use of public aid became too direct, impacting on faculty and textbooks, he chose to back away from the ever-growing church-state relationship. The practice of sectarian instruction on public school property could not be equated as a general municipal function, and was held to violate the first amendment. He maintained that attendance in such classes, although approved by parents, came under the umbrella


228. Torcaso v. Watkins, 367 U.S. 488 (1961). Justice Black stated that a Maryland constitutional requirement making public office conditional upon a declaration of the belief of existence in God unconstitutionally invades freedom of belief and religion. Id. at 496.

of compulsory school attendance. On the other hand, Justice Black was not oblivious to tradition and legislative purpose. He remained firm in his own convictions that there were valid reasons for Sunday closing laws, tax exemptions on church property, restrictions upon teacher-pupil discussions and practices not approved by school authorities. It was not long, however, before Justice Black saw his McCollum opinion ignored and his Everson opinion expanded by the Court, without his approval. In 1969, Paul Freund observed that in Everson, Justice Black went out on an edge. Freund stated that, "[o]f course, a bridge that carries you to the verge is apt to be burned behind you when you discover the verge is further ahead after all." Justice Black attempted to exert influence on the legal evolution of acceptable standards when religious questions arose. At times he succeeded, but as the flow of tax money toward parochial endeavors increased, as well as church-state interaction, he found himself in the minority again. Justice Black served the Court with distinction for thirty-four years. Whether his ideals stated in Everson regarding the separation of church and state will be followed by judges in the future remains to be seen.

233. Justice Black died on Saturday, September 25, 1971 after serving for 34 years on the Court.
234. The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.