Michigan Law Review

Volume 67 | Issue 2

1968

The Warren Court: Religious Liberty and Church-State Relations

Paul G. Kauper
University of Michigan Law School

THE WARREN COURT: RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS

*Paul G. Kauper**

I. Background to the Warren Era

The Warren Court will be remembered for a number of reasons, but for many Americans it is distinctively and immediately identified as the tribunal which put an end to prayer and Bible-reading exercises in the public schools. These cases were among the Court's most highly publicized decisions; they probably generated as much discussion, controversy, and criticism of the Court as the school desegregation, legislative reapportionment, and police interrogation decisions. The prayer and Bible-reading cases stood out among a relatively small but significant body of decisions in which the Warren Court was called upon to interpret the twin clauses in the opening language of the first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The purpose of this Article is to analyze the holdings of the Warren Court under these two clauses in an attempt to assess their significance by reference both to earlier interpretations and to the direction they may give to future development.

Some propositions had been well established before the era of the Warren Court. Fundamental to any consideration of the Supreme Court's treatment of religious liberty was the determination that the fourteenth amendment made the first amendment applicable to the states. Whatever the theory—whether a fundamental rights interpretation or an incorporation theory—the Court in the pre-Warren period had made clear that the free exercise principle explicitly stated in the first amendment as a restriction on Congress was equally applicable to the states under the fourteenth amendment.[1] The Court also left no doubt that the establishment limitation served as a restriction on the states.[2]

The dimensions of religious liberty, as epitomized in the free

* Henry M. Butzel Professor of Law, University of Michigan. A.B. 1929, Earlham College; J.D. 1932, University of Michigan.—Ed.

1. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2. Everson v. Board of Educ., 330 U.S. 1 (1947).

exercise guarantee, had been well explored by the Supreme Court before Chief Justice Warren's tenure began. In a notable series of cases primarily involving claims asserted by Jehovah's Witnesses, the Court—whether resting its decisions on free speech and free press, on a concept of intellectual liberty distilled from the first amendment, or distinctively on religious liberty itself—had opened up a wide area for the expression and propagation of religious ideas.[3] Moreover, the cases had established that restrictions on religious liberty would not be lightly countenanced and would not be permitted except in cases presenting a clear and present danger to important public interests.[4] These cases suggested that religious liberty stood at the apex of the first amendment and was, indeed, a "preferred freedom."

By contrast, the interpretation of the establishment limitation had given rise to a limited amount of litigation before the Court prior to the Warren era. Three important cases had turned on the interpretation of this limitation. In *Everson v. Board of Education*,[5] the Court held that a state could reimburse parents for the cost of transporting their children by bus to a parochial school. In reaching this result and in stating its interpretation of the establishment limitation, the Court, speaking through Justice Black, enunciated the famous doctrine that the establishment clause does more than prohibit an established church or preferential treatment for one or more religions. According to him, this limitation prohibited government from giving any aid to religion, including public spending "to support any religious activities, or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion."[6] Quoting Thomas Jefferson, Justice Black said that the establishment clause was intended to erect "a wall of separation between church and State."[7] In short, the first amendment embodies the separation principle. However, New Jersey had not breached the wall in the *Everson* case, since its purpose was not to aid religious education but to promote the valid public welfare purpose of providing safe transportation for children attending parochial schools. Thus the Court laid the foundation for the "secular purpose" doc-

3. *See* P. KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 107-12 (1956).
4. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).
5. 330 U.S. 1 (1947).
6. 330 U.S. at 16.
7. 330 U.S. at 16.

trine in the interpretation of the establishment limitation: government may advance lawful secular purposes with its spending programs even though this may result in some incidental benefit to a religious group or activity.

The *Everson* dictum was translated into a concrete holding in the *McCollum*[8] decision; the Court held unconstitutional a program whereby public school children were "released" one hour a week for religious instruction given on the school premises during the regular school day by teachers supplied by the religious communities. According to the Court, the state was using its public school program as a means of recruiting children for religious instruction and subjecting them to pressure to attend these classes.

Shortly thereafter, the Court in *Zorach v. Clauson*[9] sharply limited *McCollum* by holding that a state could promote a plan of released time for religious instruction where the instruction did not take place on the school premises, even though in other respects the plan resembled the one invalidated in *McCollum*. As the dissenters pointed out,[10] the decision could hardly be reconciled with the basic rationale of *McCollum*; moreover, the emphasis of Justice Douglas' majority opinion was a striking departure from Justice Black's opinions in *Everson* and *McCollum*. Observing that "[w]e are a religious people whose institutions presuppose a Supreme Being,"[11] Justice Douglas said that the state may properly respect the religious nature of our people and accommodate the public service to their spiritual needs. Thus, in *Zorach* the Court laid the foundation for the "accommodation theory": a state may, consistent with the establishment limitation, act in a positive way to accommodate its institutions and programs in order to provide the opportunity for its citizens to cultivate religious interests. While the decision in no sense suggests that parents could demand as a matter of constitutional right a program of released time, its basic reasoning was indicative of the problems awaiting the Court in reconciling possible conflicts between the free exercise guarantee and the establishment proscription. Both the holding and the tenor of the opinion led some to believe that the Court was retreating substantially from the hard line of separation which characterized *Everson* and *McCollum*. Thus

8. McCollum v. Board of Educ., 333 U.S. 203 (1948).
9. 343 U.S. 306 (1952).
10. 343 U.S. at 316 (Justice Black), 322-23 (Justice Frankfurter), 325 (Justice Jackson).
11. 343 U.S. at 313.

after *Zorach* was decided in 1952, it was possible to speculate that the Court was moving to a softer position which would permit state programs supportive of religion as long as there was no preferential treatment of any religious group and no coercion of dissenters.

II. The Warren Court and the Free Exercise Clause

Five cases decided by the Warren Court fall into the general category of free exercise of religion. In *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church*,[12] the Court held that it was an impairment of religious liberty for the New York courts to transfer control over St. Nicholas Cathedral in New York City from the central governing authority of the Russian Orthodox Church to a group which had established an independent Russian Church of America. Soon thereafter, the Court in *Torcaso v. Watkins*[13] declared unconstitutional a provision of the Maryland Constitution requiring a justice of the peace to take an oath that he believed in God as a condition of taking office. In *Braunfeld v. Brown*[14] the Court held that a Sunday closing law did not violate the religious liberty of sabbatarians. But in the later case of *Sherbert v. Verner*,[15] the Court distinguished *Braunfeld* and held invalid a feature of the South Carolina unemployment compensation law which, as interpreted by the state supreme court, required denial of unemployment compensation benefits to a person who refused a job requiring Saturday employment because of sabbatarian convictions. And for reasons pointed out below, *United States v. Seeger*[16] should also be included among the Warren Court's free exercise decisions even though it did not rest on constitutional grounds. The Court there held that a person could qualify for a statutory exemption as a conscientious objector under the selective service laws on the basis of religious training and belief—defined by statute as "belief in relation to a Supreme Being"[17]—despite the fact that he did not profess belief in God in the orthodox sense.

12. 363 U.S. 190 (1960).
13. 367 U.S. 488 (1961).
14. 366 U.S. 599 (1961).
15. 374 U.S. 398 (1963).
16. United States v. Seeger, also the companion cases, United States v. Jakobson, Peter v. United States, 380 U.S. 163 (1965).
17. 50 U.S.C. app. § 456(j) (1964). This definition was eliminated in the 1967 amendments to the selective service statute. 50 U.S.C. app. § 456(j) (Supp. III), *amending* 50 U.S.C. app. § 456(j) (1964).

The decision in *Kreshik*, which dealt with the freedom of churches as corporate bodies,[18] may be contrasted with the remaining free exercise cases during the Warren era, which bore distinctively on the religious liberty of the individual; attention in the discussion below will be centered on the latter cases. By invalidating the Maryland oath requirement as a condition of public office, *Torcaso* in effect incorporated into the free exercise clause as a limitation on the states the express limitation in the body of the Constitution that no religious test shall be required as a qualification for any office under the United States.[19] The case may be viewed as resting on the simple proposition that no person may be discriminated against on religious grounds in the enjoyment of public office or privilege. While this appears elementary, several curious aspects of the opinion give it a special significance. Justice Black, in his review of the precedents, repeated passages from *Everson* and *McCollum*, thereby indicating that the Court was not retreating from the interpretation previously given to the establishment limitation. But strangely the Court did not explicitly rest its decision on the establishment clause, as it might well have done since freedom from coercion to accept an officially prescribed religious belief seems clearly to be a central value served by that provision. Moreover, Justice Black's observation that the effect of the oath was to favor those who profess a particular kind of religion—namely those who preferred a belief in God as against persons professing nontheistic religious beliefs[20]—points again to what readily appears as an argument under the establishment limitation as interpreted in *Everson*. Yet the Court formally grounded its decision on the free exercise limitation.[21] This suggests that both the free exercise and establishment clauses protect against discrimination on religious grounds in the enjoyment of public privilege; it also indicates that the free exercise clause protects both belief and nonbelief. Moreover, the famous footnote in Justice Black's opinion, documenting his

18. *Kreshik* was significant in that it extended to judicial action the previous holding in Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. America, 344 U.S. 94 (1952), which had invalidated legislative interference with ecclesiastical affairs. The Court thereby converted the old federal common-law doctrine of Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872), into a constitutional rule. *See* Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419 (1964).

19. U.S. CONST. art. VI, para. 3.

20. 367 U.S. at 490.

21. 367 U.S. at 496.

point that the oath requirements gave a preference to a particular kind of religious belief, suggests a definition of religion which encompasses secular and humanistic beliefs and ideologies in addition to the traditional types of theistic belief.[22]

Seeger and its companion cases should be considered at this point for their bearing on *Torcaso*. The distinctive thing about *Seeger* is that the Court by *tour de force* interpreted "belief in relation to a Supreme Being"—required by statute as an element of the showing of religious belief and training necessary to sustain a claim of conscientious objector status[23]—to include any ethical belief which parallels the conventional belief in God as a source of moral duty. While *Seeger* rested on statutory grounds, it clearly had constitutional overtones, since a construction which limited exemption as a conscientious objector to persons resting their moral convictions on conventional theistic grounds would have been subject to attack under *Torcaso* as a discrimination against persons holding nontheistic ethical beliefs. Taken together, the *Torcaso* and *Seeger* opinions point to the conclusion that at least for purposes of the free exercise clause, the term "religion" embraces a wide variety of ethical beliefs, whether founded on theistic concepts or not; that a broad freedom of conscience comes within the protection of the free exercise clause; and that by virtue of the first amendment no preference may be granted or discrimination practiced by reference to a particular kind of religious belief as sanctioned by law.

Braunfeld and *Sherbert* are probably the most interesting cases of the Warren period on the issue of religious liberty. They deal basically with the same problem: whether or not the free exercise clause protects a person against the indirect restraint on his religious liberty which results when the application of a generally valid law places him at a special disadvantage because of his adherence to religious duty. Since this problem does not involve governmental acts which directly restrict religious acts or discriminate explicitly on religious grounds, it falls outside the range of the familiar types of restrictions on religious liberty. The issue in *Braunfeld* was whether orthodox Jews and others who because of religious conviction observe a day of rest other than Sunday must be exempted from

22. "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." 367 U.S. at 495 n.11.

23. *See* note 17 *supra*.

the coverage of a Sunday closing law. If such an exemption is denied, sabbatarians who observe both secular and religious law would be subjected to an economic disadvantage since they would be required to close their businesses two days per week. In *Braunfeld* the Court refused to go along with this economic discrimination argument; it chose to recognize the secular purpose served by Sunday closing laws and the importance of having a single day of rest prescribed by law. The Court emphasized that the restraint on religious liberty was an indirect one and asserted that substantial policy considerations militated against creating an exemption in favor of those who for religious reasons observe another day of rest.[24] Pointing to the administrative problems of policing a Sunday closing law with a recognized exemption based on religious obligation, the majority held the state was not constitutionally required to grant such an exemption.[25] Justice Brennan's strong dissent, supported by Justice Stewart, registered the view that this was a burden on the free exercise of religion which could not be justified by any compelling state interest.[26]

Braunfeld was sharply restricted, if not devitalized, by the later holding in *Sherbert* that South Carolina had violated the free exercise clause in the administration of its unemployment compensation law by cutting off unemployment compensation payments to a Seventh Day Adventist who had refused a job requiring Saturday work. According to the Court, the law forced the sabbatarian to make a choice between adhering to her religion and enjoying a public benefit; thus, the effect of the law was to discriminate against persons with religious objections to Saturday work.[27] The Court emphasized that only a compelling state interest warrants a restriction on religious liberty,[28] and the case makes clear that this standard is equally applicable to so-called indirect restraints on religious freedom. Justice Brennan, who wrote the majority opinion, attempted to distinguish the *Braunfeld* case on the ground that the same public

24. 366 U.S. at 606-09.

25. 366 U.S. at 608-09.

26. 366 U.S. at 610, 616. Justice Douglas dissented on the grounds both that the Sunday closing laws were laws establishing religion and that in so far as they compelled observance by sabbatarians they violated the free exercise clause.

27. The South Carolina law did recognize the position of a person who objected to working on Sundays on religious grounds, and the Court in support of its conclusion could, therefore, use the further argument that the law thereby discriminated against persons whose religion required a different day of rest.

28. 374 U.S. at 406.

policy considerations that justified a state in not exempting sabbatarians from a Sunday closing law were not present here.[29] Justices Douglas[30] and Stewart[31] in their concurring opinions, and Justice Harlan in his dissent,[32] indicated that they were not persuaded by this effort. Indeed, as Justice Harlan observed, the economic burden placed on the sabbatarian who complies with a Sunday closing law is greater than that suffered by an individual who is denied unemployment benefits for a restricted period of time.[33]

Perhaps it is only a matter of time before the Court reconsiders *Braunfeld*; in any event, the *Sherbert* case stands out as probably the landmark case during the Warren period on the question of religious liberty. The result of the Court's decision is to protect discrete minorities against laws which, while serving valid public purposes, have the effect of putting these groups at a special disadvantage. Equally important is the general proposition formulated in *Sherbert* that only compelling state interests warrant measures which substantially infringe upon the free exercise of religion. The impact of this formulation is evident in later cases decided by other courts.[34] Indeed, in view of its strong stand in *Sherbert*, it is surprising that the Court refused to review the Kansas Supreme Court's decision in *Kansas v. Garber*,[35] the Amish school case, thus passing up the opportunity to deal with the important issues of religious liberty raised therein.

III. The Warren Court and the Establishment Clause

Three important cases distinctively turning on the interpretation of the establishment clause were decided during the period under

29. 374 U.S. at 408-09.

30. 374 U.S. at 411-12.

31. 374 U.S. at 417-18.

32. 374 U.S. at 421.

33. 374 U.S. at 421.

34. *See*, e.g., People v. Woody, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (A state narcotics law could not constitutionally be applied to penalize the use by a California Indian tribe of peyote as part of a religious ceremony.); *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963) (A Jehovah's Witness could not be required to serve on a jury where this ran counter to religious conviction). *See also* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 Wis. L. Rev. 217; Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I, The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 (1967).

35. 197 Kansas 567, 419 P.2d 896 (1966), *appeal dismissed and cert. denied*, 389 U.S. 51 (1967). Chief Justice Warren and Justices Douglas and Fortas were of the opinion that probable jurisdiction should have been noted.

The Kansas Supreme Court held that the right of the Amish parents founded on religious considerations to direct the education of their children after reaching high school age was subordinate to the state's power to insure what it regarded as proper minimum education for all children in the state.

review. In *Engel v. Vitale*[36] and *Schempp v. School District of Abington Township*,[37] prayer and Bible-reading exercises in the public schools were condemned as a form of establishment.[38] Supplying textbooks free of charge to parochial school children was upheld in *Board of Education v. Allen*.[39] In addition, the Court upheld the validity of Sunday closing laws.[40] To these decisions must be added the recent holding in *Flast v. Cohen*[41] that a federal taxpayer has standing to challenge the constitutionality of federal spending alleged to violate the establishment limitation. To complete the picture, it should be noted that the Court passed up opportunities to review state court cases dealing with the validity of governmental grants to church-related colleges[42] and the validity of tax exemptions for property used for religious purposes.[43]

The cases dealing with religious exercises in public schools and state-financed distribution of textbooks to parochial school children have perhaps the greatest impact and long-run significance in terms of the substantive interpretation of the establishment clause. As previously observed, the prayer and Bible-reading cases, declaring invalid practices which had long been sanctioned in a number of states, attracted great attention and provoked widespread public controversy. These decisions generated charges that the Warren Court was godless and hostile to religion and led to a substantial, but in the end unsuccessful, movement in support of a constitutional amend-

36. 370 U.S. 421 (1962).

37. 374 U.S. 203 (1963). *See also* the companion case, Murray v. Curlett, 374 U.S. 203 (1963).

38. In *Engel* the Court held that the daily use in New York schools of the so-called Regents' Prayer violated the establishment clause. At the next term in the *Schempp* and *Murray* cases the Court broadened the *Engel* holding to include Bible-reading and the recitation of the Lord's Prayer. Justice Stewart wrote dissenting opinions in these cases.

39. 392 U.S. 236 (1968).

40. McGowan v. Maryland, 366 U.S. 420 (1961).

41. 392 U.S. 83 (1968).

42. The Maryland Court of Appeals held that capital grants by the legislature to church-related colleges which the Court found to be "sectarian" institutions, violated the establishment clause of the first amendment. Horace Mann League of the United States v. Board of Public Works, 242 Md. 645, 220 A.2d 51 (1966), *cert. denied*, 385 U.S. 97 (1966). Justices Harlan and Stewart were of the opinion that certiorari should have been granted.

43. The California, Rhode Island, and Maryland courts held that such exemptions did not violate the establishment clause. Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956) (Justices Black and Frankfurter dissenting); General Fin. Corp. v. Archetto, 176 A.2d 73 (R.I. 1961), *appeal dismissed*, 369 U.S. 423 (1962) (Justice Black dissenting); Murray v. Comptroller of Treasury, 241 Md. 383, 216 A.2d 897, *cert. denied*, Murray v. Goldstein, 385 U.S. 816 (1966).

ment to validate the practices held unconstitutional by the Court.[44] These cases definitely established the secular character of the public schools as a constitutional requirement; they also suggested questions about the validity of all religious observances in public life. Equally important, however, was that in *Schempp* the Court made clear that the objective study of religion and of the Bible in its literary and historical aspects is properly a part of public education. This recognition gave a special positive significance to these cases.

The *Allen* case, which upheld the public lending of secular textbooks free of charge to children in parochial schools, is significant not only because it affirms and extends the secular-purpose doctrine of *Everson*, but also because it suggests openings for other types of federal and state programs designed to provide benefits to church-related institutions or students attending church-related schools. The decision has great relevance for federal spending programs already underway and for similar state programs already adopted or under consideration.[45]

In the long run, the *Flast* case may turn out to be the Warren Court's most important decision on church-state problems. The issue was whether a federal taxpayer has standing to challenge a federal appropriation on the ground that it violates the establishment clause. In *Frothingham v. Mellon*,[46] decided in 1923, the Court had held that a federal taxpayer did not have the requisite interest to challenge spending for a purpose allegedly beyond the legislative competence of Congress. It has been commonly assumed since *Frothingham* that the case stood as a bar to any suit by a federal taxpayer to challenge federal spending on constitutional or statutory grounds. But in *Flast* the Court limited *Frothingham* by holding that a federal taxpayer does have standing to challenge federal spending

44. On various proposals to amend the Constitution to permit prayer and Bible-reading exercises in the public schools, *see Proposed Amendments to the Constitution Relating to School Prayers, Bible Reading, etc., A Staff Study for the House Comm. on the Judiciary*, 88th Cong., 2d Sess. (Committee Print 1964); *Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools Before the House Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964). *See also* Note, *School Prayer and the Becker Amendments*, 53 GEO. L.J. 192 (1964).

45. Pennsylvania recently enacted legislation authorizing grants to private schools as a contribution to the cost of providing secular educational services. Act. No. 109, 24 P.S. §§ 5601-09 Reg. Sess. (1968), 3 PURDON'S PENNSYLVANIA LEGISLATIVE SERVICE 232 (1968). A proposal to authorize limited tuition grants to parents sending children to private schools was introduced at the recent session of the Michigan legislature. S.B. 1124 Reg. Sess. (1968).

46. 262 U.S. 447.

allegedly violative of the establishment clause, since this clause is a specific limitation on Congress and impliedly creates a right in federal taxpayers to be free from spending which amounts to an establishment of religion. By finding such a right in the taxpayer, the Court actually built on a substantive interpretation in order to meet the remedial problem.[47] The specific holding in *Flast* is particularly significant since, until this decision, the *Frothingham* doctrine had barred litigation instituted by taxpayers challenging the use of federal funds, under authority of statutes directed to general welfare purposes, to aid church-related activities or institutions. We may now expect a spate of federal cases challenging such uses of funds. Perhaps decisive answers will soon be forthcoming to questions which have been the subject of prolonged controversy but which have gone unresolved for lack of a proper party to present the issue. An incidental effect of the decision may be to put an end to proposals for legislation which would expressly vest federal courts with jurisdiction to hear taxpayers' suits challenging federal appropriations on first amendment grounds.[48]

What contributions, if any, did the Warren Court make to the doctrinal development of the establishment clause? One thing is quite clear: the notion which developed after the *Zorach* case that the Court was about to engage in a general retreat from ideas expressed in *Everson* and *McCollum* proved to be ill-founded. At least the Warren Court has taken occasion in its opinions to reaffirm general ideas expressed in earlier decisions indicating a hard line on separation. Whether the Court means what it says, and whether everything it says can be reconciled with its holdings is another matter. The Court's tendency to cite and quote from prior decisions in cases raising the establishment issue obscures the doctrinal development. For instance, in the *Torcaso* case, which appeared formally to rest on the free exercise clause, Justice Black reviewed his prior

47. Dilution of the standing requirement in establishment cases was evident already in the prayer and Bible-reading cases where the Court held that it was not necessary to prove an invasion of personal freedom in order to challenge a school practice on establishment grounds. Parents objecting to these religious practices brought the suits in these cases. Justice Black in *Engel* did not even discuss standing, Justice Clark and Justice Brennan mentioned the standing problems in footnotes in their opinions in *Schempp* (374 U.S. at 224 n.9, 266 n.30).

48. Senator Ervin proposed such legislation in 1966. *See Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). For discussion of the proposed legislation, *see* Editorial Note, *The Insular Status of the Religion Clauses: The Dilemma of Standing*, 36 GEO. WASH. L. REV. 648 (1968).

opinions in *Everson* and *McCollum* and found in them support for the idea that the state cannot involve itself in religious matters by prescribing a religious test for public office. And, in stating its position on the establishment clause in the Sunday closing cases, the Court reviewed at length the earlier cases from *Everson* through *Zorach*, again suggesting that it was not rejecting the prior learning. In the end, of course, the Court found the Sunday closing laws valid on the basis of the exception to the separation principle suggested in the *Everson* case itself: that laws directed toward secular ends are valid even though they result in incidental benefits for religious purposes. In this sense the Sunday closing cases added no new doctrinal development and simply affirmed the basic rationale of the *Everson* holding. It should be noted, however, that both Chief Justice Warren in his majority opinion[49] and Justice Frankfurter in his extended concurring opinion[50] did suggest the further consideration that even a law which incidentally aids religion while furthering a secular purpose may be invalid if alternatives are open to the state for achieving the same result without conferring this incidental benefit. Justice Brennan also referred to this test in his extended concurring opinion in the *Schempp* case,[51] discussed below. The alternative-means approach has important implications as a limitation on the secular-purpose doctrine, but it remains to be determined whether this test has assumed a definitive significance in the interpretation of the establishment clause. If it has attained such a significance, it is still unclear how the test is to be applied in a variety of situations.

The school prayer and Bible-reading cases offer the greatest insight into the Court's current thinking about the establishment clause. In the first case, *Engel v. Vitale*,[52] the Court dealt rather simply with the New York Regents' prayer by saying that a statute which prescribed a prayer for daily use in the public schools violated a fundamental purpose of the establishment clause, which was designed to prohibit governmental sanction for any kind of religious belief or practice. Justice Black's opinion was notable because, except for one brief reference to the *Everson* case in a footnote, it completely lacked documentation. This suggested that while speak-

49. 366 U.S. at 450-52.
50. 366 U.S. at 466-67.
51. 374 U.S. at 294-95.
52. 370 U.S. 421 (1962).

ing for the majority of the Court in writing an opinion designed to secure as much support as possible, he was not disposed to give interpretations of prior cases which might alienate such support. Obviously any reliance on *McCollum*, which some felt would have justified the result, would have required an attempt to distinguish *Zorach*. But Justice Black did make the important point that it was not necessary for the petitioners, who were parents, to show that there was an invasion of religious liberty; since the establishment clause is an independent ground for decision, a showing that the challenged practice also violates the free exercise clause is not required.[53]

The *Schempp* case,[54] which followed in quick succession and which dealt with the issue of both prayer and Bible-reading in the public schools, was far more revealing in terms of the Court's interpretation of the establishment clause. Justice Clark, writing for the majority, reviewed all the prior cases and did not suggest any basic incompatibility between *McCollum* and *Zorach*. While reaffirming the holding in *Engel* that the establishment clause prohibits ritualistic exercises in the public schools, even though attendance is voluntary, he went on at great length to justify the Court's conclusions in the case before it and to allay fears that the Court was intent on an antireligious course with respect to the public schools. He affirmed the view that for the purpose of raising an establishment clause question it was not necessary to prove a violation of religious liberty. The really critical part of his establishment interpretation, however, appeared in that part of the opinion stating that what the first amendment requires is neutrality.[55] This marks the first time that neutrality as a central canon of interpretation appeared in the cases. Justice Black had already mentioned neutrality in *Everson*; he said that if the state elected to be neutral as between children attending public and parochial schools in the matter of providing bus transportation the Court could not say that this was unconstitutional.[56] The Court would not force the state, in administering a program aimed at the safe transportation of school children, to discriminate against children going to parochial schools. And Justice Douglas in *Zorach* stated that government must be neutral on the issue of com-

53. 370 U.S. at 430.

54. School Dist. of Abington Township v. Schempp, also Murray v. Curlett, 374 U.S. 203 (1963).

55. 374 U.S. at 215, 222-27.

56. 330 U.S. at 17-18.

petition between sects.[57] But it was in *Schempp* that neutrality, as opposed to separation, assumed a position of primary importance in the interpretation of the establishment clause.

This was a significant development, in part because neutrality had been proposed by several writers as the authoritative guide to interpretation. Professor Katz had stated that the underlying purpose of both religion clauses is to promote religious liberty; that separation is a subordinate instrumental concept to achieve this purpose; and that while the establishment clause requires government to be neutral as between religion and nonreligion, this neutrality must be interpreted in the light of the free exercise clause. Thus, neutrality cannot be used as a basis for denying the free exercise of religion or for discriminating on a religious basis in the dispensation of public benefits.[58] Professor Kurland, in his instructive study of the Supreme Court's decisions, propounded the theory that what the first amendment forbids is a classification which results in either preference or discrimination based on the religious factor.[59] This theory, too, results in a neutralistic interpretation in the sense that laws and practices must be general in application and must not be designed to favor or discriminate against religion.

In implementing the neutrality idea in *Schempp,* Justice Clark said that the decisive test was whether either the purpose or the primary effect of the enactment was the advancement or inhibition of religion: "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[60] This test fits in well with the neutrality idea—neutrality is identified with secularity of both ends and means. The difficulty with *Schempp* is that there is no indication in Justice Clark's opinion that the Court was rejecting the *Zorach* case, where there was clearly a breach of the neutrality idea in that the Court sanctioned a state program which was deliberately designed to further the religious interests of parents and children. Moreover, the emphasis in Justice Clark's opinion on the compulsive aspects of the Bible-reading and prayer exercises somewhat weakens the conclusion that these exercises were invalid simply because they reflected a positive interest of the state

57. 343 U.S. at 314.
58. Katz, *Freedom of Religion and State Neutrality,* 20 U. CHI. L. REV. 426 (1953).
59. P. KURLAND, RELIGION AND THE LAW (1962).
60. 374 U.S. at 222.

in religious matters. Instead, the opinion suggests that their invalidity turned on the element of coercion implicit in the school situation. This ambiguity is reflected also in the separate opinion of Justice Goldberg, joined by Justice Harlan. While agreeing that the state must be neutral toward religion, nevertheless they warned that an untutored devotion to neutrality could lead to results which partake of "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious"—results which are not only not compelled by the Constitution, but are prohibited by it.[61] Justice Brennan, in a long concurring opinion expressing his adherence to neutrality and the results reached in *Engel* and *Schempp*, listed a whole series of cases where he thought the state could accommodate these programs to serve religious interests.[62] But there can be no reconciliation between strict neutrality and the neutrality which permits or requires an accommodation to religious interests.[63] This difference is suggested by Justice Clark's opinion in *Schempp*, where he spoke both of "strict neutrality, neither aiding nor opposing religion,"[64] and of "wholesome neutrality."[65]

So while the *Schempp* case spoke much of neutrality, the various opinions are ambiguous on this question. It is evident that not all members of the Court are ready to accept the Kurland idea that the state can do nothing which in any way uses the religious factor as the basis for preferential classification. It seems clear that prayer and Bible-reading practices have been held invalid not simply because they violate the neutrality principle but because this particular breach of neutrality has involved the states so deeply in religious matters as to have a coercive effect on the liberty of dissenters and nonconformists.[66] *Schempp* can thus be viewed as a case protecting the freedom of the minority.

On the same day the Court decided the *Schempp* case, it held in

61. 374 U.S. at 306.

62. 374 U.S. at 294-304.

63. For analysis of the neutrality emphasis in the *Schempp* opinion, *see* Kauper, *Schempp and Sherbert, Studies in Neutrality and Accommodation*, 1963 RELIGION AND THE PUBLIC ORDER 3, 10-23. *See also* Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

64. 374 U.S. at 225.

65. 374 U.S. at 222.

66. *See, e.g.*, the statement in Justice Goldberg's concurring opinion that the "pervasive religiosity and direct governmental involvement inhering in the prayer and Bible-reading practices" could not be characterized simply as accommodation by the state in the interests of religious liberty. 374 U.S. at 307.

Sherbert[67] that as a matter of constitutional right a Seventh Day Adventist, *because of her religion,* was entitled to special treatment under the South Carolina unemployment compensation law. Here the Court approached the problem from the vantage point of the free exercise clause. The deliberate legislative policy of giving aid to religious groups through exemptions in tax and regulatory laws, evident in both federal and state statutes, cannot be reconciled with neutrality. Yet the Court in *Sherbert* went beyond saying that a legislature *may* grant a preferential exclusion on religious grounds and held that it *must* do so. The free exercise clause as interpreted in *Sherbert* thus negates neutrality. At the same time, the constitutionally required accommodation to religious liberty does not in this case violate the establishment clause—even though it departs from neutrality—since here the state's involvement in religion is minimal and the positive assistance given to one citizen's religious beliefs poses no threat to others' theistic or nontheistic beliefs.[68] *Schempp* and *Sherbert* can be reconciled, not on the basis of an abstract conception of neutrality, but on the basis that both serve to protect important facets of the basic liberty that gives unity to the religion clauses of the first amendment. Given this explanation, *Schempp* was a significant contribution to the meaning of religious liberty in our pluralistic society.

The decision in *Allen,*[69] holding that it does not violate the establishment clause for a state to lend secular textbooks free of charge to children in parochial schools, has important implications—even though on the surface it adds nothing new to the interpretation of the establishment limitation. Obviously the result fits the neutrality theory, since the state here elected to pursue a policy of not discriminating against parochial school children in the disbursement of funds for educational purposes. On the other hand, it is quite clear that *Allen* is not consistent with a strict separation theory, at least in terms of the doctrinaire no-assistance idea expressed in *Everson.* Yet it can be reconciled with the actual holding in *Everson* on the ground that, even under a strict separation theory, the state is not precluded from pursuing secular purpose programs which give incidental aid to religion. This is precisely the theory on which the

67. Sherbert v. Verner, 374 U.S. 398 (1963).

68. 374 U.S. at 409. *See Schwarz, No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692 (1968).

69. 392 U.S. 236 (1968).

Allen case rests. Following the decision in the prayer and Bible-reading cases, the question had arisen whether *Everson* was still good law. *Everson* had been decided by a five-to-four vote, and Justice Douglas, who voted with the majority, subsequently indicated that he thought *Everson* had been wrongly decided.[70] A very substantial change has occurred in the Court's personnel in the meantime. Of the nine Justices who participated in *Everson*, only Justices Black and Douglas are now on the bench. Both dissented in *Allen* along with Justice Fortas. This means that the majority in the *Allen* case consisted of six Justices who did not take part in *Everson*. Justice White, who delivered the majority opinion which received the support of five other Justices, rested the case squarely on the authority of *Everson* and its secular-purpose theory.[71] In this connection, he also made a revealing use of the primary purpose-primary effect test enunciated by Justice Clark in *Schempp*.

Allen does more than merely affirm *Everson*. It rejects the notion that the *Everson* holding is limited to forms of aid for parochial school children, such as transportation, school lunches, and health programs which, unlike books, are not directly involved in the teaching and learning processes. Perhaps what is really important about *Allen* is its affirmation of the role of private education in the American educational system, the recognition that parochial schools serve a secular purpose in addition to their sectarian function, and the clear acceptance of the idea that the establishment clause is no bar to state assistance in furthering this secular function.[72]

Allen opens up new vistas for application of the secular purpose theory. It should be pointed out, however, that the Court has never dealt with the question whether government may make direct grants to church-related educational institutions on a theory of assisting

70. *See* his concurring opinion in Engel v. Vitale, 370 U.S. 421, 443 (1962).

71. 392 U.S. at 242-44.

72. 392 U.S. at 247-48 (footnotes omitted):

> Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

them in the performance of secular functions. In *Everson* the school board reimbursed the parents for the cost of students' transportation. In *Allen* the state supplied textbooks which had to be approved by the state department of education although the parochial school authorities made the initial choice (a point emphasized in the dissenting opinions).[73] Reserved for future decision is the question of to what extent the concept of secular purpose or of neutrality, invoked to support various forms of governmental aid for parochial school education, is limited by the manner in which the benefit is conferred, the extent of state involvement in religious affairs, and the retention of public administrative control.[74]

The cases interpreting the establishment clause have done little to resolve the conceptual ambiguities bequeathed by the pre-Warren decisions. On the one hand, the Court, while continuing to pay verbal respect to the strict separation theory first enunciated in *Everson*, has used the opening provided by that case for the secular purpose doctrine. It followed this theory in the Sunday closing cases and in the school textbook cases. On the other hand, in *Schempp* the Court formulated a neutrality theory as the central canon in the construction of the establishment limitation. Yet we may wonder what kind of neutrality the Court was talking about. Indeed, Justice Harlan has recently observed that "[n]eutrality is a coat of many colors."[75] Because of the degree of state involvement, neutrality obviously suited the *Schempp* case as a theory for decision. But the Court did not disavow *Zorach*, which rested on accommodation; and on the very same day that it decided *Schempp*, it limited neutrality by holding in *Sherbert* that a state was required in the name of free exercise to grant a religious exemption from a law which served a valid public purpose. Moreover, in *Allen*, where the Court could have used neutrality as an adequate basis for decision, it chose instead to pursue the secular purpose theory. In following and expanding upon this theory, the Court said nothing about the alternative-

73. 392 U.S. at 254-55, 269-70.

74. Answering the argument that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion, the Court said in the *Allen* case that nothing in the record supported the proposition that all textbooks are used by the parochial schools to teach religion. "We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction." 392 U.S. at 248.

See Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968).

75. Board of Educ. v. Allen, 392 U.S. 236, 249 (1968).

means test which it had intimated in the Sunday closing cases was a limitation on the application of the secular-purpose concept.[76]

IV. Conclusion

On the whole there can be no serious quarrel with the results reached by the Warren Court in the cases arising under the religion clauses of the first amendment. The Court, distinguished generally for its emphasis on libertarian values, has been sensitive and hospitable to claims made in the name of religious liberty—which encompasses a wide variety of values served by both the free exercise and establishment clauses. The free exercise clause has been employed effectively to protect discrete minorities, dissenters, and nonbelievers. The "compelling considerations of public policy" test has taken its place along with the "clear and present danger" test as a judicial vehicle for invalidating both direct and indirect restraints which operate in a substantial way to burden the free exercise of religion. Whatever other criticisms may be directed against the Warren Court, a fair reading of these opinions should dispel the notion that it has been hostile to religion.

A common thread running through the decisions under both of the religion clauses is an awareness of and sensitivity to the demands both for equality of treatment in a religiously pluralistic society and for special protection of minority groups against the claims and assumptions of the majority. The prayer and Bible-reading cases must ultimately rest on the consideration that religious exercises in public schools, though sanctioned by the majority, constitute a substantial threat to the liberty of nonconforming groups. Similarly, the Court's decision in *Allen* reflects a judicial appreciation of the pluralistic character of our educational system and the freedom of choice implicit within it.

Leaving aside the results, one may venture criticism of the way in which the Court handled some of the cases. *Braunfeld* seems clearly out of line with *Sherbert*, and it may be asked why the Court did not overrule it in the latter decision instead of distinguishing it on

76. *See* note 48 *supra* and accompanying text.

It may be argued abstractly that it is unnecessary for the state to help further the secular education of children attending parochial schools since they are free to attend the public schools in order to obtain a secular education. Omission of any consideration of the alternative means test in *Allen* may suggest that this test has no relevancy if the alternative means for achieving the intended public benefit requires the sacrifice of important constitutional freedoms.

grounds that are hardly persuasive. A large part of the public furor aroused by Justice Black's blunt opinion in *Engel* might well have been avoided if the Court had given thought to the public impact of the decision and dealt more discreetly with the issue—as Justice Clark did in the later *Schempp* opinion. And, in turn, both decisions would have been strengthened had the Court bottomed the holdings on the psychologically coercive aspects of religious practices in the classroom.

The earlier analysis of the Court's interpretation of the establishment clause points up the continued failure to resolve the ambiguities, if not inconsistencies, bequeathed by the opinions of the pre-Warren era. Although neutrality appears to have emerged as the dominant theme, the cases reveal no clear perception of what is meant by neutrality. How is it reconciled with the separation principle stressed in the language of *Everson*? Does neutrality yield to a superior demand of religious liberty? Is there a difference between "secular purpose" and "neutrality"? And is the Court prepared to push the "alternative means" test as a limitation on secular purpose? The resolution of these questions depends upon a systematic analysis and ordering of the values implicit in the religion clauses of the first amendment. This is a task the Warren Court will pass on to its successor. Ironically, by opening up the floodgates to litigation in the *Flast* decision, the Warren Court has made certain that the post-Warren Court will have the opportunity to undertake this task.