

Religion in the Burger Court: The Heritage of Mr. Justice Black

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I. INTRODUCTION

The many years of Mr. Justice Black's service on the Supreme Court were marked by a dramatic focus of attention on the first amendment.¹ The Justice was committed to clarifying and preserving all of the first amendment intentions of Madison and the other Founders—the protection of *political* speech, that is, all those forms of expression which go to form and direct the processes of public decision, and the protection of *religious* speech.² Though he did not consistently command a majority in the Court at any time, but was indeed sometimes a solitary dissenter in the cause of full protection for the discussion of public affairs, still his influence always was evident and was, on the whole, progressively greater in his later years.

It is clear that Mr. Justice Black took at face value the Founders' prescriptions regarding "establishment of religion" and religion's "free exercise." He would not, it seems, have subscribed to the proposition advanced by Chief Justice Burger that the establishment and free exercise clauses are inherently at odds when taken to their logical extremes.³ For Mr. Justice Black, the religion clauses affirmed the same proposition from independent but related points of view: government was not to be in any way the vehicle for promoting or preferring any religious creed or practice, and government was not to inhibit the development of any religious creed or practice. Americans were to enjoy religious freedom, the freedom to formulate and practice their religious beliefs as their own thoughts and sentiments prescribed. As he put the matter: the free exercise clause forbids direct coercion, and the establishment clause indirect coer-

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¹"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1.

²*Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 559 (1962) (interview by Professor Edmond Cahn in New York City, Apr. 14, 1962).

³*Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) (Burger, C.J.).

cion, of religious activity; the latter "rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion."⁴ The religion clauses thus, in fact, protect both political freedom and religious freedom.

The first amendment indeed affirms an essential relationship between religious and political freedoms. Of the latter, Mr. Justice Black came to assert an *absolutist* and *public* interpretation: there may be no qualification on the freedom to discuss public affairs.⁵ Of the former we need to ask, then, whether the freedom affirmed is a *private*, rather than a *public* matter: whether religious freedom is to be protected because it is private or whether its protection is ultimately, like that of political discussion, based on its public character. Mr. Justice Black did not, so far as the record shows, answer this question explicitly. But his opinions on the first amendment's religion clauses intimate his basic attitude, as well as his view of the relation between private and public objectives in the Constitution. He associated religious freedom with the freedoms of speech, press, and assembly as essential to assuring the privilege of selecting public policies and public officials.⁶ To him the first amendment freedoms, including religion, "are the paramount protections against despotic government afforded Americans by their Bill of Rights."⁷ It seems clear that the Justice found the objectives of the religion clauses, at least in part, very close to those of the other provisions of the first amendment. The "'wall of separation between church and state'"⁸ was not to exclude from the state that kind of liberalizing dynamic inherent in the rest of the first amendment. The wall was at least transparent, susceptible of two-way vision.

There is little doubt that the common theme of the various provisions of the first amendment is, in part, a negative theme: that in each of them the Congress is forbidden to interfere with the activity of individuals or non-governmental groups. Certainly Mr. Justice Black reiterated persistently his concern about oppressive government. But the first amendment has its positive thrust as well.⁹

⁴Engel v. Vitale, 370 U.S. 421, 431 (1962) (Black, J.).

⁵Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 296-97 (1964) (Black, J., concurring) ("An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.")

⁶H. BLACK, A CONSTITUTIONAL FAITH 44 (1968) (James S. Carpentier lectures, Columbia University of Law) [hereinafter cited as A CONSTITUTIONAL FAITH].

⁷Id.

⁸Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (Black, J.), quoting Reynolds v. United States, 98 U.S. 145, 164 (1879).

⁹A CONSTITUTIONAL FAITH, *supra* note 6, at 43-63.

It protects the processes through which a self-governing people makes its decisions, including decisions as to what is public, as well as by whom something is to be done in the public realm. Equally, the first amendment expresses our common agreement about what must be "let alone" as the processes of public decision go forward.¹⁰

The first amendment is not, then, in the thinking of Mr. Justice Black, simply a charter of private immunities. It is true that, as the metaphor of the "wall of separation" suggests, institutional interaction between church and state is forbidden; the precise meaning of this prohibition will be considered below. But that prohibition is to serve the concern, which religious and secular institutions share, in the public's self-government. Religious Americans are American, as well as religious; their interpretations of religion are committed to the kind of free formation of public opinion which is inherent in our Constitution. Political Americans, *per contra*, may well be committed to religious beliefs and practices which transcend and provide spiritual and moral direction to our politics.

It is not intended here to offer this account as literally endorsed by Mr. Justice Black, but it seems to be fundamentally congruent with his opinions in a series of critical cases dealing with religion. It appears, however, to be at odds with the developing trend of the Burger Court. Both the absolutism of Mr. Justice Black and his particular conceptions of religion's relation to government seem, on the whole, to wane in influence as the Burger Court takes shape. The divergence is neither wholesale nor characteristic of all members of the present Court. But in both general principles and their application in significant cases the heritage of Mr. Justice Black appears presently to receive a somewhat skeptical attention. The present Court expressly abjures "absolutism"; it "balances" or "accommodates" the first amendment provisions which Mr. Justice Black regarded as unqualified; it tends to stress individual or state considerations rather than the commands of the federal constitutional requirements; and it is committed to conventional rather than the more reflective conceptions of religion developed in Mr. Justice Black's thinking. To explain these assertions, to consider why the divergence has taken place, and to argue for adherence to Mr. Justice Black's position will be the undertaking of the discussion which follows.

¹⁰*See* *Time, Inc. v. Hill*, 385 U.S. 374, 399-401 (1967) (Black, J., concurring); *cf.* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The Amendments] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

II. MR. JUSTICE BLACK'S INTERPRETATION OF THE RELIGION CLAUSES

In 1968 Mr. Justice Black declared that he had stated his position as to the interpretation of the religion clauses in *Everson v. Board of Education* more than twenty years before.

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 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."¹¹

In *Everson* he concluded that the payment of public money for bus fares to sectarian schools was constitutional;¹² in succeeding cases he condemned as unconstitutional "released-time" arrangements in public schools, whether on or off school property;¹³ reciting prayers¹⁴ and reading the Bible in those schools;¹⁵ and lending textbooks, financed with public funds, to students in sectarian as well as public schools.¹⁶ In his last year on the Court he recorded once again his belief in the unconstitutionality of public financial aid to sectarian

¹¹*Everson v. Board of Educ.*, 330 U.S. at 15-16 (Black, J.) (5-4 decision), *quoted with approval in A CONSTITUTIONAL FAITH*, *supra* note 6, at 44.

¹²*Id.* at 17-18; see text following note 20 *infra*.

¹³*Zorach v. Clauson*, 343 U.S. 306, 315-20 (1952) (Black, J., dissenting); see text accompanying notes 31-32 and notes 35-36 *infra*; *McCollum v. Board of Educ.*, 333 U.S. 203, 209-12 (1948) (Black, J.).

¹⁴*Engel v. Vitale*, 370 U.S. 421, 424, 430, 436 (1962) (Black, J.); see text accompanying notes 33-34 *infra*.

¹⁵*School Dist. v. Schempp*, 374 U.S. 203, 223-27 (1963) (Clark, J.). The Chief Justice and Justices Black, Douglas, Brennan, Harlan, Goldberg, and White joined in the opinion of the Court.

¹⁶*Board of Educ. v. Allen*, 392 U.S. at 253-54 (Black, J., dissenting); see text accompanying notes 37-41 and 81-84 *infra*. Justices Douglas and Fortas filed separate dissenting opinions in *Allen*.

schools and colleges.¹⁷ In the preceding year he concurred without comment in the opinion of Chief Justice Burger upholding the New York tax exemption of church properties.¹⁸ Two cases involving the religious basis for legitimate conscientious objection also must be noted: *Welsh v. United States*, in which Mr. Justice Black interpreted "religion," in practical rather than conventional terms, as a deep and persisting moral conviction,¹⁹ and *Gillette v. United States*, in which he accepted the Court's rejection of a conscientious objector claim based upon a selective denunciation of a particular war, *i.e.*, the Vietnam War.²⁰

Mr. Justice Black's opinion in *Everson* was direct and uncompromising. The religion clauses of the first amendment, Black wrote, are, like the political clauses, to be taken as meaning what they say: any action, federal or state, which aids or inhibits the exercise of religion is forbidden by the first amendment. The reimbursement of bus fares authorized in New Jersey helps children go to school, which is a public function and indeed mandated by law. Such an expenditure of public funds may incidentally reduce the cost of operating parochial schools, in that parents who need not pay the fares out of their own pockets can contribute the money to the school for other activities, including conceivably religious activities. But that is beside the point. Serving the public interest by transporting the children to school has the same general importance to the public as providing police or fire protection.²¹ Riding in school buses has no special religious overtones; it is not the occasion for a religious ceremony, any more than putting out fires or maintaining public order. To conceive of such transportation as sectarian would be like characterizing fire protection as involving the recital of prayers or police protection as embodying a command of the Old or New Testament.

In view of Mr. Justice Black's concern to avoid interpreting constitutional provisions as matters of degree, it is of interest that he noted that state aid was not to be judged unconstitutional "if it is

¹⁷*Tilton v. Richardson*, 403 U.S. 672, 689-97 (1971) (Douglas & Black & Marshall, JJ., dissenting in part); see text accompanying notes 54-58 *infra*; *Lemon v. Kurtzman*, 403 U.S. 602, 627-42 (1971) (Douglas & Black, JJ., concurring); see text accompanying notes 47-53 *infra*.

¹⁸*Walz v. Tax Comm'n*, 397 U.S. at 672-80 (Burger, C.J.); see text accompanying notes 42-46 *infra*.

¹⁹398 U.S. 333, 340, 342-44 (1970) (Black, J.); see text accompanying notes 126-29 *infra*.

²⁰401 U.S. 437, 463 (1971) (Black, J., concurring in judgment and Part I of Court's opinion); see text accompanying notes 130-31 *infra*.

²¹*Everson v. Board of Educ.*, 330 U.S. at 16-18.

within the State's constitutional power even though it approaches the verge of that power."²² He was responding, clearly, to a concluding footnote in the Rutledge dissent to the effect that New Jersey's action did in fact "[approach] the verge of her power."²³ Whether he accepted that description by Mr. Justice Rutledge seems open to question; but in any case, the critical question was not one of degree but whether New Jersey's power was or was not constitutionally transgressed. If it were not, then there was no establishment of religion even though incidentally religious activities might be assisted.

In addition to defining the issues sharply, the Rutledge dissent in *Everson* developed most of the arguments which have been advanced in recent cases on aid to religious institutions of learning. Taking its cue from Madison's injunction to take alarm at the first threat of infringement of our liberties, the dissent asserted that parochial education is indissoluble, that a separation of sacred and secular elements is inadmissible.²⁴ To help any part of such education is thus to promote religion, and to speak of "just a little case over bus fares" is to display that lack of vigilance which Madison's *Remonstrance* condemned.²⁵ The argument between majority and dissent turned upon the assertion of inseparability of religious and secular elements in sectarian education. Mr. Justice Black did in later cases acknowledge such inseparability *within* the schools.²⁶ But he found publicly financed transportation, like other public services, devoid of religious implications. He would, we may suppose, have found such implications in the event that special expenses had to be incurred because of special locations or schedules of sectarian schools. But absent these, the provision of subsidized bus fares must be equal for all children of school age.

Such a generalized principle of public interest had been the premise of *Pierce v. Society of Sisters*²⁷ accepting parochial schools as equal to public schools for satisfaction of Oregon's compulsory education law. *Pierce* had not been argued expressly in terms of religion, but rather of the right of parents to satisfy the requirement according to their private convictions.²⁸ The Court found that private

²²*Id.* at 16.

²³*Id.* at 62 n.61 (Rutledge & Frankfurter & Jackson & Burton, JJ., dissenting).

²⁴*Id.* at 45-48 (dissenting opinion) (citing *Madison, Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Board of Educ.*, 330 U.S. at 63-72).

²⁵*Id.* at 57.

²⁶See *Board of Educ. v. Allen*, 392 U.S. at 252 (1968) (Black, J., dissenting).

²⁷268 U.S. 510 (1925).

²⁸See *School Dist. v. Schempp*, 374 U.S. at 248 (Brennan, J., concurring) ("[*Pierce*] obviously decided no First Amendment question but recognized only the

schools, whether or not sectarian, might provide the basic education appropriate for citizens-to-be. Such education might or might not be religious as well. Quantitatively the secular component might vary according to the time and attention given to purely religious instruction, but at least the secular elements could be identified with sufficient firmness to accredit the school. The Rutledge dissent in *Everson* did not challenge the Court's holding in *Pierce*, though the holding might have been rejected by Thomas Jefferson. But if the *Pierce* ruling were accepted, then it may be invoked to justify distinguishing the secular and religious elements of sectarian education, so as to assure secular education in the parochial school.

The *Everson* statement of Mr. Justice Black's position was further developed in a number of other major cases. In *West Virginia State Board of Education v. Barnett* he had insisted, in conflict with Mr. Justice Frankfurter, that the free exercise of religion included such conduct as the physical gesture of saluting the flag as well as holding a given inner conviction.²⁹ Three years earlier respect for state autonomy had persuaded him to accept, rather than reject, this compulsory patriotic ceremony.³⁰ Mr. Justice Black took the position in *McCullum v. Board of Education*³¹ and *Zorach v. Clauson*³² that free exercise requirements could not justify released-time arrangements providing for religious instruction during school hours, whether on school property or elsewhere, for these violated the establishment clause by invoking the state's truancy power to assure pupils' attendance at religious sessions. For similar reasons in *Engel v. Vitale*³³ and *School District v. Schempp*,³⁴ respectively, he concluded that nondenominational prayers and Bible-reading in public schools were unconstitutional. Arguments based on the need for cooperation between church and state did not seem to Mr. Justice Black to be in keeping with our best traditions, as the majority

constitutional right to establish and patronize private schools—including parochial schools—which meet the state's reasonable minimum curricular requirements.”).

²⁹319 U.S. 624, 643-44 (1943) (Black, J., concurring). Mr. Justice Frankfurter was the sole dissenter to the Court's holding that the flag salute, like test oaths, was an instrument for restricting religious belief.

³⁰*Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (Frankfurter, J.). Mr. Justice Stone was the only member of the Court to dissent to the holding that a state regulation requiring those attending public schools to participate in a daily flag salute ceremony, on pain of expulsion, is not unconstitutional as applied to children entertaining a conscientious religious belief that such conduct is forbidden by the Bible.

³¹333 U.S. at 209-10 (Black, J.).

³²343 U.S. at 316-18 (Black, J., dissenting).

³³370 U.S. at 424, 430-36 (Black, J.).

³⁴374 U.S. at 223-27 (Mr. Justice Black joined in the Court's opinion).

claimed in *Zorach*, but reflected a "soft euphemism" that disguised government's improper intrusion into the religious sphere.³⁵

Mr. Justice Black's positive conception of religious freedom was set forth eloquently in the concluding paragraph of his dissent in *Zorach*:

Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government. Statutes authorizing such repression have been stricken. Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.

State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution 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.³⁶

³⁵*Zorach v. Clauson*, 343 U.S. at 320 (Black, J., dissenting).

³⁶*Id.* at 319-20.

When in December of 1976 decorations were erected in Indianapolis' University Park, the traditional nativity scene was not among them, a fact attributed by some, but not all, to "demands [of non-responsive and non-representative persons] which violate the conscience of the majority of our constituency." Indianapolis City-County Council Proposal No. 604, Special Resolution No. 19 (Dec. 20, 1976); *contra*, Memorandum from William H. Hudnut III, Mayor, to City-County Council regarding Special Resolution No. 604 (Dec. 21, 1976). The "demands" to which the City-County Council was referring are embodied in the following statement:

While some aspects of Christmas celebrations are traditional and secular, manger scenes are clearly associated with the Christian religious holiday. Use of public resources to install and maintain such a display on public land is offensive to non-Christian citizens and appears to constitute a violation of First Amendment prohibitions of establishment of religion. We would urge you to see that, when December decorations are erected in the Park this year, they do not include such obvious Christian religious symbols. Letter from Barbara Williamson, Executive Director, Indiana Civil Liberties Union, and Emily Fink, Executive Director, Jewish Community Relations Council in Indianapolis, to Ray Crowe, Director, Indianapolis Parks Department (November 1976).

Regardless of its impact on the Parks Department once the ICLU-JCRC request was made public by city officials, it evoked a huge media controversy and prompted a

The principal defeat suffered by Mr. Justice Black during the Warren Court years insofar as the religion clauses were concerned was in *Board of Education v. Allen*,³⁷ where the Court sustained a New York statute authorizing the loan of textbooks in secular subjects to pupils in sectarian as well as public schools. Mr. Justice Black protested that textbooks, in contrast with public services such as bus fares, school lunches, and police and fire protection, are central to the teaching process.³⁸ He left to the Douglas dissent the discussion of the pervasiveness of Catholic doctrine in all subjects—social, scientific, humanistic—taught in parochial schools,³⁹ and limited his own argument to the proposition that:

City-County Council Resolution, a bill in the Indiana General Assembly, Ind. H.R. 1224 (Jan. 5, 1977) and a policy from the mayor on the use of public property for such displays, Open Letter to The Community from Mayor William H. Hudnut, III regarding The Navity Scene on Public Property (Feb. 18, 1977). "The City respects all faiths and recognizes and defends people's inalienable right, individually and collectively, to express their beliefs freely. The City will not promote participation in the activities of any particular religious organizations or sect, nor will it seek to establish or control religion. The City is neutral." *Id.*

The recent controversy in Indianapolis over the use of public property for religious displays would, I believe, have elicited from Mr. Justice Black the following reactions:

(1) The deep feelings expressed in many letters to the press reveal once more the wisdom of the Founders in affirming in the first amendment the exclusion of religious matters from politics and of political influence from religion.

(2) The use of public money or public property in the religious displays violates the first amendment just as did the programs of released-time on school property in *McCullum v. Board of Education*.

(3) The opening of public parks and streets to religious displays which are entirely financed or supported by private groups might be admissible provided genuine equality of opportunity were accorded to all religious groups as well as to anti-religious groups. Assurances of such equality would have to be attended by successful avoidance of religious antagonisms or "excessive entanglement" by public authority.

(4) Recognition of Christmas as a public holiday can be justified on secular grounds, just as can Sunday closing laws as applied to public institutions and private businesses.

(5) Separation of political and religious institutions does not express hostility to religion, but rather dedication to free exercise of religion.

A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

McCullum v. Board of Educ., 333 U.S. at 211-12 (Black, J.).

³⁷392 U.S. 236 (1968) (6-3 decision) (White, J.). Justices Black, Douglas, and Fortas filed separate dissenting opinions in which each asserted that the challenged state statute was unconstitutional as a law respecting the establishment of religion.

³⁸*Id.* at 252 (Black, J., dissenting).

³⁹*Id.* at 258-65 (Douglas, J., dissenting).

Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service.⁴⁰

He rejected the majority's conclusion that the financial benefit could be justified because it aided parents and children rather than the schools. The crucial issue was not which persons benefited, but whether the benefit did or did not involve a general public purpose distinct from the promotion of religion.⁴¹

Other important cases involving religion were decided during 1969-71, the period when Mr. Justice Black's tenure overlapped the term of Chief Justice Burger. In *Walz v. New York Tax Commission*,⁴² a case decided in 1970, Mr. Justice Black concurred silently in the opinion by the Chief Justice sustaining the according of tax exemptions to religious properties. Only Mr. Justice Douglas dissented; to him a tax exemption is indistinguishable from a public subsidy.⁴³ It seems uncertain whether Mr. Justice Black would have taken issue with this position; on the positive side he may be supposed to have concurred in associating churches with other properties exempted because they promote " 'moral or mental improvement.' "⁴⁴ It is doubtful that he agreed with the Chief Justice's stress on the Holmes dictum that " 'a page of history is worth a volume of logic.' "⁴⁵ Mr. Justice Black was devoted to history, provided it was the history of the Founders' formulation of constitutional principles, but hardly to history at large. He must also have shaken his head at the Chief Justice's praise of the realistic nonlogic of the *Everson* decision.⁴⁶

In the following year the Court confronted the major problems involved in federal and state efforts to provide assistance to parochial education. Mr. Justice Black reiterated in these cases his distinction between nonideological public forms of assistance and direct

⁴⁰*Id.* at 252-53 (Black, J., dissenting).

⁴¹The "child benefit" argument, which often is traced to the opinion of Chief Justice Hughes in *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930), is surely inadequate, for if it is a secular benefit that is bestowed then there is no establishment of religion, but if the benefit is religious then there is establishment. The criterion is the presence of a legitimating public secular interest.

⁴²397 U.S. 664 (1970) (Burger, C.J.).

⁴³*Id.* at 704, 709 (Douglas, J., dissenting).

⁴⁴*Id.* at 672 (Burger, C.J.).

⁴⁵*Id.* at 675-76 (Burger, C.J.) quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

⁴⁶397 U.S. at 671 (Burger, C.J.).

promotion of religious teaching in private schools and colleges. In *Lemon v. Kurtzman*⁴⁷ he was in the majority in striking down programs in Rhode Island and Pennsylvania which provided for payments to nonpublic schools for textbooks, instructional materials, and teachers' salaries. He joined in the concurring opinion of Mr. Justice Douglas asserting that secular teaching in such schools cannot be separated from religious teaching and that the aid, ostensibly limited to secular uses, would enable those schools to put more money into religious teaching.⁴⁸ To police teaching in order to assure its secular character would involve undue entanglement;⁴⁹ furthermore, taxpayers' free exercise was abridged when public money was employed to promote a private religious objective.⁵⁰ Taking note of the rapid increase in the 1960's of state and federal aid to private colleges and universities, Mr. Justice Douglas rejected the contention that the widely-praised objective of variety in education is necessarily promoted by aiding sectarian education.⁵¹ In fact, he argued, if sectarian schools accept public aid, then they must give up school prayers under the *Engel* decision.⁵² In summary he stressed the unity of parochial education: "The school is an organism living on one budget" and each class, whether in history, literature, or science is a part of that organic whole.⁵³

In *Tilton v. Richardson*,⁵⁴ a case decided on the same day as *Lemon v. Kurtzman*, the Court held that the Higher Education Facilities Act of 1963 was constitutional in respect of its authorizing federal aid for buildings at church-related colleges. This case fairly illustrates the division between the liberal Warren Court members and the new Chief Justice. The Douglas dissent, in which Mr. Justice Black joined, asserted that grants to sectarian colleges to build libraries, a language laboratory, a science building, and a music, drama, and arts building were indistinguishable from grants to subsidize teaching in church-related primary and secondary schools.⁵⁵ The dissenters rejected the claim that religious teaching in church-related colleges did not involve indoctrination of the sort which the first amendment forbids promoting by public means.⁵⁶

⁴⁷403 U.S. 602 (1971) (Burger, C.J.). Only Mr. Justice White dissented in *Lemon v. Kurtzman*.

⁴⁸*Id.* at 630 n.13, 641.

⁴⁹*Id.* at 627 (Douglas & Black, JJ., concurring).

⁵⁰*Id.* at 627-28, 641-42 (Douglas & Black, JJ., concurring).

⁵¹*Id.* at 630-31 (concurring opinion).

⁵²*Id.* at 634 (concurring opinion).

⁵³*Id.* at 641 (concurring opinion).

⁵⁴403 U.S. 672 (1971) (Burger, C.J.). June 28, 1971, the date of decision of these two cases, was the last day of Mr. Justice Black's active service on the Court.

⁵⁵*Id.* at 692-93 (Douglas & Black & Marshall, JJ., dissenting).

⁵⁶*Id.* at 693-94.

Quoting a statement of President Kennedy to the effect that aid to the school is prohibited by the Constitution,⁵⁷ the dissent stressed both the impact of the grants in making the parochial system viable and the problems involved in the strictest supervision and surveillance to assure secular use of "a unitary institution with subtle blending of sectarian and secular instruction."⁵⁸

III. THE RELIGION CLAUSES IN THE BURGER COURT

The Burger Court generally has diverged from the Black position with respect to the religion clauses. Absolutism and activism in applying constitutional restrictions on state and local initiatives have been respectfully put to one side. The Court, however, has not been monolithic, and the Chief Justice, who has come to be associated normally with Justices Rehnquist and White, has not always been in the majority. It seems, nevertheless, appropriate to identify the Court's general approach with the opinion of the Chief Justice in *Walz*, the New York tax exemption case.

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.⁵⁹

⁵⁷*Id.* at 690 (quoting March 1, 1961 News Conference, [1961] Pub. Papers 142-43).

⁵⁸*Id.* at 694 (Douglas & Black & Marshall, JJ., dissenting). Mr. Justice Brennan argued that the case should be remanded to determine whether the colleges were in fact sectarian. 403 U.S. at 642 (dissenting opinion). He contrasted the block grant as a positive aid with the negative aid involved in a tax exemption, *id.* at 652-57; and declared that, in contrast with *Allen*, the New York textbook case, the aid provided in *Lemon* and *Tilton* was to education that "goes hand in hand with the religious mission that is the only reason for the schools' existence." *Id.* at 657. Mr. Justice White rejected the distinction between higher and secondary education in respect of indoctrination, but found the statute valid because it was based on an admissible separation of secular and sectarian purposes. *Id.* at 670-71 (concurring opinion).

⁵⁹397 U.S. at 668. Mr. Justice Black may be presumed to have distinguished statutes from the Constitution. But it seems unlikely that he would have regarded the

Such an injunction against undue generality has obvious appeal, but it would have, for Mr. Justice Black, limited validity when applied to first amendment principles. Although he concurred in the opinion of the Chief Justice in *Walz*, Mr. Justice Black was committed to the straightforward and absolute interpretation of the religion clauses. He could not agree that judges may balance or accommodate those clauses against other considerations in the cases at hand. He would contend that "Congress shall make no law respecting an establishment of religion" has been replaced by "Congress shall make no law . . . *except when* historical usage or some other social factor makes such a law desirable." If this analysis is correct, Mr. Justice Black accepted the constitutionality of tax exemption on the basis, similar to that advanced by Mr. Justice Brennan, that a distinction can be drawn between exemption and subsidy and, more important, that religion shares with the arts and sciences and other mental and moral improvement activities such public value as to merit special tax treatment. On the negative side, it seems clear that Mr. Justice Black rejected the contention that any governmental act which saves money for a church or church school is ipso facto "establishment." Public or general functions can be identified, and to advance them does not violate the constitutional prohibition.

The anti-absolutism of Chief Justice Burger was expressed again in *Wisconsin v. Yoder*,⁶⁰ after Mr. Justice Black had left the Court. In *Yoder* the free exercise clause was invoked to justify exempting Amish children from Wisconsin's compulsory school-attendance requirement after primary school. The Chief Justice wrote that:

"[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. . . ."⁶¹ And again: "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁶²

Free exercise, however fundamental, must be weighed, and may be outweighed. In his balancing, the Chief Justice concluded that the

Constitution as simply "stat[ing] an objective." The words of the Constitution, while indeed normative, were considered by Black to provide precise though general imperatives for the conduct of government.

⁶⁰406 U.S. 205 (1972) (Burger, C.J.). Mr. Justice Powell and Mr. Justice Rehnquist did not participate in the consideration or decision of this case.

⁶¹*Id.* at 214.

⁶²*Id.* at 215.

Amish claim must not be "based on purely secular considerations,"⁶³ but rather that it must be a matter of "deep religious conviction."⁶⁴ He noted that the social progress all around the Amish has put their way of life under increasing strain, especially at the level of high school education.⁶⁵ The Court rejected Wisconsin's argument that the free exercise clause protects only beliefs, not conduct, and also the argument that to exempt the Amish would desert neutrality in imposing the state requirement.⁶⁶ The *Walz* stress on "preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses" was reiterated.⁶⁷ The opinion examined and rejected Wisconsin's contention that sending Amish children to high school for two years would serve significantly to prepare them "to participate effectively and intelligently in our open political system."⁶⁸ In fact, the opinion concluded, the Amish system of learning-by-doing in the fifteenth and sixteenth years has been described by experts as preparing the children very well for life in the Amish community.⁶⁹ The Amish parents' right to control their children's development in this respect is not at all comparable to the asserted right, rejected by the Supreme Court, of parents to employ their children to propagandize religion on the streets.⁷⁰ As a final point, the Court noted that its holding was not intended to preclude the state's establishing reasonable standards for continuing vocational education of the children.⁷¹

There were no dissenters to the principal holding in *Yoder*; however, Mr. Justice Douglas did qualify his assent to the Court's holding. It was his belief that the free exercise at issue was that of the children as well as of their parents and that inadequate attention had been given to considering the children's own views.⁷² Mr. Justice Douglas also criticized the Chief Justice's account of religion as returning the Court to a conventional conception rather than the more expansive interpretation advanced in the conscientious objector cases.⁷³ Mr. Justice Stewart, for himself and Mr. Justice Brennan,

⁶³*Id.*

⁶⁴*Id.* at 216. Cf. *Gillette v. United States*, 401 U.S. 437 (1971) (significance of religious conviction in conscientious objector case); *Welsh v. United States*, 398 U.S. 333 (1970) (religion interpreted as practically a deep and persisting moral conviction).

⁶⁵406 U.S. at 217.

⁶⁶*Id.* at 219-20.

⁶⁷*Id.* at 221.

⁶⁸*Id.* at 221-22.

⁶⁹*Id.* at 223.

⁷⁰Compare *Yoder with Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁷¹406 U.S. at 236.

⁷²*Id.* at 241 (Douglas, J., dissenting in part). Douglas would have remanded the case with respect to two children to determine their preference.

⁷³*Id.* at 248.

noted that the matter of the children's free choice had not been presented in the record.⁷⁴ Mr. Justice White, joined by Justices Brennan and Stewart, balanced the free exercise of the Amish against the state interest and found that the former prevailed.⁷⁵

The decisive confrontation between Mr. Justice Black's position and that which was later to prevail in the Burger Court occurred, in retrospect, in *Board of Education v. Allen* in 1966. The disagreement between the six-man majority and the dissenters, Justices Black, Douglas, and Fortas, took the form of a dispute over the meaning of Mr. Justice Black's opinion in *Everson*.⁷⁶ Mr. Justice White, writing for the majority, found that supplying textbooks was in principle of the same order as paying bus transportation, *i.e.*, a secular service generally available to all pupils.⁷⁷ Secular textbooks could, the majority held, be distinguished from religious textbooks.⁷⁸ The beneficiaries of the program were the pupils and their parents, not the school.⁷⁹ If pupils are helped to go to parochial school by textbook loans, so are they by bus fares at the taxpayers' expense. Thus, Mr. Justice White concluded, the *Everson* criteria as refined in *Schempp* might be satisfactorily applied to justify the textbook loans: the purpose of the lending program was secular, and its primary effect neither advanced nor inhibited religion.⁸⁰

In dissent, Mr. Justice Black characterized the textbook lending program as a "flat, flagrant, open violation of the First and Fourteenth Amendments" as those are related to laws "respecting

⁷⁴*Id.* at 237 (concurring opinion).

⁷⁵*Id.* at 237-41 (concurring opinion).

⁷⁶Compare *Board of Educ. v. Allen*, 392 U.S. at 241-43 (White, J.) with 392 U.S. at 250-51 (Black, J., dissenting) and 392 U.S. at 254 & n.1, 257 (Douglas, J., dissenting) and 392 U.S. at 271-72 (Fortas, J., dissenting).

⁷⁷*Id.* at 242-43.

⁷⁸*Id.* at 244-45.

⁷⁹*Id.* at 243-44.

⁸⁰*Id.* at 243. The test developed in *Schempp* for distinguishing between those state contacts with religion which are forbidden and those which are not was stated as follows:

[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. 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.

374 U.S. at 222 (Clark, J.). This test was based on the Court's opinions in *Everson*, *Zorach*, and other cases. *Board of Educ. v. Allen*, 392 U.S. at 242-43.

In *Allen* Mr. Justice White did not refer to the excessive entanglement test, which was articulated in *Walz* by Chief Justice Burger and recently criticized by Mr. Justice White as redundant. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 769 (1976) (White, J., concurring in judgment).

an establishment of religion.' ”⁸¹ Repeating the main thesis of his *Everson* opinion, he declared that taxpayers were compelled “to support the agencies of private religious organizations the taxpayers oppose.”⁸² Such a linkage of state and church was what the religion clauses were meant to prevent. As Douglas argued more fully, the distinction between secular and religious textbooks in the religious schools is untenable.⁸³ Mr. Justice Black’s dissent in *Allen* concluded prophetically:

[O]n the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools.⁸⁴

He noted the passage in 1963 of the Higher Education Facilities Act, which appeared to authorize the expenditure of federal funds for the construction of buildings for sectarian religious schools and which was subsequently to be upheld in *Tilton* over his dissent.⁸⁵

The stage thus was set for the mixture of adherence to the Black position and departure from it which has characterized the Burger Court. The anti-Black position has been taken, in the main, by Mr. Justice White, in association with the Chief Justice and Mr. Justice Rehnquist. A mediating stance has been assumed by Justices Powell and Blackmun and, sometimes, Stewart. The position closest to that of Mr. Justice Black has been that of Mr. Justice Brennan, usually with the concurrence of Mr. Justice Marshall; though it should be kept in mind that in *Allen* Mr. Justice Brennan sided with the majority.

Allen was the first in a series of cases dealing with legislative efforts at both state and federal levels, to include sectarian schools and colleges in programs of financial aid. Some of these efforts took the form of aid to pupils via tuition grants; others provided tax credits or reimbursement to parents; others supplemented teachers’ salaries in schools unable to pay prevailing salary scales. They also included loans or grants for administration and instructional mater-

⁸¹392 U.S. at 250.

⁸²*Id.* at 251.

⁸³*Id.* at 254 (dissenting opinion).

⁸⁴*Id.* at 253.

⁸⁵*Id.*

ials and for construction of buildings intended for non-religious employment. As of June 1976 the position of the Burger Court on these programs may be summarized as follows:

In 1971 while Mr. Justice Black still was on the Court, Chief Justice Burger handed down a decision condemning as unconstitutional Rhode Island and Pennsylvania statutes providing for the states' making payments to supplement the salaries of teachers of secular subjects in parochial schools; the Court's opinion in *Lemon v. Kurtzman* cited the danger of excessive entanglement of state with church.⁸⁶ Mr. Justice Douglas, with Mr. Justice Black, agreed that undue surveillance would be required to see that the aid did not go to religious teaching.⁸⁷

But in *Tilton v. Richardson*, a companion case involving sectarian colleges in Connecticut, the Court upheld a one-time money grant authorized under the federal Higher Education Facilities Act of 1963 for buildings to be employed only for secular purposes.⁸⁸ Justices Douglas, Black, Marshall, and Brennan dissented on the ground that assuring restriction of the buildings to secular uses would entail such surveillance as to violate the establishment clause.⁸⁹

A second round of decisions was handed down two years later; Justices Powell and Rehnquist had replaced, respectively, Justices Black and Harlan. In *Committee for Public Education & Religious Liberty v. Nyquist*⁹⁰ the Court struck down New York's plan to provide public moneys for maintenance and repair grants, as well as tuition reimbursement and tax relief. The Powell opinion declared that all of these might be employed in sectarian enterprises and were not saved by such arrangements as paying parents rather than the schools.⁹¹ Conceding the merits of trying to help poorer parents and to encourage private schools, Mr. Justice Powell noted Mr. Justice Black's *Everson* warning about the dangers of political divisiveness when contending sects struggle to tap the public purse.⁹² Mr. Justice Rehnquist found the Court's decision inconsistent with approving bus fares, textbook loans, and tax exemptions, all of which, he contended, aided parents as much as the tuition grants at issue in *Nyquist*.⁹³

⁸⁶403 U.S. at 624-25.

⁸⁷*Id.* at 634 (concurring opinion).

⁸⁸403 U.S. 672 (1971). Justices Harlan, Stewart, and Blackmun joined in the Chief Justice's plurality opinion; Mr. Justice White concurred in the judgment.

⁸⁹*Id.* at 694 (Douglas & Black Marshall, JJ., dissenting); *id.* at 651 (Brennan, J., dissenting).

⁹⁰413 U.S. 756 (1973) (Powell, J.). Justices Douglas, Brennan, Stewart, Marshall and Blackmun joined in the Court's opinion. Dissenting in part were Justices Burger, see note 99 *infra* and accompanying text; White, see notes 101-03 *infra* and accompanying text; and Rehnquist.

⁹¹*Id.* at 780-89.

⁹²*Id.* at 795-96.

⁹³*Id.* at 806-12 (dissenting opinion).

On the same day *Levitt v. Committee for Public Education & Religious Liberty*⁹⁴ was decided. In this case the Court, speaking through the Chief Justice, declared invalid New York's spending \$28 million to reimburse private schools for administering and keeping records on tests, enrollment, pupil health, and personnel. Such aids, the Court ruled, could not readily be separated from infusing religion into the teaching process.⁹⁵ As distinct from *Allen*, here the issue was not a text whose "content is ascertainable, but a teacher's handling of a subject."⁹⁶ Justices Douglas, Brennan, and Marshall concurred, and only Mr. Justice White dissented.

A third decision on the same day split the Court. A six-man majority held in *Sloan v. Lemon*⁹⁷ that Pennsylvania could not reimburse parents for part of the tuition paid to parochial schools; the reimbursement could be viewed as potentially applied to religious instruction. Parental benefit, like child benefit, was rejected as a justification for public spending; the crucial issue was whether the benefit was religious.⁹⁸ Chief Justice Burger and Justices White and Rehnquist dissented. The Chief Justice argued that the aid to schools was incidental; when individuals make the choice as to how money is to be spent "the balance between the policies of free exercise and establishment of religion tips in favor of the former . . . and takes on the character of general aid to individual families."⁹⁹ In addition, he stressed the importance of promoting educational pluralism.¹⁰⁰ Mr. Justice White argued that the secular purposes here were sufficient to justify aid;¹⁰¹ he noted that sectarian education is shrinking in volume¹⁰² and that parental free exercise of religion should be considered.¹⁰³

As in 1971, the Court balanced these rulings in *Hunt v. McNair*¹⁰⁴ to uphold a South Carolina statute authorizing the use of public funds to facilitate the building of a secular-use plant, specifically a dining-

⁹⁴413 U.S. 472 (1973).

⁹⁵*Id.* at 480.

⁹⁶*Id.* at 481, quoting *Lemon v. Kurtzman*, 403 U.S. at 617.

⁹⁷413 U.S. 825 (1973) (Powell, J.).

⁹⁸*Id.* at 832.

⁹⁹*Id.* at 802 (concurring in part and dissenting in part). Mr. Justice Rehnquist joined in this opinion, which also applies to *Nyquist*, while Mr. Justice White did so only in part.

¹⁰⁰*Id.* at 805.

¹⁰¹*Id.* at 813, 823-24 (dissenting opinion). Mr. Justice White was joined in part by the Chief Justice and Mr. Justice Rehnquist in an opinion which is equally applicable to *Nyquist*.

¹⁰²*Id.* at 817.

¹⁰³*Id.* at 814-15.

¹⁰⁴413 U.S. 734 (1973) (Powell, J.).

hall, at a Baptist college. The majority found that: (1) The purpose of the statute was secular—to promote higher education, (2) the program's primary effect was not religious since religion at the college was not all-pervasive, and (3) no more entanglement was involved than in *Tilton*,¹⁰⁵ the Connecticut colleges case of 1971. Mr. Justice Brennan, in an opinion in which Justices Douglas and Marshall joined, dissented on the score that essentially religious activities were involved in pursuing the secular public purpose and that the program involved continuous on-site inspection of facilities to determine whether they were employed for religious purposes.¹⁰⁶

Roemer v. Board of Public Works,¹⁰⁷ the final decision to date in this series, concerned sectarian colleges; once again the Court divided, but nonetheless upheld Maryland's grant of public funds to private colleges for secular purposes. In an opinion in which the Chief Justice and Mr. Justice Powell joined, Mr. Justice Blackmun found that "the appellee institutions are not 'so permeated by religion that the secular side cannot be separated from the sectarian.'"¹⁰⁸ For this reason, the primary effect of the grants need not be considered religious, nor need excessive entanglement be involved. Mr. Justice White, with Mr. Justice Rehnquist, concurred in the result but expressed discontent with the plurality's use of the "excessive entanglement" test; it was enough, he said, to show a secular purpose and no primary religious effect.¹⁰⁹ Mr. Justice Brennan, dissenting for himself and Mr. Justice Marshall, stressed the fact that "the secular education is provided within the environment of religion,"¹¹⁰ and that "general subsidies 'tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.'"¹¹¹ Mr. Justice Stewart, dissenting, contended that evidence had not been presented sufficient to show that "the compulsory religion courses were taught as an academic

¹⁰⁵*Id.* at 741-46.

¹⁰⁶413 U.S. at 749-50, 752-55. The dissent criticized energetically the conclusion that *Tilton* was controlling, pointing out that the South Carolina plan involved not a single grant of aid, but continuing assistance which must involve concomitant regulation and surveillance.

¹⁰⁷426 U.S. 736 (1976). In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court upheld a Pennsylvania statute which provided for lending textbooks to students attending private schools, but found impermissible the loan of instructional materials and equipment and the provision of auxiliary educational services to private schools.

¹⁰⁸*Id.* at 759, quoting *Roemer v. Board of Pub. Works*, 387 F. Supp. 1282, 1293 (D. Md. 1974).

¹⁰⁹426 U.S. at 768-69.

¹¹⁰*Id.* at 771-72, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 660 (1971) (Brennan, J., concurring).

¹¹¹*Id.* at 770, quoting *School Dist. v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring).

discipline."¹¹² Mr. Justice Stevens, in his first religion opinion, supported the Brennan dissent, observing that religious schools should not be pressured to compromise their religious mission.¹¹³

IV. THE DIVERGENT THEORIES OF THE RELIGION CLAUSES

The reasons for the divergence between Mr. Justice Black and the dominant trend in the Burger Court already have been indicated. It may be that the simplest explanation has been afforded by Mr. Justice Powell's observation that the Court was showing a "sounder balance" than its predecessor.¹¹⁴ Though Mr. Justice Powell was speaking primarily about criminal cases, his opinions in first amendment cases have shown a like disposition to "balance" where Mr. Justice Black would have been peremptory and, as the rather imprecise term goes, "absolutist."

Why should one be "absolutist"; why should another denounce "absolutism"? Mr. Justice Black's adherence to absolutism issued from his conviction that the Supreme Court can and should read the Constitution as it was intended, and that its meaning, even though not always totally explicit on the surface, can be discerned to be single and internally self-consistent. This does not mean that there is always an easy process of discernment, or that application of constitutional principles always is simple and free from rational disagreements. But it does mean that the constitutional clauses, including the religion clauses, are mutually consistent even when taken to a logical extreme, and that they are not inherently at odds with other principles of the first amendment or of the Constitution more broadly. In the disposition of virtually all the present Court, with the possible exception of Justices Brennan and Marshall, the desire to reject these propositions is the reason for its rejection of the Black heritage in respect to the religion clauses.

Mr. Justice Black believed that the Court's efforts to justify restrictions on free expression in cases involving allegations of libel and censorship committed it to trying to apply unmanageable concepts under the rubrics of "actual malice" and "obscenity."¹¹⁵ In

¹¹²*Id.* at 773.

¹¹³*Id.* at 775.

¹¹⁴*N.Y. Times*, Aug. 12, 1976, § 1, at 18, col. 3 (statement made at American Bar Association meeting, Aug. 11, 1976).

¹¹⁵*See Ginzburg v. United States*, 383 U.S. 463, 478 (1966) (Black, J., dissenting) ("[T]he criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries

the religion cases the Court, mercifully, has not had to deal with such a problem as the distinction between "sacred" and "profane"; still it has involved itself in wholly unnecessary complications with such criteria as "primary effect" and "excessive entanglement."¹¹⁶ For Mr. Justice Black, a clear and manageable distinction could be drawn between secular activities, such as those involved in transportation, and the conduct of education involving not only the actual processes of instruction but also the construction and maintenance of facilities essential to them. The concern of Mr. Chief Justice Burger and of his moderate associate, Mr. Justice Powell, has been to assign as much weight as possible to state legislatures and local authorities and to restrain the activist propensity exhibited by Mr. Justice Black. Yet this has, in fact, brought the Justices into elaborate analyses of the precise degree of sectarianism in the institutions being aided.¹¹⁷ No member of the Supreme Court would confess to legislating; all propose to eschew judicial discretion; and yet it seems that in their devotion to realism, the Justices of the Burger school respond much more than would Mr. Justice Black to the felt need to bend constitutional principles to "the situation."

Are the establishment and the free exercise clauses inherently at odds when taken to their logical extremes? Are they, or is either, in any sense, self-contradictory? In arguing for the former position in *Schempp*, Mr. Justice Stewart noted the possibility that a lone soldier in a remote outpost might need, for his free exercise of religion, the "establishment" of a chaplain, or a chapel.¹¹⁸ But spending public money for such a facility hardly seems to be "promoting" or "preferring" religion in general or one religion in particular; it is on a level with providing various facilities like libraries or post exchanges.¹¹⁹ Mr. Justice White has suggested that the very reference to religion in the first amendment is a form of preferring religion to

him."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., dissenting) ("[T]he Court holds that 'the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.' . . . The Court goes on to hold that a State can subject such critics to damages if 'actual malice' can be proved against them. 'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.")

¹¹⁶In *Zorach*, Mr. Justice Black took note of the creation of a governmental power to determine "what constitutes 'a religion.'" 343 U.S. at 318 n.4 (dissenting opinion).

¹¹⁷See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755-61 (1976) (Blackmun, J.).

¹¹⁸374 U.S. at 309 (dissenting opinion).

¹¹⁹Establishing a religious facility to proselytize would exceed the demands of free exercise; on the other hand, providing a facility for worship alone would not seem to be "establishment."

non-religion and so a form of establishment.¹²⁰ To this contention Mr. Justice Black surely would have answered that the suggestion ignores the essential character of freedom: if religious freedom is to be genuine it must be accompanied by a like freedom for non-religion.¹²¹

The divergence between the Black and Burger Court conceptions may, once again, be described in terms of the latter's stress on balancing the religion clauses against one another or other provisions of the Constitution. Such balancing is precisely what Mr. Justice Black condemned in first amendment cases.¹²² Decision is made to rest on intuitions regarding matters of competing importance, such as a high school education on one hand and the "good behavior" and sincerity of the embattled Amish on the other. For Mr. Justice Black the question would have been whether free exercise was genuinely involved in *Yoder*; if it were, then the children must go home to their parents' supervision; if not, then the children must attend public high school.

The critical question in *Yoder*, from the absolutist point of view, is whether the constitutional limitation imposed by the free exercise clause was properly invoked to keep the children away from high school. Mr. Justice Black's writings in the school cases do not provide an unequivocal answer. He had found the compulsory flag salute to be an infringement on free exercise; he did not find released-time arrangements mandated by free exercise; however much parents wished to have prayers and Bible-reading in public schools, he did not find such desires an undeniable element of free exercise. On the other hand, he did hold that religious objection to combatant service in war was to be construed with the utmost liberality; and no doubt Amish fathers regarded their children's approach to modern society as a form of combatant experience.

On the whole, the foregoing suggests that Mr. Justice Black might well have refused to accept the Amish appeal to free exercise. Education is not an affair to be left wholly to parents, even when religious education is involved. Parents may not dictate the content or procedure of education in ways which clash with the legitimate interests of the state in training citizens of the future—not because the interest of the state outweighs that of parents, but because parental interest, as a form of free exercise, simply does not reach so far. In *Zorach* Mr. Justice Black condemned the release of public school pupils for religious instruction as an arrangement which

¹²⁰*Welsh v. United States*, 398 U.S. at 372 (dissenting opinion) (by implication).

¹²¹*See, e.g., Zorach v. Clauson*, 343 U.S. at 320 (Black, J., dissenting); *Everson v. Board of Educ.*, 330 U.S. at 15-16 (Black, J.).

¹²²A CONSTITUTIONAL FAITH, *supra* note 6, at 50-52.

invaded the "sacred area of religious choice."¹²³ In the long-established *Pierce* case the Court held that parents might send their children to private schools on condition that appropriate subject matters and teaching procedures were present. The Amish, like any other parents, have the right and the duty to criticize schools, primary or secondary, in respect of their impact on the morality and the mental development of their children. But to withdraw children from the general processes in which citizenship training culminates is to reflect a conception of religion which is negative and narrow; it is also a preferment of a special religion which flies against the establishment clause. Religion which is cultivated exclusively in moral terms, independently of intellectual training, lacks an authentic claim to free exercise in respect of education.¹²⁴

To put the matter polemically, the decisive question in *Yoder* is whether the first two years of high school were in conflict with the religious objectives of the Amish. On this point, one would suppose that the most pertinent evidence would be that supplied by the state educational authorities. To the extent that they could show that their instruction did not, like saluting the flag, commit children to bowing down before the graven image of modern technology, they would escape the charge of invading free exercise. A Justice concerned as Black for religious and intellectual freedom would hardly fail to challenge such representations closely. One may note in passing that the entire issue seems to reflect a practical failure on both sides to arrange for private schools in which both the moral and intellectual development of the children might go forward.

It is characteristic of the divergence between the Black and Burger theories that, in practice, their conclusions are not uniformly and diametrically opposed. Mr. Justice Black concurred in *Walz*, the decision upholding the tax exemption for religious-use properties; and the Burger Court has generally refused to sanction unspecified grants of assistance to primary and secondary sectarian education. The most striking disagreement to date is over aid to sectarian colleges; here the dissents of Mr. Justice Brennan seem to carry forward effectively the Black position. In these cases the Burger Court majority appears to respond to such considerations as the sectarian colleges' need for assistance, the country's need for educational pluralism, and the alleged ability of sectarian college students to resist indoctrination. To these arguments Mr. Justice

¹²³*Zorach v. Clauson*, 343 U.S. at 320 (Black, J., dissenting) (emphasis added); see text accompanying note 36 *supra*.

¹²⁴One may sympathize with the desire of the Amish to preserve the values of the simple rural life. But why could not Amish high schools be established? Would the Amish have rejected any education involving books?

Brennan responds in very much Mr. Justice Black's spirit that the very *raison d'être* of the sectarian colleges is religious and that they play an essential role in the entire scheme of sectarian education, Catholic or otherwise.

The mixture of practical agreement and disagreement between the Black and Burger views of the religion clauses reflects no doubt a mixture of agreement and difference about what "religion" means and how it is to be related to other constitutional provisions. Clearly no Supreme Court Justice can follow a sectarian view of these matters: an explicitly Catholic, Protestant, Jewish, or atheist interpretation cannot be advanced for resolution of Supreme Court issues. However difficult it may be to achieve, a Supreme Court decision must not play favorites among different religions. Somehow a conception of "religion" must be explicated which does not "prefer" any single orthodoxy to any other.

It appears reasonable to distinguish the Black position from that of its opponents, in part, in terms of such a problem of explication. The sensible, realistic approach of Chief Justice Burger proceeds as a working affair with the various sectarian conceptions, adopting in effect a kind of "Roman tolerance" which acknowledges the validity of each provided it does not unduly annoy or harass the others.¹²⁵ The Court in *Yoder*, for example, accepted the religious practices of the Amish on their face and yielded deference in the absence of strong evidence of any social disruptions. On the other hand, and notably in *Welsh v. United States*, Mr. Justice Black offered a more comprehensive, if elusive, interpretation of religion as a constitutional concept.¹²⁶

Welsh took to its logical extreme the interpretation of the religious objection exemption to combatant service in the armed forces.¹²⁷ Over the objection of the Chief Justice and Justices White

¹²⁵Rousseau prescribed complete tolerance for all creeds except those which were intolerant.

Now that there is and can be no longer an exclusive national religion, tolerance should be given to all religions that tolerate others, so long as their dogmas contain nothing contrary to the duties of citizenship. But whoever dares to say: *Outside the Church is no salvation*, ought to be driven from the State, unless the State is the Church, and the prince the pontiff. Such a dogma is good only in a theocratic government; in any other, it is fatal. J. ROUSSEAU, *SOCIAL CONTRACT*, bk. IV, ch. VIII, at 122 (E. Dutton ed. 1913) (emphasis in original).

Historically, it was the Christian refusal to be relaxed about non-Christian faiths that presumably brought on the Roman persecutions.

¹²⁶398 U.S. at 342-43.

¹²⁷The conscientious objector exemption extends to one "who, by reason of *religious* training and belief, is conscientiously opposed to participation in war in any form." Universal Military Training and Service Act of 1967, § 1, 50 U.S.C. app. § 456(j) (1970) (emphasis supplied).

and Stewart that the intention of Congress was clearly being obstructed, Mr. Justice Black declared that Welsh's deep-seated conscientious objections, though not theistic or associated with an organized religious sect, were, in effect, equivalent to those asserted by conventional objectors, such as the Quakers, on traditional theological grounds.¹²⁸ The Black opinion accepted Welsh's appeal to principles "essential to every human relation," rather than to a being transcending every human relation.¹²⁹ In effect, the Court stood upon a humanistic account of religion which was to be taken as fundamental to all the more particular accounts embraced in organized sectarian beliefs. Though Mr. Justice Black did not explicitly phrase the matter this way, it seems that absolutism in interpreting the religion clauses must find such a broad conception of religion rather than simply dealing separately with each particular creed.

One additional conscientious objector case — *Gillette v. United States*¹³⁰ — was decided during Mr. Justice Black's last year of service on the Court. In that case the Court rejected an assertion of conscientious objection to service in the Vietnam War. Mr. Justice Black's concurrence in the opinion written by Mr. Justice Marshall was limited to the principal finding that "Congress intended to exempt persons who oppose participating in all war," therefore, such selective objection was not within the purview of the exemption section of the Selective Service Act.¹³¹ He declined to join in the Court's rejection of claims based explicitly on the establishment and free exercise clauses. Mr. Justice Douglas alone dissented, arguing from the *Welsh* decision and principles advanced in Chief Justice Hughes' dissenting opinion in *United States v. MacIntosh*.¹³² It is not fully clear why Mr. Justice Black found the Douglas argument unpersuasive; presumably he regarded selective objection as inherently founded on more than simply conscientious grounds.

V. THE MERITS IN THE BLACK-BURGER ARGUMENT

The foregoing discussion has reflected a general partiality for the thinking of Mr. Justice Black, though it is to be hoped that the divergence between his views and those of the Burger Court has been

¹²⁸398 U.S. at 337-43 (Black, J., announcing the judgment of the Court). Mr. Justice Black concluded that *Welsh* was controlled by *United States v. Seeger*, 380 U.S. 163, 176 (1965), in which the Court held that the test of religious belief under section 6(j) of the Universal Military Training and Service Act is whether it is a sincere and meaningful belief occupying in its possessor's life a place parallel to that filled by the God of those admittedly qualified for the conscientious objector exemption.

¹²⁹398 U.S. at 343.

¹³⁰401 U.S. 437 (1971) (Marshall, J.).

¹³¹*Id.* at 447, 463.

¹³²401 U.S. at 465, 467-68 & n.6.

fairly stated. It is in order, finally, to consider whether a broad theoretical justification may be offered supporting that partiality.

Practically, the divergence has been over whether or not education at college and university levels may receive public assistance even when it is associated with a religious undertaking. The arguments over such aid, as well as over textbook loans at the primary and secondary levels, appear to turn on whether or not secular and sectarian elements of such education can be separated so as to confine public aid to the secular part. The basic argument supporting the Black position is in the conception of religion as pervasive in the classroom and community atmosphere of such institutions. Rather than, so to speak, accepting science classes as secular, as distinct from theology classes as sectarian, Mr. Justice Black viewed religion as providing the general frame and spirit of all the undertakings within the institution.¹³³ He drew his basic distinction between intellectual and spiritual concerns of schools and colleges on the one hand and accessory services, such as transportation and police and fire protection. And in this he appears to have the more persuasive conception of religion.

It must be stressed that what is here at issue is not the personal religious beliefs held by Mr. Justice Black or any of his colleagues. Rather, the basis of their difference is a divergence about what religion is—specifically, how pervasively religion colors all aspects of human existence. There is an extreme form of pantheism which asserts that divinity inheres in every element of the universe; on the other hand, there are limited conceptions of religion such as that of the Epicureans, who believed the gods are far away and not concerned at all with human affairs. In contrast with these, the religion designated in the first amendment clearly has definite limits and yet is also of paramount human significance. In articulating that significance Mr. Justice Black followed the most comprehensive conception of religion consistent with those boundaries which are affirmed by the major religious bodies in the United States. He maintained inclusiveness without losing discrimination, and definiteness without becoming narrow.

Thus, in *Welsh* Mr. Justice Black endorsed the conception of religion conceived as a deep-going conscientious sensitivity to the dignity of human beings and the sacredness of life. It surely is to his credit that he declined to restrict his argument to a textual analysis of what the Congress may have intended; the Founders, rather than a particular Congress, always were his guide. On the other hand, in

¹³³See *Board of Educ. v. Allen*, 392 U.S. at 251 & n.1 (Black, J., dissenting), 262-66 (Douglas, J., dissenting).

accepting the Court's rejection of selective conscientious objection in *Gillette*, Mr. Justice Black indicated his regard for congressional interpretation provided that it might be shown congruent with the Founders' intention. He was, thus, at once "constitutional" in his basic theory and appropriately respectful of legislative privilege as that is defined in the Constitution.

Arguments on the merits in the field of constitutional interpretation reflect both the absence of full explicitness in the Constitution and also a common understanding that a single meaning can be established for constitutional language. If it is hard to be sure just what the religion clauses mean, it is, nevertheless, imperative that a definite meaning be articulated which commends itself to the thinking of the American public. From this it follows that the religion clauses must be interpreted with full generality—one might indeed say generosity—in the sense of comprehending the widest possible usage of the language involved. "Religion" surely is to be given that breadth of meaning which can embrace all the sects on the American scene as well as those who disavow sectarianism altogether.

It is this comprehensiveness of conception which confers particular merit upon Mr. Justice Black's account of religion in *Welsh*. Conscience, as the common element in all religious experience, conceived as the recognition of moral dignity in oneself and other human beings, is the key to the special status conferred upon religion in the first amendment. Establishment of religion is forbidden, not because religion was considered dangerous, but because only independent and conscientious religion, freely developed by individuals, is genuine religion. This is the valid element of the metaphor of the religious road to salvation. To phrase the point in first amendment terms, *it is precisely because religion must be freely exercised that it may not be established*. And if some creeds hold that for them free exercise means being established and being able to coerce non-believers to their ways of belief, the American constitutional rejoinder is that these are not, in the full sense, the religions with which the first amendment is concerned.

The comprehensive view of religion advanced by Mr. Justice Black may be contrasted with the account offered by Chief Justice Burger in *Yoder*. In language reminiscent of pre-*Seeger* conscientious objector cases, the Chief Justice rejected the suggestion that religious claims might rest upon "philosophical and personal" values such as those which Thoreau cultivated at Walden Pond. As Mr. Justice Douglas observed in his partial dissent, this separation between religious and "philosophical" or "moral" values had been transcended in *Seeger*; the Court had acknowledged that genuinely

religious values are continuous with the moral values that give fundamental direction to human life. Conventional theism is not the core of religion as that is relevant in the conscientious objector cases. And it does not appear to be a proper basis, per se, for the release of the Amish from the compulsory high school attendance requirement. Rather, as expressed in *Welsh*, the religion that is relevant is the free development of one's ideas and attitudes toward other people and the world around us. The proper question in *Yoder* was whether the Amish children needed to leave school after the age of fourteen to assure such free development. As suggested above, it seems possible that Mr. Justice Black would have found free religious development as likely to be promoted by their staying two more years in school.

The conception of religion advanced here may be tested by considering whether Mr. Justice Black's general position on aid to sectarian education is consistent with the *Pierce* decision in which the Supreme Court affirmed the propriety of satisfying public education requirements through attendance at parochial schools. As has been pointed out, the parochial school makes complete what is in released-time arrangements only partial; and if Mr. Justice Black condemned the latter, how could he accept the former? One may not, in reply, adopt the tempting suggestion that a decision so fundamental could not be rejected after twenty-five years had confirmed its acceptability, even though such a page of history might seem compelling, though illogical, to the Chief Justice. But one may find a persuasive rationale in the comprehensive conception of religion advanced by Mr. Justice Black. In contrast with exclusively sectarian instruction to be offered in released-time arrangements, the parochial school might be regarded as providing a more general education in which all major components of intellectual training are included. Absent basic instruction in letters, numbers, history, and science, such schools are not accredited; but with that basic instruction they may also teach religion in a context that embraces that general human prospect with which religion in the wider sense is articulated. Such an educational process can develop the intellectual freedom which is the first amendment's central concern. It is not disqualified from the support of the state's truancy power by the fact that it also may serve more narrow sectarian ends.

The merits of Mr. Justice Black's position also may be explicated in terms of his disagreement with Mr. Justice White. The two Justices have looked with disfavor on the criterion of "excessive entanglement" as employed by the Burger Court majority. But their reasons for opposing employment of that criterion were, if a play on words is pardonable, as different as their names. For while both men rejected questions phrased in terms of degree or excess in favor of the

question whether or not a secular purpose was being served, they disagreed deeply in specific cases over whether a given purpose was secular. Thus in *Allen*, the textbook loan case, they disagreed over whether education in the secular sense could be identified and separated from religious education. Mr. Justice White believed that religious education, such as that offered in theology courses, could be demarcated at the classroom door, so to speak, and separated from education in the natural sciences or social sciences or humanities. Per contra, Mr. Justice Black adhered to that conception of education which involved the development of free and independent thinking in all fields of knowledge. As he observed in *Allen*, Mr. Justice Douglas' dissent amply noted the infusion of religious ideas into history, biology, and social science. A religion of serious intention cannot be excluded from any region of human experience.

The religion clauses in the first amendment provide the Supreme Court with perhaps its greatest challenge in interpreting the general charter by which Americans have agreed to be governed. Those clauses invite Americans to consider how their deepest convictions about the world and the human enterprise may be freely developed and put into practice without engendering collisions and hostilities that have disfigured human history. To affirm any given interpretation of what "religion" means in those clauses is to run the risk of disappointing believers in some creed or other. But the lesson cannot be that the Supreme Court should adhere to that conception of religion which is universally inoffensive; such a nominalism would reduce the notion of religion to insignificance. The appropriate interpretation of "religion" must invoke the sense of the first amendment as a whole; it must conceive religion in terms of the free development of the human mind and spirit. It is because he did this so well that Mr. Justice Black provides such effective instruction. He can hardly be said to have formulated the last word, but he put us securely on the right path. As he said at the end of his James Madison Lecture in 1960:

Since the earliest days philosophers have dreamed of a country where the mind and spirit of man would be free; where there would be no limits to inquiry; where men would be free to explore the unknown and to challenge the most deeply rooted beliefs and principles. Our First Amendment was a bold effort to adopt this principle—to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss and deny. The Framers knew, better perhaps than we do today, the risks they were taking. They knew that free speech might be the friend of change and revolution. But they also knew that it is

always the deadliest enemy of tyranny. With this knowledge they still believed that the ultimate happiness and security of a nation lies in its ability to explore, to change, to grow and ceaselessly to adapt itself to new knowledge born of inquiry free from any kind of governmental control over the mind and spirit of man. Loyalty comes from love of a good government, not fear of a bad one.¹³⁴

¹³⁴Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 880-81 (1960).