
In 1962, the four cases testing whether religious exercises in the public schools violated the First Amendment were moving quickly through the courts. The *Schempp* case had reached Washington, D.C., at the end of 1959. Its chances of being the first of the four cases to be reviewed by the U.S. Supreme Court had evaporated when Pennsylvania’s legislators amended the Bible-reading law to allow students to excuse themselves. But now, after the second Biggs decision, the case headed back to Washington.

Already before the justices was *Engel v. Vitale*, testing the Regents’ Prayer composed by the New York State Board of Regents. It was scheduled for oral argument for April 3. Meanwhile, in Baltimore, *Murray v. Curlett* was awaiting a decision by the Maryland Court of Appeals, the highest court in that state. In Miami, *Chamberlin v. Dade County*—Leo Pfeffer’s case—was before the Florida Supreme Court.

That *Engel* had won the race to the Supreme Court did not automatically relegate *Schempp* and the others to a spot in the deep shade. *Engel* involved a short and innocuous state-composed prayer—quite possibly a unique situation in the country. If the Court struck down the prayer, it could be because the state education board had composed it, a situation not duplicated in the other cases. If the Court upheld the prayer, lawyers representing the plaintiffs in the other cases could point out that their situations involved religious practices that were far more extensive and carried deeper Christological significance.

The dominoes were about to fall.
The Supreme Court that awaited all these cases was in the throes of major changes that would affect the lives of all Americans. When President Dwight D. Eisenhower appointed Earl Warren, a former Republican governor of California, to be chief justice in 1953, men of conservative judicial philosophy controlled the Court, exercising a restraint that saw them typically defer to the decisions of legislative majorities. At the time, the only two reliably liberal votes on the Court came from Hugo Black and William O. Douglas. Arrayed against them were the Court’s two leading conservatives, Felix Frankfurter and Robert Jackson, with the other four justices typically falling in line with them.¹

At the time that Frankfurter and Black ascended to the Court, a reasonable expectation would have placed each man in a philosophical role completely opposite to what he assumed as a justice. Frankfurter had been an eminent professor at Harvard Law School and a leading progressive; on the Court, he became the intellectual leader of the conservative bloc. Black had been a senator from Alabama and, early in his life, a member of the Ku Klux Klan. Yet as a member of the Court, he felt, along with Douglas, that he had a deep responsibility to protect individual rights and liberties against encroachment by the government.²

As Black and Douglas faced off against Jackson and Frankfurter, the personal relationships between these two blocs disintegrated into acrimonious feuding on a level rarely seen on the Court. When Jackson died in 1954, Eisenhower replaced him with John Marshall Harlan, a Princeton graduate, Rhodes scholar, and grandson of another justice of the same name. Harlan would become an erudite and respected conservative and leader of that bloc after Frankfurter’s retirement in 1962.

The swing toward a Court more activist in protecting and recognizing constitutional rights and liberties—the so-called Warren Court—began with the school desegregation cases of 1954, but it took a few years and some significant changes in personnel before the
votes became more reliable in that direction. In his first few years on the Court, Warren himself often voted with the conservative bloc. By 1956, though, he had finally found his voice within the more liberal wing of the Court. That same year, Eisenhower appointed William J. Brennan, Jr., a judge on New Jersey’s highest court, to a seat on the Supreme Court. Although Brennan was a Democrat, Eisenhower expected him to live on the conservative side of most issues. In reality, though, Brennan immediately provided a fourth vote with Black, Douglas, and Warren. In time, Brennan became one of the most influential justices of the twentieth century, combining a fierce defense of First Amendment and other freedoms along with a keen political ability to build a consensus for his point of view on the issues most important to him. Conservatives, though, continued to hold a five-to-four advantage until 1962, when Frankfurter retired and the appointment of Arthur Goldberg swung the fifth vote to the Warren faction. Goldberg had been President John F. Kennedy’s secretary of labor.

As the school prayer cases began to reach the Court in the early 1960s, their outcome was by no means certain, even with Goldberg on board. Representing Schempp, Henry Sawyer could have probably counted on three votes: Brennan, Warren, and Black—the latter a strong believer in the separation of church and state and author of several of the Court’s earlier rulings on religion in the schools, including Everson v. Board of Education, in which he had invoked Jefferson’s metaphor of a “wall of separation” to describe the meaning of the establishment clause. Douglas looked like a possible fourth vote, although his stance on separating religion and the schools seemed somewhat wobbly. Douglas had written for the Court majority in upholding the off-campus released-time program of religious education in Zorach v. Clauson and had even said, in explaining why the justices held no antagonism toward religion, “We are a religious people whose institutions presuppose a Supreme Being.” That didn’t necessarily sound like a justice who would definitely ban prayer and Bible reading in public schools. It was unclear how the other members of the Court—Harlan, Tom C. Clark, Potter
Stewart, and Byron R. White—would come out on devotional exercises in the schools. All four were judicial conservatives, although that is a broad designation. White, appointed by Kennedy in 1962, was perhaps the most moderate of the group.

The Court’s leading conservative of the previous two decades, Felix Frankfurter, would hear the *Engel* case but leave the Court and not participate in the decision. Ironically, he might have been the best candidate to supply a fifth vote to ban religious exercises in the schools, because he had agreed strongly with the “wall of separation” in the fifties cases. He might well have found Jewish students compelled to attend crucifixion plays in *Chamberlin* too much to bear under the free exercise clause. But that did not mean that those who generally followed him would see it the same way.

By April 3, 1962. *Engel v. Vitale* had finally completed its long journey to the U.S. Supreme Court. It wasn’t clear, though, why the justices had voted to hear the *Engel* case. The Court had the discretion to accept the case or not, and *Engel* did not pose the most compelling case for the justices to decide. It was true that the Board of Regents had composed the prayer for children to use in the public schools, but it would have been hard to find a prayer that was more innocuous. As Yale law professor Louis H. Pollak wrote at the time, the possibility that the Court might turn down review of the case “might have been strengthened by a feeling that New York’s attempt to write a prayer had produced such a pathetically vacuous assertion of piety as hardly to rise to the dignity of a religious exercise.” Pollak observed, “The court might very reasonably have decided to save its scarce ammunition for a prayer that soared, rather than squander it on New York’s clay-footed pigeon.”

Perhaps the justices felt they had no choice. The *Schempp* case was certainly headed back to the Court, and because it would be on appeal from a three-judge court, the justices would have no discretion to turn it away. So they may have felt that they had no way to
avoid the issue. Or, as Pollak speculated, the justices may have seen *Schempp* as potentially a far more explosive case, involving as it did both Bible reading and the Lord’s Prayer, both emotional hot buttons for many Christians. If the justices knew that a majority of them might conceivably strike down Bible reading and the Lord’s Prayer in the schools, they may have thought it better to prepare the country for what was soon to come by first striking down a purely contrived prayer to which few, if any, people had an emotional attachment.⁶

William Butler, Engel’s lawyer, was first up before the justices on April 3. He had prepared for an hour-long argument. To be safe, he had to be ready to speak without interruption, although such monologues never take place in practice. Justices interrupt anytime they want and as frequently as they want. Attorneys must answer their questions while still being sure that they circle back to make the critical points for their case. That’s the challenge Butler faced from the beginning.

Butler had barely started speaking when the first question came from the justices, and for the next hour, he rarely got back to his prepared argument. When he did, he tried to bring *Engel* within the ruling of *McCollum v. Board of Education*, the released-time case in which clergy came into the schools in Champaign, Illinois, to teach religion to students.⁷ Butler argued that his case, like *McCollum*, involved religious activities during school hours, cooperation of state officials in presenting the religious activity, use of tax-supported buildings to aid in teaching religious doctrine, and the potential of students not to participate.⁸

Butler struggled, though, to make his points amid tough questioning by the justices. They weren’t so much antagonistic as they were trying to understand Butler’s rationale for outlawing the short, bland Regents’ Prayer as a violation of the Constitution. After all, the prayer—“Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country”—seemed nonsectarian and not terribly different from the many reverential statements made in governmental meet-

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Butler made a mistake when he agreed, in response to a question early on, that the whole premise of his argument was that the prayer amounted to the teaching of religion in a public institution. That led to a number of confusing exchanges, with Butler trying again and again to move the justices toward his more powerful argument: that by composing a prayer and asking youngsters to recite it specifically in a public school, the state was impermissibly sponsoring a religious devotional observance that is typically performed in a house of worship.

Two of the justices helped Butler out toward the end of his argument. Justice Frankfurter, who seemed to be losing patience, compared objections to the Regents’ Prayer to the problem posed, in other contexts, by reading the King James Version of the Bible in the classroom. Catholics use the Douay Version, not King James, “however beautiful that may be,” he observed, deducing, “therefore you make Catholic children listen to formulations that they reject.” Butler picked up on that cue, arguing that the Regents’ Prayer assumes belief in God. Two of the plaintiffs in Engel, he said, were of non-theistic religions: “[T]his is an attempt to force down the throats of believers in nondeistic religions a theistic prayer, and in that sense the content of the prayer is objectionable.”

Minutes later, just before the close of Butler’s argument, Justice Brennan himself articulated the potential establishment clause violation: while the state could not promote any religious sect’s ritual or holy books, neither could it promote religion in general—even if the group of students believed in the religious concepts being promoted. Brennan observed: “And what you’re saying, Mr. Butler, if I understand your argument: If there were schools in which concededly every member of the school was a communicant of the Episcopal Protestant Church, and the Lord’s Prayer as sanctioned by that church were required to be uttered at a morning assembly, a devout Episcopalian parent could object to having that prayer said. You would have legal standing to object to it, although it’s precisely the prayer that is uttered in the petitioner’s—in that petitioner’s church
every Sunday morning.” Butler responded, “Yes, Your Honor, because it violates the establishment side of the First Amendment.” Justice Brennan replied, “All right, now you get down to a real legal point.”

The justices continually probed Butler with what-ifs. What, they asked, if someone challenged the invocation—“God save this honorable Court”—that was recited at the beginning of each public session of the Supreme Court? Butler answered that the state requires each student to attend school; that is not the case with sessions of the Court. In addition, students recite the Regents’ Prayer in a teaching environment with the assistance of teachers, who are state officials; the circumstances surrounding the Court’s opening invocation are completely different. What, the justices asked, if someone challenged the “under God” phrase in the Pledge of Allegiance? Butler said that the pledge is at its heart a political affirmation. By comparison, the Regents’ Prayer “is solely religious.”

When his turn came, Bertram B. Daiker, attorney for the school board, remembered standing before the justices and feeling like “perhaps the most lonesome person in the world.” He wondered if he had prepared adequately, knowing “that if they ask you a question, and you don’t know the answer, there’s no one in that courtroom to help you.” Daiker went directly to the heart of his case. In composing a prayer that acknowledged the students’ reliance on a Supreme Being, he said, the state was “proceeding fully in accord with the tradition and heritage which has been handed down to us.” Daiker reminded the justices that the Declaration of Independence has four references to the Creator and that forty-nine of the fifty states in 1962 had references to God in either the preamble to their state constitution or in their state constitution itself.

Under questioning, Daiker conceded that the Regents’ Prayer was an avowal of religious faith. But he argued that the New York State Board of Regents did not intend it to serve as a religious ceremony or as the teaching of religious faith. Instead, reminiscent of Brewster Rhoads’s argument defending Bible reading in the Abington public
schools, Daiker argued that the state “was interested in promoting
the belief in traditions, the belief in the moral and spiritual values
which make up part of our national heritage.”\textsuperscript{16}

Some of the justices couldn’t accept Daiker’s assurance about the
regents’ intention in authoring a prayer for students to recite in
school, and it led to several tough exchanges, including the follow-
ing:

“Why do you say ethical purposes and things of that kind, but shy
away from religion, when the entire wording of the prayer is in the
words of religion?”

“Well, I don’t want to have the Court understand my words as say-
ing that the board of education was trying to teach religion in the
schools.”

“Well, I know you want to keep away from that. (General laugh-
ter) But what I’m trying to find out is, how you analyze the language
of the Board of Regents, the action of the Board of Regents, the
action of your school board, and the delivering of this prayer every
morning, without getting to the question of religion.”

“I don’t think you can stay away from religion. So long as you have
a prayer, there is a religious facet to it.”\textsuperscript{17}

A few minutes later, Daiker had to come back to the same point
when he was asked if the Regents’ Prayer was a religious practice. He
argued: “Is it a religious practice? No more so than the saying of any
prayer on any public occasion is a religious practice. Any group of
men who gather together for dinner commence with a prayer. This,
to that extent, is a religious practice.” One of the justices responded,
“Well, Mr. Daiker, as I understand Mr. Butler, neither he or his
clients object to any such prayers anyplace except in the public
schools, where the children are compelled to come, and where they
will be indoctrinated with the prayer as a matter of training, and
where they will be held up to contempt or ridicule if they or their
parents should want them to be excused, and pointed out as being
different from the others.”\textsuperscript{18}
Neither of the lawyers had performed brilliantly. The justices had quickly seized control of both arguments and sent both Butler and Daiker on the defensive, where they often had trouble answering the questions. As the session came to an end, both sides had reason to worry. The justices seemed concerned that if they outlawed recitation of the Regents’ Prayer in the schools, they might soon face challenges concerning prayers and invocations in other places—including those in their own courtroom. Yet some of the justices clearly didn’t accept the assertion that recitation of the Regents’ Prayer honored a long tradition and the teaching of moral values.

Just three days after the oral argument in Engel v. Vitale, the Maryland Court of Appeals handed down its decision in Madalyn Murray’s case, Murray v. Curlett. In a case similar to the Schempp case, Murray had complained about Bible reading and recitation of the Lord’s Prayer in the public school attended by her son Bill. With four judges voting to uphold the practice of Bible reading and three judges dissenting, it was the closest decision in any of the four cases. Like the other cases, Murray presented difficult questions of law, but Maryland’s highest court showed little interest in exploring them. In what was a lazy intellectual effort, Judge William R. Horney said that the dedication of public funds and school time to the morning devotionals was negligible. Bible reading in the schools, he wrote, differed little from other public displays of religion—the prayers used to open sessions of state and federal legislatures and the references to God at the beginning of many public meetings and court sessions. He didn’t attempt to explain why those other displays of religiosity met First Amendment standards or how the practices differed from or were similar to each other.

Horney thought that the provision allowing excusal of students from the devotionals was a controlling factor in the case, although he didn’t explain why—except to say that the Supreme Court had vacated the Schempp decision and remanded the case to the Biggs
court after the Pennsylvania law had been amended. “It seems to us,” Horney speculated, “that the remand of this case at least indicated that the use of coercion or the lack of it may be the controlling factor in deciding whether or not a constitutional right has been denied.”

Horney noted that the three-judge federal court in Philadelphia had reheard the case and decided once again that the Bible-reading practice violated the First Amendment. Without attempting to explain why, Horney said that he and his three colleagues “do not find the decision on remand persuasive and decline to follow it.”

Madalyn Murray’s lawyer, Leonard J. Kerpelman, submitted his petition for a writ of certiorari in Murray v. Curlett to the U.S. Supreme Court on May 15, almost six weeks after losing in Maryland’s highest court. After recovering from a hysterectomy, Madalyn Murray had gotten a job at the Department of Public Welfare in Baltimore, supervising social workers. The day after Kerpelman filed his petition with the U.S. Supreme Court, however, she said that her boss fired her for “incompetence.” She got two weeks notice and vacation pay, but no unemployment compensation. Out of money, she sold her fur coat, her piano, and her dinette set. Her legal bills, including the printing cost associated with filing the case, consumed the last of her checks from her lost job.

Within a few months of the filing, the Murrays were out of money. “The food supply in the basement was about gone,” she wrote in An Atheist Epic. “The big freezer was empty. I had made a job application anywhere job applications were being taken in Maryland.” She applied for jobs as a sales clerk, a secretary, a waitress, and a dishwasher, to name a few, but claimed later that she was turned down because of the case. Madalyn had received some supportive mail over the last few years, much of it from atheists like herself. Now she decided, on Bill’s suggestion, to put out a newsletter and ask her ideological supporters to financially support her appeal to the U.S. Supreme Court. She bought a small mimeograph machine, stencils, paper, and other supplies, and proceeded to write what she called the Newsletter on the Murray Case. Out it went to about 750 people. Back, she reported, came 325 letters, bearing a total of $134
for the legal fund and $709 for other expenses. Some people pledged to send money every month. Over the next few years, it was largely the newsletter and donations that supported Madalyn Murray and her family.\textsuperscript{24}

Madalyn and her son continued to be the target of abuse, and all of that came on top of the myriad plagues she brought on herself. Her neighbors constantly complained of the loud barking of Marx and Engels, her self-proclaimed “atheist dogs,” and since she did nothing about it, they eventually filed a formal complaint. When Madalyn received a summons to come to court and refused to show up, the judge ordered her arrested and jailed. She managed to post $500 bail to get out of jail. Fearing the dogs would be taken from her and destroyed, she began searching for a place to keep them. One farmer who had agreed to take them changed his mind, she said, “because he was a Christian and could not have the Atheist dogs on his farm.”\textsuperscript{25} Meanwhile, some prankster was tampering with her mail, crossing off the last four letters of her first name—“alyn”—when they appeared in her address. The mail reached her box addressed to “Mad Murray.”\textsuperscript{26}

On June 6, just two months after the Engle case was argued before the justices in Washington, D.C., the Florida Supreme Court handed down its decision in Chamberlin v. Dade County. It was a complete victory for the school district. All seven judges agreed to affirm the trial court’s decision upholding most of the religious practices in the Dade County schools, including Bible reading and prayer recitation.\textsuperscript{27}

Certainly, Leo Pfeffer wasn’t surprised by the result. He had been creating a deep and detailed trial record all along for the purposes of a showdown in Washington, D.C. The Florida court’s reasoning, however, must have shocked him at first. In the annals of American jurisprudence, few decisions have been more openly rebellious than what Florida’s highest court announced that day, in effect telling the
justices in Washington that their interpretation of the U.S. Constitution was worthless. When the U.S. Supreme Court interprets constitutional law, all federal and state tribunals—including the highest courts of each state—must follow the Court. Other courts may not reject the justices’ rulings or, in cases involving the Bill of Rights, constrict individual rights and liberties that the Court has recognized and defined. In the 1960s, though, several Southern courts tested the Court’s supremacy in cases involving the civil rights of black citizens; here, the challenge came on conceptions of religious freedom. In the *Chamberlin* case, the Florida court refused to follow the Supreme Court’s interpretation of the First Amendment’s establishment clause and was only too happy to say so. Its *Chamberlin* decision in 1962 would turn out to be the start of a battle between the two courts that would grow in two years to even more aggressive defiance by the Florida judges.

Justice Millard Fillmore Caldwell delivered the unanimous decision. Caldwell was a man of unusual dexterity, having served in high office in all three branches of Florida government. After serving in the Florida state legislature and then in the U.S. House of Representatives, Caldwell won the race for governor in 1944 and held the office for four years. He joined the Florida Supreme Court in 1962, not long before the *Chamberlin* decision, and became that court’s chief justice.28

Caldwell quoted from the Supreme Court’s opinion in *Everson v. Board of Education*. Justice Black had written that the establishment clause prohibited the government from more than only setting up an official church or promoting one particular sect; it could not promote religion generally. It was not the Florida court’s prerogative to reject the justices’ interpretation—yet that is precisely what it did.

We are not impressed with the language quoted as being definitive of the “establishment” clause. It goes far beyond the purpose and intent of the authors and beyond any reasonable application to the practical facts of every day life in this country. We feel that the broad language
quoted must, in the course of time, be further receded from if weight is to be accorded the true purpose of the First Amendment.29

If not the U.S. Supreme Court, whose interpretation of the establishment clause would the Florida tribunal follow? Caldwell cited Thomas M. Cooley, a preeminent constitutional scholar of the previous century, whose views, according to Caldwell, “more appropriately and accurately states the proposition” of what the establishment clause means.30 Cooley had looked at the establishment clause narrowly, believing that it prohibited only the recognition of an official state church, such as in England, or special advantages conferred on one or a few sects apart from all others. In his treatise General Principles of Constitutional Law in the United States of America, Cooley said that the government could recognize religion “where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects.”31 To further buttress his views, Caldwell went on to quote from other sources that he surely knew carried no weight at all in his rejection of the Supreme Court’s interpretation of the establishment clause—the dissenting opinions in several state court decisions.32

For good measure, again referring to the U.S. Supreme Court, Caldwell added that the First Amendment religion clauses had “been tortured beyond the intent of the Authors.”33 He rejected Pfeffer’s contention that the Dade County schools violated his clients’ rights under the free exercise clause; the excusal provision removed any possibility that the students had been compelled to participate. It was “the tender sensibilities of certain minorities” that Pfeffer was trying to protect, said Caldwell, and he and his colleagues would not permit “disrupting the lives of others because of some hyper-sensitivity or fractious temperament” or because “a minority might suffer some imagined and nebulous confusion.”34 The Florida court, he said, did not “feel impelled to indulge in flights of fanciful philosophy.”35 Caldwell couldn’t resist bringing into his discussion the clash between civilizations that marked the showdown of America against
communism. As to the Supreme Court’s interpretation of the First Amendment, he said, the Florida judges would “preserve those clauses and the rights of the States and the people thereunder against weasel-worded constructions and distinctions designed to impute to them either more or less than was originally intended.”

Leo Pfeffer could not have been happier with the Florida Supreme Court’s opinion. Sure, Caldwell and his colleagues had forcefully rejected his position. The opinion was so extreme, though, that it undoubtedly increased the probability that the justices in Washington would agree to hear the case. After all, unlike the Schempp case, which the Court would be required to hear on appeal, the Chamberlin case would have to go to the Court by the more usual, but uncertain, route of a petition for certiorari, which the Court could deny. “Moreover,” Pfeffer wrote in a letter to Tobias Simon, who was a member of the team of lawyers representing Chamberlin, “if we had to lose in the Supreme Court of Florida, we could not ask for a better opinion, from our point of view, than the one written by that court—an opinion which is a bald defiance of the U.S. Supreme Court.”

Pfeffer had not been consulted, and when he found out about the petition, he seethed at Simon. He wanted Chamberlin to be the primary case for the Supreme Court to consider on devotional exercises in the public schools, because he was sure he had the most compelling of all the cases—easily stronger than Schempp and Murray. Now, instead of immediately asking the U.S. Supreme Court to hear the case, he was stuck waiting for the Florida judges to answer the
petition for a rehearing. The additional wasted time that would be involved if the Florida judges actually agreed to a rehearing was doubtlessly more than Pfeffer could even contemplate. In a letter to Simon on June 25, 1962, Pfeffer said that he was “a little puzzled” by the rehearing petition and that they needed to get the Chamberlin case to Washington “as quickly as possible so that it could be argued together with the Pennsylvania and Maryland cases, rather than be disposed of on the basis of the decisions in those cases.”

Three days later, Simon replied a bit sheepishly that the petition “had no value at all except some therapeutic value for me.” Given Pfeffer’s intensity about getting the Chamberlin case to the justices, that response was akin to teasing a hungry Bengal tiger. Pfeffer wrote back on July 5, more upset than ever. He scolded Simon that “it is not the principal purpose of petitions for rehearing to provide therapeutic services to attorneys.” He chastised that the petition was “a serious error,” because the case was now out of their hands, leaving them forced to wait on the schedule of the Florida judges. Pfeffer was convinced that his case offered the best chance for success before the Supreme Court.

For all we know, they can hold it until after the Pennsylvania and Maryland Bible reading cases are decided by the United States Supreme Court. This to me would be highly unfortunate. Of the three cases, ours presents by far the best record and certainly should be before the Supreme Court at the same time as the other two cases. . . . This would have been possible had there been no petition for rehearing but in all likelihood will not prove possible if the petition for rehearing is permitted to stand.

Pfeffer asked Simon to formally withdraw the petition and threatened, should Simon refuse to do so, to go to the Florida Supreme Court himself and explain that all the lawyers in the case had not authorized the petition. Such a radical step proved unnecessary, however. Less than four weeks later, the Florida Supreme Court
denied the petition for a rehearing. Now Pfeffer was free to ask the justices in Washington to hear his case. But he feared that he was too late to overtake Schempp and Murray.

The 1961 term of the Supreme Court was drawing to a close. June 25, 1962, was decision day for *Engel v. Vitale*. Justice Black delivered the opinion of the Court, as the justices split six to one in striking down the Regents’ Prayer as a violation of the First Amendment. Two justices, Felix Frankfurter and Byron White, did not participate in the decision, and Justice Potter Stewart was the lone dissenter.

Justice Black had already put his fingerprints on the Court’s emerging stance on religious freedom. He had written the *Everson* opinion in 1947, approving taxpayer subsidies of bus fares for parochial school students. A year later, he had written for the Court in the *McCollum* opinion, which had struck down a released-time program of religious instruction in the public schools. Now, Black got right to the point, with a forceful statement that the Regents’ Prayer violated the establishment clause. Black said that “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”

When the justices announce a decision that sets the ground trembling underfoot, they usually try to build credibility for their stance by reasoning from prior cases. But Black chose not to revisit the judicial past. Instead, his quest for historical underpinnings sent him back as long as four centuries earlier, to the ugly skirmishes over the attempt to legislate uniformity in English religious practices. The Book of Common Prayer, approved by Parliament in 1549 as the single accepted form of prayer for the Church of England, became the catapult that launched thousands of religious nonconformists to American shores, where they started a new country. Those who
wrote and adopted the Constitution knew those struggles well, said Black, and they guaranteed the right to be free from established churches and the right to practice religion freely in order to avoid divisive conflicts. “These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government’s placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services,” Black wrote. So they adopted the First Amendment to “guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.” Black wrote:

These men knew that the First Amendment, which tried to put an end to governmental control of religion and prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men’s tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

New York had argued that the Regents’ Prayer met constitutional standards in large part because, after the trial court’s decision, students did not have to participate in the recitation. Black swept away that contention easily enough. A violation of the establishment clause, after all, does not depend on the government’s compulsion on individuals to participate. Even with an excusal provision, he said, a psychological compulsion may still operate to compel an individual to participate. “When the power, prestige, and financial support of government is placed behind a particular religious belief,” he wrote,
“the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”

Black likewise dismissed New York’s argument that the Regents’ Prayer should be upheld because it was nondenominational. The First Amendment, said Black, prohibited the government from adopting any kind of official prayer or religious observance, whether it advanced one sect or all sects. Black acknowledged that the brief and bland Regents’ Prayer paled compared to the abridgements of liberty in centuries past. To that, Black responded with the words of James Madison, author of the First Amendment, in his *Memorial and Remonstrance against Religious Assessments*: “[I]t is proper to take alarm at the first experiment on our liberties.”

If the Regents’ Prayer amounted to such an experiment, how serious and dangerous an experiment was it? Black did not say. Nor did Black deal squarely with the fact—pursued vigorously at the oral argument just three months earlier—that invocations and references to God pervaded patriotic and ceremonial observances. These included invocations at the start of sessions of the Supreme Court, the Senate, and the House of Representatives and the “under God” phrase in the Pledge of Allegiance. Black said only, in a footnote, that these observances “bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.” He did not explain what test would delineate the acceptable from the unacceptable observance under the First Amendment. Perhaps the Court could not agree on any such formulation. It was true that these references to God were not before the Court in the *Engel* case, but the Court’s banishment of the issue to a brief footnote was probably responsible for some of the anger and misunderstanding that followed on the decision.

Justice Douglas concurred in the decision but was clearly troubled by what he saw as an unclear demarcation between acceptable and unacceptable religious practices. While Black was drafting the Court’s opinion, Douglas had written to him articulating his trouble. “If, however, we would strike down a New York requirement that public school teachers open each day with prayer, I think we could
not consistently open each of our sessions with prayer,” he wrote. “That’s the kernel of my problem.” In the end, Douglas went along with the Court, although for reasons that were ambiguous. For him, the major point was that the government could not, consistent with the First Amendment, finance a religious exercise. The Regents’ Prayer had not established a religion, at least not in the historic understanding of establishment, but “once government finances a religious exercise,” argued Douglas, “it inserts a divisive influence into our communities.”

Justice Potter Stewart was the lone dissenter, arguing that the Court had “misapplied a great constitutional principle.” He disagreed with the Court’s historical analysis, arguing that the established Anglican Church in England and the early established churches in the American colonies had little to do with the state of New York allowing schoolchildren to recite a short prayer. Stewart thought that the Regents’ Prayer differed little from many other religious references in public life. “What is relevant to the issue here,” he said, “is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.”

A fierce storm of protest followed the Engel decision. For the justices, it must have felt like a category 5 hurricane coming ashore. The political reaction was intense and immediate. Politicians attacked the decision and the justices themselves. Representative Mendel Rivers (D-SC) rolled a dozen thunderbolts into one sentence when he criticized “this bold, malicious, atheistic and sacrilegious twist of this unpredictable group of uncontrolled despots.” Representative Thomas Abernathy (D-MS) wanted Congress to take action “to calm the power grab of these power-drunken men.” Representative Arthur Winstead (D-MS) charged that the justices were “trying to drive God and religion out of our schools and even out of our her-
itage.” Referring to the Court’s decision eight years earlier, Representative George W. Andrews (D-AL) said of the justices, “They put the Negroes in to the schools and now they have driven God out of them.” Even the litigants who had brought the case suffered scurrilous attacks. W. R. Raleigh Hull, Jr. (D-MO), said that the justices had protected “some fancied rights of a minority of citizens, in some instances communists, murderers, rapists and similar scum.”

Even two former presidents joined in the attack. “I have always thought that this nation was essentially a religious one,” said Dwight Eisenhower. Herbert Hoover said that Engel pointed to “a disintegration of one of the most sacred of American heritages.” President Kennedy, a Catholic and the sitting president, was one of the few who tried to calm the situation. Kennedy urged support of the Court even when it issued controversial decisions. He said, “[W]e can pray more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of all our children.”

It took only twenty-four hours for Representative Frank Becker (R-NY) to introduce a constitutional amendment—the first of what would become many over the years—to overturn the Engel decision. His amendment said: “Prayers may be offered in the course of any program in any public school or other public place in the United States.” The Senate Judiciary Committee then held hearings that turned out to be inconsequential except for offering another platform for vituperative attacks on the Court. In all, the heat from Engel generated proposals for constitutional amendments from twenty-two senators and fifty-three representatives during the second session of the Eighty-seventh Congress. One congressman offered legislation, which was defeated, to purchase a copy of the Holy Bible for each justice. On a unanimous vote, the House decided to place behind the Speaker’s desk the motto “In God We Trust.”

Religious leaders split on the Engel decision. Catholics had strenuously opposed Bible reading in the public schools in the nineteenth century, when they were a weak minority to the Protestants, who controlled the schools. Now, Catholics were overwhelmingly critical
of the Court. Francis Cardinal Spellman of New York said, “[The
decision] strikes at the heart of the Godly tradition in which Amer-
ica’s children have for so long been raised.” Jewish leaders generally
favored Engel. Protestant leaders split. The Reverend Billy Graham
opposed the decision. “God pity our country when we can no longer
appeal to God for help,” he said.57 In 1962, the justices received more
than five thousand letters on the case,58 the vast majority of them
negative. Justice Black, the author of the opinion, got enough letters
to fill forty-six file folders.59 Some people scrawled a dozen words on
postcards, while others sent long and thoughtful responses.

Engel was certainly controversial in its own right, but the media’s
reporting of the decision instigated some of the public backlash. In a
speech before the American Bar Association convention two months
later, Justice Tom C. Clark said that reporters caused misunder-
standing with stories written so quickly under time pressure that they
were “not complete.” He emphasized the limited nature of the rul-
ing—that the Regents’ Prayer was a state-written prayer distributed
to the public schools with instructions that teachers should read it.
“As soon as people learned that this was all the court decided—not
that there could be no official recognition of a Divine Being or
recognition on silver or currency of ‘In God We Trust,’ or public
acknowledgement that we are a religious nation—they understood
the basis on which the court acted,” Clark said.60

A study of press coverage of Engel found many shortcomings. About the stories put on the wire service after the decision, William
A. Hachten, an assistant professor at the University of Wisconsin,
wrote in the Columbia Journalism Review that they met professional
expectations for objectivity and accuracy but that “their terseness,
especially after pruning by news desks and copy desks, probably con-
tributed to misunderstanding.” Some headlines, such as “Court
Rules Out Prayers in Schools” in the Los Angeles Times, were simply
inaccurate—the Court had not banned students from saying prayers
under all circumstances. Within a week, more balanced articles came
out, according to Hachten.61 By then, though, much of the miscon-
derstanding had probably hardened into the perception of fact.