18. In Chambers

Justice Brennan came to his chambers at the U.S. Supreme Court looking troubled one Monday morning in the fall of 1962. Brennan, the only Roman Catholic on the Court, had intimate experience with religion in the schools. His family had sent him to Catholic schools as a youth, where he had regularly prayed with his classmates. As an adult, he went to Mass on most Sundays. Brennan felt particularly distressed by what had happened in Mass the previous day. Church members were asked to stand and recite the Pledge of the Legion of Decency, in which they condemned indecent and immoral motion pictures. Brennan felt that taking such a pledge would be inappropriate for a sitting justice, so he had—conspicuously, it turned out—decided to stay seated and quiet. “He [Brennan] came in one Monday morning and he looked gray and shook his head and we said, ‘Hey, tough weekend?’” says Robert M. O’Neil, one of his two law clerks at the time. “He said, ‘You have no idea what it’s like to be in a Catholic mass when a priest asks the entire congregation to rise to recite the Pledge of Decency and you are the only person in that congregation who cannot or will not join. Everybody looks at you and says, hey, the judge isn’t standing.’ That is a harrowing experience and that had just happened the day before. So he was more conscious [of the line between his roles as a Catholic and a justice] than I think most people today would acknowledge.”

Brennan once said in an interview that decisions concerning school prayer were the most difficult decisions he made as a justice.
“In the face of my whole lifelong experience as a Roman Catholic, to say that prayer was not an appropriate thing in public schools, that gave me quite a hard time,” Brennan said. “I struggled.”

Other justices as well may have been tugged by their own faith. Seven of the justices were Protestant, Arthur Goldberg was Jewish, and Brennan was Roman Catholic. Black, who had written the *Engel* opinion for the Court, had taught Sunday school in Alabama. Chief Justice Warren wrote in his memoirs in 1977, “[A] majority of us on the Court were religious people.”

On Friday, March 1, the day after the oral arguments concluded, the justices met in their conference room to discuss the *Murray* and *Schempp* cases. As they went around the room, starting with Chief Justice Warren, each man voted to affirm or reverse the lower court’s decision and explained the reasons why. All votes taken at the conference are considered tentative, and sometimes votes change as an opinion is written and circulated.

That day, William O. Douglas took some cryptic notes for himself on what was said, indicating each justice by initials and most likely paraphrasing their remarks rather than taking direct quotes. The justices began with *Murray*. The chief justice stated his views first, and his position was no surprise. He urged reversal of the Maryland high court’s ruling that upheld Bible reading in the public schools. “Unless we reverse *Vitale,*” Douglas recorded Warren saying, “we must reverse here—case is stronger than it—this is a violation of Establishment Clause.” Next was Hugo Black, who also voted to reverse, as did Douglas himself. So did Tom Clark. John Marshall Harlan voted “tentatively” to reverse but urged the justices to consider the whole issue of prayer anew. Potter Stewart, the only dissenter in *Engel*, continued his attack on the results in that case. He wanted to remand the case to the Maryland courts for reconsideration, arguing that the prior case had misinterpreted the historical meaning of the establishment clause. In Stewart’s view, the establishment clause prevented the state
from setting up an official church, and Bible reading was nothing like that. Douglas’s notes reveal Stewart’s focus: “Establishment Cl[ause] is obsolete today like the right to bear arms—Free Exercise is the important one—the 18th century fear of Establishment is no longer relevant.” Finally, Byron White and Arthur Goldberg voted to reverse, making the final tally eight to one.5

Earl Warren’s notes from the conference confirm what Douglas recorded. Of Harlan, he scribbled in his notes, “agrees that unless Vitale and other cases are reversed, but concerned.” As for Stewart’s position, Warren wrote, “Vitale does not govern either this or 142 [Schempp]. That was only concerning a state prepared prayer.” Stewart, he wrote, felt that the establishment clause was “obsolete” and “would remand both cases.”6

Now Schempp came up for discussion, and the vote down the line was an identical eight to one, this time for affirming the Biggs court decision against devotional exercises. In the discussion, Goldberg rejected Stewart’s contention that the establishment clause was now obsolete because it pertained only to setting up official churches. He raised the possibility, discussed just the day before at oral argument, that approval of Bible reading and prayer would set religious groups vying for control of local school boards so that they could bring their own observances into the classrooms. According to the notes scribbled by Douglas, Goldberg said: “Affirmance here is necessary from Vitale because this is a much more religious prayer than the one in Vitale—this issue is a heated one—people however should be reassured—he thinks Establishment Clause is not obsolete—schools can’t be opened to every sect—how about Black Muslims? How about screwball groups! You can’t draw a line that’s a usable one—it would mean drawing lines that would interfere with Free Exercise. No better way to respect religion than to follow Vitale.”7

When the conference was over, Brennan returned to his chambers and greeted his two law clerks. He had chosen a pair of extraordinary
young men during the October 1962 term, both graduates of Harvard Law School and both destined to become among the leading legal scholars of their generation. Robert M. O’Neil became president of the University of Wisconsin and then the University of Virginia before settling in as a law professor at Virginia. He is a constitutional scholar and director of the Thomas Jefferson Center for the Protection of Free Expression. The second clerk, Richard A. Posner, became chief judge of the U.S. Court of Appeals for the Seventh Circuit and senior lecturer at the University of Chicago Law School. He is a prolific author of books and articles on law and economics.

O’Neil remembers that Brennan, when he returned from the conference, told them that the Court planned a short per curiam decision that would simply affirm *Schempp* and reverse *Murray* on the basis of the *Engel* precedent, without delving into the issues any more deeply. “He smiled and said, ‘What do you think?’” O’Neil recalls. “We all said, ‘That’s a terrible idea. It’s much too important.’ Then he said, ‘I’m just kidding.’” Brennan then told them of his plans to write his own concurring opinion because *Engel* had been badly misunderstood and that a scholarly analysis of the issue would surely help in that regard. Brennan asked O’Neil to help him research and draft his concurring opinion.8

On Monday, the chief justice, who assigns majority opinions when he himself is voting with the majority, officially gave the assignment to Tom Clark. A former governor of California, Warren understood political ramifications of Court decisions as well as anyone. *Schempp* and *Murray* would be yet another controversial decision on religion in the public schools, and the political reaction could be extreme. After all, *Engel* had generated an earthquake even though it involved no more than a vague, tepid prayer invented by a group of state education officials. The *Schempp* and *Murray* cases, though, involved banning from devotional use in the public schools religious materials at the other end of the scale—the holiest book of Christianity and one of its most well-known and revered prayers. Warren was surely aware that trouble lay ahead.

Hugo Black, who had authored *Engel* and a few other key church-
state decisions, would have been the logical choice to write the majority opinion in these cases as well. But Black was already regarded as a strong proponent of church-state separation, and his authorship of yet another decision on religion in the schools would certainly not bring any more weight to the Court’s position. In comparison, Clark was a cautious, conservative Texan. A former attorney general under President Truman, he had conducted prosecutions of American Communist Party leaders. It would be impossible to pin a liberal label on Clark, and his hard-line anticommunist reputation would make it difficult to say, as some critics did after Engel, that the Court was aiding atheists and communists. With those credentials, Clark would bring additional credibility to the Court’s decision.

Clark also seemed likely to produce the kind of centrist opinion that would keep the Court from splintering. When the Court issues a decision whose impact on society registers on the Richter scale, a unanimous or near unanimous decision enhances its authority. Warren had worked assiduously to produce a unanimous decision just nine years earlier in *Brown v. Board of Education*, prohibiting racial segregation in the public schools. With Stewart already certain to dissent in the two cases involving the Bible and Lord’s Prayer, Warren couldn’t afford to lose any more justices from the majority and still have the Court speak with the weight that he thought was necessary. Clark was bright but not brilliant, a man who produced workmanlike opinions largely without doctrinaire positions. He was certainly capable of crafting a centrist opinion with sufficient gravity to keep other justices from flying off into separate orbits.

For both Clark and Brennan, work started immediately on the opinions. Although the Supreme Court justices meet to discuss and decide cases, they operate for the most part as nine small, independent law firms. Those people who work in each justice’s chambers—at the time of *Schempp*, there were two law clerks (now typically four), a few secretaries, and a messenger—support the individual
work of their justice. Interaction among chambers on cases is typically done through memos and correspondence. The clerks perform a variety of important legal tasks for their justice. In addition to reading petitions for certiorari that arrive at the Court and writing memos that prepare the justices for oral argument, the clerks help to produce the opinions. The practice varies from justice to justice and even from case to case. Some justices write their own opinions from scratch, but most ask their clerks to prepare first drafts. That doesn’t mean clerks decide cases. The justices give their clerks directions in how to draft a specific opinion, telling them generally or in detail what they want to say. Then the justices edit or rewrite the drafts given to them.9

Clark went through a number of drafts in writing the majority opinion for the Court, and figuring out their significance and chronological order requires some detective work. Nine drafts are on file in the Tom Clark Papers at the University of Texas School of Law in Austin and have been made available online,10 but they may not be all the drafts he wrote. In general, justices or their clerks might compose in longhand or on a typewriter; some had their early drafts printed by the Court’s own press inside the Supreme Court building, even though the drafts were not yet ready for circulation. One draft, which Clark composed in longhand and which is probably his first, is twenty pages long and is undated, although it most likely was produced in late March or in April.11 Another draft is typed with handwritten insertions and almost certainly was a later developmental draft that never left Clark’s chambers.12 A third draft in the Tom Clark Papers was printed by the Court’s own press inside the Supreme Court building and simply carries the imprint “May,” without any specified day.13 It probably represents either Clark’s first circulation of the opinion to his colleagues—recorded in his records as May 20—or a recirculation on May 27. Only three of the nine available drafts carry the imprint “June”; two are undated, and another is dated June 10, a week before the Court announced its decision. Clark’s written record of circulation shows drafts going out to colleagues on June 10 and June 12.14
Because most colleagues joined his draft of the opinion within a week of its original circulation in May, the major themes of the decision would most likely have been established by then. Could any drafts be missing? Justices save or dispose of records according to their own wishes. Moreover, manuscripts of any one draft—and comments written in the margins and between lines—may not contain any identification of authorship. Even so, any draft is the product typically of only the justice and the clerk working with him on it. Comments by other justices come back in memos or scribbled in the margins of copies of a circulated draft, not the original, which is kept in the authoring justice’s chambers.

From the very beginning of his drafting right through to the finished opinion, Clark appeared unusually sensitive to the impact the decision would likely have on the public. In 1989, Thomas M. Mengler, then a law professor at the University of Illinois, wrote in the law journal *Constitutional Commentary* that Clark was “strongly motivated in *Schempp* to engage in public relations.” Mengler argued that the decision tried to soothe public fears that the justices in *Engel* had campaigned against religion. “Reading the *Schempp* decision as an ordinary example of Court reasoning, therefore, misses the point,” Mengler wrote. “Clark’s opinion primarily functions as a defensive attempt to temper the expected unfriendly response.”

When he received the assignment to write the opinion, Clark began working with one of his clerks, Martin J. Flynn, who had graduated Phi Beta Kappa from Indiana University. He earned his law degree in 1962 from the same school, where he was editor of the *Indiana Law Journal*. In the future, he would go on to a corporate practice at a prominent firm in Washington, D.C. (Shea and Gardner, now Goodwin Procter), and to part-time teaching of commercial law at the Catholic University of America.

Clark began the long process of producing an opinion by writing in longhand on lined paper. It’s likely that this first draft was Clark’s original composition. Clark’s draft quickly moved into a detailed recitation of the facts of the *Schempp* case, with various details added or dropped as the work proceeded through several versions.
In the Court’s published opinion, Clark’s presentation of the facts was extraordinarily effective. Clark made the point that the Schempps regularly attended a Unitarian church. He wrote, “At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible ‘which were contrary to the religious beliefs which they held and to their familial teaching.’” Clark thus made several points: the Schempps worshiped within a Protestant denomination, attended church, held deep religious beliefs, and taught religious lessons at home. These points carried critical weight. The assumption had always been that people who did not believe in God, people who did not revere the Bible as a sacred text, or those whose religions were nontheistic—Buddhists, for example—would be the most likely people to object to Bible reading and recitation of the Lord’s Prayer in public schools. Clark made clear that even some to whom the Bible was a sacred text and the Lord’s Prayer was a sacred prayer objected as a matter of conscience to their use in the classroom as part of a religious ceremony.

Quoting from the Biggs opinion, Clark then made use of the expert testimony that Sawyer adduced at the trial. If Christian parents could object to Christian ceremonies in the classroom, so could Jewish parents, whose Bible was not the King James Version and whose supplication was not the Lord’s Prayer. Clark reviewed Solomon Grayzel’s testimony that many passages of the King James Version brought Jews into ridicule and that other passages contradicted Jewish teachings. He highlighted the testimony of Luther Weigle, Abington’s expert witness, that the King James Version was nonsectarian only within the Protestant faiths.

In his first draft of the opinion, though, as Clark finished discussing the facts of the cases, something significant was oddly missing—one of the two cases. Clark said nothing of the Murray case itself and made not the slightest mention of its colorful litigant. That was quite an oversight. Ignoring Madalyn Murray was like overlooking a town fireworks display taking place on your front lawn, but Clark managed to do exactly that. He discussed the facts of the Schempp case in some detail, but he made no mention at all of the
Murray facts, as if the case did not exist. Clark did not mention Murray at all until page 12, where he referred to it only as the “companion case” to Schempp.18

Murray made an appearance in the two subsequent drafts, but only in a cameo role. Clark’s second internal draft, mostly typewritten, contained his handwritten insert that mentioned Madalyn Murray and William Murray once by name and included sparse details of the case. But he made no mention of the fact that Murray was an atheist, even while pointing out that the Schempps were members of the Unitarian church in the Germantown section of Philadelphia.19 In what appears to be the third draft, which was circulated to his brethren on May 20, Clark backpedaled even more. He omitted the Murrays by name and substituted “the petitioners” instead, and he cut one reference to Madalyn asking that her child, William, be excused from the morning exercises.20 But the two later drafts in June finally did mention Madalyn and William by name and disclosed that they were “professed atheists.”21

In the final published opinion, Clark continued to include the Murrays and their atheism. There is nothing in the Clark Papers that explains why he changed his mind and became more forthcoming about them, but it could have come at the suggestion of another justice. He included the names of Madalyn and William and the disclosure that they were “professed atheists.” He also quoted a line from their petition to the Court. But the short mention of their case consumed only one page, compared to a detailed retelling of the Schempp proceedings over more than six pages.22

In addition to almost dropping out of sight in the opinion, the Murray case lost its expected marquee billing in the naming of the case. Normally, when cases are consolidated for decision (as Murray and Schempp had been), the case with the lowest number—signifying that it had been docketed earlier with the Court—would be listed as the title case. For his law review article, Thomas Mengler surveyed the Court’s opinions during the 1961–63 terms and found that thirty-three out of thirty-five consolidated cases decided during this period had been named for the case docketed earlier.23 Had it followed its
custom, the Court would have made *Murray* the lead case, since it had been docketed as number 119 and *Schempp* as number 142. The first draft, though, mentioned *Murray* as the companion case to *Schempp*, and when Clark’s third draft circulated, it showed *Schempp* listed first, as the title case. Thus, *Schempp* became the name by which the Court’s opinion would forever be known in the legal and religious history of the nation. The *Murray* case was then and continued to be listed second, as a historical afterthought.

Did the Court title the decision after *Schempp* to distance itself from Madalyn Murray, the avowed atheist, whose larger billing in the decision might have further infuriated the Court’s critics? Mengers thought so, although the Clark Papers contain no memo explicitly addressing the issue. Justice Clark had shown reluctance in the earliest drafts of the opinion to even mention Murray and her case or, once he did so, to describe her as an atheist. It was not unheard of for the Court to elevate one particular case over all others for a strategic reason. In the decision on *Brown v. Board of Education* nine years earlier, the Court had purposely chosen *Brown* as the title case out of a number of similar cases that had been consolidated, some of them from the South. *Brown* had originated in Topeka, Kansas. The justices wanted to make a point by choosing *Brown*, as Justice Clark admitted later. “We felt it was much better,” he is quoted in Richard Kluger’s *Simple Justice*, “to have representative cases from different parts of the country, and so we consolidated them and made *Brown* the first so that the whole question would not smack of being a purely Southern one.”

In the case of *Murray* and *Schempp*, however, concern for any potential furor may have been of secondary importance to the justices. The *Schempp* case presented the more compelling factual situation on which the Court could build its opinion: though Protestants themselves, the Schempps objected to the use of Protestant sacred writings in public schools. The Court may also have focused on *Schempp* simply because there had been a trial with expert witnesses and was a stronger factual record from which Clark could draw for his opinion. The *Murray* case, by contrast, lacked a factual record,
because the city of Baltimore had proceeded by a demurrer, in effect admitting the facts in Murray’s complaint and thereby obviating the need for witnesses and testimony. “In an opinion, when you state the facts, you have to state them based on the record,” says Martin Flynn, Clark’s law clerk. “There was nothing in Murray. You didn’t have any record.”

Having finished his discussion of the facts of the cases, Clark dedicated the next few parts of his opinion to a spare discussion of the historical context of the decision. Part 2 changed little from Clark’s draft to his final opinion, and it seemed to speak directly to the American people. It assured them that despite declaring Bible reading and recitation of the Lord’s Prayer impermissible in the public schools, the justices deeply respected religion and its important place in the life of the country. “It is true,” Clark wrote, “that religion has been closely identified with our history and government.” Clark mentioned a number of ways that this religious orientation continued on in public life (e.g., oaths of office, opening prayers for each house of Congress). Then he made his pivot, pointing out that the connection between religion and government must have a limit if individual freedom is to survive. He mentioned the religious persecution “suffered by our forebears” in Europe and the guarantees in the Constitution. He observed that the nation’s increasing diversity made freedom of religion even more important. “This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion,” Clark wrote. “Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups.”

In part 3, which also moved from first draft to final opinion without many changes, Clark began a legal analysis that he would carry forward in the two concluding sections. Clark here addressed the two most fundamental legal principles on which the Court relied for its decision. First, he dealt with the fact that two states, Pennsylvania and Maryland, had allegedly violated the plaintiffs’ legal rights. Clark said that the Court had “decisively settled” that the First
Amendment guarantees of religious freedom applied not only to actions of the federal government but also, through the Fourteenth Amendment, to actions by the states. Over the years, the Court had “repeatedly reaffirmed” this principle. Second, Clark aimed directly at Stewart’s contention that the establishment clause prohibited only the setting up of official churches. Clark declared that the justices had “rejected unequivocally” that the First Amendment’s establishment clause barred the government only from favoring one religion over another or establishing a church. Instead, the clause meant more broadly that the government could not provide public aid or support for one religion or for religion in general. This stance, said Clark, had been “firmly maintained” through a number of cases. In summary, Clark wrote that both principles “have been long established, recognized and consistently reaffirmed . . .”

Clark then moved on to the opinion’s fourth part, in which he reviewed prior religion cases. Although the number of cases that the Court had decided up to that time was limited, explaining them cogently was a challenge. The Court had zigzagged through half a dozen cases and reached results in a few that were difficult to reconcile. Yet it was important for Clark to extract precedents that would apply to the cases at hand. In his first, handwritten draft, he discussed a number of cases at some length, including Everson v. Board of Education, the case in which the Court had upheld the reimbursement of parents of parochial school students for the cost of bus transportation. He also explored Zorach v. Clauson, which upheld the practice of releasing children early from public schools for religious programs off the school grounds and included the dissenting opinions of three justices. But he crossed out much of this material on Everson and Zorach in the second draft. On Zorach, for example, what circulated to the justices in the third draft was just a short quotation from Justice Douglas’s majority opinion.

A kindly law professor probably would have given a student an average grade for such work. Clark’s part 4 amounted to little more than quotations from prior cases, without any explanation of the facts of each case, how the cases differed from one another, or how
the uneven results could be reconciled—all of which Clark could have marshaled, albeit with some difficulty, in support of the inevitability of the decision in *Schempp*. Why would a justice actually delete material that contributes to his legal analysis? The answer is not in his files, but perhaps Clark realized that an adequate explanation would require much more analysis than he already had included in his first draft and that a legalistic approach was not what was most needed. As Mengler surmised, “Any extended discussion of the prior Establishment Clause cases would have detracted from Clark’s mission: to create for the public the illusion of ‘unequivocal’ and ‘unanimous’ support on religion issues.”35 In the long run, though, a more thorough legal analysis might have served the Court better as the years brought critics who challenged the legal underpinnings of the decision.

Finally, in part 5, the concluding section of his opinion, Clark made an important advance in the analysis of cases involving the establishment clause. He enunciated a two-part test that the Court could use as a standard—in this and future cases—to judge whether some tie between government and religion violated the clause. Martin Flynn, Clark’s clerk, says he helped Clark frame the test. “To me the most difficult aspect of the opinion was trying to come up with a test that would have some lasting effect so that every single case wouldn’t simply come up on its own facts and have to be decided without some measurable standard,” says Flynn.36 As Clark and Flynn conceived it, the Court would examine “what 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.”37 In other words, the Bible-reading statute would violate the establishment clause if legislators had intended that it aid religion or if the actual readings in school primarily had that effect.

Clark applied this purpose–and–effect test to the *Schempp* case. As had the Biggs court, Clark concluded that Bible reading and recitation of the Lord’s Prayer were intended by Pennsylvania to be—and clearly did amount to—a religious ceremony. He made the same
finding in the Murray case. Clark didn’t buy the state’s contention in either case that the purpose was primarily related to moral teachings. “Surely the place of the Bible as an instrument of religion cannot be gainsaid,” wrote Clark, “and the State’s recognition of the pervading religious character of the ceremony is evident from the rule’s specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises.” Clark’s final thought in the opinion was an important one: he emphasized the Court’s assurance that religion was not being evicted from the public schools. Only religious ceremonies were prohibited. Students could study the Bible in academic courses on comparative religion or religious history. “Nothing we have said here,” Clark wrote, “indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.” Six months after the Schempp decision was announced, Irving R. Kaufman, a judge on the U.S. Circuit Court of Appeals for the Second Circuit, wrote that the Court had given important assurances to the public: “Written much more with an eye toward public perusal and in anticipation of public criticism, the opinions drew with greater clarity the line between the proscribed and the permitted.”

Clark circulated his draft of the opinion on May 20. That same day, Douglas became the first to sign on, writing, “I join your fine opinion.” The next afternoon, Brennan circulated the draft of his concurring opinion, noting that he joined Clark’s opinion but wanted to express his own thoughts separately. As Robert O’Neil, Brennan’s clerk, wrote at the time of his justice’s concurrence, “He had already made clear to the other Justices and now reemphasized, that he
wished this to be in every sense his own opinion, expressing solely his own views of the case, and for that reason would join with him no other member of the Court.” The chief justice noted on May 22, the next day, that he would join Clark, becoming the fourth to sign on.

At that point, Flynn wrote to Clark, updating him on where he stood on getting a “Court,” or a five-justice majority for his opinion. “We now need either Justice Black, Justice Goldberg or Justice White for a Court,” wrote Flynn. “I am assuming that Justice Harlan is unlikely to join.” Douglas’s notes from the conference indicated that Harlan had voted “tentatively” to join the majority, but his final position was still at that point unknown. On May 23, Stewart sent around a note that was no surprise, considering his vote at conference: “In due course I shall circulate a dissenting opinion in these cases.” On May 24, the next day, Byron White sent Clark a terse memo: “Dear Tom: I join.” With that, Clark had the five votes he needed for the majority opinion.

In coming days, Black, Goldberg, and Harlan would agree to join Clark, for an eight-vote majority. Significantly, three of the four most conservative members of the Court—Harlan, White, and Clark—were voting to strike down religious observances in the public schools. As in Engel, only Stewart stood apart in dissent.

Clark’s opinion was well received in Brennan’s chambers when the draft landed there on May 20. When Brennan circulated his own concurring opinion the next day, he noted that he joined Clark’s opinion but that the “deep conviction with which views on both sides are held” had convinced him to explore the issues in more depth. O’Neil had been working on the Brennan concurrence for more than a month. He had done the research and writing of the draft by himself, under instructions from Brennan to explore three major points. First, Brennan wanted to mine the rich history behind the First Amendment’s religion clauses, as well as the experience with religion in the public schools. Second, he wanted to explain why prohibiting religious ceremonies in the schools did not mean banning religion from public life or even from the schools. Third, like Clark, he wanted to devise a test that could guide the Court in adjudicating
In all, the goal was to remedy the opportunity missed in *Engel* a year earlier to fully explain the rationale for removing religious ceremonies from the public schools. Brennan hoped to therefore calm the anticipated public storm. “I think there was a sense that they [the justices] had not really spoken to moderates about the limited consequences of these decisions,” says O’Neill.

O’Neil ran into problems when he began his research in March. Although the Court has an extensive law library, he had to leave the building several times to find specific materials that were not available at the Court. When he prepared for one of those forays, he discovered just how secretive the Court can be; O’Neil had to keep his fingerprints off anything that could be traced back to the Court and thereby provide clues as to how the decision might turn out. He recalls:

> I combed the Supreme Court library. This was long before any Internet or electronic databases. Once I had to get stuff from the Agriculture Department library. They all had to go through the Supreme Court librarian—trying to get people off the trail because if it became known that a particular justice was looking for historical works about school prayer this would not be good. They actually sent me one day to the Department of Agriculture library because that was the only way to find this stuff, but we were nervous. The Supreme Court librarian said, don’t let anybody see you. Park some blocks away or take—there wasn’t a Metro yet—take a bus or something. Don’t let anybody see you. We don’t want it known that you or anybody else from the Court is actually looking for something. So just wander in like you’re a farmer or something.

O’Neil, who had earned three degrees from Harvard by then, didn’t drive a tractor to the Department of Agriculture, but he successfully kept his secret nonetheless. As he gathered his research material, he spread it out on a long table and on shelves in a room on an upper floor of the Supreme Court building. The opinion went
through at least three drafts, with O’Neil doing the primary writing and Brennan making substantive additions either in longhand directly on the manuscripts or in dictation to his secretary, Mary Fowler (whom he later married in 1983 after the death of his first wife). Fowler then typed up his comments as inserts to the drafts. Richard Posner, Brennan’s other clerk, also made some comments on the manuscript. In the end, O’Neil and Brennan produced a scholarly opinion that, at more than seventy pages, was more than three times the length of Clark’s and provided the depth of analysis that Clark often did not provide.

The drafts and final concurrence tackled some of the difficult historical questions surrounding the First Amendment and religion in the schools. Brennan conceded that the primary concern of the framers of the First Amendment in ratifying the two religion clauses was to prohibit the federal government from setting up an official church, such as had existed in England and in some of the American colonies. “But,” wrote Brennan, “nothing in the text of the Establishment Clause supports the view that the prevention of the setting up of an official church was meant to be the full extent of the prohibitions against official involvements in religion.” Brennan quoted Justice Frankfurter’s concurring opinion in *McGowan v. Maryland* in 1961. Frankfurter said that the framers tried to end “the extension of civil government’s support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each.” Frankfurter further observed, “The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation.”

Now turning his attention to the question of how the establishment clause affected devotional exercises in the public schools, Brennan said that it was “futile and misdirected” to search for specific advice from the framers. He offered three cautions. First, the historical record was unclear, and the framers “were concerned with far more flagrant intrusions of government into the realm of religion
than any that our century has witnessed.” Second, in a key thought he had inserted (in his own script) into O’Neil’s first draft, Brennan added that the framers never knew the issue now before the justices. “While it is clear to me,” he said, “that the Framers meant the Establishment Clause to prohibit more than the creation of an established federal church such as existed in England, I have no doubt that, in their preoccupation with the imminent question of established churches, they gave no distinct consideration to the particular question whether the clause also forbade devotional exercises in public institutions.” Brennan noted that American education had undergone vast changes since the late eighteenth century. In the framers’ time, private schools under church auspices typically educated the young, so there was no reason for the framers to question the appropriateness of religious exercises in what were essentially church-run schools. It was not until well into the next century that public education took root. “It would, therefore, hardly be significant,” he wrote, “if the fact was that the nearly universal devotional exercises in the schools of the young Republic did not provoke criticism; even today religious ceremonies in church-supported private schools are constitutionally unobjectionable.” Third, said Brennan, the diversity of religious groups in the America of the 1960s had created a situation unknown to the framers. In their time, diversity was almost entirely among Protestant denominations. “In the face of such profound changes,” Brennan wrote, “practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.”

Then Brennan reached his conclusion:

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord’s Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices. By such a standard, I am persuaded, as is the Court, that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment
because they sufficiently threaten in our day those substantive evils
the fear of which called forth the Establishment Clause of the First
Amendment. 62

Brennan argued that religious diversity in the American population
had been instrumental in shaping the development of public educa-
tion supported by public funds. The public schools trained young
people “in an atmosphere free of parochial, divisive, or separatist
influences of any sort—an atmosphere in which children may assim-
ilate a heritage common to all American groups and religions.” Bren-
nan wrote, “This is a heritage neither theistic nor atheistic, but sim-
ply civic and patriotic.” 63 Brennan concluded that the morning
devotionals in the Abington and Maryland public schools were reli-
gious in character. He wrote: “Thus the panorama of history permits
no other conclusion than that daily prayers and Bible readings in the
public schools have always been designed to be, and have been
regarded as, essentially religious exercises. Unlike the Sunday closing
laws, these exercises appear neither to have been divorced from their
religious origins nor deprived of their centrally religious character by
the passage of time.” 64

Brennan’s jet was at full throttle, and he wasn’t about to let go
without taking on specific claims made by Abington in its argument
before the Court. Abington had argued that Bible reading had served
the nonreligious ends of promoting moral values and discipline in
the schools. If that were the purpose, Brennan answered, there were
other readings and exercises—for example, great speeches and writ-
ings or the nation’s historical documents—that could accomplish the
same ends without infringing the religious liberty of schoolchild-
ren. 65 The schools had also argued that Bible reading and recitation
of the Lord’s Prayer had not elevated any religious denomination
over another. Brennan recalled here that more than a century of con-
troversy had swirled around religious practices in the schools pre-
cisely because the Bible was a sectarian book. Many devout people
found offense in Bible reading because some passages conflicted with
their beliefs or because they felt strongly that the Bible was meant for
private study. Lastly, Abington and Maryland had argued that their excusal provisions saved the morning devotionals from violations of the First Amendment. But Brennan answered that it was settled law that an excusal provision did not cure a violation of the establishment clause and that, in any case, excusal of young schoolchildren was at best illusory. He said “even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists on the basis of their request.”

In the last section of his concurring opinion, Brennan discussed where the *Schempp* decision might lead the Court in the future. Would banning devotional exercises involving the Bible and the Lord’s Prayer in the public schools lead inevitably to the removal of religion in other areas of public life—acting as the first hard fall in a line of dominoes? This had been the question on everyone’s mind after *Engel*, which had not touched on the matter. It probably was the source of some misunderstanding of that decision, which brought an angry response directed at the justices. The Court, including Brennan, had no obligation to take on the question of the ruling’s limits. In fact, there were grave risks in doing so. It could in effect decide cases not then before the justices, controversies more appropriately left to careful consideration when and if the time came for it. In his majority opinion, Clark had said that the decision did not affect study of the Bible for its literary and historical value in a secular education program. This was vague and safe enough. He didn’t provide an example, but surely a course on comparative religion would bring no objection.

“For Brennan,” says O’Neil, his former clerk, “that was only one illustration among many of a much larger point, which is not only that we’re not throwing God out of the public schools but we’re not throwing God out of public life in a much broader sense.” Brennan saw no problem in the government providing chaplains for prisons and military establishments, because this practice enabled citizens under the government’s control to exercise their right to worship
under the free exercise clause. He also found no challenge to the establishment clause in reciting invocational prayers at meetings of legislative bodies, because they involved mature adults who could excuse themselves without penalty. Brennan said that the imprint of the motto “In God We Trust” on coins might not violate the First Amendment either: “The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.”

Then Brennan parachuted into a controversy that would land at the Supreme Court forty-one years later—a challenge to the words “under God” in the Pledge of Allegiance. The Court didn’t reach the merits of the issue in the 2004 case *Elk Grove Unified School District v. Newdow*, but a similar challenge to the pledge is likely to recur. Brennan said that the words “under God” might no longer convey a religious meaning and thus might survive a First Amendment challenge. O’Neil regrets not having sufficiently cautioned Brennan about prejudging a likely future legal controversy. “We discussed each of these at the time,” O’Neil says. “What I didn’t do, I think, particularly with respect to legislative chaplains, tax exemptions, and the Pledge, was sufficiently to caution against pre-judging issues that might well later come before the Court without benefit of any record, without argument from either side.” O’Neil adds: “I think the only clear explanation is that he was very anxious to go as far as he possibly could in assuring people that the Supreme Court was not taking religion out of public life.” In fact, Brennan later changed his views on legislative chaplains, dissenting in a case in 1983 in which the Court found no violation of the establishment clause in the Nebraska legislature’s practice of starting each session with a prayer read by a minister paid with public funds.

Although he surely could not have anticipated it, Brennan received an endorsement from John Marshall Harlan, the intellectual leader of the Court’s conservatives. When Harlan read the first circulated draft of Brennan’s concurring opinion in May, he wrote in longhand in the left-hand margin of the first page: “This is a massive,
and in many respects very impressive piece of work. Although I have some troubles, there is much that I think is unusually well said.” Arthur Goldberg, the only justice of the Jewish faith, also filed a concurring opinion, joined, significantly, by none other than Harlan. Both men seemed motivated to answer Potter Stewart’s argument, contained in his dissent, that the First Amendment required the government to show neutrality toward religion and thus must accommodate those who wished to read the Bible. Goldberg wrote that the government had involved itself in sectarian practices that “give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude.” He continued, “The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment.”

For the credibility of the decision in the eyes of the public, it was critical that the conservative wing of the Court hold firm with the majority. Three of the four conservatives had joined Clark. Harlan had signed on to the majority opinion and had even joined the liberal Goldberg in his concurrence. White was on board. Only Stewart, as he had in Engel the previous year, remained in dissent.

For a while, Stewart’s position on Schempp and Murray was enigmatic. Stewart had been the lone dissenter in the conference vote early in March. Then he seemed to move closer to the majority for a while. In his notes on the decision, O’Neil wrote, Stewart “seemed on the verge of joining the Court and expressed views nearly in accord with those advanced in Justice Brennan’s concurrence.” On April 10, however, Stewart circulated a memorandum to the justices outlining his views. To him, the important legal issue was the free exercise clause, not the establishment clause.

To Stewart, the establishment clause did not apply, because he
thought it referred only to the recognition of a national church. That left the free exercise clause, which protected the right of individuals to practice their religion free of coercion by the state. Here, Stewart focused on the rights of those in the majority. Students who wanted to read the King James Version in public school should be protected in their desire to do so—as long as other kids were not coerced into participating as well. Was there coercion against the Schempp and Murray boys? Stewart wrote in his April 10 memo to his brethren, “The ultimate issue in these cases . . . is whether there exist coercive factors in these cases of a nature to deny any person the free exercise of religion.” His most likely ally, it would seem, would have been Harlan. But the eminent conservative saw it quite the other way from his colleague. In the margin of his copy of Stewart’s memo, Harlan scribbled, “I think this is the crucial issue, and that it must be resolved against the state.”

Stewart repeated his assertion that the establishment clause prevented the recognition of a national church and not much more. What was relevant instead to these two cases was the free exercise clause, he said, which prevented the government from interfering with the desire of parents who wanted their children to read Bible passages each morning in the public schools. The government’s duty of neutrality toward religion involved “the extension of evenhanded treatment to all who believe, doubt, or disbelieve,” said Stewart. In Abington and Baltimore, he argued, the government’s inclusion of Bible reading in the schools was simply an attempt “to accommodate those differences which the existence in our society of a variety of religious beliefs makes inevitable.” Stewart considered such accommodation permissible unless evidence existed that individual students were coerced to participate or that the state favored one or more set of beliefs.

Coercion would exist, Stewart said, where the law did not allow for students to be excused from Bible-reading exercises if they requested it. If the religious exercises took place during the school day, he added, school officials would have to provide students with an “equally desirable alternative.” Otherwise, he conceded, “the like-
lihood that children might be under at least some psychological compulsion to participate would be great.” 79 Stewart said that the trial records in the Schempp and Murray cases did not provide adequate answers to the coercion question. He wanted both cases sent back to the trial courts for additional hearings.

Though only a single voice in dissent, Stewart’s analysis of the free exercise clause would bring aftershocks many years later. He had tried to shift the Court’s focus from the actions of the government under the establishment clause to the right of individuals to practice their religion under the free exercise clause. His position was fundamentally different from that of the Court and a light-year from that of Leo Pfeffer, who had become excited by the Chamberlin case because he believed that the wide-ranging religious practices in the Dade County schools were a coercive act that burdened the ability of non-Christians to freely practice their religion. Both Pfeffer and Stewart saw the primacy of the free exercise clause, but they disagreed on its meaning. Stewart regarded the clause as protecting the rights of the religious majority to practice their religion. Decades later, Stewart’s approach would become the backbone of attempts by Christian conservatives to return religious practices to the public schools.

On June 17, 1963, Justice Clark announced the Court’s decision in the two cases. By identical votes of eight to one, the justices affirmed the decision of the Biggs court in Schempp and reversed the decision of the Maryland Court of Appeals in Murray. The justices unequivocally ordered the end of Bible reading and recitation of the Lord’s Prayer in the public school classrooms of Pennsylvania and Maryland—and in the public schools of every other state in the nation.

At 3:18 p.m. that day, a Western Union telegram reached Philip Ward, the attorney who had argued for Abington, at his office in Philadelphia. It was from John F. Davis, clerk of the U.S. Supreme Court, and had been sent forty-five minutes earlier. It read simply:
“JUDGMENT SCHOOL DISTRICT ABINGTON TOWNSHIP AGAINST SCHEMPP AFFIRMED TODAY.”

That same day, the U.S. Supreme Court decided another case with far less fanfare. There had been no oral argument and no extended debate among the justices, and now there was no opinion with detailed analysis of the First Amendment. The Chamberlin case that Leo Pfeffer thought would be the one best suited to change religious practices in the public schools—and for which he had helped to create a rich trial record detailing religious practices in the public schools—was decided in a dry one-line opinion by the Court: “The judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of Murray v. Curlett and School District of Abington Township v. Schempp, ante, p. 203, both decided this day.” The Chamberlin case was over, or so Pfeffer thought.

Ellery Schempp was driving on a two-lane road near the Badlands of South Dakota when the news of the decision on his case came on the radio. Exactly a week earlier, he had married his college sweetheart, Josephine Hallett. They had set out on an extended honeymoon driving across the country, hiking and camping in national parks. “We were driving along just listening to the news,” says Ellery. “Suddenly it was announced that the Supreme Court had a historic decision about Bible reading and prayer in the public schools.” Ellery remembers that the report was “relatively brief”: “They interviewed a couple people and that was the end of it.” He further recalls:

We wanted to get more information and see the evening television news, which was not available in our tent. So we stopped at a motel. We were poor students so we weren’t too inclined to spend the night
there and rent a room. So we came to the motel and said, “Can we have a room for an hour? We just want to watch television.” They didn’t believe a word of it. Here’s a young man and woman, and God knows whether they’ve had the benefit of clergy or not. The idea of renting a room for an hour! Then I tried to explain it to them and they weren’t having any part of this. They said, “You must be kidding.”

We were ushered out of that one. So we went to another one down the road. They happened to have a television in their lobby. So we sat and watched the television without renting a room.83

For Madalyn Murray the decision brought no peace. Or so she told a wire service. “Well, it’s been a continual harassment,” she said. “I can’t tell you how often our windows have been broken. Just since the decision we’ve had police patrolling the area almost every fifteen minutes. The tires on Bill’s car have been slashed, oil’s been drained from the tank. Absolutely no one will hire me.”84