The McNeese Review 43 (2005): 60-86

Murray v. Curlett and the American Mind: Public Sentiment as Systematic Objectification, 1963-1964

Thomas Aiello
University of Arkansas

When the United States Supreme Court decided *School District of Abington Township v. Schempp* in conjunction with *Murray v. Curlett* in June 1963, effectively removing the Lord's Prayer and compulsory Bible reading from public schools, Horace Mann had been dead for more than one hundred years. John Dewey had been dead for eleven. A desperate majority of national representatives, Christian religious leaders, and pundits claimed God would be next. A significant and vocal minority of the American populace, however, supported the high court's ruling and summoned Mann's Twelfth Annual Report of 1848 and Dewey's philosophy of progressive education as cornerstones for their concurrence.[1]

The arguments for and against school prayer and Bible reading in 1963, regardless of individual merit, represented an attempt to organize, both personally and collectively, the judicial vindication of unbelief and the perceived threat it posed. The prevailing popular ethic, flush with a white Protestant Christianity that had weathered the deism of its forebears, entrenched itself as a significant component of an American ideal—sanctioned by Congress in a 1954 joint resolution inserting "under God" into the Pledge of Allegiance and a similar 1956 mandate that "In God We Trust" become the country's official motto.[2] Any challenge to that ideal, especially in the form of

[1] *School District of Abington Township v. Schempp*, 374 US 203 (1963), [hereinafter cited as *Abington Township v. Schempp*, 374 US 203]; Horace Mann died on August 2, 1859. John Dewey died on June 1, 1952. "Educational Contributions of Horace Mann"; Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001), 438; Stephen Macedo, "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism," *Political Theory* 26 (February 1998): 61, 72; and "Progressive Education."

[2] "The Supreme Court, the First Amendment, and Religion in the Public Schools," *Columbia Law Review* 63 (January 1963): 84; and J. A. Leo Lemay, *Deism, Masonry, and the Enlightenment: Essays Honoring Alfred Owen Aldridge* (Newark: University of Delaware Press, 1987), 11-15, 158-60.

outspoken atheist petitioner Madalyn Murray, was an argument against the contradiction between American "equality" and modern middle-class religious categories—an atheist, no matter how hard she tried, could never be a Baptist. Or, more precisely, an atheist could never comply with the various codes and customs expected to accompany the Baptist label.

An atheist, in most cases, still can't. The affluence of the ideal created a systematic organizational dispossession of those who did not display the proper labels. The logic of the system was self-defeating—"Americanism" was universal, personal, and tethered to the whim of the majority. These concepts were (and still are) bedrock elements of society, but none can coexist. Any qualifier on universality or equality immediately bankrupts both ideas. Nowhere were those qualifiers so rampant as in the popularity of popular Christianity. The objectification of those who did not meet those qualifiers was a result of the system itself. It created a popular mind that based its ideas about equality on the non-universal elements of "Americanism." So when the Supreme Court rendered its *Murray v. Curlett* decision, the emerging national discourse represented a relatively united organization against the ruling based primarily on moral, rather than legal, grounds.

Organizational dispossession, however, was not always blatant. Every American was theoretically free to choose methods of belief or disbelief and to make pragmatic judgments based on response to national events. Therefore, when a palpable discourse of popular belief maintained the cultural limelight in the year following the Court's *Murray* decision, every recipient of information became a *de facto* participant—a participation only aided by a vitriolic and pervasive "godless Communist" rhetoric still resonating from the Congressional walls of the former House Un-American Activities Committee.

Murray v. Curlett stood as significant—*to* a discourse of disbelief and *from* the concurrently decided *School District of Abington Township v. Schempp*—primarily due to petitioner Madalyn Murray, whose boisterous manner and outspoken atheism made her an American pariah and lent the general public a unified perception of what it was to disbelieve. The soft-spoken Unitarian Schempp family of Pennsylvania did not present the threat to religious values offered by Murray. Moreover, the *Murray* decision overturned the ruling of a Maryland appellate court, directly stymieing state will and lending the verdict a tone of imposition not present in its affirmed Pennsylvania cohort. Certainly, the opinion for both cases remained the same, decided as they were in unison, but *Murray* continued a perceived trend of national interference with state governmental will, exacerbated by the decade-long national civil rights crisis initiated by the Court's *Brown* decision, another denial of state policy. *Murray* (and *Brown*) reconciled contradictions within that ideological system, bringing latent popular tendencies away from pluralism to the fore. In addressing *Schempp*, the Court essentially acknowledged that the Pennsylvania state court made the correct decision.

Both, however, gave many the impression that something had been stolen from believers.[3]

In the immediate aftermath of the Court's 1963 ruling, various arguments abounded either for or against the Supreme Court's theft of the Lord's Prayer and Bible reading from public schools, whether judicial, philosophical, or popular. The prevailing societal attitude, along with briefs, arguments, decisions, reactions, and the actual human participants, encompassed the entirety of what Americans constructed as a "court case." The attendant features and personalities of *Murray v. Curlett* led to a public assessment of the Court's decision as an infringement upon the historical values of the majority for the sake of minority rights. The backlash present in the response of the religious majority contributed to the overriding goal of the dominant American discourse to subjugate the minority by defining "Will of God" as "Majority Rule."

Of course, the Supreme Court's *Schempp* and *Murray* decision prompted more popular debate than blind public outrage throughout the subsequent school year. While the majority of the population approved of public recitation of the Lord's Prayer and Bible verses, prior case law lent the Court's verdict a perception of inevitability. Slight variations in precedent over time, beginning in the 1940s, gradually formed and finalized new public conceptions. The justices recognized the necessity of deciding another public school establishment case and granted certiorari to *Schempp* and *Murray* primarily to clarify the obscure language of prior decisions.[4]

As early as 1817, the first legal challenges to American establishment of religion emerged, involving protests, usually unsuccessful, against Sabbath laws. Between the 1830s and 1870s, heavy Catholic and Jewish immigration led to the first substantial arguments against public school Bible reading, and most states outlawed public funding for parochial education by the early 1880s. The public school religion cases that directly led to *Murray*, however, began in 1940 with *Cantwell v. Connecticut*, in which the Court first incorporated the Fourteenth Amendment with the First by requiring states to protect religious freedom.[5]

[3] "On Writ of Certiorari To the Court of Appeals of the State of Maryland," No. 119, October Term 1962, Supreme Court of the United States; and "Appeal From the United States District Court for the Eastern District of Pennsylvania," No. 142, October Term 1962, Supreme Court of the United States.

[4] Frank Way, "Stability and Change in Constitutional Litigation: The Public Piety Cases," *The Journal of Politics* 47 (August 1985): 911; and Louis H. Pollak, "Public Prayers in Public Schools," *Harvard Law Review* 77 (November 1963): 63.

[5] Macedo, "Transformative Constitutionalism and the Case of Religion," 63; Way, "Stability and Change in Constitutional Litigation," 913; Kirk W. Elifson and C. Kirk Hadaway, "Prayer in Public Schools: When Church and State Collide," *Public Opinion Quarterly* 49 (Autumn 1985): 318; D. L., "Constitutional Law—Establishment Clause of the First Amendment—Bible Reading and the Lord's Prayer in Public Schools," *New York Law Forum* 9 (December 1963): 544; *Cantwell v. Connecticut*, 310 US 296 (1940).

Following *Cantwell*, the Supreme Court decided a series of cases throughout the 1940s, 50s, and early 1960s, that created a solid foundation for the 1963 *Murray* decision, essentially developing the Court's interpretation of "freedom of religion" to include "freedom from religion." In 1943, the Court's decision in *West Virginia State Board of Education v. Barnett* established that the Fourteenth Amendment protected citizens from states in upholding the right of Jehovah's Witnesses to abstain from saluting and pledging allegiance to the American Flag, a practice the group believed to be a sign of devotion to a graven image. *Barnett* overturned the Court's decision in a similar Pennsylvania case, *Minersville School District v. Gobits*, three years prior, the same year as the *Cantwell* decision, demonstrating an interpretational progression that was certainly not strictly linear.[6] Four years later in *Everson v. Board of Education*, the Court ruled five to four that although the Establishment Clause was applicable to the states by the Fourteenth Amendment, parochial schools could still use public funds to bus children in need, further illustrating the continuing judicial struggle with the dichotomy between "freedom from" and "freedom of" public school religion.[7] In the 1948 session following *Everson*, the Court established in *McCollum v. Board of Education* that schools could not excuse students from general classroom activity for the purpose of religious instruction on public school grounds, but *Zorach v. Clauson*, decided in 1952, deemed the excusal constitutional if the parochial teaching took place away from school premises. Again, *McCollum* and *Zorach* indicated a nonlinear evolution, demonstrating a considered, incremental process that allowed for caveats such as *Zorach* even as the judicial interpretation moved toward support for the disbelieving minority. Even in the *Zorach* decision, the theists, not the atheists, required the excusal.[8] The Court's 1961 decision in *Torcaso v. Watkins*, which removed any devotional oath to a supreme being as a license requirement for notary publics, mandated that government could not aid religion over non-religion or God-based religions over other forms of belief. This distinction was crucial, for it

[6] *West Virginia State Board of Education v. Barnett*, 319 US 624 (1943); D. L. "Constitutional Law," 545; *Minersville School District v. Gobits*, 310 US 586 (1940); and Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), 150-51.

[7] *Everson v. Board of Education*, 330 US 1; *New York Times*, 21 June 1963, 28.

[8] *McCollum v. Board of Education*, 333 US 203 (1948); William C. McClure, "Constitutional Law—First Amendment—State Law Requiring the Reading of the Holy Bible in the Public Schools Violates the 'Establishment Clause' of the Federal Constitution," *University of Pittsburgh Law Review* 25 (October 1963): 89; "No Bible in the Schools?" *Life*, 12 April 1963, 63; *Zorach v. Clauson*, 343 US 306 (1952); Paul G. Kauper, *Religion and the Constitution* (Baton Rouge: Louisiana State University Press, 1964), 59, 67; and *New York Times*, 26 June 1962, 17.

revealed a notable policy shift from a Court that had traditionally viewed non-establishment as the government's inability to aid one religion over another.[9] Each incremental decision was vital to the Court's eventual 1963 *Murray* ruling, but none played the prominent role of *Engel v. Vitale*, decided during the preceding 1962 session.

On June 25, 1962, the Supreme Court held six to one in *Engel v. Vitale* that a 1951 prayer composed by the New York Board of Regents presented an unconstitutional establishment of religion in public schools. The state never mandated the prayer and never kept records as to the prayer's use or disuse, however, because the state's Commissioner of Education, James Allen, feared violating the Constitution. *Engel v. Vitale*'s petitioners, five Long Island parents, all but one of whom claimed religious faith, argued that a constitutional violation had occurred. The subsequent ruling enflamed the passions of the American public and made the Court's *Murray* decision the following year a virtual inevitability. New York Republican Representative Frank Becker, voicing the majority's frustration with *Engel*, called the Court's decision, "the most tragic in the history of the United States." *The Pilot*, a Boston Catholic newspaper, called the verdict "a stupid decision, a doctrinaire decision, a decision that spits in the face of our history, our tradition and our heritage as a religious people." While courtroom attendance had been sparse for *Engel*'s oral arguments, the uproar following the Court's decision created a full house during the next session's *Schempp* and *Murray* arguments.[10]

The 1962 *Murray* argument had its genesis in a 1905 mandate by the Baltimore school district that required either the reading of one Bible chapter or recitation of the Lord's Prayer at the inception of each school day. Fifty-six years later, thirty-seven states and forty-one percent of public school districts required or allowed the Lord's Prayer or Bible reading in classes. Indeed, a 1961 survey demonstrated that the number of religious requirements in public schools rose dramatically in the southern and eastern regions of the country. During this same time, eighty-three different religious denominations featured membership lists of more than fifty thousand worshipers, and a sectionally divided yet overwhelmingly religious nation annually spent twice as much on church construction as it did on hospital construction.[11] In early-1960s

[9] *Torcasso v. Watkins*, 367 US 488 (1961); *New York Times*, 20 June 1963, 20; and D. L., "Constitutional Law," 549.

[10] The Regent's prayer read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country." *Engel v. Vitale*, 370 US 421 (1962) [hereinafter cited as *Engel v. Vitale*, 370 US 421.]; *New York Times*, 26 June 1962, 1, 16, 17; Dennis L. Thompson, "The Kennedy Court: Left and Right of Center," *Western Political Quarterly* 26 (June 1973): 263-264; and "Supreme Court: The Fourth 'R,'" *Newsweek*, 11 March 1963, 24.

[11] "The Supreme Court: A Loss to Make Up For," *Time*, 28 June 1963, 13; *New York Times*, 18 June 1963, 1, 27; 26 June 1962, 17; Catharina Csaky Hirt, "The Efficacy of Amicus Curiae Briefs in the School Prayer Decisions" (Ph.D. diss., Vanderbilt University, 1995), 34; and Michal R. Belknap, "God and the Warren Court: The Quest for 'A Wholesome Neutrality,'" *Seton Hall Constitutional Law Journal* 9 (Spring 1999): 405. Further demonstrating the lack of religious uniformity, Abstracts of the United States for 1961 reported that thirty-seven percent of the American population was not religiously affiliated at the close of the 1950s. Larry H. Schwartz, "Separation of Church and State: Religious Exercises in the Schools," *University of Cincinnati Law Review* 31 (Fall 1962): 412.

Baltimore, William J. Murray, son of Madalyn Murray and the petitioner of standing, suffered continual verbal and physical assault after his mother's initial protest of the school board's Bible reading or Lord's Prayer participation requirement. The school district responded to Murray's objection by amending its policy to allow the option of excusal—essentially stating that William Murray, or any other dissenting student, could leave the classroom during the Bible chapter or Lord's Prayer recitation—but Murray filed a mandamus action for removal of the practice in its entirety, nonetheless. Unlike *School District of Abington Township v. Schempp*, however, an actual trial never ensued until oral arguments before the Supreme Court. A trial court dismissed the original *Murray* suit in 1961, stating that the Bible was not a sectarian document and that the school board's excusal amendment was sufficient to foster religious equality. The Maryland Court of Appeals upheld the lower court's dismissal the following year, citing Supreme Court silence as grounds. That silence became the backbone of *Murray*'s federal appeal. After Madalyn Murray filed for certiorari in the Supreme Court, the FBI began monitoring the atheist petitioner, and Baltimore's Department of Public Welfare, Murray's longtime employer, fired her.[12]

During oral arguments, attorneys for the Baltimore school district argued that Bible reading and recitation of the Lord's Prayer were secular attempts to promote moral values. "Now, the practice, we maintain, has something in it other than religiousness itself," argued attorney Francis Burch for the school district, "it has a traditional teaching of moral and ethical values." "The literature of the Bible was historical," he continued, "the most widely read book of all books ever composed."[13] Obviously the Court could not accept

[12] *New York Times*, 18 June 1963, 27; G. Cohen, "Constitutional Law—Whether State Action Requiring Public Schools To Begin Each Day With Readings From the Bible Violates the First Amendment," *Chicago-Kent Law Review* 40 (Fall 1963): 168; Leo Pfeffer, "The Schempp-Murray Decision on School Prayers and Bible Reading," *Journal of Church and State* 5 (Spring 1963): 166; "Petition for a Writ of Certiorari to the Court of Appeals of Maryland," No. 119, October Term 1962, Supreme Court of the United States, 10-11; "Brief in Opposition to Petition for Writ of Certiorari," No. 119, October Term 1962, Supreme Court of the United States, 7.

[13] "Oral Argument by Francis B. Burch, Esq., on Behalf of Respondents, Number 119—27 February 1963," in *Oral Arguments of the Supreme Court of the United States: The Warren Court, 1953 Term—1968 Term* (Paul M. Hebert Law Center, Baton Rouge; Frederick, MD: University Publications of America, Inc., 1984), text-fiche, 19, F17; and Pfeffer, "The Schempp-Murray Decision," 168. Leonard J. Kerpelman argued

such an argument after its *Engel* decision, which ruled that the sectarianism of a relatively innocuous Regent's prayer necessitated its public school removal. The Bible and Lord's Prayer, by comparison, unquestionably promoted a specific belief.

Generally, the overwhelmingly disgruntled public viewed the pending verdict as inevitable, as the Supreme Court had never upheld religious activities in the public schools. The Citizens for Educational Freedom characterized the verdict as "another step toward the elimination of God from all public American life." "Every time the Supreme Court restricts religious ceremony in the public schools," wrote commentator James Reston the day following the ruling, "this country suffers a twinge of conflict between its heart and mind." The conflict in Reston's heart and mind, however, could also be described as a conflict between two different versions of America's social identity. The cultural discourse's contradictory "Americanism" falsely offered religion as a replacement for equality, rather than an aid to it.[14]

Thus the affront when *Murray* reaffirmed the Court's former decisions while allowing the Bible a place in the secular realm of objective teaching on world religions. But the country's heart and mind lacked the Court's uniformity, and reaction was understandably diverse. Heritage and tradition arguments dominated early reaction to Supreme Court religion decisions, even prompting the normally reclusive former president Herbert Hoover to publicly warn of the 1962 *Engel* decision's "disintegration of a sacred American heritage." Dwight Eisenhower also called upon the national tradition to publicly disagree with the Court's ruling, and Justice Potter Stewart, in his *Engel* dissent, argued that denying children the opportunity to participate in the Regent's prayer denied them the "spiritual heritage of the nation." "I realize, of course, that the Declaration of Independence antedates the Constitution," said former President Eisenhower in response to the decision, "but the fact remains that the Declaration was our certificate of national birth."[15]

The most stringent post-*Murray* heritage arguments, however, came from the religious community. Billy Graham noted that religion had been a part of American heritage since the arrival of the pilgrims, adding, "Now a Supreme

for the petitioners, Francis B. Burch and George W. Baker, Jr. for the respondents, and Thomas B. Finan for the State of Maryland *amicus curiae*. "Freedom of Religion . . . Bible Reading In Schools," *American Bar Association Journal* 50 (January 1964): 82; and *New York Times*, 18 June 1963, 27.

[14] Cohen, "Constitutional Law," 172; McClure, "Constitutional Law," 89-90; Pfeffer, "The Schempp-Murray Decision," 172; and *New York Times*, 18 June 1963, 27, 36; 19 June 1963, 36.

[15] *New York Times*, 27 June 1962, 20; 26 June 1962, 16; 29 June 1962, 26; 30 June 1962, 20; 19 June 1963, 36; Philip B. Kurland, "The School Prayer Cases," in *The Wall Between Church and State*, ed. Dallin H. Oaks (Chicago: The University of Chicago Press, 1963), 145; and *Engel v. Vitale*, 370 US 421.

Court in 1963 says our fathers were wrong all these years." "We need more religion, not less," said Graham. "Why should the majority be so severely penalized by the protests of a handful?" The Catholic Archdiocese of New York, in a statement typical of Catholic reaction to *Murray*, noted that secularization of schools was a radical departure from American tradition. The Archbishop of Washington, Patrick A. O'Boyle, said of the Court, "It is obvious that little by little it is discarding religious traditions hallowed by a century and a half of American practice." The decision was, in this scenario, the antithesis of American religiosity, creating a society of atheists and agnostics, and a decided U.S. policy shift. Others, including Jewish organizations such as the Synagogue Council of America, argued that America's legacy of religious freedom should take prominence over its legacy of religion and that a practice's duration does not necessarily ensure its constitutionality. "We fervently believe," declared the Council's president, Uri Miller, "that public institutions such as the public school should be free of such practices." Madalyn Murray herself responded to religious heritage arguments by positing that, "through history . . . you find that nearly all who contributed anything . . . were atheists or agnostics."[16]

Southern legislators disagreed, the most memorable exhortation pronounced by Representative George Andrews of Alabama who lamented, "They put the Negroes in the schools, and now they've driven God out." But local counterparts and constituents equally and ably matched the animus of their national politicians. Southern protest stemmed heavily from the segregationist community, which somewhat mitigated national ire and caused some citizens to alter their positions to avoid the appearance of racism. While mass disagreement with *Engel* and *Murray* emanated from every American region, the South proved far less acquiescent than the North and West.[17]

Representative L. Mendel Rivers of South Carolina, typically illustrating Southern frustration with perceived judicial interference, declared in 1962 that the Supreme Court was "legislating—they never adjudicate—with one eye on the Kremlin and the other on the National Association for the Advancement of Colored People." A group of Southern Senators offered a constitutional amendment after *Engel* that asserted, in part, "the right of each state to decide on the basis of its own public policy the question of decency and morality."

[16] *New York Times*, 18 June 1963, 27, 29; and 27 June 1963, 32; Daniel B. Ritter, "Constitutional Law: The Bible Reading Cases," *Washington Law Review* 38 (Autumn 1963): 657; "Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae," No. 119 and No. 142, October Term 1962, Supreme Court of the United States, 7; "No Bible in the Schools?" 64; Jane Howard, "The Most Hated Woman in America," *Life*, 19 June 1964, 94; and Sanford Kessler, "Tocqueville on Civil Religion and Liberal Democracy," *The Journal of Politics* 39 (February 1977): 122, 142.

[17] *New York Times*, 26 June 1962, 16; 27 June 1962, 1, 20; 30 June 1962, 20; and Belknap, "God and the Warren Court," 441-42.

Southerners, however, and conservatives in general, had no consistent defense against *Murray*, just as they did not have a unified defense against the Court's *Brown* decision in 1954, because in both instances, conservatives failed to anticipate judicial action based on legal precedent. Different agendas and different reasons for opposing judicial impositions made different positions inconsistent. One consistent similarity, however, involved the belief that the better judgment of each community should base decisions as to what a proper society should be. Alabama Governor George Wallace pronounced in 1964, in a manner strikingly similar to some of his more prominent integration denunciations, "We will not permit God and religion to be suppressed, outlawed, and banned from the institutions created by the people. Nor will we permit the State or any branch of our Government to order God out of our schools." While the Court's segregation decisions were implementable because the non-Southern mind held a virtual consensus that the practice was morally wrong, no such consensus existed for the Court's *Murray* decision.[18]

Wallace and others were not arguing *for* religion; they were arguing *against* judicial interference. The arguments were prevalent, but did have detractors who favored a barrier between church and state. The prayer and Bible reading cases rallied the strict separation forces, whose varied religious and anti-religious makeups had previously kept the groups disparate. Prominent among the religious forces was Martin Luther King, Jr., who approved of the Court's *Murray* ruling and referred to it as "a sound and good decision reaffirming something that is basic in our Constitution, namely separation of church and state." Responses such as King's allied religious liberals with groups such as the American Ethical Union and the American Humanist Association, and while the response this coalescence created did not match the hard-line conservative zeal of a George Wallace or Strom Thurmond, it established a voice that had not previously existed. The American Ethical Union made a strikingly similar statement to King's after the previous year's *Engel* decision, declaring, "The principle of separation is a basic safeguard of freedom." "Even among the theistic religions," stated the Union's amicus brief for the petitioners in *Murray*, "the Bible readings heard by the children include doctrines not accepted by some sects or denominations." A similar brief filed on the petitioners' behalf by the American Humanist Association argued that public Bible reading and Lord's

[18] *New York Times*, 27 June 1962, 20; Willmoore Kendall, "American Conservatism and the 'Prayer' Decisions," *Modern Age* 8 (Summer 1964): 250, 252, 258; Robert D. Smith, "Religion and the Schools: The Influence of State Attorneys General On the Implementation of *Engel* and *Schempp*," *Southern Quarterly* 8 (April 1970): 225; and Pollak, "Public Prayers in Public Schools," 62.

Prayer recitation aided "all religions against non-believers and aid those religions based on a belief in God."[19]

These separation arguments, along with Southern railings against judicial interference, inevitably led to a debate over government neutrality, which featured two competing conceptions. An argument included on the opinion pages of the *New York Times*, as well as in the *Murray* opinion of Justice Tom Clark, stated that in order for government to remain neutral, religious exercises in the public schools must be removed. Clark quoted Cincinnati Judge Alphonso Taft, father of future Supreme Court Chief Justice William Howard Taft, in an 1870 opinion, "The government is neutral, and, while protecting all, it prefers none, and it disparages none." Justice Potter Stewart promulgated the counter-argument in his dissenting opinion and claimed that making the option of religious exercise obsolete promoted secularism and was fundamentally non-neutral. "For a compulsory state educational system so structures a child's life," wrote Stewart, "that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage."[20]

Proponents of removal-as-neutrality based their arguments on the work of James Madison, who insisted that governmental involvement in religious exercise degraded that exercise. A delineation of the public school religion cases featured in the *Columbia Law Review* echoed Madison in early 1963. It stated that government union with religion, even in the smallest forms, endorsed one faith as more appropriate than another, therefore encouraging the more "appropriate" faith and creating an indirectly "chosen" government religion. A 1963 article in the *Washington Law Review*, however, noted that *Murray* could be construed as promoting secularism over neutrality, because government denial of resources to a Christian community that had continually and historically received them effectively ruled against that Christian community. The critical flaw of neutrality theory was that in order to remain strictly neutral, the government must fund both secular and religiously affiliated organizations when the purpose of each was the same. Maryland's

[19] Martin Luther King, Jr., as quoted in Leo Pfeffer, "Prayer in Public Schools: The Court's Decisions," *National Forum* 68 (Winter 1988): 26; Bradley C. Canon, "The Supreme Court as a Cheerleader in Politico-Moral Disputes," *The Journal of Politics* 54 (August 1992): 650-51; "Brief of the American Ethical Union as Amicus Curiae," No. 119 and No. 142, October Term 1962, Supreme Court of the United States, 5 [hereinafter cited as "Brief of the American Ethical Union."]; "Brief of the American Humanist Association, As Amicus Curiae, and Motion for Leave to File Same," No. 119 and No. 142, October Term 1962, Supreme Court of the United States, 13, 19 [hereinafter cited as "Brief of the American Humanist Association."]; and *New York Times*, 29 June 1962, 26.

[20] *New York Times*, 28 June 1963, 28; *Abington Township v. Schempp*, 374 US 203; and Stephen V. Monsma, "Justice Potter Stewart on Church and State," *Journal of Church and State* 36 (Summer 1994): 560.

Attorney General, Thomas B. Finan, highlighted this flaw in his amicus brief to the Supreme Court on behalf of the respondents, arguing that to avoid funding any secular activity proposed by a religious organization, just because it was a religious organization, was not, by definition, neutral. Removal of the Lord's Prayer and Bible reading, argued Finan, would "by necessary implication impose upon the populace an atheistic or at least agnostic concept of our origin and end and will itself constitute the establishment of a religion." Adherents as diverse as Episcopal Bishop James Pike, Republican New York Senator Kenneth Keating, and Harvard Law School's Erwin Griswold, echoed Maryland's reasoning and propagated these neutrality arguments as the basis for their disapproval of *Murray*.[21]

While Erwin Griswold portrayed the Court's prayer decisions as examples of judicial absolutism, his disagreement with the decision stopped short of accusing the Court of establishing a communistic secularism. Often, however, the overwhelming American fear of Soviet Communism saturated discussions of public school secularism. The juxtaposition of freedom and totalitarianism, after all, was an integral part of that overriding "Americanism." In 1962, for instance, West Virginia Senator Robert Byrd blamed the Court's public school religion decisions on a palpable Communist influence, and various school boards throughout the nation similarly assailed the decisions as "victor[ies] for communism," but the majority of this Communist rhetoric was simple hubris employed for argumentative emphasis. No evidence exists that links any of the eight concurring justices to Communist influence. Despite its fears, the nation was in no danger of a Red invasion of its public schools.[22]

While Communist charges, regardless of merit, remained relatively clear, evaluations of a proper definition of communism's counterpart and *Murray*'s inconsistency with the American status quo were far murkier. "In God We Trust" slogans on money, prayers in the legislature and other previously present official procedures basically, if not technically, established a national religion. While military chaplains, religious tax exemptions, and other public religious activities clouded the issue, Justice Brennan's concurring opinion in *Murray* argued that "the line we must draw between the permissible and the

[21] Ritter, "Constitutional Law," 663, 665; William W. Van Alstyne, "Constitutional Separation of Church and State: The Quest for a Coherent Position," *American Political Science Review* 57 (December 1963): 865, 867; "The Supreme Court, the First Amendment, and Religion in the Public Schools," 94; Wilber G. Katz and Harold P. Southerland, "Religious Pluralism and the Supreme Court," *Daedalus* 96 (Winter 1967): 181, 183; Bernard J. Coughlin, SJ, "Toward a Church-State Principle for Health and Welfare," *Journal of Church and State* 11 (Winter 1969): 38-39; "Brief and Appendix of Attorney General of Maryland, Amicus Curiae," No. 119, October Term 1962, Supreme Court of the United States, 3-4; "The Supreme Court: A Loss to Make Up For," 14; and *New York Times*, 28 June 1962, 17.

[22] Pfeffer, "Prayer in Public Schools," 26; *New York Times*, 27 June 1962, 20; and Kendall, "American Conservatism," 246.

impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." While it did not untangle the governmental inconsistencies, Brennan's stance attempted to reassure doubters that the Supreme Court did not intend to secularize the nation. The Supreme Court had previously allowed public funding for busses and textbooks for parochial school children as well as off-campus religious instruction for public school students. Conservative commentator L. Brent Bozell ignored Brennan's reassurances, however, arguing in the month following the decision that *Murray* continued a logical governmental progression toward "every public action affecting religious interests constitut[ing] a *prima facie* case of unconstitutionality."[23]

Regardless of actual legitimacy, American ideology held concepts of "truth" and "consistency" as one in the same, describing positions held in contradiction to popular belief as wrong despite potential merit. The contradictory principles of neutrality and non-establishment, the changing definitions of "religious" and "secular," the varying conceptions of the wall of separation, and the common view of America as a Christian nation all left the Supreme Court searching for the proper application of principles to given situations, while the popular majority scrambled to maintain their religious hegemony. Justice Tom Clark, the Christian moderate who wrote the majority opinion in *Murray*, stated that the refusal of separation would only damage religious purity and confuse school children as to the divine or secular nature of religious exercise. "The place of religion in our society is an exalted one," declared Clark, "achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind."[24] Clark's value argument, endorsed by many makeshift pundits, acted as the primary countermeasure against popular coercion and consistency claims. President Kennedy, U.S. Commissioner of Education Sterling McMurrin, and New York Senator Jacob Javits each anticipated Clark after the Court's *Engel* decision, arguing that religion in the schools transferred spiritual responsibility from the church and home to public education, thereby weakening all three and disorienting children's conception of religious purpose. "We have in this case a very easy remedy," said Kennedy, responding to *Engel*, "and that is to pray ourselves." Following *Murray*, mainstream religious groups such as the National Council of Churches, the United Presbyterian Church, and the Synagogue Council of America—each with a vested interest in maintaining the unique sanctity of church life—made similar pleas as to the proper place of

[23] *New York Times*, 28 June 1962, 30; L. Brent Bozell, "Saving Our Children from God," *National Review*, 16 July 1963, 20.

[24] Ellis M. West, "Justice Tom Clark and American Church-State Law," *Journal of Presbyterian History* 54 (Winter 1976): 387, 394-95; *Abington Township v. Schempp*, 374 US 203; and Bryan F. Le Beau, *The Atheist: Madalyn Murray O'Hair* (New York: New York University Press, 2003), 79-80.

religion in American life. The National Council of Churches, in a representative statement, emphasized that, "neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program."[25]

Devotional use, in fact, was the culprit. The sectarian nature of the Lord's Prayer and the Bible (and even the New York Regent's prayer) existed not only because the two promoted one belief system over another, but also because they distinguished between theism and atheism. This distinction became particularly relevant in light of the presence of a disbelieving petitioner and assumed a key role in the amicus briefs of the American Humanist Association and the American Ethical Union on the petitioner's behalf. The American Humanist Association's brief explained, "The reading of the Holy Bible in the King James, Douay or other version and the recitation of the Lord's Prayer presupposes a religious belief and a religion based on a belief in God," while the American Ethical Union described the practices as "necessarily offensive to children of followers of the Ethical religion, since they express official sanction of dogmas and practices to which these children cannot subscribe." Madalyn Murray argued that the purpose of public education was "to prepare children to face the problems on earth, not to prepare for heaven," and the petitioners' brief filed on her behalf prominently featured arguments against the sectarianism of the Baltimore practices. Religion in the public schools did not and could not in-and-of-itself create moral students. Clark's opinion and Murray's victory, however, did not fully convince a nation focused on conceptions of what type of students public schools should create.[26]

But that opinion and that victory remained, and Americans used their own understanding of constitutional history to justify a pro- or anti-*Murray* stance. The majority of the populace viewed the decision as a broad interpretation of the First Amendment after application of the Fourteenth but disagreed as to the correctness of that interpretation. The First Amendment itself stemmed from eighteenth-century Jeffersonian liberalism that, in turn, stemmed from the primarily Baptist and Presbyterian desire for more stringent protection of religion from state authority. The 1868 Fourteenth Amendment barred the states from passing laws that abridged the rights of any American citizen.[27]

[25] *New York Times*, 17 June 1963 24, 29; 18 June 1963, 29; 22 June 1963, 23; 26 June 1962, 17; 28 June 1962, 1; and 30 June 1962, 20.

[26] Schwartz, "Separation of Church and State," 409-10; "Brief of the American Humanist Association," 19-20; "Brief of American Jewish Committee and Anti-Defamation League of B'Nai B'Rith as Amici Curiae," No. 119 and No. 142, October Term 1962, Supreme Court of the United States, 10-11; "Brief of the American Ethical Union," 5; "No Bible in the Schools?" 64; and "Petitioners' Brief," No. 119, October Term 1962, Supreme Court of the United States, 11, 16.

While these generalizations made original intent arguments appear obvious and standard judicial practice dictated application of the latter amendment to the former, opponents of the *Murray* decision asserted that the First Amendment's congressional mandate and the Fourteenth's preoccupation with the newly freed slaves mitigated the use of original purpose as valid argument. "*All* that is in question is what our 50 *states* (and their subordinate agencies) can or cannot do under the First Amendment," wrote Willmoore Kendall in 1964, "which is a matter about which the Framers of the First Amendment, directed as it is exclusively at Congress, certainly had no discernable intent." By emphasizing that the nation's Founding Fathers would have disapproved of total governmental absence from religion, *Murray*'s detractors further portrayed religiosity as a national ideal and magnified the disbelieving minority's outsider status.[28]

The validity of that minority's position in a democratic society also understandably received much attention. Like "liberty" and "freedom," "democracy" served (and serves) as a vague term that supposedly set America apart, but its actual function and relationship with equality often fell victim to those prior assumptions. California Republican Don Clausen stated that the Court's *Murray* and *Engel* decisions punished the majority to accommodate a small minority, replacing the democratic theory of government with an American oligarchy. A 1962 editorial in the Catholic newspaper *The Pilot* railed against the "futility of following a course of public policy and public law which is based on the clamorous and constant protestation of a well-organized and litigious minority." "We must see to it that minority groups are protected," contributed a letter-writer to the *New York Times*, "but is their wish and whim to be the law of the land?" The concern from lawmakers and letter-writers, however, did not take hold in the pulpit. Many Protestant churches saw the need to safeguard religion, even if that religion happened to be a minority faith. In essence, theologians such as Arthur Lichtenberger, Presiding Bishop of the Protestant Episcopal Church, argued that assuming minorities only warranted toleration—even when that minority was, like the Murray family, atheistic—was inconsistent with the concept of religious pluralism. Such an assumption, pronounced a statement issued by the National Council of Churches prior to the Court's *Murray* decision, "endangers both true religion and civil liberties." Tolerance was not equality and, by definition, could never be equality. *Murray* and *Engel*, in Bishop Lichtenberger's conception,

[27] D. L., "Constitutional Law," 542; *New York Times*, 26 June 1962, 17; 18 June 1963, 36; and U.S. Constitution, amend. 1, amend. 14, sec. 1.

[28] The italics are Kendall's. Kendall, "American Conservatism," 252; Van Alstyne, "Constitutional Separation of Church and State," 866; "The Supreme Court, the First Amendment, and Religion in the Public Schools," 80-81; D. L., "Constitutional Law," 550; House, James Madison, June 1789, *Annals of Congress*, vol. 1, 1st Congress, 1789-1791 (Washington: Gales and Seaton, 1834), 434; and U.S. Constitution, amend. 1.

"reflect[ed] the Court's sense of responsibility to assure freedom and equality to all groups of believers and non-believers as expressed in the First Amendment to the Constitution." The subtle yet fundamental difference between tolerance and equality, however, remained elusive to the majority of Americans concerned about the minority's "wish and whim."[29]

When the "tyranny of the minority" arguments ran their course, opponents were left with the First Amendment. Violation of the Establishment Clause required one to demonstrate either "advancement" or "inhibition" of religion, while the Free Exercise Clause evaluated church and state separation from the bottom up, guaranteeing each citizen religious freedom. A decision hinged on Free Exercise therefore required a demonstration of coercion, whereas a decision based on the Establishment Clause did not. Essentially, establishment claims considered overt acts of governmental religious manipulation, while claims based on the Free Exercise Clause considered the protected population and the impact of any governmental policy on the equal participation or non-participation in the religion of one's choice. However, *McCollum*—itself based on a violation of the Establishment Clause—demonstrated a form of coercion, so a state could also establish religion by coercing or funding religious exercises. The Court's *Murray* decision also acknowledged an adequate demonstration of indirect coercion and used the establishment claims of *McCollum* and *Engel* as precedent.[30]

The Establishment and Free Exercise Clauses of the First Amendment, as presented in the *Murray* opinion, were inherently contradictory. Establishment encouraged government isolation while Free Exercise mandated government protection, a paradox of precedence in the petitioners' argument before the Supreme Court. Leonard Kerpelman argued for the petitioners that the Baltimore statute promoted a "free exercise" for the majority that "established" a dominant religion against minority claims. The establishment could be removed only after a reinterpretation of "free exercise" on the part of the school board. "I don't think that the free exercise of the majority can work that way," argued Kerpelman. "In exercising its right it is establishing a religion in the public school; by establishing the religion in the public school, they take away, of course, the right of the petitioners to be free of an establishment." With the variety of available interpretations, *Murray*'s eight concurring justices did not necessarily present a unanimous voice. Rather,

[29] *New York Times*, 18 June 1963, 29; 29 June 1962, 26; 27 June 1962, 20; House, "The Supreme Court Decision on the Issue of Prayer in Our Public Schools," Extension of Remarks of Hon. Don H. Clausen of California in the House of Representatives, transcript of Living Waters Broadcast, June 23, 1963, 88th Cong., 1st sess., *Congressional Record* 109, pt. 10 (24 July 1963): 13328; and Katz, "Religious Pluralism," 183.

[30] Ritter, "Constitutional Law," 662; Van Alstyne, "Constitutional Separation of Church and State," 867; Cohen, "Constitutional Law," 171; D. L., "Constitutional Law," 548-49; and *Abington Township v. Schempp*, 374 US 203.

each offered his own conception of how far the Establishment Clause reached, leaving the public to interpret the validity of those individual claims. Public opinion began at the water's edge of a shoreline created by these competing viewpoints.[31]

A brief swim from that edge, beyond the varied arguments surrounding the logic and legitimacy of *Murray*, lay the reality of action and implementation. The Court handed down its opinion on June 17, 1963, and before the close of the month, a barrage of Constitutional amendments appeared in both the House and Senate attempting to void the judicial decree. Delaware Republican Senator John Williams offered his amendment just two days following the ruling, the bill stating in part, "Nothing contained in this constitution shall be construed to prohibit the authority administering any school, school system, or educational institution supported in whole or in part from any public funds from providing for the participation by the students thereof in any periods of Bible reading or non-sectarian prayer if such participation is voluntary." Protesters picketed Justice Tom Clark, writer of the majority opinion, at a June 28 meeting of the National Council of Juvenile Court Judges in Knoxville, Tennessee. Representative Robert Ashmore of South Carolina even introduced a bill to place "In God We Trust" above the bench of the U.S. Supreme Court within days of the decision.[32]

Madalyn Murray, too, became a target of American resentment following her victory, suffering the murder of her cat and graffiti accusing her of Communism. "I've missed so, so much school this year," said Garth Murray, Madalyn Murray's youngest son, at the close of the 1963-1964 school year, "because of atheism and sinus and measles." Vandals inflicted severe property damage and threatened the family with death, but Christian ire fumed outside of Baltimore, as well. The atheist received threatening correspondence from across the nation. "You filthy atheist," wrote one disgruntled citizen, "Only a

[31] Coughlin, "Toward a Church-State Principle," 36; "Oral Argument by Leonard J. Kerpelman, Esq., on Behalf of Petitioners, No. 119—27 February 1963," in *Oral Arguments of the Supreme Court of the United States: The Warren Court, 1953 Term—1968 Term* (Paul M. Hebert Law Center, Baton Rouge; Frederick, MD: University Publications of America, Inc., 1984), text-fiche, 6, F17; Van Alstyne, "Constitutional Separation of Church and State," 865; and Barbara A. Perry, "Justice Hugo Black and the 'Wall of Separation Between Church and State,'" *Journal of Church and State* 31 (Winter 1989): 56.

[32] Howard, "The Most Hated Woman in America," 92; *New York Times*, 20 June 1963, 20; 29 June 1963, 20; 26 June 1963, 43; Senate, "The Proposed Constitutional Amendment on Bible Reading and School Prayers," John J. Williams, 88th Cong., 1st sess., *Congressional Record*, 109, pt. 8 (19 June 1963): 11088; House, *A Bill to Provide for the Inscription in the Courtroom in the U.S. Supreme Court Building of the Phrase "In God We Trust,"* 88th Cong., 1st sess., H.R. 7252, *Congressional Record*, 109, pt. 9 (25 June 1963): 11529; Pfeffer, "The Schempp-Murray Decision," 174; and Bozell, "Saving Our Children from God," 34.

rat like you would go to court to stop prayer. All curses on you and your family. Bad luck and leprosy disease upon you and your damn family." "Lady," said another, "you are as deadly to our city as a snake. Return to Russia. (Signed) A True Believer in our God who gave you the air you breathe." Finally, direct death threats also emanated from Murray's mailbox: "You will repent, and damn soon a .30-.30 (rifle bullet) will fix you nuts. You will have bad luck forever. You atheist, you mongrel, you rat, you good for nothing s___, you damn gutter rat. Jesus will fix you, you filthy scum." Murray's war was not simply one of words, however. A physical confrontation with Baltimore police led to charges of assault and contempt of court, as well as the Murray family's flight from the city.[33]

Two days after the Court's opinion, the ACLU filed suit in California state court to remove "under God" from the Pledge of Allegiance in Los Angeles public schools. Murray continued her legal campaign the following year by unsuccessfully suing the city of Baltimore to halt the practice of exempting religious organizations from taxation. Judicial scholar Leo Pfeffer predicted in 1963 that governmental support and tax status of religious organizations would be the next major area of inquiry, and America's legal community, if not its Protestant populace, seemed firmly committed to the beneficial effects of church and state separation. The reality of public school implementation, however, proved differently.[34]

Ten years after the ordered removal of the Lord's Prayer and Bible reading from public schools, absolute compliance had yet to be achieved, though many school districts initially appeared relatively compliant. In Alabama, West Virginia, and other states, compliance actions stemmed from state court decisions that applied the Supreme Court standard judicially. In some states, such as Louisiana, Kentucky, and New York, attorneys general wrote official opinions declaring constitutional the general principle established by the Court, while many western states ratified state constitutional amendments firmly elaborating the Court's *Murray* position. While some Southern state governments made overtures toward compliance, the only significant regional variation in successful implementation occurred in the South, which saw in *Murray* an opportunity to defy the Supreme Court without any tangible danger of Federal troops arriving to enforce decisions. As *Time* magazine noted in its coverage of *Murray*, "No federal authority is likely

[33] Howard, "The Most Hated Woman in America," 92; Robert Liston, "Mrs. Murray's War on God," *The Saturday Evening Post*, 11 July 1964, 86; and "Playboy Interview: Madalyn Murray," *Playboy*, October 1965, 65.

[34] *New York Times*, 20 June 1963, 20; Howard, "The Most Hated Woman in America," 91-92; Richard E. Morgan, *The Supreme Court and Religion* (New York: The Free Press, 1972), 105; "Playboy Interview," 69; Katz, "Religious Pluralism," 183; Pfeffer, "The Schempp-Murray Decision," 175; and Theodore Sky, "The Establishment Clause, the Congress and the Schools: An Historical Perspective," *Virginia Law Review* 52 (December 1966): 1396.

to call out the troops to take the Bible out of a teacher's hand or order children to unclasp theirs."[35]

In all, sociological compliance studies, intended to gauge local response to the Bible and Lord's Prayer removal in the years following the *Murray* decision, showed that school districts previously requiring some sort of devotional practice demonstrated a much stronger tendency to comply with the *Murray* decision than did those previously allowing a devotional practice without an actual physical requirement. The latter most likely assumed that sufficient compromise had already occurred, or that the Court's decision could not affect the less stringent devotional practices. Both groups, however, attempted to forward alternatives as religious supplements, the most popular of which was the moment of silence, adopted, in fact, by both Maryland and Pennsylvania, the home states of Murray and Schempp. Some school boards substituted a recitation of the fourth verse of the "Star Spangled Banner," which repeated the line, "In God is our Trust," and referred to the United States as a "heav'n rescued land." New York, home of *Engel*'s Regent's prayer, found many of its school districts willing to recite the song as an opening ceremony. Another supplemental method, encouraging student-initiated prayer, assumed the lack of authority control would circumvent *Murray*, but proved unconstitutional during the Court's 1965 session in *Stein v. Olshinsky*. Many school districts offered released-time programs, allowing students to spend a portion of the school day receiving religious instruction off campus, but only Hawaii, Oregon, and Vermont created laws affirming the practice. Each supplement demonstrated religious America's reluctance to move toward a more secular and equal position.[36]

In these maneuvers, the adaptability of a system of thought positing religious patriotism as the only "Americanism" appears most evident. This American mind—this collective ideal held by a majority of religious Americans in the mid-1960s (and through the first years of the twenty-first

[35] Michael W. LaMorte and Fred N. Dorminy, "Compliance with the Schempp Decision: A Decade Later," *Journal of Law and Education* 3 (July 1974): 403-04; Schwartz, "Separation of Church and State," 399; and "The Supreme Court: A Loss to Make Up For," 14.

[36] Smith, "Religion and the Schools," 227-28; Robert H. Birkby, "The Supreme Court and the Bible Belt: Tennessee Reaction to the 'Schempp' Decision," *Midwest Journal of Political Science* 10 (August 1966): 309; *New York Times*, 29 June 1962, 17, 26; 19 June 1963, 1, 18; 29 June 1963, 25; 30 June 1962, 20; 22 June, 1963, 20; Pfeffer, "The Schempp-Murray Decision," 175; LaMorte, "Compliance with the Schempp Decision," 405-06; Oscar George Theodore Sonneck, *Report on "The Star-Spangled Banner," "Hail Columbia," "America," "Yankee Doodle"* (Washington, D.C.: Government Printing Office, 1909), 37; *Stein v. Olshinsky*, 248 F.2nd 999 (2ns Cir.), *cert. denied*, 382 US 957 (1965); Pfeffer, "Prayer in Public Schools," 27; Sky, "The Establishment Clause," 1396; and "Brief of Attorney General of Maryland, Amicus Curiae," No. 119, October Term 1962, Supreme Court of the United States, 5.

century)—adjusted when forced to change. Interestingly, in an attack by America (the judiciary) on religion (school prayer and Bible reading), opinion sided *against* America in the name of Americanism. That was the strength of the religious-patriotic ideal, leaving atheist opponents with little room to maneuver. The religious patriotism of the majority American mind, however, never disappeared.

Texas and Kentucky both appeared before the Supreme Court in March 2005 to defend monuments to the Ten Commandments—Kentucky's inside the capitol, Texas's on the capitol grounds. In June, the Court demonstrated that uniformity was still impossible. A pair of split decisions ruled the Ten Commandments unconstitutional inside government buildings, but acceptable on their lawns. "The court has found no single mechanical formula," wrote Justice Stephen Breyer, "that can accurately draw the constitutional line in every case." Breyer quoted the *Shempp* and *Murray* decisions to demonstrate the historical frustration with inconsistency. Interestingly, Chief Justice Renquist, in his majority opinion endorsing the right of Texas to display a monument to the Ten Commandments on the capitol grounds, selectively quoted the *Shempp* and *Murray* opinion, repeating, "Religion has been closely identified with our history and government." His neglect of the final ruling in that opinion, however, stands as its own monument to the inconsistency so frustrating to Breyer.[37]

In April 2005, the Arkansas House of Representatives approved a bill disallowing school administrators from interfering in student-led public prayer on school grounds. Though it failed to receive a motion to appear on the Senate floor, the bill's overwhelming popularity in the House led representatives to promise its swift return.[38] Groups continue to fight America for America's sake—they fight the universal for the sake of the personal. And when outspoken atheist petitioners reappear, such as Michael Newdow and his unsuccessful attempt to remove "under God" from the Pledge of Allegiance, culminating in 2004, "mainstream" citizens follow the story in the popular media and damn their actions and characters as subversive at best, un-American at worst.[39]

[37] Quotations are from *Van Orden v. Perry*, the Texas decision. *Los Angeles Times*, 1 March 2005, A18; *New York Times*, 3 March 2005, A1; *Van Orden v. Perry*, 545 US__(2005), http://wid.ap.org/documents/scotus/_050627vanorden.pdf, accessed 29 June 2005; and *McCreary County, Kentucky v. American Civil Liberties Union*, 545 US__(2005), http://wid.ap.org/documents/scotus/050627mccreary.pdf, accessed 29 June 2005.

[38] Melissa Nelson, "Ark House Committee Approves School Prayer Bill," *The Associated Press State & Local Wire*; and "Senate Panel Silent on School Prayer Bill," *The Associated Press State & Local Wire*.

[39] Newdow v. United States Congress, 292 F.3d 597 (9th Circuit 2002); Elk Grove Unified School District v. Newdow, 542 US 1 (2004); *San Francisco Chronicle*, 27 June 2003, A1; and Howard Fineman, "One Nation, Under . . . Who?" *Newsweek*, 8 July 2002, 24.

The majority of the American populace receives Supreme Court rulings from news outlets rather than careful readings of opinions, as they did in 1963. The Court's *Murray* decision, then, created a controversy based more on its portrayal than the content of its written opinion. The pattern of responses upon responses only fomented public ire and exacerbated the negative reaction towards the opinion. In essence, the majority of the populace heard Alabama Representative George Andrews declare, "They put the Negroes in the schools, and now they've driven God out," before they heard Justice Tom Clark explain from his majority opinion, "The place of religion in our society is an exalted one." Exaggerated disapproval of every Supreme Court public school religion decision, *Murray* primary among them, stemmed from exaggerated initial coverage, while more thoughtful and accepting press evaluation and legal commentary prompted gradual acceptance.[40]

Acceptance, however, was reluctant. The *Murray* decision had a twenty-four percent approval rating in 1963. Twelve years later that figure rose to only thirty-five percent. In another survey, pollsters asked respondents whether someone who was ideologically opposed to all churches and forms of religion should be allowed to speak publicly. In 1954, thirty-seven percent of the population approved of the possibility, while in 1976 the number rose to sixty-four percent.[41] But hesitant compliance with the Supreme Court's *Murray* decision did not signal the American religious majority's willingness to grant full equality to non-believers. American citizens were products of their faith and nationalism, both of which assured them of a superiority based on beliefs and place of birth. That citizenry, however, was far less homogeneous than the anti-*Murray* majority assumed.

The growing ethnic and religious diversity in America aligned the 1963 Supreme Court with popular necessity, if not popular will. The broadest support for school prayer came from the section of the population with the lowest incomes and lowest education. African Americans, for example, remained more devoted to school prayer than whites due primarily to lower socioeconomic status and heavier reliance on religion and church activities, especially in the area of civil rights. The Anti-Defamation League of B'Nai B'rith, representing another prominent American minority, referred to the

[40] *Abington Township v. Schempp*, 374 US 203; and Gregory Casey, "Popular Perceptions of Supreme Court Rulings," *American Politics Quarterly* 4 (January 1976): 4-5, 12.

[41] Mariana Servin-Gonzalez and Oscar Torres-Reyna, "Trends: Religion and Politics," *Public Opinion Quarterly* 63 (Winter 1999): 620, 614.

Court's prayer decisions as "splendid reaffirmation[s] of a basic American principle."[42]

Decisions gain significance for a number of reasons. The *Murray* decision clearly acknowledged the virtual impossibility of absolute church and state separation. The continued acceptance of "under God" in the Pledge of Allegiance and similar customs made this impossibility clear, as did the fact that no Supreme Court decision had been an all-encompassing removal of religion from public schools. Even after *Murray*, the Bible could still be objectively and historically taught, but the religious majority consistently worried over the dismantling of structured religious activity in the public school system. They still do, though absolute separation remains impossible. The piecemeal-removal policy, however, regardless of the public outcry, stemmed (and still stems) from a pragmatic approach to the Establishment and Free Exercise clauses of the First Amendment.[43]

Whether John Dewey would recognize such judicial pragmatism as the Jamesian version of his youth is debatable. So too is the question of whether *Murray* logically elaborated on Horace Mann's original vision for American public education. Regardless, the Court clearly demonstrated its willingness to view the church as an important social, if not national, institution, leaving the disbelieving minority to patiently wait for further elaborations. The religious patriotic majority clearly demonstrated *its* willingness to fight for its definition of "Americanism," proving, if nothing else, the resiliency of the American mind and the traditions it held dear. Each copy of the Ten Commandments on each piece of state property stands today as a monument to that resiliency. The retrenchment of majority sentiment following *Murray* ensured that judicial decisions would not immediately place atheists on the same equal playing field as the religious. The American God did not die, but neither did the minority challenge, and as the 1960s cycled toward their inevitable conclusion, Dewey and Mann were left spinning quietly, carefully in their graves.

BIBLIOGRAPHY

Court Documents

"Appeal From the United States District Court for the Eastern District of Pennsylvania." No. 142. October Term 1962. Supreme Court of the United States.

[42] Belknap, "God and the Warren Court," 402; and John C. Green and James L. Guth, "The Missing Link: Political Activists and Support for School Prayer," *Public Opinion Quarterly* 53 (Spring 1989): 42-43.

[43] Coughlin, "Toward a Church-State Principle," 42-43.

"Brief and Appendix of Attorney General of Maryland, Amicus Curiae." No. 119. October Term 1962. Supreme Court of the United States.

"Brief in Opposition to Petition for Writ of Certiorari." No. 119. October Term 1962. Supreme Court of the United States.

"Brief of American Jewish Committee and Anti-Defamation League of B'Nai B'Rith as Amici Curiae." No. 119 and No. 142. October Term 1962. Supreme Court of the United States.

"Brief of Attorney General of Maryland, Amicus Curiae." No. 119. October Term 1962. Supreme Court of the United States.

"Brief of Respondents." No. 119. October Term 1962. Supreme Court of the United States.

"Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae." No. 119 and No. 142. October Term 1962. Supreme Court of the United States.

"Brief of the American Ethical Union as Amicus Curiae." No. 119 and No. 142. October Term 1962. Supreme Court of the United States.

"Brief of the American Humanist Association, As Amicus Curiae, and Motion for Leave to File Same." No. 119 and No. 142. October Term 1962. Supreme Court of the United States.

Cantwell v. Connecticut. 310 US 296, (1940). Accessed 2 October 2003: http://laws.findlaw.com/us/310/296.html.

Elk Grove Unified School District v. Newdow. 542 US 1 (2004). Accessed 23 June 2005: http://www.lexis-nexus.com.

Engel v. Vitale. 370 US 421, (1962). Accessed 15 March 2003: http://laws.findlaw.com/ us/370/421.html.

Everson v. Board of Education of Ewing. 330 US 1, (1947). Accessed 15 March 2003: http://laws.findlaw.com/us/330/1.html.

McCollum v. Board of Education. 333 US 203, (1948). Accessed 10 September 2003: http://laws.findlaw.com/us/333/203.html.

Minersville School District v. Gobits. 310 US 586, (1940).

Newdow v. United States Congress. 292 F.3d 597 (9th Circuit 2002). Accessed 1 July 2003: http://caselaw.lp.findlaw.com/data2/circs/ 9th/0016423p.pdf.

"On Writ of Certiorari To the Court of Appeals of the State of Maryland." No. 119. October Term 1962. Supreme Court of the United States.

"Oral Argument by Francis B. Burch, Esq., on Behalf of Respondents, Number 119—27 February 1963." In *Oral Arguments of the Supreme Court of the United States: The Warren Court, 1953 Term—1968 Term*. Paul M. Hebert Law Center, Baton Rouge; Frederick, MD: University Publications of America, Inc., 1984. Text-fiche.

"Oral Argument by Leonard J. Kerpelman, Esq., on Behalf of Petitioners, No. 119—27 February 1963." In *Oral Arguments of the Supreme Court of the United States: The Warren Court, 1953 Term—1968 Term.* Paul M. Hebert Law Center, Baton Rouge; Frederick, MD: University Publications of America, Inc., 1984. Text-fiche.

"Petition for a Writ of Certiorari to the Court of Appeals of Maryland." No. 119. October Term 1962. Supreme Court of the United States.

"Petitioners' Brief." No. 119. October Term 1962. Supreme Court of the United States.

School District of Abington Township v. Schempp. 374 US 203, (1963). Accessed 31 January 2003: http://laws.findlaw.com/us /374/203.html.

Stein v. Olshinsky. 248 F.2nd 999, (2ns Cir.), *cert. denied*, 382 US 957. (1965).

Torcasso v. Watkins. 367 US 488, (1961). Accessed 2 October 2003: http://laws.findlaw.com/us/367/488.html.

West Virginia State Board of Education v. Barnett. 319 US 624, (1943). Accessed 2 July 2003: http://laws.findlaw.com/us/319/624.html.

Zorach v. Clauson. 343 US 306, (1952). Accessed 7 July 2003: http://laws.findlaw.com/us/343/306.html.

Government Documents

Sonneck, Oscar George Theodore. *Report on "The Star-Spangled Banner," "Hail Columbia," "America," "Yankee Doodle."* Washington, D.C.: Government Printing Office, 1909.

U.S. Congress. House. *A Bill to Provide for the Inscription in the Courtroom in the U.S. Supreme Court Building of the Phrase "In God We Trust."* 88th Cong., 1st sess., H.R. 7252. *Congressional Record* 109, pt. 9 (25 June 1963): 11529.

U.S. Congress. House. James Madison. June 1789. *Annals of Congress.* Vol. 1, 1st Congress, 1789-1791. Washington: Gales and Seaton, 1834.

U.S. Congress. House. "The Supreme Court Decision on the Issue of Prayer in Our Public Schools." Extension of Remarks of Hon. Don H. Clausen of California in the House of Representatives. Transcript of Living Waters Broadcast, June 23, 1963. 88th Cong., 1st sess. *Congressional Record* 109, pt. 10 (24 July 1963): 13328.

U.S. Congress. Senate. "The Proposed Constitutional Amendment on Bible Reading and School Prayers." John J. Williams. 88th Cong., 1st sess. *Congressional Record* 109, pt. 8 (19 June 1963): 11088.

U.S. Constitution.

Newspapers

New York Times, 1962, 1963, 2005.
Los Angeles Times, 2005.
San Francisco Chronicle, 2003.

Other Published Primary Sources

Birkby, Robert H. "The Supreme Court and the Bible Belt: Tennessee Reaction to the 'Schempp' Decision." *Midwest Journal of Political Science* 10 (August 1966): 304-19.

Bozell, L. Brent. "Saving Our Children From God." *National Review*, 16 July 1963, 19-34.

Cohen, G. "Constitutional Law—Whether State Action Requiring Public Schools To Begin Each Day With Readings From the Bible Violates the First Amendment." *Chicago-Kent Law Review* 40 (Fall 1963): 167-74.

D. L. "Constitutional Law—Establishment Clause of the First Amendment—Bible Reading and the Lord's Prayer In Public Schools." *New York Law Forum* 9 (December 1963): 540-55.

"Freedom of Religion . . . Bible Reading In Schools." *American Bar Association Journal* 50 (January 1964): 81-82.

Howard, Jane. "The Most Hated Woman in America." *Life*, 19 June 1964, 91-94.

Katz, Wilber G., and Harold P. Southerland. "Religious Pluralism and the Supreme Court." *Daedalus* 96 (Winter 1967): 180-92.

Kendall, Willmoore. "American Conservatism and the 'Prayer' Decisions." *Modern Age* 8 (Summer 1964): 245-59.

Liston, Robert. "Mrs. Murray's War on God." *Saturday Evening Post*, 11 July 1964, 83-87.

McClure, William C. "Constitutional Law—First Amendment—State Law Requiring the Reading of the Holy Bible in the Public Schools Violates the 'Establishment Clause' of the Federal Constitution." *University of Pittsburgh Law Review* 25 (October 1963): 87-91.

"No Bible in the Schools?" *Life*, 12 April 1963, 63-68.

Pfeffer, Leo. "The Schempp-Murray Decision on School Prayers and Bible Reading." *Journal of Church and State.* 5 (Spring 1963): 165-75.

"Playboy Interview: Madalyn Murray." *Playboy*, October 1965, 61-74.

Pollak, Louis H. "Public Prayers in Public Schools." *Harvard Law Review* 77 (November 1963): 62-78.

Ritter, Daniel B. "Constitutional Law: The Bible Reading Cases." *Washington Law Review* 38 (Autumn 1963): 657-66.

Schwartz, Larry H. "Separation of Church and State: Religious Exercises in the Schools." *University of Cincinnati Law Review* 31 (Fall 1962): 408-34.

"The Supreme Court: A Loss to Make Up For." *Time*, 28 June 1963, 13-14.

"The Supreme Court, the First Amendment, and Religion in the Public Schools." *Columbia Law Review* 63 (January 1963): 73-97.

"Supreme Court: The Fourth 'R'." *Newsweek*, 11 March 1963, 24-25.

Van Alstyne, William W. "Constitutional Separation of Church and State: The Quest for a Coherent Position." *The American Political Science Review* 57 (December 1963): 865-882.

Secondary Sources

Belknap, Michal R. "God and the Warren Court: The Quest for "A Wholesome Neutrality." *Seton Hall Constitutional Law Journal* 9 (Spring 1999): 401-57.

Canon, Bradley C. "The Supreme Court as a Cheerleader in Politico-Moral Disputes." *The Journal of Politics* 54 (August 1992): 637-53.

Casey, Gregory. "Popular Perceptions of Supreme Court Rulings." *American Politics Quarterly* 4 (January 1976): 3-46.

Cord, Robert L. *Separation of Church and State: Historical Fact and Current Fiction*. New York: Lambeth Press, 1982.

Coughlin, Bernard J. S. J. "Toward a Church-State Principle for Health and Welfare." *Journal of Church and State* 11 (Winter 1969): 33-46.

"Educational Contributions of Horace Mann." Accessed 24 February 2003: http://www.cals.ncsu.edu/agexed/aee501/mann.html.

Elifson, Kirk W., and C. Kirk Hadaway. "Prayer in Public Schools: When Church and State Collide." *Public Opinion Quarterly* 49 (Autumn 1985): 317-29.

Fineman, Howard. "One Nation, Under . . . Who?" *Newsweek*, 8 July 2002, 20-25.

Green, John C., and James L. Guth. "The Missing Link: Political Activists and Support for School Prayer." *Public Opinion Quarterly* 53 (Spring 1989): 41-57.

Hirt, Catharina Csaky. "The Efficacy of Amicus Curiae Briefs in the School Prayer Decisions." Ph.D. diss., Vanderbilt University, 1995.

Kauper, Paul G. *Religion and the Constitution*. Baton Rouge: Louisiana State University Press, 1964.

Kessler, Sanford. "Tocqueville on Civil Religion and Liberal Democracy." *The Journal of Politics* 39 (February 1977): 119-46.

Kurland, Philip B. "The School Prayer Cases." In *The Wall Between Church and State*, ed. Dallin H. Oaks, 142-179. Chicago: The University of Chicago Press, 1963.

LaMorte, Michael W., and Fred N. Dorminy. "Compliance with the Schempp Decision: A Decade Later." *Journal of Law and Education* 3 (July 1974): 399-407.

Le Beau, Bryan F. *The Atheist: Madalyn Murray O'Hair*. New York: New York University Press, 2003.

Lemay, J. A. Leo, ed. *Deism, Masonry, and the Enlightenment: Essays Honoring Alfred Owen Aldridge*. Newark: University of Delaware Press, 1987.

Macedo, Stephen. "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism." *Political Theory* 26 (February 1998): 56-80.

Menand, Louis. *The Metaphysical Club*. New York: Farrar, Strauss and Giroux, 2001.

Monsma, Stephen V. "Justice Potter Stewart on Church and State." *Journal of Church and State* 36 (Summer 1994): 557-76.

Morgan, Richard E. *The Supreme Court and Religion*. New York: The Free Press, 1972.

Nelson, Melissa. "Ark House Committee Approves School Prayer Bill." *The Associated Press State & Local Wire*. Accessed 23 June 2005: http://www.lexis-nexis.com.

Perry, Barbara A. "Justice Hugo Black and the 'Wall of Separation Between Church and State'." *Journal of Church and State* 31 (Winter 1989): 55-72.

Pfeffer, Leo. "Prayer in Public Schools: The Court's Decisions." *National Forum* 68 (Winter 1988): 26-29.

"Progressive Education." Accessed 24 February 2003: http://www.ilt.columbia.edu/publications/projects/digitexts/notes/ilt_prog_education.html.

"Senate Panel Silent on School Prayer Bill." *The Associated Press State & Local Wire*. Accessed 23 June 2005: http://www.lexis-nexus.com.

Servin-Gonzalez, Mariana, and Oscar Torres-Reyna. "Trends: Religion and Politics." *Public Opinion Quarterly* 63 (Winter 1999): 592-621.

Sky, Theodore. "The Establishment Clause, the Congress and the Schools: An Historical Perspective." *Virginia Law Review* 52 (December 1966): 1395-1466.

Smith, Robert D. "Religion and the Schools: The Influence of State Attorneys General On the Implementation of *Engel* and *Schempp*." *Southern Quarterly* 8 (April 1970): 221-35.

Thompson, Dennis L. "The Kennedy Court: Left and Right of Center." *The Western Political Quarterly* 26 (June 1973): 263-79.

Way, Frank. "Stability and Change in Constitutional Litigation: The Public Piety Cases." *The Journal of Politics* 47 (August 1985): 910-25.
West, Ellis M. "Justice Tom Clark and American Church-State Law." *Journal of Presbyterian History* 54 (Winter 1976): 387-404.

The McNeese Review 43 (2005): 87-112

The Color of Birth Control Politics: Race, Class, and Norplant

Christina Gerken
Bowling Green State University

> A woman charged with child abuse last week was ordered in the early 1980s not to conceive any children after her son nearly starved to death, but the order was overturned on appeal. On Friday, prosecutors and foster parents familiar with the background of Ruby Pointer, 40, reacted with outrage that county social workers had done little to prevent her from abusing a new set of children. 'Here we are again,' said Ralph Boroff, the former Santa Cruz County assistant district attorney who prosecuted the earlier case. 'It's shameful neglect. They're doing an appalling job at their responsibility. This is the same damn situation as 10 years ago.' (*Philadelphia Inquirer* June 23, 1991)
>
> Three young sisters were in foster homes Friday and their mother was in custody after the girls were found malnourished in a squalid apartment and able only to grunt, authorities said. Neighbors said authorities had ignored repeated pleas to end the girls' 'nightmare.' Ruby Pointer, 40, pleaded not guilty Friday to child endangerment and marijuana cultivation charges. Police said that Pointer is not cooperating with them and that she breaks into incoherent speech when questioned. 'All she'll tell us is that the father of her children is either Tom Selleck or Rod Stewart.' (*Los Angeles Times* June 22, 1991)

When Ruby Pointer, a "welfare mother" convicted of child abuse in 1984,[1] was discovered to have neglected her three daughters in 1991, there was an

[1] In 1984, a California court convicted Ruby Pointer of child endangerment after her children were severely damaged by her adherence to a macrobiotic diet. Apparently, several counselors, social workers and pediatricians had tried to convince her to change her diet, which she refused to do. She also resisted the hospitalization of her semicomatose and severely malnourished son Jamal. The judge argued that Ruby Pointer showed little remorse and would not only harm any living children left in her care, but would also endanger the health and life of any fetus in utero should she become pregnant. He thus ordered her to practice contraception for the next five years.