Conscience and Belief
The Supreme Court and Religion

Edited with introductions by

Kermit L. Hall
North Carolina State University

GARLAND PUBLISHING, INC.
A MEMBER OF THE TAYLOR & FRANCIS GROUP
New York & London
2000

Introductions copyright © 2000 Kermit L. Hall. All rights reserved.

Library of Congress Cataloging-in-Publication Data

Conscience and belief: the Supreme Court and religion/ edited with introductions by Kermit L. Hall

p. cm. — (The Supreme Court in American society ; 8)

Includes bibliographical references.

ISBN 0-8153-3431-1 (alk. paper)

1. Freedom of religion—United States. 2. Liberty of conscience—United States. I. Hall, Kermit. II. Series.

KF4783 .C65 2000

344.73'096—dc21 00-062242

Printed on acid-free, 250-year-life paper

Manufactured in the United States of America

Series Introduction

The inscription carved above the entrance to the Supreme Court of the United States is elegant in its brevity and powerful in its directness: "Equal Justice Under Law." No other words have been more regularly connected to the work of the nation's most important judicial tribunal. Because the Court is the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States, it functions as the preeminent guardian and interpreter of the nation's basic law. There was nothing, of course, in the early history of the Court that guaranteed that it would do just that. The justices in their first decade of operation disposed of only a handful of cases. During the subsequent two centuries, however, the Court's influence mushroomed as it became not only the authoritative interpreter of the Constitution but the most important institution in defining separation of powers, federalism, and the rule of law, concepts at the heart of the American constitutional order.

Chief Justice Charles Evans Hughes once declared that the Court is "distinctly American in concept and function." Few other courts in the world have the same scope of power to interpret their national constitutions; none has done so for anything approaching the more than two centuries the Court has been hearing and deciding cases. During its history, moreover, the story of the Court has been more than the sum of either the cases it has decided or the justices that have decided them. Its story has been that of the country as a whole, in war and peace, in prosperity and depression, in harmony and discord. As Alexis de Tocqueville observed in *Democracy in America*, "I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people." That power, as Tocqueville well understood, has given the justices a unique role in American life, one that combines elements of law and politics. "Scarcely any political question," Tocqueville wrote, "arises in the United States that is not revolved, sooner or later, into a judicial question." Through the decisions of the Supreme Court, law has become an extension of political discourse and, to that end, the rule of law itself has been embellished. We appropriately think of the high court as a legal institution, but it is, in truth, a hybrid in which matters of economics, cultural values, social change, and political interests converge to produce what we call our constitutional law. The Court, as a legal entity, speaks through the law but its decisions are shaped by and at the same time shape the social order of which it is part. All of

which is to say that, in the end, the high court is a human institution, a place where justices make decisions by applying precedent, logic, empathy, and a respect for the Constitution as informed by the principle of "Equal Justice Under Law." That the Court has at times, such as the struggle over slavery in the 1850s, not fully grasped all of the implications of those words does not, in the end, diminish the importance of the Court. Instead, it reminds us that no other institution in American life takes as its goal such a lofty aspiration. Given the assumptions of our constitutional system, that there is something like justice and freedom for all, the Court's operation is unthinkable without having the concept of the rule of law embedded in it.

As these volumes attest, interest in the Court as a legal, political, and cultural entity has been prodigious. No other court in the American federal system has drawn anything approaching the scholarly attention showered on the so-called "Marble Palace" in Washington, D.C. As the volumes in this series make clear, that scholarship has divided into several categories. Biographers, for example, have plumbed the depths of the judicial mind and personality; students of small group behavior have attempted to explain the dynamics of how the justices make decisions; and scholars of the selection process have tried to understand whether the way in which a justice reaches the Court has anything to do with what he or she does once on the Court. Historians have lavished particular attention on the Court, using its history as a mirror of the tensions that have beset American society at any one time, while simultaneously viewing the Court as a great stabilizing force in American life. Scholars from other disciplines, such as political science and law, have viewed the Court as an engine of constitutional law, the principal agent through which constitutional change has been mediated in the American system, and the authoritative voice on what is constitutional and, thereby, both legally and politically acceptable. Hence, these volumes also address basic issues in the American constitutional system, such as separation of powers, federalism, individual expression, civil rights and liberties, the protection of property rights, and the development of the concept of equality. The last of these, as many of the readings show, has frequently posed the most difficult challenge for the Court, since concepts of liberty and equality, while seemingly reinforcing, have often, as in the debate over gender relations, turned out to be contradictory, even puzzling at times.

These volumes also remind us that substantial differences continue to exist, as they have since the beginning of the nation, about how to interpret the original constitutional debates in the summer of 1787 in Philadelphia and the subsequent discussions surrounding the adoption of the Bill of Rights, the Civil War amendments, and Progressive-era constitutional reforms. Since its inception, the question has always been whether the Court , in view of the changing understandings among Americans about equality and liberty, has an obligation to ensure that its decisions resonate with yesterday, today, tomorrow, or all three.

此为试读,需要完整PDF请访问: www.ertongbook.com

Volume Introduction

Few issues in modern American life have stirred such sustained controversy as the constitutional protection afforded religious beliefs. The First Amendment to the Constitution provides that Congress shall neither establish a religion nor interfere with the free exercise of it. What exactly these provisions in the amendment mean has been the subject of heated debate. At a minimum, the framers of the amendment meant through the Establishment Clause to prevent the newly created federal government from granting to any denomination the political and governmental privileges enjoyed by the Anglican Church in England. Yet the framers almost certainly did not mean to do away with existing religious establishments in the states; to the contrary, the Establishment Clause was designed to prevent national religious establishments, while leaving the vexing political problem of what to do on the state level to the states. The Free Exercise Clause aimed to prevent the government from persecuting dissenting religious radicals, a practice that was widespread in England. There was also a spirit among the framers of the Constitution that persons who conscientiously objected on religious grounds to a governmental practice, such as participating in a war, could not be coerced into doing so. Yet the states continued to restrict the practice of free exercise, and it is most likely the case that the federal Free Exercise Clause was meant to prevent the federal government from violating the rights of religious dissenters.

The Supreme Court has struggled in modern times to give definition to the meaning of religious freedom. As late as 1879, for example, the high court proclaimed in *Reynolds* v. *United States* that America was a "Christian nation" as it upheld a federal law prohibiting polygamy among Mormons. The fact that the Bill of Rights for most of the nation's history did not apply against the states and the federal government's minor role until recently in the lives of most Americans meant that religion was not a matter of critical constitutional concern among the justices. However, since the 1930s the issue of the incorporation of the religion clauses of the First Amendment through the Fourteenth Amendment and the growing secularization of America have elevated the role of the Court in this area dramatically. By the 1940s American public life had become more secular, even though large numbers of Americans remain committed to traditional religious beliefs and practices in their private lives. Moreover, throughout the twentieth century religious practices have become increasingly varied, breaking what had historically been viewed as the essential link between Protestant religion and good

government. Today, the role of the Court in matters of religion, as these essays remind us, can best be understood as a struggle to define the relationship of religion to government in the context of a social order that treats religion as a predominantly private activity.

Contents

GOD AND THE WARREN COURT: THE QUEST FOR "A WHOLESOME NEUTRALITY"

Michal R. Belknap[*]

I. INTRODUCTION

In 1962, Representative Alvin O'Konsinski (R. Wis.) exclaimed, "We ought to impeach these men in robes who put themselves up above God."[1] The target of his outrage was the Supreme Court, headed by Chief Justice Earl Warren. The reason for his outburst was the Warren Court's decision declaring that the Constitution forbade praying in public schools.[2] That ruling, coupled with another decision one year later, which held that classroom Bible reading also violated the First Amendment's ban on the establishment of religion,[3] "probably generated as much discussion, controversy, and criticism of the Court as its school desegregation, legislative reapportionment, and police interrogation decisions."[4] Despite the controversy aroused by the Warren

---

[*] Professor of Law, California Western School of Law, Adjunct Professor of History, University of California, San Diego. B.A., 1965, University of California, Los Angeles; M.A., 1967, Ph.D, 1973, University of Wisconsin; J.D., 1981, The University of Texas. During the 1984-1985 academic year Professor Belknap served as Richard J. Hughes Distinguished Visiting Professor of Constitutional and Public Law and Policy at the Seton Hall University School of Law. This article includes material from a forthcoming history of the Warren Court, to be published by the University of South Carolina Press. The author wishes to thank Marshall Brenner and Barbara Glennan for their help with the research, Professor Glenn Smith for his assistance with Congressional procedure, and Professors Laurence Benner, Marilyn Ireland and Matthew Ritter for reading and commenting on the manuscript.

[1] JOHN HERBERT LAUBACH, SCHOOL PRAYERS: CONGRESS, THE COURTS, AND THE PUBLIC 2 (1969).

[2] *See* Engel v. Vitale, 370 U.S. 421 (1962).

[3] *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[4] Paul G. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968). While controversial, Dean John Sexton has insisted that the

Court, these rulings have survived numerous Congressional efforts to overturn them by amending the Constitution.[5] Although the opposition was widespread and vocal, the decisions of the theoretically unrepresentative Supreme Court reflected the popular will better than did the complaints of its critics in the political branches of the government.[6] The Court outraged those who wanted government to promote religion, but in a nation that was becoming increasingly diverse and religiously divided, there was no consensus as to what faith the state should foster. Ultimately, the only policy that could command the support of a majority of the American people was governmental neutrality toward religion. That is what the Warren Court, not always with complete success, sought to achieve.

Part II of this article outlines the religious views of the Justices who comprised the Warren Court. Part III discusses the religious divisions within the nation to which they addressed their Free Exercise and Establishment Clause decisions, while Part IV sketches the development of the constitutional law of church-state relations down to the time when Earl Warren became Chief Justice in 1953. This article next discusses the Warren Court's Sunday closing law decisions and the reaction provoked by those rulings, which upheld business regulations that benefited Christians while burdening Jews and other Sab-

---

Warren Court's religion clause decisions were not doctrinally important. *See* John Sexton, *The Warren Court and the Religion Clauses of the First Amendment*, *in* THE WARREN COURT: A RETROSPECTIVE 104 (Bernard Schwartz ed., 1996). Dean Sexton stated, "Quite simply, the Warren Court cases on church and state that were noteworthy political and social events added little to the jurisprudence of the First Amendment's Religion Clauses." *Id.* at 104. Sexton argued that

> [these decisions] cannot be described as pathbreaking. Only *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)] can be viewed as a seminal case, and then only if one shares my view that the Supreme Court's earlier decisions in *Schneider v. New Jersey*, [319 U.S. 105 (1943)], *Cantwell v. Connecticut*, [310 U.S. 296 (1940)], and *Murdock v. Pennsylvania* [308 U.S. 147 (1939)] did not establish a right of free exercise with sufficient doctrinal clarity. Moreover, even if one does view *Sherbert* as seminal, its doctrinal power and ultimate influence are open to serious question.

Id. at 105. Although this author is inclined to view the Warren Court's religion clause decisions as somewhat more doctrinally significant than Sexton considers them to be, this article does not address that issue.

[5] *See infra* notes 332-390 and accompanying text.

[6] The best evidence of this is the failure of those critics to persuade Congress to pass a constitutional amendment overturning those decisions. *See infra* notes 332-390 and accompanying text.

batarians. It then examines in Part VI cases in which the Warren Court held that government could no longer be permitted to place those whose religious beliefs or practices set them apart from a majority of Americans at a disadvantage. The article will demonstrate that these decisions reflected the reasoning underlying the prayer and Bible reading rulings: a conviction that government must be entirely neutral toward religion. Part VII examines the Warren Court's rulings prohibiting religious exercises in public schools. Part VIII explains that despite the outrage provoked by those decisions, all proposals to overturn them by constitutional amendment failed. It argues that this happened, not because neutrality was a popular concept, but because, although most Americans favored some sort of governmental support for religion, they could not agree upon specifics. As a principle, neutrality was flawed, but the type of cases that would reveal its weaknesses did not reach the Supreme Court until the eve of Chief Justice Warren's retirement in 1969. As Part IX explains, although disagreeing among themselves about precisely what neutrality required, the members of the Warren Court continued until 1969 to make it their objective. Until the very end they implemented, out of conviction, a policy the nation accepted out of necessity.

II. THE JUSTICES' RELIGIOUS VIEWS

The Warren Court's decisions interpreting the First Amendment were not, as critics often charged, the product of hostility toward religion. In his memoirs, Chief Justice Warren wrote, "The majority of us on the Court were religious people . . . ."[7] Although most were not active churchmen, Justice Tom Clark was. Raised in an Episcopalian family, he became a Presbyterian as an adult.[8] Justice Clark was an active Christian, who viewed himself as a man of faith.[9] Justice William J. Brennan, Jr., a Catholic, attended mass regularly.[10] The Chief Justice, on the other hand, was "[a]t best a nominal Baptist."[11] Jus-

[7] EARL WARREN, THE MEMOIRS OF EARL WARREN 316 (1977).

[8] *See* Ellis M. West, *Justice Tom Clark and American Church-State Law*, 54 J. OF PRESBYTERIAN HIST. 387, 387-88, 400 (1976).

[9] *See id.* at 400. Justice Clark's thinking about church-state relations resembled that of contemporary Presbyterians. *See id.* at 404 n.89.

[10] *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 9 (1998). According to Horwitz, the Eisenhower administration, which appointed Justice Brennan because Francis Cardinal Spellman was pressuring the administration to nominate a Catholic, checked with his parish priest to make sure he attended Sunday Mass regularly before announcing the appointment. *See id.*

[11] ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 387 (1997).

此为试读,需要完整PDF请访问: www.ertongbook.com

tice Hugo Black, who had taught Sunday school at the First Baptist Church in Birmingham, Alabama as a young man, had stopped attending church services by the time of his appointment to the Supreme Court in 1937.[12] Likewise, Justice William O. Douglas, the son of a Presbyterian minister who had gone to church three times per week as a teenager, eventually began to question the virtues of organized religion and to entertain doubts about such important articles of Christian faith as the virgin birth and the resurrection of Jesus.[13] The wilderness became the place of worship for this devoted outdoors man.[14] Justice Abe Fortas had been raised as an Orthodox Jew, but even during the most religious period of his life, he viewed Judaism as primarily a matter of ritual, and it "never had much spiritual meaning for him."[15] Justice Felix Frankfurter was descended from a long line of rabbis, but his father had abandoned religion for business after suffering a crisis of faith during his last year of religious studies.[16] Justice Frankfurter was an agnostic, and his only involvement in Jewish affairs was his membership in the American Jewish Committee.[17]

Yet, while many members of the Warren Court had fallen away from organized religion, they were not hostile to it. Both Justice Black and Chief Justice Warren sent their children to Sunday school.[18] Justice Black viewed the Scriptures as a source of moral guidance, and he instructed his son to study them carefully.[19] The Chief Justice also viewed religion as a valuable source

---

[12] *See* Barbara A. Perry, *Justice Hugo Black and the Wall of Separation Between Church and State*, 31 J. OF CHURCH & ST. 55, 57-59 (1989). His biographer, Roger K. Newman, reports that Justice Black and his wife, Elizabeth, did sometimes attend services at All Souls Unitarian Church in the 1960's. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 521 (1994). Newman adds, however, "A more formally irreligious man would have been hard to find." *Id.*

[13] *See* JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 23, 44-45 (1980).

[14] *See id.* at 44.

[15] LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 8 (1990).

[16] *See* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 8 (1982).

[17] *See id.* at 131.

[18] *See* CRAY, *supra* note 11, at 387; Perry, *supra* note 12, at 58.

[19] *See* Perry, *supra* note 12, at 59.

of ethical guidance, and he kept a Bible beside his bed.[20] Chief Justice Warren once said in a candid interview published after his death, "A person who has no religion of any kind is almost a lost soul."[21]

III. A RELIGIOUSLY DIVIDED NATION

Although the Warren Court was hardly hostile to religion, the abuse it received for its rulings, which prevented public schools from inculcating spiritual values, was hardly surprising. By almost any measure, when Earl Warren became Chief Justice in 1953, the United States was a very religious nation. Bible sales had escalated dramatically since 1949.[22] Church membership rose from 57% of the population to 64% during the 1950's.[23] By 1958, Americans were spending nearly one billion dollars per year building new churches, nearly twice the amount spent on public hospital construction.[24] In 1954, 96% of those interviewed by the Gallup Poll said they believed in God.[25] One decade later, 63% claimed to pray frequently while only 6% admitted never praying at all.[26] Even popular culture reflected the public's religious bent. A novel about Jesus, *The Robe*, made the fiction best-seller list in 1953, and five of the six non-fiction best sellers also had religious themes.[27] One of the country's best-liked television personalities during the 1950's was Bishop Fulton J. Sheen, whose "Life is Worth Living" show often outdrew Milton Berle's popular comedy program.[28]

---

[20] *See* CRAY, *supra* note 11, at 387. Chief Justice Warren and his wife, Nina, "sent their children to Sunday school at the local Baptist Church, not for doctrinaire purposes, but to master the precept that 'if one believes in the principles learned through the Gospel and tries to abide by them, it is bound to affect one's actions and reactions.'" *Id.* at 62.

[21] *Id.*

[22] *See* JAMES GILBERT, ANOTHER CHANCE: POSTWAR AMERICA, 1945-1958 238 (1981).

[23] *See id.*

[24] *See id.*

[25] *See* 2 Gallup Poll at 1293 (1972). This poll was taken on December 18, 1954. *See id.*

[26] *See* 3 Gallup Poll at 1863 (1972). This poll was taken on February 7, 1964. *See id.*

[27] *See* GILBERT, *supra* note 22, at 238.

[28] *See id.*

Although most Americans were religious, their religious beliefs and affiliations divided rather than united them. Indeed, theologian Will Herberg argued that religion was replacing nationality, language, and culture as America's chief basis of social differentiation.[29] While ethnic intermarriages increased, religious intermarriages did not, and religion was often the most obvious basis of social cleavage in the burgeoning suburbs.[30] For example, emigrants from ethnic urban neighborhoods, where their faiths had been dominant, clung tightly to the new churches and synagogues they founded in suburban areas where they constituted a minority.[31] Catholic and Protestant children attended different schools, played on different teams, attended different social functions, and generally kept their distance from one another.[32] As adults, members of these two religious groups sometimes joined the same country clubs, but they golfed and developed close friendships mainly with those who shared their own religious backgrounds.[33] The wall between Gentiles and Jews was even higher.[34] Most country clubs catered predominantly to one religion or the other, and friendships between Christians and Jews rarely matched, in warmth, intimacy, and trust, those with other members of their own groups.[35] A 1958 study verified this phenomenon, finding that Jews and Gentiles were distinctly uncomfortable in each others' presence.[36]

The 1960 presidential campaign highlighted the seriousness of the religious divisions in America. John F. Kennedy was only the second Catholic nominated for President by a major party, and the first since Al Smith, whose Catholicism had contributed significantly to his overwhelming defeat in 1928.[37]

---

[29] *See* RICHARD POLENBERG, ONE NATION DIVISIBLE: CLASS, RACE, AND ETHNICITY IN THE UNITED STATES SINCE 1938 146-47 (1980) (citing WILL HERBERG, PROTESTANT-CATHOLIC-JEW (1955)).

[30] *See id.* at 146.

[31] *See id.* at 148-49.

[32] *See id.* at 147.

[33] *See id.* at 147-48.

[34] *See id.* at 147.

[35] *See id.* at 148.

[36] *See id.* at 147.

[37] *See* DAVID BURNER, THE POLITICS OF PROVINCIALISM: THE DEMOCRATIC PARTY IN TRANSITION, 1918-1932 217-22 (1967). *But cf.* MICHAEL E. PARRISH, AMERICA IN PROSPERITY AND DEPRESSION, 1920-1941 214-16 (1992) (arguing that Smith gained as well

Some Alabama Methodists claimed Senator Kennedy's candidacy was the product of political machinations by the Papacy.[38] Sharing their fear that a Catholic President would be controlled by the Church, and would, therefore, give government money to Catholic schools and other institutions, Norman Vincent Peale and other Protestant clergy and laymen organized the National Conference of Citizens for Religious Freedom.[39] The approximately nine and one half million member Southern Baptist Convention also mobilized to defeat Kennedy.[40] A Baptist publication, the *Baptist Standard*, editorialized that a Catholic President would not be free to exercise his own judgment, an argument Kennedy soon realized he needed to answer if he did not wish to share Smith's fate.[41]

Ignoring warnings from most of his advisors, he accepted an invitation to address the Greater Houston Ministerial Association on September 12, 1960.[42] Kennedy assured a hostile crowd that he favored a United States that was officially neither Catholic, Protestant, nor Jewish, and declared, "I believe in an America, where the separation of church and state is absolute-where no Catholic prelate would tell the President (should he be Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote."[43] His speech was well received, and the next day, Senator Kennedy's Republican opponent, Vice-President Richard Nixon, agreed that religious issues should be eliminated from the campaign.[44]

Nevertheless, religion significantly influenced the outcome of the election.[45] Had he been a Protestant Democrat, Kennedy would have received about half

---

as lost votes because of his Catholicism and that his defeat was due mainly to other factors).

[38] *See* POLENBERG, *supra* note 29, at 165.

[39] *See* ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960'S 22 (1984).

[40] *See id.*

[41] *See* POLENBERG, *supra* note 29, at 165.

[42] *See* MATUSOW, *supra* note 39, at 22.

[43] *Id.* at 23 (footnote omitted).

[44] *See id.*

[45] *See* POLENBERG, *supra* note 29, at 167.

of the Protestant vote; instead, he received 38%.[46] On the other hand, a Protestant Democrat would have received only an estimated 63% of the Catholic vote,[47] while Kennedy received 80%.[48] Since Protestant defections occurred mainly in Midwestern farm states, which Kennedy figured to lose anyway, and in the South, where the Democrats had a huge majority, they did not harm greatly his chances of winning the election.[49] The extra Catholic votes he garnered, on the other hand, were concentrated in hotly contested Northern industrial states, such as New Jersey, Illinois, and Michigan.[50] Thus, the religious divisions in the country contributed significantly to Kennedy's razor-thin victory over Nixon.[51]

Unfortunately, the election of America's first Catholic President did not put an end to political conflict based on religion.[52] During Kennedy's presidency, most of the battles—over issues such as the liberalization of divorce laws and the proscription of birth control devices—were fought at the state and local level.[53] President Kennedy's efforts to enact federal aid to education, however, were thwarted by a dispute over whether parochial schools should receive government money.[54]

IV. THE INTERPRETATION OF THE RELIGION CLAUSES PRIOR TO THE WARREN COURT

A. Extent Of Protection For Religious Minorities

The religious divisions within American society and the conflicts among

---

[46] *See id.* at 168.

[47] *See* MATUSOW, *supra* note 39, at 27.

[48] *See* POLENBERG, *supra* note 29, at 168.

[49] *See* MATUSOW, *supra* note 39, at 28.

[50] *See id.*

[51] *See* POLENBERG, *supra* note 29, at 168.

[52] *See id.* at 169.

[53] *See id.*

[54] *See id.* at 169-72.

religious groups that unsettled American politics necessarily affected judicial interpretation of the First Amendment's religion clauses. The Warren Court inherited from its predecessors a body of doctrine that forbade governmental interference with religious belief and safeguarded the right of even the most unpopular minorities to teach and preach what they believed. As it had been interpreted prior to 1953, however, the First Amendment did little to prevent any sect, or combination of sects, which commanded a political majority, from utilizing governmental institutions to promote its values and even its dogma.[55] In *Reynolds v. United States*,[56] the Court had announced that "Congress was deprived of all legislative power over mere opinion,"[57] but had gone on to hold that the national legislature could prohibit Mormons from practicing polygamy, even though that practice was part of their religion.[58] *Reynolds* allowed the country's Protestant majority to use the power of government to impose its cultural values on a religious minority.[59]

During the quarter century after 1920, the Supreme Court had extended somewhat greater constitutional protection to disfavored religious minorities. In *Meyer v. Nebraska*[60] and *Pierce v. Society of Sisters*,[61] the Court used substantive due process[62] to invalidate state laws that sought to destroy the paro-

---

[55] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

[56] 98 U.S. 145 (1878).

[57] *Id.* at 164. Subsequently, in a ruling inconsistent with *Reynolds*' declaration that the First Amendment protected religious belief, the Court upheld an Idaho territorial statute requiring all voters to sign an oath swearing that they were not members of any organization that taught polygamy or celestial marriage. *See* Davis v. Beason, 133 U.S. 333, 348 (1890). As Professor Laycock has pointed out, "In effect, voters had to swear that they were not Mormons." Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 417 (1986).

[58] *See Reynolds*, 98 U.S. at 166.

[59] The *Reynolds* Court noted that polygamy had "always been odious among the northern and western nations of Europe." *Id.* at 164.

[60] 262 U.S. 390 (1923).

[61] 268 U.S. 510 (1925).

[62] "Substantive due process" is a doctrinal construct that had been employed mainly to hold unconstitutional economic regulations the Justices considered unreasonable. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 374-82 (5th ed. 1995).

此为试读,需要完整PDF请访问: www.ertongbook.com