MEMORANDUM

To: Justice Powell  
From: Leslie  

No. 85-1513, Edwards v. Aquillard  

I have not forgotten that you asked me to draft a concurrence in this case. I have spoken to Justice Brennan's clerk who says that he (the clerk) has just started work on the opinion and does not expect it to circulate for several weeks. I would expect to have a draft of the concurrence to you next week, in time for it to be edited and ready for circulation shortly after the Court opinion.
March 3, 1987

Re: NO. 85-1513-Edwards v. Aguillard

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference
March 5, 1987

85-1513 - Edwards v. Aguillard

Dear Bill,

My present inclination is to write separately in this case and concur in the judgment.

Sincerely yours,

Justice Brennan

Copies to the Conference
March 5, 1987

Re: 85-1513 - Edwards v. Aquillard

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference
Banned in Alabama

The Judge's Decision in the Alabama schoolbook case is, as lawyers say, profoundly and irremediably wacko. It won't survive appeal unless the Supreme Court chooses to rewrite the First Amendment. But for all its eccentricity, the decision touches a serious question: What moral values, if any, should a public school reflect? Many schools have succeeded in scrubbing all of the traditional religious references out of their curricula, leaving only a mushy indecision on matters of basic morality. That is disquieting not only to fundamentalist Christians such as the parents in the Alabama case. You don't have to read very far in the textbooks at issue to see what the plaintiffs were complaining about.

Legally, this whole proceeding is a genuine oddity. It began when a parent went into federal court six years ago to protest an Alabama law that encouraged prayer in classrooms. After giving it long study, Judge W. Brevard Hand concluded that the Supreme Court had been wrong all these years and the Alabama law was constitutional. He went on to say that, if he were overruled and told that religion must be kept out of the schools, he would reopen the whole question to see whether secular humanism was not also a religion that must be excluded. This suit was the consequence. Judge Hand has now found that some 40 common schoolbooks are infected with secular humanism, whatever that is, and he has banned them from Alabama's public schools.

The judge convicted those books of the wrong charge. Most of them are guilty not of promoting secular standards, but rather of offering no standards at all. Their publishers, terrified of offending any point of view, have stripped them down to a level of vacuity and evasiveness that deserves to be considered criminal, if not in the legal sense. While Judge Hand is wrong about much, he is dead right in observing that it's impossible to give a coherent account of American history, as some of these books attempt, without reference to religious belief.

No religious community is ever going to be satisfied with the public schools' handling of the deep questions of faith and ethics. That's why churches, synagogues and mosques usually run their own programs for children. The Constitution was not written by atheists. It was written by people who held deep convictions of their own and wanted to ensure that other faiths would never be able to use public institutions to oppress theirs. That was a valid concern in the 18th century, and it is no less valid now.

But the Constitution does not require schools to avoid all descriptive reference to religion or to suspend judgment on all questions of moral conduct. Judge Hand has given a ludicrous answer, but it's a real question.
Re: No. 85-1513, Edwards v. Aguillard

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

cc: The Conference
I have had an interesting afternoon reviewing the first draft of a concurring opinion, and commend you on doing this so well and so quickly. Apart from minor editing, and a suggested change in the first paragraph, I think the draft through Part I (pp. 1-17) is excellent, and I have no substantive changes or additions to suggest.

You also have done quite well in incorporating many of my views in Part II, as we have discussed. I think, however, that some additions – either in the text or in notes – would strengthen the discussion of what
properly can be taught and why. I now identify possible ideas or facts that may be included in the revision of Part II, either in the text or in notes.

1. It would be interesting as well as educational to include more about the early history of our country. Certainly the Pilgrims, and perhaps others (my history is bit weak here!), came to America to escape religious persecution. The more relevant history, however, is that with which you are now familiar. I refer particularly to the history of the First Amendment. I have in mind Mason's Declaration of Rights followed by Madison's Bill of Rights, and I believe by one of his Federalist papers. It may be that the Declaration of Independence itself referred to religious freedom. I see no reason to go into Jefferson's historic role, as the
Court has talked about it, and I think Bill Rehnquist wrote a long opinion in dissent.

2. One of your quotes mentions the teaching of comparative religions. This would be a good place to add a footnote, after you hear from the Library's research, as to the number of major religions now practiced in the United States with IRS exemptions. It could be argued, I suppose, that a statute such as Louisiana's could be viewed as discriminatory. Of course, this diversity of religions is of comparatively modern origin.

3. We should at least say at some point that the Bible, quite apart from its prominence in the religious history of the Christian era, is widely recognized as one of the great works of literature read more widely than any other book.
4. In a couple of his opinions, Chief Justice Burger referred to history and the prominence of religion in our history. I joined him in the Christmas pageant case, but probably not in others.

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At this point, you are wondering whether I am expecting you to write 15 or 20 pages. I have no such thought and think the basic facts and ideas can be included quite summarily.

I will discuss the timing on this with you.

L.F.P., Jr.

ss
March 11, 1987

85-1513 Edwards v. Aguillard

Dear Bill:

Please join me in your opinion for the Court.

As I have some separate views, not inconsistent with your opinion, I plan to write a concurring opinion in due time.

Sincerely,

Justice Brennan

1fp/ss

cc: The Conference
March 16, 1987

No. 85-1513  Edwards v. Aguillard

Dear Bill,

I join all but Part II of your opinion. I may add a few words depending on the additional writing.

Sincerely,

[Signature]

Justice Brennan

Copies to the Conference
June 15, 1987

Re: 85-1513 - Edwards v. Aguillard

Dear Nino:

Please join me in your dissent.

Sincerely,

Justice Scalia

cc: The Conference
June 16, 1987

No. 85-1513  **Edwards v. Aguillard**

Dear Lewis,

Please join me in your concurring opinion.

Sincerely,

Sandra

Justice Powell

Copies to the Conference
85-1513 Edwards v. Aguillard (Leslie)

WJB for the Court 12/15/86
1st draft 3/3/87
2nd draft 3/12/87
3rd draft 6/15/87
4th draft 6/16/87
5th draft 6/16/87
Joined by TM 3/3/87
JPS 3/5/87
HAB 3/9/87
LFP 3/11/87

SOC joins all but Part II 3/17/87
BRW concurring in the judgment
1st draft 3/18/87
2nd draft 6/17/87
BRW will write separately and concur in the judgment
3/5/87

LFP concurring
1st draft 3/19/87
2nd draft 4/1/87
3rd draft 4/24/87
4th draft 6/17/87
Joined by SOC 6/16/87

AS dissenting
1st draft
2nd draft 6/17/87
3rd draft 6/18/87
Joined by CJ 6/15/87
LFP will write concurring opinion 3/11/87