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THE JUDICIAL EXPERIMENT WITH PRIVATIZING RELIGION

Gerard V. Bradley†

I. INTRODUCTION

1984 was the high water mark of the U.S. Supreme Court's campaign to privatize religion—to strip public life bare of the sacred.¹ It may also prove to be the mid-point: the “naked public square” was mandated by the Supreme Court in 1962, and there is good reason to think that now, in 2007, the Court might finally put an end to their misbegotten experiment.

“Privatization” of religion is tantamount to “secularism.” Neither term denotes atheism, the claim that there is no God and that religion is, basically, an illusion. Privatization and secularism refer not to the denial of God, but to the claim that the relevant activity—e.g., governing—should proceed *as if there is no God*. Historian Jon Butler suggests that secularization typically means “the essential disappearance of religion from public life despite its presence, even a vital presence, in private life.”²

In constitutional law the privatization (or secularist) project is carried out doctrinally through the three-part *Lemon* test.³ Other doctrinal carriers include the so-called “endorsement” test,⁴ which holds that religion may never be endorsed by public authority as good, valuable, or desirable compared to (what is usually called) “non-religion.”⁵ Another expression of the Court's secularist mandate is that the state must always be “neutral” as between belief and unbelief, and must never favor religious adherents collectively over non-adherents.⁶ These themes have dominated the Court's church and state jurisprudence since 1962.

It is almost correct to say that the Supreme Court introduced these themes in revolutionary fashion in the 1962 school-prayer case, *Engel v. Vitale*.⁷ Almost,

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1. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

2. Jon Butler, *Jack-in-the-Box Faith: The Religion Problem in Modern American History*, 90 J. AM. HIST. 1360 (2004).

3. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (“[E]very act of public authority must have a secular legislative purpose, must not (primarily) advance religion, and must always keep religion and the state free of ‘excessive entanglement.’”).

4. See, *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

5. See, *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

6. See, *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994).

7. *Engel v. Vitale*, 370 U.S. 421 (1961).

because the Court's privatization initiative was anticipated during a brief "secular spring" in the late 1940's. First in dictum in the 1947 *Everson* decision,⁸ and then in the holding of *McColum*⁹ a year later, the Court tried to secularize public life. This privatizing *putsch* failed; I describe this false start in Part I.

In Part II we see that in 1952, in *Zorach v. Clauson*,¹⁰ the Court rejected *McColum* and its secularist doctrinal baggage. The *Zorach* court once again centered our constitutional law upon a creative partnership between religious and governmental entities, an arrangement from which coercion of conscience was barred and in which no religious group received special favors. But this was *not* secularism. It was not the "naked public square." It was a stable pluralism of publicly involved religions.

In Part III I show that, on the eve of the Court's watershed decision in *Engel v. Vitale*, constitutional law across the country had recovered from the Court's failed secularist campaign and had re-centered itself upon *Zorach*'s traditional doctrines of free and equal cooperation between church and state.

In Part IV I take a closer look at the *Engel* holding of 1962, and try to determine what the Court intended with that grand departure.

In the Conclusion I explain why 2007 might be the year of reckoning for the "naked public square" decreed in *Engel*.

II. FALSE START OF PRIVATIZATION IN THE 1940S

Engel v. Vitale launched the privatization campaign in 1962. The Court's decision was doctrinally breathtaking and its result a shock to our politics. Although *Engel* was not woven from whole cloth, its roots in Supreme Court holdings were, however, quite thin: *McColum* and little else besides expansive dictum in *Everson*. The central passage of *Everson* claimed that the Establishment Clause stood for the proposition that neither the states nor the federal government may aid religion, even if there is no discrimination among sects, and even where no coercion is alleged.¹¹ The *Everson* court asserted that the "Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers."¹² It is fair to say that these and similar passages implied the propriety of government secularization. But these comments were dictum, because the "believers" won in *Everson* on entirely

8. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

9. *McColum v. Bd. of Educ.*, 333 U.S. 203 (1948).

10. *Zorach v. Clauson*, 343 U.S. 306 (1952).

11. *Everson*, 330 U.S. at 15-16.

12. *Id.* at 18.

different grounds, namely free bus rides to and from Catholic school were a child benefit—they were not aids to the school.

Everson was a curious platform for such bold pronouncements, even in dictum. The case had neither been briefed nor argued as an Establishment Clause dispute. The issue brought to the Supreme Court was a Due Process question: whether New Jersey's paying for Catholic school children's bus rides was a public expenditure for a "private" purpose. The most relevant case was *Cochran*.¹³ *Cochran* involved a Louisiana textbook loan dispute, decided in 1930 in favor of aid to Catholic schools.

Justice Black's opinion for the *Everson* Court went through at least three draft stages, each one a qualitative doctrinal leap from the preceding draft(s). At first, Black would have ruled in favor of the school kids on the strength of *Cochran*. Under pressure from separationist brethren, his second draft "incorporated" the Establishment Clause. Black said in this installment that the Establishment Clause henceforth inhibits the acts of *all* public authorities—national, state, and local—subject to the Constitution's authority. Black wrote, however, that non-establishment required equality among religions. He did not say or imply that the state had to be neutral between religion and "non-religion." In other words, thus far, Black adhered to traditional non-establishment doctrine; the only real innovation was the "incorporation" move.

Finally, Black circulated the opinion which went into the books, setting out the secularist construct:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, "The clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"¹⁴

All of Black's doctrinal logrolling came to naught. The separationist Justices who pushed him—chiefly Frankfurter and Rutledge—ended up dissenting anyway.

13. *Cochran v. Bd. of Educ.*, 281 U.S. 370 (1930).

14. *Everson*, 330 U.S. at 15–16.

Where did all the secularist rhetoric of *Everson* come from? As his reference to Jefferson suggests,¹⁵ from long ago. Black's opinion is suffused with tales of heroic, freedom-loving colonials, shepherded to the light by the far-seeing Madison and Jefferson.¹⁶ But the whole display of historical learning is either irrelevant to the meaning of the federal Establishment Clause, patently false, or both.

Where else might the secularist exhortations come from? The impetus came, in part, from Frankfurter and Rutledge, who relentlessly hammered away at Black's drafts, pushing all the way for a "strict separationist" decision.¹⁷ We learn, too, from one of Black's biographers that he relied for his stirring rhetoric upon a 1943 volume by Charles Beard.¹⁸ Beard wrote in his 1943 book, *The Republic*: "The Constitution is a purely secular document. . . . [I]t treats religion as a private matter, extraneous to the interests of the Federal government."¹⁹ Black wrote to a friend of "this great book," whose title might almost have been, Black opined, "The Origin and Aim of the American Constitution."²⁰

What Beard said was, very strictly speaking, largely true. The un-amended Constitution mentions religion by name once: to ban religious tests for federal office.²¹ No power over religion was given to the new government, and early drafts of the First Amendment included proposals declaring that "Congress had no power over religion." However, that was the case because the national government possessed no general police power at all. Power over religion (and over education and family matters and public health) was part of the police power, and it was reserved to the States. Thus the truth of Beard's observation owes to the federal structure of the union, not to a separationist doctrine embraced by anti-clerical colonials as a norm of public morality. In fact, where the national government did enjoy a measure of police power—in the territories, for example—we see that public authority (always a matter of delegated congressional authority) possessed the power to promote religion—and used it.²²

15. *Id.* at 16.

16. *See id.* at 11–13.

17. ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 362–63 (2d ed. 1997).

18. *Id.*

19. CHARLES A. BEARD, *THE REPUBLIC* 166 (1943).

20. Newman, *supra* note 17, at 363.

21. U.S. CONST. art. VI, cl. 3.

22. For a full account of the Establishment Clauses origins in Congress see GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987).

Black's adoption of *Beard* was doubly mistaken. First, by 1947, it was no longer true that the national government lacked a police power within the states—Prohibition and the New Deal had seen to that. Second, Black applied this outdated conception of the limited competency of the national government to the states—i.e., incorporation—whose police power had always included a competence to care for the common good in religion. But *Everson* displaced police power to promote religion, until *Zorach*²³ restored it four years later. In between *Everson* and *Zorach* is the case upon which the *Engel* Court greatly relied.

The weaknesses of *Everson*'s reasoning, and the apparent incongruity of its outcome with that reasoning, rendered the case ambiguous, if not simply confusing. What *had* the Court said? Where was it going with the new departure in church-state law? When the Court agreed to decide during the next term whether local religious leaders could provide voluntary religious instruction in public schools, all interested eyes turned to watch.

In *McCollum*, a local free-thinker named Vashti McCollum sued Champaign, Illinois, schools on behalf of her son.²⁴ Vashti's beliefs, or the son's, or the beliefs of them both obliged the boy to wait outside the classroom while sectarian instruction took place. The Illinois courts upheld the local practice.²⁵ The Supreme Court reversed.²⁶

"Champaign's lawyers argued that *Everson*'s expansive language was dictum," not binding in *McCollum*,²⁷ and these lawyers supplied the briefing *Everson* lacked. They argued in a masterful 168-page submission authored by John Franklin that nonestablishment did not entail secularism, the godless public square, or privatization by any other description.²⁸ The other side responded with briefs nearly as able. A full dress rehearsal of all the relevant history was placed before the Court. The central question—whether the Establishment Clause originally meant sect equality and thus permitted promotion of religion as such, or whether it required neutrality between belief and unbelief—was never before so well presented and it has never been so well presented in the fifty-six years since.

23. *Zorach v. Clauson*, 343 U.S. 306 (1952).

24. Interestingly, another of the McCollum boys—Daniel—grew up to be Mayor of Champaign.

25. See *McCollum v. Bd. of Educ.*, 71 N.E.2d 161 (1947).

26. See *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

27. Gerard V. Bradley, *The Prodigal Argument: McCollum v. Board of Education*, 5 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 131 (2004).

28. *Id.* Franklin challenged incorporation, too, but with much less vigor.

Hugo Black, author of *Everson*, wrote for the Court in *McCullum*. He laid out Franklin's contentions: dictum, dis-incorporation, and—by far the most urgently pressed—that “historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions.”²⁹

The Court's response: “After giving full consideration to the arguments presented we are unable to accept either of these contentions.”³⁰ The *dictum* of *Everson* became law in *McCullum*.

The nation's religious leaders responded to *McCullum* as a clarion call to action. A typical response is recorded in John McGreevy's excellent book, *Catholicism and American Freedom*.³¹ McGreevy himself asserts that *McCullum* “erected a putative ‘wall of separation’ between church and state.”³² He reports on an “off-the-record meeting of religious leaders held in the wake” of the decision.³³ At the meeting, John Courtney Murray, one of the leading American Catholic intellectuals of that (or any) other time, “emphasized that the *McCullum* decision was a victory for secularism and as such should be of great concern to Catholics, Jews and Protestants.”³⁴

It was. But religion got its revenge just four years later, in *Zorach v. Clauson*.

III. SHIFT BACK TO A PLURALISM OF PUBLICLY INVOLVED RELIGIONS

Zorach was the “Released Time” case from New York City. “Released Time” usually occurred on Wednesday afternoons, but whenever it occurred public school children were “released” early—at parental request—to receive religious instruction at a nearby parochial school.³⁵ “Released time” was almost wholly a Catholic thing, though no legal restriction made it so. No religious instruction occurred on public property. But public school authorities kept records, supervised early dismissal, tolerated “down time” while so many students were absent, and otherwise promoted what amounted to catechetical instruction.

The *Zorach* court offered no support for forcing religion upon anyone. But, so long as that freedom was preserved—and neutrality in the “competition

29. *McCullum*, 333 U.S. at 211.

30. *Id.*

31. JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* (2003).

32. *Id.* at 205.

33. *Id.*

34. *Id.*

35. *See Zorach v. Clauson*, 343 U.S. 306, 308 (1952).

between sects”³⁶ was maintained—anything more would, *Zorach* said, show “hostility” to religion,³⁷ “callous indifference to religious groups,”³⁸ and prefer non-believers.³⁹

Could a position of “neutrality” between religion and nonreligion really be considered to show *hostility* towards religion as the *Zorach* court declared? Was the Court’s pronouncement an exaggeration or a fit of pique? Even if one claims that it is an exaggeration, it is important to see that the expression—“neutrality between religion and nonreligion”—is quite misleading. In truth, the deliverance of *McCullum* and *Engel* (and beyond) was rather nonreligion as the “neutral” ground between religion and irreligion or, perhaps, nonreligion as the only ground which a religiously diverse society, one moving towards notions of secularism or the “naked public square,” could safely occupy.

I think the best sense to be made of *Zorach*’s “pique” is this: there is a natural and good connection between God and public life, one which arises from the nature of religion and the nature of public life, a connection verified by experience and common sense. To stifle or to cork this organic efflorescence is an unnatural and wrong-headed intervention. Being unnatural—that is, artificial, posited, an act of human will—*Zorach* may be saying that it must express some negativity towards religion. Perhaps it is best to understand the *Zorach* court to have said that there is, as an objective matter, a common good in religion, and that any stipulation of public authority to the contrary is, or can only be understood as being rooted in, some negative story about religion.

The *Zorach* court said that there “cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.”⁴⁰ That Amendment, “however, does not say that in every and all respects there shall be a separation.” “Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.”⁴¹ This is “common sense.” “Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.”⁴² Black, Frankfurter, and Jackson dissented.⁴³

36. *Id.* at 314.

37. *Id.* at 315.

38. *Id.* at 314.

39. *Id.* at 315.

40. *Id.* at 312.

41. *Id.*

42. *Id.*

43. *See id.* at 315–25.

Zorach was unmistakably at odds with the separationist doctrine of *McCullum* and like *dictum* of *Everson*. *Zorach*'s "accommodationism"—as it swiftly came to be called—became the law of the land.⁴⁴

IV. CONSTITUTIONAL LAW NATIONWIDE RE-CENTERS ON ZORACH APPROACH

The first important post-*Zorach* judicial decision was *Tudor v. Bd. of Educ.*⁴⁵ There the New Jersey Supreme Court forbade school officials to distribute Gideon's Bibles. The court noted the continuing debate over a "wall of separation," and said: "The plaudits and the criticisms of the various majority, concurring, and dissenting opinions" of *Everson*, *McCullum*, and *Zorach* "still continue."⁴⁶ Though its holding rested on sect-preference grounds and though it distinguished *Zorach*, the New Jersey court was inclined to the stricter church-state view expressed in *McCullum*. Even so: "This is more than mere 'accommodation' of religion permitted in the *Zorach* case. The school's part in this distribution is an active one and cannot be sustained on the basis of a mere assistance to religion."⁴⁷

Cases coming after *Tudor* characteristically viewed *Everson*'s expansive language as mere *dictum*. These subsequent cases by and large zeroed in on *Everson*'s holding in favor of aid to religious education, limited *McCullum* to its facts, and took *Zorach*'s accommodationism to be the controlling principle of federal constitutional law.

Among these cases is *Carden v. Bland*,⁴⁸ in which the Tennessee Supreme Court upheld a statute compelling teachers to read from the Bible every day. The court read *Everson* as sanctioning state favor towards religion. The court concluded: "we think that the highest duty of those charged with the responsibility of training the young people of this state in the public schools is in the teaching both by precept and example that in the conflicts of life they should not forget God."⁴⁹

In 1957 the California Supreme Court took *Zorach*'s side over *Everson*.⁵⁰ *First Unitarian Church v. County of Los Angeles* involved a state constitutional provision which made the grant of a tax exemption to a religious organization

44. *Id.*

45. *Tudor v. Bd. of Educ.*, 100 A.2d 857 (N.J. 1953).

46. *Id.* at 864.

47. *Id.* at 868.

48. *Carden v. Bland*, 288 S.W.2d 718 (Tenn. 1956).

49. *Id.* at 725.

50. *First Unitarian Church v. County of Los Angeles*, 311 P.2d 508 (Cal. 1957).

conditional on the group's non-advocacy of overthrow of the government.⁵¹ A church group argued that this condition violated the Free Exercise Clause. In disagreeing with the plaintiff's argument, the court drew a sharp distinction between an absolute freedom to believe and freedom to act, which cannot be absolute and remains subject to regulation for the protection of society.⁵²

But the court did not end its constitutional inquiry there. The court asserted that "[t]here are decisions wherein provisions having some effect on religious activity have been upheld on the ground that their effect was only incidental."⁵³

However, instead of citing *Everson* as the authority for this position, the court cited *Zorach*, and then quoted its decision extensively.⁵⁴

The initial judicial opinion in *Engel v. Vitale*⁵⁵ went deeply into the history of both the First and Fourteenth Amendments. The court concluded that even though sectarian worship in public schools was eventually proscribed in the states, such exclusion did not extend to the Bible or to non-compulsory prayer.⁵⁶ The court's diversion into history provides the backdrop to a decision that significantly follows *Zorach* and ignores the reasoning in *Everson*, *McCullum*, and even *Tudor*. The court stated that the *Zorach* decision constituted a retreat from both *Everson* and *McCullum*: "where *Everson* . . . outlawed aid to all religions, *Zorach* recognized that government can, without violation, accommodate all religions."⁵⁷ *Zorach* accommodated religion by prohibiting indirect compulsion in matters of religion only when "the nexus between government and religion thus produced is too close."⁵⁸ In essence, the *Engel* court favored *Zorach* by arguing that the First Amendment did not require separation in every respect: "freedom 'of' religion does not mean freedom 'from' religion."⁵⁹ Some form of prayer "would appear to fall within the realm of permissible accommodation."⁶⁰

Regarding school prayer the court said: "It is recited during opening exercises rather than as part of any instructional period. It is phrased in traditional prayer form rather than in any form normal for instructional

51. *Id.* at 511. See also CAL. CONST. art. XX, § 19.

52. *Id.* at 517.

53. *Id.* at 517-18.

54. See *id.*

55. *Engel v. Vitale*, 191 N.Y.S.2d 453 (N.Y. Sup. Ct. 1959).

56. *Id.* at 472.

57. *Id.* at 485.

58. *Id.* at 486.

59. *Id.* at 487 (citing *Gordon v. Bd. of Educ.*, 78 Cal. App. 2d 464, 476 (Cal. Dist. Ct. App. (1947))).

60. *Id.* at 490.

materials.”⁶¹ This contrasts with the reasoning in the *Tudor* case, which held that the practice of distributing Gideon Bibles in the schools was not a permissible “accommodation” in part because of the psychological pressures created when school authorities distribute the religious materials.⁶²

In *Perry*,⁶³ the Supreme Court of Washington dealt with a release-time program, and relied on the *Zorach* case as controlling precedent.⁶⁴ While it is true that the *Zorach* decision was controlling authority on point because it dealt with a release-time program similar to the one at issue in *Perry*, the court made it clear that *Zorach*’s reasoning embodied important First Amendment principles by including in the body of the *Perry* decision an unusually long quotation from the *Zorach* opinion, the logic of which the court clearly approved: “The reasoning of the *Zorach* case is sound and reflects the reasoning of the state courts which have passed upon the same question”⁶⁵ The quote is noteworthy because the *Perry* court found the statute unconstitutional, but apparently found *Zorach* more compelling than the *dictum* in *Everson*. Again in *Perry*: “It was never the intention that our constitution be construed in any manner indicating any hostility toward religion. Instead, the safeguards and limitations were for the preservation of those rights.”⁶⁶ Nowhere does *Perry* mention *Everson*.

In *Carolina Amusement Co. v. Martin*,⁶⁷ the court ruled on the constitutionality of Sunday blue laws. The court said that because *Everson* and *McCullum* were not concerned with Sunday laws, neither case was applicable.⁶⁸ The court then stated: “nor is the *reasoning* of them applicable.”⁶⁹ Similarly, the court admitted that *Zorach*, “the leading opinion,” was not on point, but, unlike the other cases, the *reasoning* of *Zorach* “indicate[d] the constitutionality of Sunday observance laws.”⁷⁰

The *Engel* case on first appeal took a similar position.⁷¹ *Engel* held that an optional prayer before class was constitutional.⁷² As in several other cases, the court treated *Zorach* as a way to break down the strict separation between

61. *Id.*

62. *See Tudor v. Bd. of Educ.*, 100 A.2d 857, 866–67 (N.J. 1954).

63. *Perry v. Sch. Dist. No. 81*, 344 P.2d 1036 (Wash. 1959).

64. *See id.*

65. *Id.* at 1042.

66. *Id.* at 1043.

67. *Carolina Amusement Co. v. Martin*, 115 S.E.2d 273 (S.C. 1960).

68. *Id.* at 280.

69. *Id.*

70. *Id.*

71. *Engel v. Vitale*, 206 N.Y.S.2d 183 (N.Y. App. Div. 1960).

72. *Id.*

church and state, thus further confining *Everson*. Introducing a long passage from *Zorach*, the court claimed that the *Zorach* majority “gave to the nation these basic principles for its guidance.”⁷³ It would seem, then, that by 1960 the authority of *Everson* had significantly eroded. Apparently few federal appellate and state supreme courts feared being overturned for failing to follow, or even cite, *Everson*.

The trend toward *Zorach* continued in *Lewis v. Allen*,⁷⁴ another New York case. The plaintiffs sued to revoke a regulation recommending use in public schools of the Pledge of Allegiance, including the words “under God.” The court did little to explain why it found the regulation constitutional, other than saying that students were not *compelled* to recite the Pledge. The court explained that the Pledge does not illicitly blur the distinction between church and state: “the doctrine of accommodation enunciated in *Zorach v. Clauson*” justifies the incantation of “under God” because the school is merely accommodating the expression of a religious view while permitting students to omit the words “under God.”⁷⁵

A Supreme Court of Rhode Island decision, *Archetto*,⁷⁶ dealt with the constitutionality of statutes granting tax exemptions to religious organizations. After methodically reviewing the *Everson*, *McCullum*, and *Zorach* decisions, the court concluded that *Everson*’s “forceful language” was “oddly in contrast with the net effect of the court’s decision.”⁷⁷ Since *Everson*’s forceful separationist language was mere dictum, its legal import was doubtful. However, the court seemed to hold that the “doubt” was wiped out by the concrete application of *Everson* dictum in *McCullum*. But the broad implications of *McCullum*, the court said, “have been more closely confined by the decision in *Zorach v. Clauson*.”⁷⁸ In other words, by distinguishing the facts in *Zorach* from those in *McCullum*, the Supreme Court confined *Everson*’s separationist language to the narrow fact pattern extant in *McCullum*: “The opinion of the majority in *McCullum* . . . on the facts operating therein, is the law of the land.”⁷⁹

In *Chamberlain*,⁸⁰ the Supreme Court of Florida was outspoken in its complete rejection of *Everson*’s separationist language. The case centered on a

73. *Id.* at 188.

74. *Lewis v. Allen*, 207 N.Y.S.2d 862 (N.Y. App. Div. 1960).

75. *Id.* at 866.

76. *Gen. Fin. Corp. v. Archetto*, 176 A.2d 73 (R.I. 1961).

77. *Id.* at 78.

78. *Id.*

79. *Id.* (emphasis added).

80. *Chamberlain v. Dade County Bd. of Instruction*, 143 So. 2d 21 (Fla. 1962).

statute requiring prayer and recitation of the Bible in public schools.⁸¹ Pupils who objected were excused from attending. After quoting the relevant language from *Everson* ("neither a state nor the federal government can set up a church . . ."), the court remarked that the quoted language "has done little other than cause confusion" and that the quoted paragraph must, "in the course of time, be further receded from if weight is to be accorded the true purpose of the First Amendment."⁸²

The court then undermined *Everson*'s "wall of separation" in several ways. First, it

attacked the Jeffersonian metaphor itself by pointing out that "the 'wall of separation between church and State' that Mr. Jefferson built at the University [of Virginia] did not exclude religious education from that school."⁸³ Next, the court recognized Cooley, the nineteenth century constitutional law scholar, as correctly capturing the purpose and meaning behind the First Amendment. The court quoted favorably his views on the First Amendment: "[E]stablishment of religion is the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing religion."⁸⁴

The court applied its own theory of constitutional construction to find a meaning of the First Amendment contrary to *Everson*'s meaning. "It must be the rule as to constitutions, just as to statutes, that there is 'no occasion for construction' when the phrasing 'is entirely free from ambiguity.'"⁸⁵ When construction is required the goal is to find the intent of the framers: "The fundamental purpose in construing [a constitution] is to ascertain and give effect to the intent of the framers and of the people who adopted it"⁸⁶ Keeping in mind these two principles of construction, the court then asked, "what is the meaning of an 'establishment of religion'?"⁸⁷ This question had been answered by the United States Supreme Court in *Cantwell v. Connecticut*⁸⁸: "[I]t forestalls compulsion by law of the acceptance of any . . . form of worship."⁸⁹ Lack of compulsion is one fundamental element of the

81. FLA. STAT. ANN. § 231.09 (1961).

82. *Id.* at 24–25.

83. *Id.* at 25.

84. *Id.* (quoting COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 213–14 (2d ed. 1891)).

85. *Chamberlain*, 143 So. 2d at 26.

86. *Id.* at 30.

87. *Id.* at 31.

88. *Cantwell v. Conn.*, 310 U.S. 296 (1940).

89. *Chamberlin*, 143 So. 2d at 31 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

First Amendment. The other element is the prohibition against state sponsorship of a church: "'Established' churches were well known to the colonists, who had experienced them in Europe and America. They knew that the phrase meant 'a state church,' such as, for instance, existed in Massachusetts for more than forty years after the adoption of the Constitution."⁹⁰

By 1960, courts no longer strained reason to reconcile *Everson* and *Zorach*. Besides the overall language and holdings of the cases, two concrete examples drawn from the cases reflect the trend away from *Everson*. First, more than one court during this time period viewed *Everson* as confusing because its final decision contrasted with its separationist dictum. In the end, the lower courts generally rejected the strong separationist language of *Everson*. Second, the cases display a trend toward defining the First Amendment increasingly in terms of a proscription against compelling religious practice.

The definition of compulsion changed during this time period. In *Tudor* the court used testimony of psychologists to show that any involvement by school authorities in religion operates as a subtle psychological compulsion or influence on students.⁹¹ Later cases narrowed the definition of compulsion, refusing to include in its definition a psychological component. In *Chamberlain* the court insisted that the First Amendment mandated only freedom from "present compulsion requiring unwilling support of religion."⁹² The *Engel* lower court similarly argued that "[t]o recognize 'subtle pressures' as compulsion under the Amendment is to stray far afield from the oppressions the Amendment was designed to prevent"⁹³

V. ENGEL USHERS IN THE NAKED PUBLIC SQUARE

The law of non-establishment in place when the Supreme Court heard *Engel v. Vitale* was not a wall of separation. It was a picket fence or, maybe, a chain-link barrier permeated by considerable cooperation between church and state for the purpose of mutual interest conducive to the common goal of the whole community. This cooperation was constrained by norms against sect-preference and coercion. Governments could promote, encourage, and even financially aid religion, so long as the different religions were treated equally and so long as no one was coerced.

90. *Chamberlain*, 143 So. 2d at 31 (citing CORWIN, CONSTITUTION AND WHAT IT MEANS TODAY 155–56 (9th ed. 1947)).

91. *Tudor v. Bd. of Educ.*, 100 A.2d 857, 867 (N.J. 1953).

92. *Chamberlain*, 143 So. 2d at 29.

93. *Engel v. Vitale*, 191 N.Y.S.2d 453, 492 (N.Y. Sup. Ct. 1959).

A naked public square was nonetheless on the *Engel* petitioners' minds. Their lawyer, William Butler, came before the Court to preserve religious liberty, he said in oral argument, but the only way to do that was to "keep religion out of our public life."⁹⁴ Later in the argument, Butler was asked: "is it your position that our public schools, by virtue of our Constitution, are frankly secular institutions?" He answered: "Absolutely yes." That was his "ultimate position."⁹⁵

Butler relied "very heavily" on *McCollum*.⁹⁶ He distinguished *Zorach* as an off-premises religious observance.⁹⁷ The Court, save for Justice Stewart, seemed to be on his side. Stewart pressed him hard to distinguish the Regents' prayer—"Almighty God we acknowledge our dependence on Thee"—from: "I pledge allegiance to . . . one nation under God."⁹⁸ Butler faltered, as he did when pressed to distinguish other divine adornments of public life—"In God We Trust," "God Save this Honorable Court," and the like.⁹⁹

Butler argued forcefully that informal social and psychological pressures combined to vitiate kids' option not to participate in the Regents' prayer.¹⁰⁰ The Court would adopt the offering in later school-prayer cases, taking on board an account of kids' susceptibility to "coercion" that would make any genuine *education* a pipedream. But not in *Engel*—the Court's opinion put aside coercion as irrelevant to the Establishment Clause inquiry. Butler was not pressed hard on *Zorach* and how it effectively displaced *McCollum* as the law. Why not is a good question. It seems that the Court had already decided to go for the naked public square.

The defenders of the Regents' prayer made the contrast as clear as it could be made. Bertram Daiker represented school officials and he said: "[H]ere is where my friend [Butler] and I depart in our thinking. Since the earliest days of this country, going back to the Mayflower Compact, the men who put our country together have publicly and repeatedly recognized the existence of a Supreme Being, a God."¹⁰¹ Later on, Porter Chandler, on behalf of intervening parents, said that petitioners "are now seeking to . . . eliminate all reference to

94. Transcript of Oral Argument at 11, *Engel v. Vitale*, 370 U.S. 421 (1962) (No. 468).

95. *Id.* at 26.

96. *Id.* at 9.

97. *Id.* at 9–10.

98. *Id.* at 20–22.

99. *Id.* at 14–15.

100. *See id.* at 16.

101. *Id.* at 28.

God from the whole fabric of our public life and of our public educational system.”¹⁰²

The *Engel* Court set up the question clearly enough: “[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause”¹⁰³

The reach and point of the Establishment Clause are broader, and depend upon no such showings. The point of that clause was to forestall “union” of government and religion, to leave “that purely religious function to the people themselves and to those the people choose to look to for religious guidance.”¹⁰⁴

But, should the “people” “choose” to look to public officials for such guidance, they were out of luck. The Establishment Clause expresses the “principle” that religion is “too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate”¹⁰⁵—except that “unhallowed perversion” was not a sorting tool. The Court’s ruling made clear that *whenever* the civil magistrate gets religion it *is* an “unhallowed perversion.”

Justice Stewart, in dissent, could not see “how an ‘official religion’ is established by letting those who want to say a prayer say it.”¹⁰⁶ He had pressed Butler hard about the Pledge, and now worked the problem into his opinion. The National Motto, the Star Spangled Banner, and “under God” were at stake.

The validity of them all, Stewart asserted, was “summed up by this Court just ten years ago in a single sentence: ‘We are a religious people whose institutions presuppose a Supreme Being.’”¹⁰⁷

The *Engel* Court did not expressly overrule *Zorach*. In fact, New York City had “released time” for decades thereafter, including my days at Mary Queen of Heaven School in Brooklyn. But *Engel* shredded *Zorach*’s reasoning and put an end to the era of “accommodation.” To *Zorach*’s notion that secularism indicated hostility to religion, *Engel* replied: “Nothing, of course, could be more wrong.”¹⁰⁸ Why? Probably because religion does not naturally or rightly manifest itself politically. Religion is private.

102. *Id.* at 42.

103. *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

104. *Id.* at 435.

105. *Id.* at 432 (quoting JAMES MADISON, MEMORIAL AND REMOISTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 5 (1785)).

106. *Id.* at 445 (Stewart, J., dissenting).

107. *Id.* at 450 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

108. *Engel*, 370 U.S. at 434.

Zorach had been received by later courts to say that "separation" was a matter of "degree."¹⁰⁹ Prudential judgments about how far to go had to be made, but they were to be judgments which presupposed that moderate cooperation and recognition of God were good things. No more. *Engel* set the tone for twenty-two years of judicial hyper-scrupulousness by quoting Madison: "It is proper to take alarm at the first experiment on our liberties."¹¹⁰ The principle of separation could tolerate no exceptions because—as the Court said wholly without irony—steadfast consistency was the *only* alternative to persecution.

The wellsprings of *Engel* are difficult to pin down. The opinion is absolute, peremptory, confident, even strident. The drift of the oral argument suggests that the matter was settled before then. So what happened? The Court offered the usual stories about freedom-loving colonials, and the preciousness of religious liberty.¹¹¹ But so it had in *Everson*, and its *dictum* had ceased to command allegiance a decade before *Engel*. The question then arises in a different form: *why* did the *Engel* Court return to the separationist founding of *Everson*, and disown the accommodationist founding of *Zorach*?

Engel said that it was not for government to *compose* official prayers. But the next year's declarations against school Bible reading and saying the Lord's Prayer ("Our Father, Who art in heaven . . .")¹¹² reveal that to have been a throwaway line.

It might be that some Justices came to believe sometime shortly before *Engel* what Butler said at oral argument: liberty finds no refuge in a teeming, religiously pluralistic public square.¹¹³ Someone holding this view could affirm that religion is good, that one or more religions might be true, and even that religion "naturally" expresses itself publicly. On this view, however, the positive law would stipulate that a barrier be erected for the greater good. This account represents a prudential judgment in light of circumstances and the needs of the day. The judgment could even be quite defensible, all things considered, in some contexts. But the judgment is itself provisional, contingent, and—it seems to me—one which was never made by the Founders. It is not a judgment which the First Amendment can be made to articulate, save on the assumption that the First Amendment *means* judicial authority to enact constitutional law.

109. See discussion *supra* Part III.

110. *Engel*, 370 U.S. at 436 (quoting Madison, *supra* note 105, at ¶ 3).

111. See *id.* at 428–30.

112. See *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

113. See Transcript of Oral Argument at 16, *Engel v. Vitale*, 370 U.S. 421 (1962) (No. 468).

There is another possibility. It lies in the Court's understanding (presuppositions or ideology) of religion. "Privatization" can be seen much less as a campaign about or even against religion as it can be viewed as a judicial attempt to redefine religion. It might well be that many mid-twentieth century Justices believed that doctrine, churches, and institutional forms were inimical to genuine spirituality. Religion was, in this perspective, the enemy of genuine faith. The Court in the early 1960's relied upon Paul Tillich's emerging philosophy of religion.¹¹⁴ And, as Jon Butler recently wrote in the *Journal of American History*: "Tillich's conviction that religion was, at its essence, a philosophical and theological 'ground of being' whose redefined spiritual centeredness could successfully confront modern totalitarianism, religious bigotry, and racism even as it transcended the creedal orthodoxy and denominational distinctiveness."¹¹⁵

VI. CONCLUSION

Religion has since *Engel*—and the 1984 high tide—hopped the picket fence around the public square. The public square is now open to religious expression. Cases beginning in 1993 (*Lamb's Chapel*¹¹⁶ and, later, *Rosenberger*¹¹⁷) nearly eradicated discrimination against religious speech, institutions, and individuals *as, or on the precise grounds of being, religious*. Where the religious activity (or speech or writing) can be assimilated to a class of actions which can be described without reference to religion, constitutional norms of viewpoint equality open wide the gates to the public forum. And so, if a local public library sets up a lecture series on "family issues," it may not exclude a speaker such as Dr. James Dobson because he brings a religious perspective to the subject.

This is a real breakthrough. *Engel's* legacy had been that religion was uniquely politically problematic. Because religion alone among ideologies, viewpoints, and belief systems—the Court said for a while—fostered divisiveness, oppression, and warfare, and because religion could not be promoted even a bit by the state without ruin, the state had to keep it private. But note well: though the *Rosenberger* breakthrough is very important and though it has been fueled by reduced judicial hostility to religion, it is the achievement of Free Speech and Free Press doctrine, *not* of the Religion Clauses.

114. See *United States v. Seeger*, 380 U.S. 163, 180, 187 (1965).

115. See Butler, *supra* note 2.

116. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

117. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

Another recent sign of change is the Court's unanimous 2005 decision in *Cutter v. Wilkinson*.¹¹⁸ *Cutter* reversed a lower court holding against a Congressional enactment titled, "The Religious Land Use and Institutionalized Person Act"—RLUIPA.¹¹⁹ Targeted at zoning and prison authorities, this law requires them to justify, in a judicial proceeding, their refusal to excuse a religious claimant from the strictures of a law, rule, or regulation which diminishes the believer's ability to freely exercise his or her faith.

The constitutional challenge to RLUIPA was that it gave a prohibited preference to believers over non-believers. There was, up to a point, a preference for religion but it was not prohibited. Where Congressional favors of this sort are concerned (states are a different matter), Professor Carl Esbeck recently wrote that the one constitutional law is, and long has been, that such preferences do *not* run afoul of the Establishment Clause.¹²⁰ The *Cutter* Court fell into line with this tradition.

Still another important development has to do with aid to religious schools. The Court struck down a parochial school aid law for the first time in 1971.¹²¹ The most stringent of these decisions—the last of which occurred in 1985—was *Nyquist*,¹²² in 1973. For some time now, the whole social and political context of public aid to religious schools has radically changed. Since 1985 we can see the steady development of a new (perhaps even a renewed) appreciation for the critical importance of good education for success in today's economy; for the intractability of underachievement in many public school systems; for the educational achievements of religious schools; for the racial and even the religious mix of students in those schools; for the role of choice in education (think of the rise of home schooling and the radical change in state laws making it possible, even practicable); and, perhaps most pointedly, for the liberality of Catholic schools. And we can see the effect upon the Court in a string of permissive rulings on parochial school aid,¹²³ culminating in the decision upholding the Cleveland voucher program in *Zelman v. Simmons-Harris*.¹²⁴

What would closing down the judicial experiment with secularism look like in terms of doctrine? Well, it would be a return to the Founders' vision, the

118. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

119. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000).

120. See Carl H. Esbeck, "Play in the Joints Between the Religious Clauses" and Other Supreme Court Catecheses," 34 HOFSTRA L. REV. 1331, 1333–36 (2006).

121. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

122. *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

123. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

124. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

vision captured in Justice Black's *Second Everson* draft: cooperation between church and state without coercion and without special favors to any one church.¹²⁵ There are only two votes on the present Court for this rule of "sect-equality." Justices Scalia and Thomas, in *Lamb's Chapel*, said that the Constitution requires that aid to religion not discriminate between or among faiths.¹²⁶ Justice Kennedy is the key variable. On the assumption that Roberts and Alito make common cause with Thomas and Scalia, will he supply the needed fifth vote to, finally, reject the secularism which has squatted in the public square since 1962?

Kennedy has never been a "strict separationist." He joined in key parts of the vigorous dissent written by Scalia in *McCreary County v. ACLU*,¹²⁷ the Kentucky Ten Commandments display case from 2005. The *McCreary* dissent which he joined was highly critical, not only of the majority's holding in that case, but of the whole doctrinal patrimony generated by *Lemon v. Kurtzman*.

Is this a result to be hoped for? Justice White wrote in *Nyquist* that the Court had long since lost meaningful contact with the Founding, and that the Justices had "carved out what they deemed to be the most desirable national policy"¹²⁸ on church-state issues.¹²⁹ I think White was right: privatization has been a judicial experiment—and an unfortunate one.

Born in '62, the privatization project has for almost two decades been in decline. With a little more time and a little more experience we may be able to judge it a fumbling, but plausible, transition from centuries of an implicit Protestant establishment to what the Justices for a time could scarcely imagine: religious liberty in a pluralistic society, one in which the government possesses constitutional authority to aid and promote religion.

125. See *supra* note 24 and accompanying text.

126. *Lamb's Chapel v. Ctr. Union Free Sch. Dist.*, 508 U.S. 384, 397–401 (Scalia & Thomas, JJ., concurring).

127. *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

128. Policy is contingent, time and place and context bound, revisable and surely not infallible, a best guess, perhaps, about what the times require.

129. *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973).

