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# Constitutional Divide: The Transformative Significance of the School Prayer Decisions

Steven D. Smith\*

- I. INTRODUCTION
- II. CONTINGENCIES AND UNCERTAINTIES
  - A. *The Conclusion: Engel*
  - B. *The Explanation: Schempp*
  - C. *Unanswered Questions*
- III. A CRAZY-QUILT, QUASI-CONSTITUTIONAL TRADITION
  - A. *The Perennial Contenders*
  - B. *Incompatible but (Sometimes) Indistinguishable*
  - C. *Patterns of Dominance?*
  - D. *The Conceptions as Quasi-Constitutional*
  - E. *The Virtues of Quasi-Constitutionalism*
    - 1. Quasi-Constitutionalism as the Default Position
    - 2. The Positive Advantages of Quasi-Constitutionalism
  - F. *On the Eve of the School Prayer Decisions*
- IV. THE SIGNIFICANCE OF THE SCHOOL PRAYER DECISIONS
  - A. *How the Decisions Transformed Constitutional Doctrine*
    - 1. Secularism as the Doctrinal “Test”
    - 2. The Significance of the Public Schools
    - 3. The Importance of Prayer
  - B. *Why the Significance of the School Prayer Decisions Went Largely Unnoticed (by Their Supporters)*
- V. TRANSFORMATIONS: THE CONSEQUENCES OF THE SCHOOL PRAYER DECISIONS
  - A. *Establishment Clause Jurisprudence*
    - 1. Subverting *Everson*

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2. The Emergence of the “No Endorsement” Doctrine
- B. *Constitutional Law Outside the Establishment Clause*
- C. *Divided Discourse*
  1. The Historical Divide
  2. The Cultural Divide

## VI. CONCLUSION: THE IRONIES OF THE SCHOOL PRAYER DECISIONS

### I. INTRODUCTION

*Everson v. Board of Education*<sup>1</sup> was the visionary (or perhaps foolhardy) granddaddy of modern Establishment Clause jurisprudence; the school prayer decisions—*Engel v. Vitale*<sup>2</sup> and *Abington School District v. Schempp*<sup>3</sup>—were among that decision’s dutiful descendants. *Everson* founded the modern enterprise; *Engel* and *Schempp* inherited *Everson*’s legacy and faithfully maintained and built the family business. To change the metaphor, *Everson* was the primary proof; the decisions invalidating prayer in the public schools were among the virtually irresistible corollaries.

Or at least so goes a standard understanding of modern Establishment jurisprudence.<sup>4</sup> *Everson* is, as Douglas Laycock declares, “[t]he most important establishment clause case.”<sup>5</sup> As a natural result, in professional constitutional discourse (as distinguished from politics and popular culture), *Everson* has been the more examined, and also embattled, decision.<sup>6</sup> By contrast, though promptly and enduringly unpopular with the general public,<sup>7</sup> the school prayer decisions have from the beginning generally

1. 330 U.S. 1 (1947).

2. 370 U.S. 421 (1962).

3. 374 U.S. 203 (1963).

4. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 287 (2001) (asserting that “*Everson* began the modern edifice of separation of church and state” and that “[f]or half a century, the Supreme Court followed *Everson*’s lead”).

5. 1 DOUGLAS LAYCOCK, *A Survey of Religious Liberty in the United States*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY 272, 288 (2010).

6. See, e.g., EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS (Jo Renée Formicola & Hubert Morken eds., 1997).

7. Writing at the time, Philip Kurland observed that “[t]he immediate reaction to *Engel* was violent and gross.” Philip B. Kurland, *The School Prayer Cases*, in THE WALL BETWEEN CHURCH AND STATE 142, 142 (Dallin H. Oaks ed., 1963). Bruce Dierenfield reports that *Engel* provoked “the greatest outcry against a U.S. Supreme Court decision in a century.” BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER: HOW *ENGEL V. VITALE* CHANGED AMERICA 72 (2007). At an annual Conference of State Governors, every governor except New York’s Nelson Rockefeller condemned *Engel* and urged passage of a constitutional amendment to overturn it. *Id.* at 146; see also ROBERT S. ALLEY, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS 28, 230 (1996) (recalling that the school-prayer decisions “sent shock waves through large portions of the citizenry” and “caused an enormous uproar against the Supreme Court”); JULIA C. LOREN, *ENGEL V. VITALE: PRAYER IN THE PUBLIC SCHOOLS* 7, 61 (2001) (observing that “[t]he public outcry against the Court’s ruling was swift and loud” and that “newspaper editorials across the country denounced the ruling”). Lucas Powe notes that “*Engel* produced more mail to the Court than any previous case

enjoyed a virtual consensus of confident support among constitutional scholars and cultural elites.<sup>8</sup> If *Everson* with its approval of the “wall of separation” was correct—and this is of course a contested *if*—then the school prayer decisions were pretty much inevitable.<sup>9</sup>

So it is commonly supposed. In this article, however, I will argue that these common assessments are mistaken. Controversial though it has been, *Everson* was in an important sense an expression of one deeply-rooted (albeit contested) but relatively concrete and confined American political tradition—the tradition, which *Everson* affirmed but distinguished, of denying public financial assistance to churches or to “sectarian” schools. The school prayer decisions, by contrast, were a constitutional turning point, working to transform not only the jurisprudence of religious freedom but constitutional discourse generally, and indeed the American self-understanding. Far from being an automatic corollary of *Everson*, the school prayer decisions quietly subverted and fundamentally redirected *Everson*’s teachings. Without denying the significance of *Everson*, therefore, I will suggest that the school prayer decisions were the more momentous of the cases.

If the outcome of the cases today seems foreordained (to legal observers, at least) and not especially transformative, that fact is in part a manifestation of the decisions’ success in reshaping constitutional understandings in their own image. By helping to establish a larger

(and few write to say what a good job the justices are doing).” LUCAS A. POWE JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 260 (2009). This opposition, though perhaps less strident today, has not disappeared; thus Kent Greenawalt reports that “[a] large segment of the American population persists in condemning the Supreme Court for taking religion out of schools and thus contributing to a secular, immoral, materialist cultural ethos.” KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* 9 (2005); see also Mary C. Segers, *The Religious Equality Amendment and Voluntary School Prayer*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS*, *supra* note 6, at 192–98.

8. See Jeffries & Ryan, *supra* note 4, at 322 (“The broad consensus of elite opinion on this issue . . . was demonstrated when Leo Pfeffer, counsel for the American Jewish Congress, rounded up 110 law school deans and professors of law and political science to sign a letter to the Senate Judiciary Committee supporting *Engel* and opposing school-prayer amendments on the ground that such observances in public schools would endanger ‘the institutions which have preserved religious and political freedom in the United States.’”). Not all leaders supported the decision, however; Erwin Griswold, Harvard Law School Dean and later Solicitor General under Presidents Johnson and Nixon, was critical. DIERENFIELD, *supra* note 7, at 136.

9. See Jeffries & Ryan, *supra* note 4, at 326–27; cf. GREENAWALT, *supra* note 7, at 39 (“To understand why the decisions about prayer and Bible reading were so one-sided, we look to the *Everson* case.”); William Bentley Ball, *Litigating Everson After Everson*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS*, *supra* note 6, at 222 (describing *Schempp* as “complementary to *Everson*”). Mary Segers reports that “[t]he connection between the 1947 *Everson* decision and the Court’s school prayer prohibitions in *Engel* and *Schempp* is clear and well acknowledged by scholars of Supreme Court jurisprudence.” Segers, *supra* note 7, at 193.

constitutional framework within which they themselves appear virtually inevitable, the decisions have been in a sense self-validating.

And yet this assessment cannot be the whole story because the momentous quality of the decisions also seems to have been largely invisible even to those who rendered those decisions. Although the general public immediately perceived the school prayer decisions as radical,<sup>10</sup> the Justices themselves seem for the most part to have been unaware of doing anything especially audacious.<sup>11</sup> The transformative significance of their pronouncements is discernible, it seems, only from a distance—not so much from a geographical or chronological distance as from a cultural and perspectival distance which allows us to perceive in the cases what a renowned First Amendment scholar described as “the unnoted change in the meaning of familiar words and the consequent transformation of controlling concepts.”<sup>12</sup>

Exerting ourselves to notice such developments, we can see how the cases erected and reflected (in some mixture of unknowable proportions) a sort of constitutional divide—a divide in both a chronological and a cultural sense. The decisions subtly worked to sever the American self-conception that ensued from the understanding that had prevailed historically. But this separation occurred quietly and mainly among cultural elites, as the decisions made explicit and official assumptions that had long been taken for granted by many within those elites. In this somewhat oblique way, the decisions created, or at least formalized and reinforced, a split—one that has become if anything even more conspicuous with the passage of years—within the American self-understanding as it subsisted, at one level, in elite and professional culture and, at another, in the American culture generally. From a distance we can observe the beginnings of this divide, and we can also see how and why the cases’ larger significance was, and remains, more visible from outside professional constitutional discourse than within it.

Part II of this Article briefly reviews the school prayer decisions, explaining how the decisions were contingent in a way that is easy to overlook today, and noting the questions that the decisions left unanswered.<sup>13</sup> Part III steps back to describe the legal and cultural backdrop against which the cases were decided, and which they helped to transform.<sup>14</sup> More specifically, this section argues that the nation’s history had been

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10. See *supra* note 7 and accompanying text.

11. DIERENFIELD, *supra* note 7, at 132 (observing that “[i]n a rare moment of political tone-deafness, [Chief Justice Earl] Warren did not anticipate the fallout from the [*Engel*] case”). Justice Brennan insisted that the rulings were not radical or novel, but rather “accord[] with history and faithfully reflect[] the understanding of the Founding Fathers.” *Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

12. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 154 (1965).

13. See *supra* notes 17–125 and accompanying text.

14. See *supra* notes 126–280 and accompanying text.

characterized by an ongoing competition, sometimes collaborative and sometimes more contentious, between providentialist and secularist conceptions of America. This competition was conducted on a “quasi-constitutional” level: both the providentialist and the secularist conceptions claimed, with some support, to be interpretations of how America was constituted, but neither was understood to be a binding and official orthodoxy formally mandated by the Constitution. Part IV explains how, unlike *Everson*, the school prayer decisions transformed the preexisting pattern and understanding.<sup>15</sup> They did this *not* by inventing the secular conception, which had been around in some form since the Republic’s beginnings, but rather by canonizing it as constitutional orthodoxy, thereby relegating the competing conception to the status of a constitutional heresy.

This change was subtle and thus easy to overlook (at least by those for whom the secularist conception was already close to axiomatic), but it was also immensely important—and disruptive, as the vehement public opposition which was provoked by the decisions foreshadowed. Some of the change’s implications and consequences, not only for Establishment Clause issues but also for constitutional law and national self-understanding more generally, are explored in Part V.<sup>16</sup>

## II. CONTINGENCIES AND UNCERTAINTIES

In retrospect, the outcome of the school prayer decisions may seem to have been predetermined. By the 1960s, after all, the nation had become home to people of a sprawling diversity of religious faiths, or of none. Some citizens pray in one way, some in another, some not at all.<sup>17</sup> In addition, the Supreme Court had more than once pronounced the nation’s commitment to “a wall of separation between church and State.”<sup>18</sup> Given these realities, for public schools to begin each school day with the recitation of a prescribed prayer was plainly unacceptable. Wasn’t it?<sup>19</sup>

15. See *supra* notes 282–315 and accompanying text.

16. See *supra* notes 316–424 and accompanying text.

17. See 1 DOUGLAS LAYCOCK, “Noncoercive” Support for Religion: Another False Claim About the Establishment Clause, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 617, 644 (describing “[t]hose who would not pray at all, those who would pray only in private, those who would pray only after ritual purification, those who would pray only to Jesus, or Mary, or some other intermediary, those who would pray in Hebrew, or Arabic, or some other sacred tongue”).

18. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

19. Bruce Dierenfield observes that “[t]he Warren Court had little choice but to side with the petitioners in *Engel*. Given the ever-growing religious pluralism in U.S. society, the Court simply accommodated constitutional law to reality.” DIERENFIELD, *supra* note 7, at 133; cf. 1 DOUGLAS

If the outcome of the cases was foreordained, however, that fact was not generally apparent on the eve of the decisions. The Court's rulings came as a shock to the nation,<sup>20</sup> and as something of a surprise even to many of the participants in the litigation.<sup>21</sup> The revelation came in two stages and, in a sense, in reverse order. The first case, *Engel v. Vitale*, presented the Court's conclusion—namely, that school prayer was unconstitutional. The second case, *Abington School District v. Schempp*, attempted to provide the innocently portentous premise for that conclusion.

#### A. *The Conclusion: Engel*

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country."<sup>22</sup> This exquisitely minimalist prayer, the product of lengthy deliberations by a group of ministers, priests, and rabbis, was unanimously approved by the New York Board of Regents and enthusiastically endorsed for use in schools by the New York Association of Secondary School Principals, the Directors of New York School Boards Association, and the New York Association of Judges of Children's Courts.<sup>23</sup> In fact, only a minority of schools—by one estimate only about ten percent<sup>24</sup>—actually used the so-called Regents' Prayer. New York City schools, for example, opted not to use the prayer.<sup>25</sup> But when a nearby school district in Nassau County adopted a policy of having teachers begin each day with a recitation of the Regents' Prayer, the American Civil Liberties Union promptly filed suit in a New York state court on behalf of a group of objecting parents and students.<sup>26</sup>

The lawsuit was instituted against the advice of Leo Pfeffer, the most learned and active separationist litigator-scholar of his time (and, arguably, ever).<sup>27</sup> Like the plaintiffs, Pfeffer was devoutly opposed to school prayer.

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LAYCOCK, *Substantive Neutrality Revisited*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 225, 254 ("When the Court began to take religious minorities seriously after World War II, majoritarian religious ceremonies at public events, and especially in public schools, looked less and less tolerable.").

20. See *supra* note 7 and accompanying text.

21. Nassau County schoolteachers were "shocked" by the decision, and the school district's attorney, Bertram Daiker, was likewise "completely shocked." William Butler, attorney for the plaintiffs, had expected to win the case, but only by one vote, not by a nearly unanimous decision. DIERENFIELD, *supra* note 7, at 133-34.

22. *Id.* at 67.

23. *Id.* at 67-68.

24. LOREN, *supra* note 7, at 25. Other sources estimated seventeen percent. DIERENFIELD, *supra* note 7, at 71.

25. DIERENFIELD, *supra* note 7, at 70.

26. See *id.* at 72.

27. Among Pfeffer's numerous scholarly works were GOD, CAESAR, AND THE CONSTITUTION (1974); THE LIBERTIES OF AN AMERICAN (1957) and (with Anson Phelps) the multi-volume CHURCH AND STATE IN THE UNITED STATES.

But he feared that if the case were to go to the Supreme Court, the prayer would probably be upheld, and a damaging precedent would be established.<sup>28</sup>

Pffeffer's pessimism was well-founded. For one thing, the timing seemed inauspicious: the case was filed during the era of "piety on the Potomac"—the period in which President Dwight D. Eisenhower held regular prayer breakfasts and Congress added the words "under God" to the Pledge of Allegiance.<sup>29</sup> And the piety extended beyond the capital. In his classic study *Protestant-Catholic-Jew*, the sociologist Will Herberg reported that "there has in recent years been an upswing of religion in the United States [that] can hardly be doubted."<sup>30</sup> This "reversal of trend," Herberg observed, was evident in "the new intellectual prestige of religion on all levels of cultural life."<sup>31</sup>

But of course public prayer did not begin in the Eisenhower Administration. It had a long and pervasive history in this country, going back to the legislative prayers inaugurated in Congress at the same time the First Amendment was being drafted and enacted, and performed ever since in legislatures both state and federal.<sup>32</sup> Nor was it only the legislative branch that had conducted prayers; prayer was a uniform feature of Presidential inauguration ceremonies, and the Court's own sessions began with a brief invocation—"God Save the United States and this Honorable Court."<sup>33</sup> Given this history, how could a court determine that government-sponsored prayer violated the Constitution?

28. DIERENFIELD, *supra* note 7, at 105.

29. For a good, if somewhat disdainful, contemporary account, see WILLIAM LEE MILLER, *PIETY ALONG THE POTOMAC: NOTES ON POLITICS AND MORALS IN THE '50S*, at 41 (1964) (report dated August 17, 1954):

The manifestations of religion in Washington have become pretty thick. We have had opening prayers, Bible breakfasts, special church services, prayer groups, a "Back to God" crusade, and campaign speeches on "spiritual values"; now we have added a postage stamp, a proposed Constitutional amendment, and a change in the Pledge of Allegiance. The Pledge, which has served well enough in times more pious than ours, has now had its rhythm upset but its anti-Communist spirituality improved by the insertion of the phrase "under God." The Postmaster General has held a dedication ceremony, at which the President and the Secretary of State explained about spiritual values and such, to launch a new red, white, and blue eight-cent postage stamp bearing the motto "In God We Trust." A bill has been introduced directing the post office to cancel mail with the slogan "Pray for Peace."

30. WILL HERBERG, *PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 56 (Anchor Books 1960) (1955).

31. *Id.* at 53.

32. See *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

33. For a review of the tradition, see *id.* at 786–90.



To be sure, the school setting was distinctive. A daily prayer imposed on impressionable and vulnerable schoolchildren may seem far more problematic than a similar exercise performed in front of, say, legislators or adult litigants. But in the Nassau County school district, the prayer was, in principle, voluntary: students who did not want to participate in the prayer were allowed to remain silent or leave the classroom.<sup>34</sup> Given social and psychological pressures, of course, this opt-out option might be difficult as a practical matter for children to exercise. Christopher Eisgruber and Lawrence Sager point out that “[s]tudents who visibly abstain from public prayer rituals may find themselves shunned, teased, or even assaulted by students in the mainstream.”<sup>35</sup> Still, an opt-out was precisely the remedy that the Supreme Court had approved in the celebrated case of *West Virginia State Board of Education v. Barnette*.<sup>36</sup> Jehovah’s Witnesses could not be compelled to recite the Pledge of Allegiance, the Court had ruled.<sup>37</sup> But as long as dissenters were permitted to refrain, schoolteachers were free to lead unobjecting students in the customary “voluntary and spontaneous” (as the Court sanguinely described it)<sup>38</sup> recitation of the Pledge. A similar conclusion might be anticipated in *Engel*. Indeed, a post-*Everson* Supreme Court decision rejecting a challenge to Bible reading in a public school provided support—albeit ambiguous support—for such a prediction.<sup>39</sup>

Nor had more recent decisions from the Supreme Court given the challengers much to work with. In *Everson*, to be sure, the Court had eloquently affirmed a constitutional commitment to the “wall of separation between church and state.”<sup>40</sup> But the case had in fact upheld a New Jersey program for subsidizing the transportation of students to schools, including religious schools. The next year, in *McColum v Board of Education*,<sup>41</sup> the Court invalidated a “release time” program in which students could elect to receive religious instruction in public schools.<sup>42</sup> A few years later, though,

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34. DIERENFIELD, *supra* note 7, at 70.

35. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 162 (2007). *But cf.* 1 DOUGLAS LAYCOCK, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 531, 573 (asserting that “legislative prayer is equally coercive” as school prayer).

36. 319 U.S. 624 (1943).

37. *Id.* at 643.

38. *Id.* at 641.

39. In *Doremus v. Board of Education*, 342 U.S. 429, 432 (1952), the Court had dismissed on standing grounds a challenge to a state practice of reading the Bible in public schools, noting among other things that “there was a pretrial stipulation that any student, at his own or his parents’ request, could be excused during Bible reading and that in this case no such excuse was asked.” However, the significance of this fact was uncertain because it was only one among several reasons given by the Court for its denial of standing.

40. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

41. 333 U.S. 203 (1948).

42. *Id.* at 333.

in what many viewed as a retreat from *McCullum*,<sup>43</sup> the Court in *Zorach v. Clauson* had approved an off-premises release-time program.<sup>44</sup> Treating the permissibility of public prayer as a solid premise from which to reason,<sup>45</sup> the Court had famously declared: “We are a religious people whose institutions presuppose a Supreme Being.”<sup>46</sup> *Zorach* was the Court’s last word on the subject; for almost a decade the Court had refrained from taking cases involving religion in the schools. Indeed, the Court had stayed out of the Establishment Clause area altogether.<sup>47</sup>

Despite Pfeffer’s objection,<sup>48</sup> in early 1959 the plaintiffs filed their lawsuit, but the decisions in the New York courts seemed to vindicate Pfeffer’s warning. The case was initially tried before Justice Bernard S. Meyer, a new Democratic appointee to the bench who would later serve on New York’s highest court.<sup>49</sup> Meyer was a model of the conscientious judge. After hearing evidence and argument, he drafted a twenty-page opinion declaring the prayer exercise unconstitutional. Before issuing his decision, however, he decided to devote six months of intensive study to the issue—and then reached the opposite conclusion.<sup>50</sup>

Meyer’s opinion<sup>51</sup> was far and away the most learned and meticulous judicial opinion of the ten that the case would produce; citing and analyzing

43. See *Zorach v. Clauson*, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting) (asserting that “the *McCullum* case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected.”). Philip Kurland opined that *Zorach* was a “surrender to the political power of the churches.” Kurland, *supra* note 7, at 172. Such a surrender, however, hardly seems characteristic of Justice Douglas, author of the majority opinion.

44. *Zorach*, 343 U.S. at 315.

45. Among the markers of our constitutional tradition which the Court invoked as points from which to reason were “[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; [and] ‘so help me God’ in our courtroom oaths.” *Id.* at 312–13.

46. *Id.* at 313. Douglas later sought to explain away the statement as a mere acknowledgment that Puritanism had “helped shape our constitutional law and our common law.” *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (Douglas, J., dissenting).

47. While the case was working its way through the lower courts, however, the Supreme Court decided *McGowan*, upholding a state Sunday closing law against an Establishment Clause challenge. And in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Court ruled that a religious test for holding public office violated the Establishment Clause.

48. When the case reached the U.S. Supreme Court, Pfeffer submitted amicus briefs on behalf of various Jewish organizations. DIERENFIELD, *supra* note 7, at 122.

49. In another controversy that gained national attention, Meyer would also serve as a special deputy attorney general to investigate the Attica prison riots. Margalit Fox, *Bernard S. Meyer is Dead*, N.Y. TIMES, Sept. 8, 2005, <http://www.nytimes.com/2005/09/08/nyregion/08meyer.html>.

50. DIERENFIELD, *supra* note 7, at 115–16.

51. *Engel v. Vitale*, 18 Misc. 2d 659 (NY Sup. Ct. Special Term 1959), *aff’d*, 206 N.Y.S.2d 183 (App. Div. 1960), *aff’d*, 176 N.E.2d 579 (N.Y. 1961), *rev’d*, 370 U.S. 421 (1962).

numerous judicial and academic sources, it read almost like a well-researched law review article.<sup>52</sup> Meyer was hardly sympathetic to the prayer exercise (as his initial draft opinion declaring it invalid would suggest). He sharply rejected a number of arguments made by the school district,<sup>53</sup> and he insisted that the district do more than it had previously done to ensure that parents and students would have a full opportunity to opt out of the prayer if they so chose, without any contrary influence or constraints imposed by the school.<sup>54</sup> However, after a thorough review of how the Establishment Clause had been understood both at the time of its enactment and also (anticipating arguments by scholars like Akhil Amar and Kurt Lash)<sup>55</sup> at the time the Fourteenth Amendment was adopted, and after a painstaking examination of the relevant case law, both state and federal, Meyer concluded that the prayer exercise was well within a constitutional tradition that was deeply entrenched and that the Supreme Court had at least indirectly approved.

This judgment was appealed, and appealed again, and appealed yet again, but none of the judges who wrote opinions in the case devoted to it anything like the same care that Justice Meyer had demonstrated. The five-judge Appellate Division issued a brief, per curiam affirmance, which simply said, “We agree with the views expressed in the opinion of the learned Justice at Special Term.”<sup>56</sup> Judge George Beldock wrote a separate opinion concurring in the judgment on the understanding that the prayer exercise was not compulsory and did not constitute religious instruction; it “does nothing more than acknowledge the existence of God and dependence upon him.”<sup>57</sup>

New York’s highest court, the Court of Appeals, affirmed in a 5–2 decision. None of the four opinions was lengthy. Very much in the spirit of *Zorach*, Chief Judge Charles Desmond’s opinion noted the pervasiveness of official acknowledgments of deity and concluded:

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52. Though disagreeing with Meyer’s analysis and conclusion, Philip Kurland described Meyer’s opinion as “exhaustive and erudite.” Kurland, *supra* note 7, at 149.

53. For example, Justice Meyer rejected the district’s procedural and standing arguments, *Engel*, 18 Misc. 2d at 663–67; he summarily rejected the district’s arguments based on a rise in juvenile crime, *id.* at 669; and he denied the relevance of the institution of congressional chaplains with the observation that no citizen would have standing to challenge the institution. *Id.*

54. *Id.* at 694–97.

55. Amar and Lash have argued that the Fourteenth Amendment effectively altered the meaning of the Establishment Clause. See AKHIL REED AMAR, *THE BILL OF RIGHTS 246–57* (1998); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995).

56. *Engel v. Vitale*, 206 N.Y.S.2d 183 (App. Div. 1960), *aff’d*, 176 N.E.2d 579 (N.Y. 1961), *rev’d*, 370 U.S. 421 (1962).

57. *Id.* at 343 (Beldock, J., concurring and dissenting). Judge Beldock’s dissenting portion disagreed with some of Justice Meyer’s specific suggestions for ensuring that the prayer exercise was voluntary.

That the First Amendment was ever intended to forbid as an “establishment of religion” a simple declaration of belief in God is so contrary to history as to be impossible of acceptance. No historical fact is so easy to prove by literally countless illustrations as the fact that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of government and society.<sup>58</sup>

Judges Charles Froessel and Adrian Burke wrote concurring opinions. Judge Marvin Dye, while agreeing that the prayer exercise was completely voluntary,<sup>59</sup> interpreted *Everson* as requiring “a complete and unequivocal separation of church and State,” and this meant, he thought, that “[t]he inculcation of religions is a matter for the family and the church,” not the schools.<sup>60</sup> Judge Stanley Fuld joined in Dye’s dissent.<sup>61</sup> Judge Burke responded that Dye’s position “would force on the children a culture that is founded upon secularist dogma” and would support “the consequent promotion and advancement of atheism.”<sup>62</sup>

By the time the case reached the U.S. Supreme Court, therefore, eleven of the thirteen judges considering the issue had concluded that the prayer exercise was constitutional, as had six of the seven judicial opinions produced by the case to that point. The Supreme Court was as emphatically of the opposite view, ruling in a 6–1 decision (which would almost certainly have been 8–1 if Justices Frankfurter and White had voted)<sup>63</sup> that the prayer was unconstitutional.<sup>64</sup> To contemporary sensibilities, at least, that outcome hardly seems extraordinary: indeed, the decision may seem over-determined. The legal imagination can readily devise rationales sounding in psychological coercion and appealing to doctrines and decisions under the Establishment,<sup>65</sup> Free Exercise,<sup>66</sup> and Free Speech Clauses.<sup>67</sup> But the Court

58. *Engel v. Vitale*, 176 N.E.2d 579, 581 (N.Y. 1961), *rev'd*, 370 U.S. 421 (1962).

59. *See id.* at 584 (Dye, J., dissenting) (observing that “no penalty attaches for nonparticipation, since the board announced that, as a matter of policy, no child was to be required or encouraged to join in said prayer against his or her wishes”).

60. *See id.* at 585, 588.

61. *Id.*

62. *Id.* at 583 (Burke, J., concurring).

63. Frankfurter had been crippled with a paralyzing stroke; White was recently appointed and did not participate in the case. DIERENFIELD, *supra* note 7, at 129. But Frankfurter was a strong proponent of secular schools—he had dissented in *Zorach*—and a year later, White voted with the majority in *Schempp*.

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

65. *Cf. Lee v. Weisman*, 505 U.S. 577 (1992) (declaring prayer at middle school graduation exercise unconstitutional, in part because of psychological coercion imposed on students); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV.

in *Engel* did not articulate such rationales; in fact, the Court provided no very deliberate or satisfying explanation at all.

In this respect, as much as in its conclusion, Justice Hugo Black's opinion for the Court presented a striking contrast to Justice Meyer's lengthy and exhaustive opinion. Meyer had methodically reviewed a sweeping array of prior judicial decisions, state and federal; Black, by contrast, cited not a single supporting precedent—not even *Everson* (which he had authored).<sup>68</sup> Meyer had carefully analyzed the evidence of how the Establishment Clause had been understood at the founding and afterwards; Black briefly noted controversies over the Book of Common Prayer in England in the sixteenth and seventeenth centuries, asserted that many people came to this land in part because of their dislike for governmentally-sponsored prayer, and then, with little ado, attributed a purpose of prohibiting such prayers to the enactors of the First Amendment.<sup>69</sup> Black did not pretend to reconcile this attribution with those same enactors' simultaneous approval of legislative prayer or with the long and pervasive practice of governmentally-sponsored prayer that had seemed so compelling to the New York judges and that Justice Potter Stewart referred to at some length in a dissenting opinion.<sup>70</sup>

The opinion's unforthcoming quality led constitutional scholar Paul Kauper to describe it as “short and bland . . . and noteworthy as much for what it did not say as for what it did say.”<sup>71</sup> But not all the Justices were so reticent. Justice William O. Douglas found Black's opinion unsatisfactory. In a note to Black, Douglas wrote, “I still do not see how most of the opinion is relevant to the problem.”<sup>72</sup> Consequently, Douglas wrote a separate concurring opinion in an effort to provide a more persuasive justification for the result.

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933, 934–36 (1986) (arguing that prayer invalidated in *Engel* was unconstitutional because coercive).

66. See Patrick M. Garry, *The Institutional Side of Religious Liberty*, 2004 UTAH L. REV. 1155, 1170 (“Under the First Amendment, schools should not be permitted to force children to adhere to a creed contrary to the moral or religious teaching of their family. For this reason, school prayer cases should only be analyzed under the Free Exercise Clause.”).

67. Cf. *Wooley v. Maynard*, 430 U.S. 705 (1977) (ruling that the Free Speech Clause precludes state from compelling citizens to affirm prescribed ideas).

68. However, the presentation in *Engel* to some extent tracked that of *Everson*. In each case, Justice Black described a pattern in which Old World evils associated with established religion led colonizers to come to America, where the old practices and evils were reintroduced but then, with experience and the passage of time, were prohibited, first in Virginia, and then by the First Amendment.

69. *Engel*, 370 U.S. at 424–30.

70. *Id.* at 446–50 (Stewart, J., dissenting).

71. Paul G. Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, in RELIGION AND THE PUBLIC ORDER 3, 6 (Donald A. Gianella ed., 1963). Louis Fisher defends the decision but suggests that it provoked misunderstanding and angry reaction in part because of the “the clumsy and tactless way it was written and presented.” LOUIS FISHER, RELIGIOUS LIBERTY AND AMERICA 123 (2002).

72. DIERENFIELD, *supra* note 7, at 128.

But Douglas's reasoning was, if anything, even less cogent. Surprisingly, Douglas shunned several potentially promising lines of argument. The prayer was not an imposition of religion on students, he thought, because "there is no element of compulsion or coercion in New York's regulation," nor was there any "effort at indoctrination" or "any element of proselytizing."<sup>73</sup> *McCollum* was distinguishable, Douglas said, and *Everson*, far from providing support for his conclusion, was an obstacle to overcome.<sup>74</sup> The real problem, he insisted, had to do with money: New York was transgressing the Constitution by "financ[ing] a religious exercise."<sup>75</sup>

Douglas's emphasis on money reflected a larger project or vision: he believed that any sort of public financial support for religion should be deemed unconstitutional. This concern would be articulated more fully and vehemently a few years later when he would argue, in *Walz v. Tax Commission*,<sup>76</sup> that tax exemptions for churches were unconstitutional. But whatever the merits of Douglas's view on financing, his argument hardly seems the most perspicuous explanation for why school prayer was unconstitutional.

After all, the prayer did not directly, or as a practical matter, cost the taxpayers anything. It was administered, to be sure, by teachers who received a salary, as Douglas pointed out.<sup>77</sup> But given that the recital of the prayer would take less than a minute during the school day—"about the same amount of time," Douglas observed, "that our Crier spends announcing the opening of our sessions and offering a prayer for this Court"<sup>78</sup>—the expenditure was both indirect and *de minimis*. And invalidating the exercise would not save taxpayers a dime: no pro rata reduction in teachers' salaries would result. A decade earlier, in *Doremus v. Board of Education*,<sup>79</sup> the Court had denied standing (over Douglas's dissent) to a taxpayer challenging a school's Bible-reading practice, quoting with approval the lower court's observation that "it is not charged . . . that the brief interruption in the day's schooling . . . adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's

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73. *Engel*, 370 U.S. at 438–39.

74. *Id.* at 439, 443 ("My problem today would be uncomplicated but for *Everson v. Board of Education* . . .").

75. *Id.* at 437.

76. 397 U.S. 664 (1970).

77. *Engel*, 370 U.S. at 441.

78. *Id.*

79. 342 U.S. 429 (1952).

work.”<sup>80</sup> Thus, Douglas’s singular insistence that money was the problem seemed a notable instance of the tail wagging the dog. Philip Kurland observed that “Douglas . . . would seem to have been more concerned with the problem of federal aid to parochial education than with the facts of the case immediately before him.”<sup>81</sup>

In fact, laconic though it was, Justice Black’s opinion probably came closer to expressing the real reason animating most of those who opposed the prayer—a reason that (for those who accepted it) rendered largely superfluous all of Justice Meyers’s painstaking reviews of founding-era history and subsequent practice and precedent. Thus, early in his opinion, Black emphasized that the prayer was a “religious activity.”<sup>82</sup> Indeed, with the triumphant flourish of a lawyer who has discovered a fatal “smoking gun” admission by an adversary, Black declared that both Justice Meyer and the school district itself had expressly acknowledged that prayer is religious in nature.<sup>83</sup> Given this admission, it followed (for Black, anyway) that the prayer exercise was “wholly inconsistent with the Establishment Clause.”<sup>84</sup> Brief though Black’s opinion was, one has the sense that in his own mind it was longer than it needed to be. After all, the district itself had admitted everything necessary to definitively establish the prayer’s unconstitutionality.<sup>85</sup> And most of Black’s fellow Justices evidently thought the same.

At this point, it seems we have stumbled upon a crucial interpretive divide. Everyone agreed that the Regents’ Prayer was religious in nature (hardly a shocking observation). So what? For the New York judges, this obvious fact was simply the prelude to the constitutional analysis.<sup>86</sup> For Black and most of his brethren, by contrast, the fact settled the debate: once the religious nature of the prayer was conceded, the conclusion of invalidity inexorably followed.<sup>87</sup> Foreshadowing recurring controversies under the “no-endorsement” doctrine articulated just over two decades later,<sup>88</sup> the *Engel* Court evidently assumed that in order to salvage its practice, the school district would have needed to make the heroic (or preposterous) argument that the prayer was somehow not religious.<sup>89</sup>

On that assumption, it seems the New York judges’ constitutional understanding was seriously deficient. Acknowledging that the Regents’

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80. *Id.* at 431.

81. Kurland, *supra* note 7, at 157.

82. *Engel*, 370 U.S. at 424.

83. *Id.* at 424–25.

84. *Id.* at 424.

85. *Id.* at 424–25.

86. *See Engel v. Vitale*, 176 N.E.2d 579, 580–81 (N.Y. 1961), *rev’d*, 370 U.S. 421.

87. *Engel*, 370 U.S. at 424–25.

88. *See infra* notes 314–20 and accompanying text.

89. *Engel*, 370 U.S. at 424.

Prayer was religious and then asking whether it was constitutional, Justice Meyer was like the innocent observer of a sports event who naively asks, “I know that the Yankees scored more runs, but who won the game?”<sup>90</sup>

But exactly how and where had Meyer and his judicial colleagues gone astray? In *Engel*, the Supreme Court did little to answer that question. Apparently the matter seemed so axiomatic as not to require—or perhaps even permit?—explanation. The next year, however, in *Abington School District v. Schempp*, the Court made a more serious effort to explain and justify its position.

### B. *The Explanation: Schempp*

In *Schempp*, the Court considered a statutorily mandated practice of beginning each school day in Pennsylvania schools with the reading of ten Bible verses without commentary, followed by recitation of what is often called “The Lord’s Prayer” from the New Testament.<sup>91</sup> The Court’s bottom line in *Schempp* matched that in *Engel*. Writing for the majority, Justice Tom Clark noted that the trial court had found that the Bible-prayer exercise was a “religious ceremony,” and he concluded that “[g]iven that finding, the exercises . . . are in violation of the Establishment Clause.”<sup>92</sup>

Clark’s somewhat mechanical majority opinion offered little analysis but consisted mostly of a long string of quotations from previous cases followed by a conclusion. His opinion was supplemented, though, by a more careful and deliberate opinion by Justice William Brennan,<sup>93</sup> which might be viewed as the counterpart or response to the searching opinion of Justice Meyer in the *Engel* case. Like Meyer, Brennan reviewed the early history of the Establishment Clause.<sup>94</sup> But he argued that a “too literal quest for the advice of the Founding Fathers upon the issues of these cases seems . . . futile and misdirected . . .”<sup>95</sup> Instead, history should be consulted for “broad purposes, not specific practices.”<sup>96</sup> And the broad purpose that Brennan discerned in the course of examining a large number of precedents was one of “strict adherence to the principle of *neutrality*” in

90. See *Engel*, 176 N.E.2d at 581.

91. *Sch. Dist. v. Schempp*, 374 U.S. 203, 205–06 (1963). The case was consolidated with *Murray v. Curlett*, challenging a prayer and Bible reading exercise conducted in Baltimore schools.

92. *Id.* at 223; see also *id.* at 266–67 (Brennan, J., concurring) (“The religious nature of the exercises here challenged seems plain. Unless *Engel v. Vitale* is to be overruled, or we are to engage in wholly disingenuous distinction, we cannot sustain these practices.”).

93. See *id.* at 230–304.

94. *Id.* at 232–38.

95. *Id.* at 237.

96. *Id.* at 241.



matters of religion.<sup>97</sup> Neutrality, in turn, entailed “a public *secular* education.”<sup>98</sup> School prayer was religious, not secular, Brennan reasoned, and hence it violated the obligation of neutrality-as-secularism.

With less analysis, Justice Clark’s majority opinion accepted and even codified this reasoning. Thus, Clark agreed that what the Establishment Clause required of government was a “wholesome ‘neutrality’” toward religion.<sup>99</sup> And neutrality meant that government must remain in the domain of the secular. To that end, Clark announced a constitutional “test”: “[T]o withstand the strictures of the Establishment Clause,” he declared, “there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”<sup>100</sup> This test provided the first two requirements of what would later become known as the three-part “*Lemon* test.”<sup>101</sup>

In sum, the *Schempp* Court construed the Establishment Clause to require governmental neutrality in matters of religion,<sup>102</sup> and it interpreted neutrality to mean that the state must limit itself to acting for secular purposes and in ways that would have primarily secular effects. Prayer, as everyone acknowledged, was a religious exercise.<sup>103</sup> But if school prayer was religious, it was therefore not secular, and therefore not neutral, and therefore not within the proper domain of the public schools, and therefore not constitutional.

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97. *Id.* at 246 (emphasis added).

98. *Id.* at 242 (emphasis added).

99. *Id.* at 222 (majority opinion); *see also id.* at 215.

100. *Id.* at 222.

101. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). In *Schempp*, Justice Brennan also offered his own three-part doctrine or test, though his proposal did not have the good fortune to be codified as a regular Establishment Clause doctrine. Brennan declared that the Constitution “enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice.” *Schempp*, 374 U.S. at 231 (Brennan, J., concurring).

102. In a concurring opinion, Justice Douglas reiterated his financial rationale but also agreed that the Constitution requires governmental “neutrality” in matters of religion. *Schempp*, 374 U.S. at 229 (Douglas, J., concurring). Justice Goldberg, joined by Justice Harlan, likewise endorsed the obligation of neutrality, while emphasizing that this obligation permitted and even in some circumstances required governmental accommodation of religion, lest neutrality devolve into “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.” *Id.* at 306 (Goldberg, J., concurring). Paul Kauper observed that although earlier cases had referred to neutrality, the “really distinctive” feature of *Schempp* was its emphasis on this as its central theme. Kauper, *supra* note 71, at 11. “The new emphasis in *Schempp* is on the neutrality principle.” *Id.* at 38.

103. *See supra* note 91 and accompanying text.

*C. Unanswered Questions*

Although *Schempp* and particularly Justice Brennan's concurring opinion went some distance toward explaining the conclusion that *Engel* had presented in more peremptory fashion, major questions remained unanswered. The assertion that government must be neutral toward religion was not novel; *Everson v. Board of Education* had said as much.<sup>104</sup> But why did the *Schempp* Court so confidently equate *neutrality* with governmental *secularism*?

The question was highlighted by Justice Stewart's dissenting opinion in *Schempp*, in which he elaborated upon his dissent in *Engel*. Stewart agreed that the Constitution required governmental neutrality toward religion.<sup>105</sup> But that proposition, he thought, required "an analysis of just what the 'neutrality' is which is required by the interplay of the Establishment and Free Exercise Clauses,"<sup>106</sup> and Stewart was not satisfied with the pronouncements on this point by the majority and Justice Brennan. What their opinions overlooked was that many citizens believe (sometimes as a matter of their own religious faith) that prayer is a *public* obligation, not merely a private one, and hence that it has a place in the schools. In rejecting the beliefs of these citizens, Stewart reasoned, a ruling prohibiting school prayer offended neutrality: the ruling "is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or"—here, perhaps sensing that he had overreached, Stewart hastened to soften his claim—"at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private."<sup>107</sup> In Stewart's view, the obligation of neutrality supported a conclusion precisely contrary to the majority's: on the assumption that the prayer exercises were voluntary, "permission of such exercises . . . is necessary if the schools are truly to be neutral in the matter of religion."<sup>108</sup>

In sum, both the majority and Justice Stewart agreed that the state and the public schools should be neutral toward religion.<sup>109</sup> But the majority applied this requirement with an eye toward those (such as the plaintiffs) who opposed the Bible and prayer exercise, and so the Court concluded that *school prayer* was not neutral.<sup>110</sup> Stewart, by contrast, seemed more

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104. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–18 (1947).

105. *Schempp*, 374 U.S. at 313 (Stewart, J., dissenting).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 226 (majority opinion); *id.* at 299 (Brennan, J., concurring).

110. *See id.* at 223 (majority opinion).

cognizant of those who believed that public prayer was proper or obligatory, and he accordingly inferred that *a prohibition of school prayer* violated neutrality by rejecting the religious beliefs and commitments of these citizens.<sup>111</sup> Ostensibly starting from the same premise, the majority concluded that neutrality entailed governmental secularism, while Stewart reasoned that completely secular public schools were themselves not neutral toward religion.

Commenting on the case in the annual *Supreme Court Review*, Harvard professor Ernest Brown saw a vexing “dilemma” in this disagreement.<sup>112</sup> Schools inevitably teach moral values, Brown observed, and while a theistic approach to this task is surely not “neutral,” a purely secular approach to values inculcation will likewise conflict with the views of students and parents who believe that moral values necessarily rest on a religious or theistic foundation.<sup>113</sup> Acknowledging “the impossibility of any substantive decision that was not non-neutral to a substantial extent,”<sup>114</sup> and troubled by what he perceived as a serious problem of “standing” under the Establishment Clause,<sup>115</sup> Brown wished that the Court had avoided a decision on the merits or that it had addressed the controversy in free-exercise terms.

In the ensuing decades, the ideal of governmental neutrality would continue to dominate Religion Clause jurisprudence, and the ideal would accordingly come in for a good deal of academic scrutiny. One common observation would be that a law’s or practice’s “neutrality” can be judged only relative to some baseline.<sup>116</sup> An analogy is to an athletic contest, in which the referees are expected to be “neutral” in officiating the game. This expectation entails that the referees will enforce the rules, whatever they are, evenly and consistently against both teams. The requirement of neutrality has meaning relative to the baseline provided by the rules of the game; conversely, without such rules, the demand that the referees call the game in a “neutral” fashion would make little sense. What would it even mean to call fouls in a “neutral” fashion if there are no rules specifying what a foul is?

Similarly, given some constitutional baseline about how government is supposed to treat religion, the government can be neutral by complying

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111. *Id.* at 317 (Stewart, J., dissenting).

112. Ernest J. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 14 (1963).

113. *Id.* at 12–15.

114. *Id.* at 14.

115. *Id.* at 15–31.

116. See, e.g., ANDREW KOPPELMAN, *RELIGIOUS NEUTRALITY IN AMERICAN LAW*, ch. 2 (forthcoming); 1 DOUGLAS LAYCOCK, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, in *RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY*, *supra* note 5, at 3, 17–19; Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 793 (1993).

consistently with that baseline or by enforcing it evenly against all citizens and institutions, whatever their religious beliefs or dispositions. On this understanding, we might say that although the majority and Justice Stewart both embraced a requirement of governmental neutrality toward religion, they were evidently interpreting that requirement against the backdrop of different (albeit largely unarticulated) baselines.

But what were those baselines, exactly?<sup>117</sup> Where did they come from? And why did the Justices embrace the particular baselines they implicitly adopted? On these questions, the opinions were less than forthcoming: the Justices seemed to suppose that the notion of “neutrality” itself was somehow self-explanatory or self-interpreting. Thus, a major question left by the cases concerned the choice of baselines against which the requirement of neutrality was or should be interpreted.

This question relates closely to another set of questions that the decisions left open: in the larger scheme of things, how significant were the school prayer decisions? How narrow or how sweeping were their implications and consequences? Contemporary assessments differed drastically. Alarmed critics of the decisions foresaw far-reaching, even radical, consequences.<sup>118</sup> Justice Douglas agreed but did so with enthusiasm, rather than alarm. Thus, in his *Engel* concurrence, Douglas indicated that the opening invocation at Supreme Court sessions (“God save the United States and this honorable Court”)<sup>119</sup> was as constitutionally infirm as school prayer: “the principle is the same, no matter how briefly the prayer is said . . . .”<sup>120</sup> And in footnotes he provided a list of other measures vulnerable to potential invalidation: the national motto (“In God We Trust”), the words “under God” in the Pledge of Allegiance, legislative and military chaplains, Presidential religious proclamations, the use of the Bible in

117. In retrospect, we might read the cases as adopting a baseline of governmental secularism and then applying the neutrality requirement relative to that baseline; indeed, my argument is that this was the effect of the decisions. In the opinions themselves, however, the logic seems to run the other way: the primary obligation that the cases take from the Establishment Clause is the obligation of neutrality, it seems, and the obligation of public secularism is *derived from* (or perhaps viewed as simply *identical to*) that requirement of neutrality.

118. A *Wall Street Journal* editorial opined that the majority opinion “must logically require the excision of all those other countless official references to God, such as in the Declaration of Independence; the Pledge of Allegiance; the Star-Spangled Banner; and the words used to inaugurate the President, open the Congress, and convoke the Supreme Court itself.” Editorial, *reprinted in* RELIGIOUS LIBERTY AND THE SUPREME COURT 138 (Terry Eastland ed., 1993). Senator Strom Thurmond described *Engel* as a “major triumph for the forces of secularism and atheism which are bent on throwing God completely out of our national life.” Kurland, *supra* note 7, at 145 (quoting Thurmond).

119. *Engel v. Vitale*, 370 U.S. 421, 439 (Douglas, J., concurring).

120. *Id.* at 441.

administering official oaths—and perhaps even, Douglas hinted tantalizingly, official recognition of the Christmas holiday.<sup>121</sup> Likewise, the plaintiffs’ attorney in *Engel* and the ACLU predicted wide-ranging consequences.<sup>122</sup>

By contrast, the Court itself confined its rulings to particular school prayer and Bible exercises, and Justice Brennan emphasized the limited reach of the rulings. Where Douglas exuberantly presented measures ripe for possible invalidation, Brennan soberly enumerated and discussed a range of issues that, he said, the school prayer decisions did *not* resolve, including legislative prayer, non-devotional use of the Bible in schools, tax exemptions for churches, and the national motto.<sup>123</sup>

But however sincere Brennan’s disclaimers may have been, with the benefit of hindsight it is difficult to take them fully at face value. For example, Brennan maintained (somewhat coyly, perhaps) that legislative prayer “*might* well represent no involvements of the kind prohibited by the Establishment Clause.”<sup>124</sup> Two decades later, however, when that issue was presented to the Court in *Marsh v. Chambers*, Brennan not only concluded that legislative prayer was unconstitutional, but he thought that this conclusion was obvious and inescapable precisely on the basis of the secular purpose and effect requirements articulated in *Schempp* and later absorbed into the *Lemon* test.<sup>125</sup> Brennan’s later opinion suggests that even if he and his brethren did not fully realize or at least acknowledge the fact at the time, the school prayer cases and the doctrine they announced did in fact have implications that extended beyond the public schools.

But how far beyond? And with what implications? These questions are connected to the previous one about baselines, because the full implications of the decisions depended on what constitutional baseline the Court was implicitly importing into its constitutional analysis, and why. In order to investigate those questions, therefore, we need to look more closely at that fundamental issue. What baseline, or what basic conception of the relation between government and religion, animated the school prayer decisions? We can more fully appreciate that question and its answer if we step back from the decisions and survey the possibilities on offer.

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121. *Id.* at 437 n.1, 440 n.5, 442 n.8.

122. DIERENFIELD, *supra* note 7, at 133.

123. Sch. Dist. v. Schempp, 374 U.S. 203, 296–304 (1963) (Brennan, J., concurring).

124. *Id.* at 299 (emphasis added).

125. *Marsh v. Chambers*, 463 U.S. 783, 796–801 (1983) (Brennan, J., dissenting); *see also id.* at 800–01 (“I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”). The *Marsh* Court itself deflected that conclusion only by declining to apply the *Lemon* test in deference to longstanding tradition. *Id.* at 792 (majority opinion).

## III. A CRAZY-QUILT, QUASI-CONSTITUTIONAL TRADITION

Unlike its European ancestors, the American republic from the outset eschewed any religious orthodoxy<sup>126</sup> (and perhaps, it is sometimes sanguinely suggested, *any* sort of officially prescribed orthodoxy, religious or otherwise)<sup>127</sup>. But the decision to forego an established religion did not relieve Americans of the continuous task of thinking about—and arguing about, on an ongoing basis—the proper relation between government and religion. For one thing, in a nation in which a large majority of citizens has been and continues to be religious in diverse and shifting ways, the issue could hardly be avoided. For another—paradoxically, perhaps—a political community self-consciously constituted in part on a commitment to maintain a *separation* of government from established religion may need to give more attention to the matter than a community lacking such a commitment would. What exactly is the government supposed to keep itself separate from? And separate in what ways?

So despite (or because of) the constitutional commitment to separation of church and state, Americans from the beginning have pondered and argued about the relation between religion and political community.<sup>128</sup> Their various views have of course been complicated and diverse. But with the simplification that we necessarily impose on history in order to engage with it, we can discern two broad views, or families of views, that run through American political thought and culture from the beginning.

A. *The Perennial Contenders*

Describing the current political landscape with respect to religion, Noah Feldman sorts the most prominent actors and views into two main families or camps, which he calls “values evangelicals” and “legal secularists.” These families are to be distinguished not only from each other but also from more extreme positions to which their critics sometimes assimilate them, carelessly or for polemical purposes. Thus, the family of values evangelicals includes many Catholics, Protestants, Muslims, and even people who do not

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126. The eschewal was expressed through silence—namely, through a failure to adopt any national religion—but also explicitly in Article VI’s prohibition on religious tests for public office, and later, of course, in the First Amendment’s Establishment Clause. U.S. CONST. art. VI, § 3; *id.* amend. I, cl.1.

127. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); Robert D. Kamenshine, *The First Amendment’s Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1134 (1979).

128. Cf. NOAH FELDMAN, *DIVIDED BY GOD* 5 (observing that “no question divides Americans more fundamentally than that of the relation between religion and government”).

identify with any particular religious tradition but who believe in public morality and are friendly to religion, including a sort of generic public religion, as a basis for this morality.<sup>129</sup> Feldman's values evangelicals are a far cry, however, from more sectarian and theocratic believers, such as the so-called Christian Reconstructionists, who would reconstruct America on the model of Calvin's Geneva.<sup>130</sup> Conversely, legal secularists urge the maintenance of a secular regime but only in the public sphere;<sup>131</sup> their view is to be distinguished from what Feldman calls "strong secularism" that constitutes "a comprehensive worldview that present[s] itself as an alternative to religious conceptions of the world" and that is "concerned with removing religion from the public sphere as a corollary to the general goal of removing superstitious religion from all human thought and decision making."<sup>132</sup>

Feldman's interpretation of American political culture as divided between values evangelicals and legal secularists is reminiscent of the much-discussed diagnosis offered some years earlier by the sociologist James Davison Hunter. Hunter found that across a wide variety of seemingly independent political and social issues, Americans tend to coalesce into two broad camps, which he called "orthodox" and "progressive."<sup>133</sup> The "orthodox" camp, reflecting a "biblical theism" that includes many Catholics, Protestants, and Jews,<sup>134</sup> is defined by "the commitment on the part of adherents to an external, definable, and transcendent authority."<sup>135</sup> This authority "tells us what is good, what is true, how we should live, and *who we are*."<sup>136</sup> By contrast, the progressive camp is composed of both "secularists," who adhere to no religion, and also persons who, though counting themselves religious, place their trust in "personal experience or scientific rationality" over "the traditional sources of moral authority, whether scripture, papal pronouncements, or Jewish law."<sup>137</sup>

Hunter argued that these contrasting perspectives are central to their adherents' views on a host of political issues and indeed to their understanding of what America most fundamentally is.<sup>138</sup> The conflict between these constituencies "amounts to a fairly comprehensive and momentous struggle to define the meaning of America—of how and on what

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129. *Id.* at 7–8, 186–212.

130. *See, e.g.*, ROUSAS JOHN RUSHDOONY, *CHRISTIANITY AND THE STATE* (1984).

131. FELDMAN, *supra* note 128, at 8, 150–85.

132. *Id.* at 129.

133. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 43–44 (1991).

134. *Id.* at 71.

135. *Id.* at 44 (emphasis omitted).

136. *Id.* (emphasis added).

137. *Id.* at 44–45.

138. *Id.* at 46–51.

terms will Americans live together, of what comprises the good society.”<sup>139</sup>

Looking back in American history, we can perceive antecedents to these two broad visions. Thus, Feldman describes the widespread commitment through much of the nineteenth century and early twentieth century to what was commonly described as “nonsectarianism,” particularly in the area of public education.<sup>140</sup> Nineteenth-century nonsectarianism held that “there were moral principles shared in common by all Christian sects, independent of their particular theological beliefs” and expressed in the Bible, which was “the font of common morality.”<sup>141</sup> Thus, the proponents of nonsectarianism were discernibly similar in their views and aspirations to Feldman’s value evangelicals<sup>142</sup> and to Hunter’s “orthodox” citizens of today, the main difference being that in the course of the twentieth century the position expanded beyond Protestants to include Catholics, devout Jews,<sup>143</sup> and eventually theists generally. Justice Antonin Scalia’s recent commendation of a tradition of non-denominational theism is very much in this vein.<sup>144</sup>

Feldman suggests that the “secularist” position is of more recent vintage. Indeed,

[u]ntil the 1870s, the word “secular” did not even figure in American discussions of church and state. “Secularism” in the contemporary sense was a term unknown to the Framers and unmentioned by the Reconstruction Congress that drafted the Fourteenth Amendment. As late as the Scopes trial of 1925, “secularism” was still a term of opprobrium to most Americans,

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139. *Id.* at 51.

140. FELDMAN, *supra* note 128, at 57–110. Feldman points out that nonsectarianism seemed plausible

because it relied on the basic truth that nonsectarian religion pervaded American public life. Criminal laws and laws prohibiting adultery did rest on the bedrock of religious Christian values. Citizens did invoke God’s help when they took their oaths as witnesses or public servants. Public prayers opened legislative sessions everywhere in America, as they still do. All these practices were broadly understood by Americans of the nineteenth century as fully compatible with the preservation of religious liberty.

*Id.* at 81.

141. *Id.* at 61.

142. *Id.* at 188. Feldman notes the continuities but argues that values evangelicals have also adapted their position in response to modern secularism and concern for minorities. *Id.*

143. *Cf.* HERBERG, *supra* note 30, at 240–41 (describing “the transition from a ‘Protestant nation’ to a ‘three-religion country’”).

144. *See* *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893–98 (2005) (Scalia, J., dissenting).



associated as it was with radical atheism and contempt for religion.<sup>145</sup>

Feldman may be right about the terminology. But it is not difficult to discern the elements of an essentially secularist vision much earlier. Thus, though intended to be broadly inclusive, “nonsectarian” religiosity still did not encompass everyone, and those who found themselves on the outside—nineteenth-century Jews, Quakers, and Unitarians, for example—often contended that the public schools should forego even the relatively generic religion of Bible reading and prayer in favor of a regime that today would be described as secular.<sup>146</sup> Similarly, a secular conception is apparent in the view (which prevailed, despite strong opposition, throughout most of the nineteenth century) that the Post Office ought to deliver mail on every day of the week and that a refusal to deliver the mail on Sundays would be an improper mixing of government and religion.<sup>147</sup> Indeed, some historians argue that the secularist vision (of government and politics, at least) was present and even dominant from the nation’s beginning.<sup>148</sup>

Using a different vocabulary, John Witte describes American visions of religion and political community in terms of two “models,” which he associates with Thomas Jefferson and John Adams, respectively, and which have competed with each other throughout American history.<sup>149</sup> The Jeffersonian model insisted on a fairly rigorous separation of government from religion.<sup>150</sup> By contrast, Adams’s model aimed to maintain a regime in which freedom of conscience and many private religions flourished under the general banner of a more theologically thin public religion.<sup>151</sup> A “Publick Religion” was essential, Adams declared, to provide “the foundation, not only of republicanism and of all free government, but of social felicity under all governments and in all the combinations of human society.”<sup>152</sup>

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145. FELDMAN, *supra* note 128, at 181.

146. DIERENFIELD, *supra* note 7, at 29.

147. See DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 283–305 (2010); Richard R. John, *Taking Sabbatarianism Seriously: The Postal System, the Sabbath, and the Transformation of America*, 10 J. EARLY REPUBLIC 517 (1990).

148. See, e.g., ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE (2005 ed. 1996). For a spirited and well-documented presentation of this interpretation, see Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?*, 38 CAP. U. L. REV. 409 (2009).

149. JOHN WITTE JR., GOD’S JOUST, GOD’S JUSTICE 245–62 (2006).

150. *Id.* at 245–46.

151. *Id.* at 246–51.

152. *Id.* at 248 (quoting JOHN ADAMS, WORKS, 9:636). Regarding the content of that “Publick Religion,” Witte explains that

[i]n Adams’s view, its creed was honesty, diligence, devotion, obedience, virtue, and love of God, neighbor, and self. Its icons were the Bible, the bells of liberty, the memorials of patriots, the Constitution. Its clergy were public-spirited ministers and religiously committed politicians. Its liturgy was the public proclamation of oaths, prayers, songs,

In a similar vein, Rodney Smith distinguishes between what he calls “Madison’s position” and “Story’s position.”<sup>153</sup> Smith refers to responses made to a pamphlet written in 1833 by Jasper Adams, president of Charleston College, contending that nondenominational Christianity served as a national religion.<sup>154</sup> Adams sent the pamphlet to various public figures for comment, and Madison’s response, though somewhat unclear, appeared to dissent in a separationist or secular direction.<sup>155</sup> By contrast, Joseph Story warmly endorsed Adams’s pamphlet, asserting that “government cannot long exist without an allegiance with religion *to some extent*; and that Christianity is indispensable to the true interests and solid foundation of free government.”<sup>156</sup> John Marshall, the Chief Justice, expressed a similar opinion, observing that “the American population is entirely Christian” and that “[i]t would be strange indeed, if with such a people our institutions did not presuppose Christianity.”<sup>157</sup>

Although Feldman, Hunter, Witte, and Smith employ different labels and trace their categories somewhat differently, their interpretations and categories overlap to a significant extent, and they converge to sketch out two major conceptions of the relation between government and religion that have joined and jostled with each other throughout American history. We might call one of these positions “ecumenical providentialism” and the other “political secularism.”

Depending on the prevailing demographics, providentialism has struggled to include Protestants, or Christians, or Christians and Jews,<sup>158</sup> or

and election and Thanksgiving Day sermons. Its policy was state appointment of chaplains for the legislature, military, and prison, state sanctions against blasphemy, sacrilege, and iconoclasm, state administration of tithes collections, test oaths, and clerical appointments, state sponsorship of religious societies, schools, and charities.

*Id.* at 247.

153. RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION 113–15 (1987).

154. *Id.* at 113.

155. *Id.* at 113–14.

156. *Id.* at 114.

157. *Id.* Adams’s pamphlet and the responses by Madison, Story, and Marshall are reproduced in THE SACRED RIGHTS OF CONSCIENCE 597–614 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

158. By the 1950s, Will Herberg argued, most Americans had come to believe in “the conception of the three ‘communions’—Protestantism, Catholicism, Judaism—as three diverse, but equally legitimate, equally American, expressions of an over-all American religion, standing for essentially the same ‘moral ideals’ and ‘spiritual values.’ HERBERG, *supra* note 30, at 87. This “common faith,” Herberg reported, “makes no pretensions to override or supplant the recognized religions, to which it assigns a place of great eminence and honor in the American scheme of things.” *Id.* at 88–89. Herberg’s own assessment of this conception was complex and ambivalent, admiring yet highly critical.

theists generally. The position's core claims are that America's history and institutions are subject to an overarching providence,<sup>159</sup> that public morality or civic virtue need a religious foundation, and that it is imperative for citizens and for the nation itself to acknowledge their dependency on Providence—but that government can and should remain noncommittal with respect to specific creedal differences that are not important for civic or political purposes.

The general sense of the view was nicely expressed by Dwight D. Eisenhower, who famously insisted that “[o]ur form of government has no sense unless it is founded in a deeply felt religious faith[,] and I don’t care what it is.”<sup>160</sup> Eisenhower’s statement described a state of affairs that had been observed by Tocqueville more than a century earlier.<sup>161</sup> Indeed, Sidney Mead argues that “Eisenhower’s position in this respect, far from being ‘new,’ seems directly in the tradition of the founding fathers.”<sup>162</sup>

Political secularism,<sup>163</sup> by contrast, has maintained that religion is and should be a private affair. Political secularists typically have not attempted

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159. For an argument asserting the pervasiveness of this theme through American history, see STEPHEN H. WEBB, *AMERICAN PROVIDENCE* 29–50 (2004).

160. Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEMPHIS L. REV. 973, 978 (2009). The statement was not made casually or inadvertently, it seems, but reflected Eisenhower’s considered commitment:

The General said over and over during the campaign that when the founding fathers said that men were endowed by their Creator with rights, they showed that the basis or foundation of this nation and form of government lay in a “deeply felt religious faith.” Our government is the attempt to “translate” that religion into the political world. He said that no other nation has American’s “spiritual and moral strength.” He said that “the Almighty takes a definite and direct interest day by day in the progress of this nation.”

MILLER, *supra* note 29, at 34.

161. See, e.g., 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 308 (Henry Reeve trans., 1875) (“The sects which exist in the United States are innumerable. They all differ in respect to the worship which is due from man to his Creator; but they all agree in respect to the duties which are due from man to man. . . . Society has no future life to hope for or to fear; and *provided the citizens profess a religion, the peculiar tenets of that religion are of very little importance to its interests.*” (emphasis added)).

162. SIDNEY E. MEAD, *THE NATION WITH THE SOUL OF A CHURCH* 25 (1975). Mead’s title refers to Chesterton’s famous observation after a trip to the United States that this country was “a nation with the soul of a church.” 21 G. K. CHESTERTON, *What I Saw in America*, in G. K. CHESTERTON: COLLECTED WORKS 35, 45 (1990). More recently, a similar theme is discernible in the work of Michael Perry. In his first book, Perry discussed how the constitutional commitment to human rights is grounded in what Perry described as “a basic, irreducible feature of the American people’s understanding of themselves . . . [that] can be described, for want of a better word, as religious.” MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 97 (1982). Perry argued that “this religious American self-understanding . . . supplies the crucial context in which the function of noninterpretive judicial review in human rights cases is finally clarified.” *Id.* at 98. However, he hastened to make clear that he was not referring to any *particular* religion or kind of religion. *Id.* at 99 (“My point is in no sense a metaphysical or supernaturalistic one. . . . I invoke no assumptions about any deity or any divinely ordained ‘natural law.’”).

163. The term is useful to distinguish *political* secularism from secularism as a more comprehensive philosophical position, much in the way that John Rawls distinguished *political* liberalism from “comprehensive liberalism.” See JOHN RAWLS, *POLITICAL LIBERALISM* xxix (1996).

to oppose or suppress religion: on the contrary, they have sought to respect religion and to maintain religious freedom. Indeed, some have argued for political secularism primarily on religious grounds.<sup>164</sup> But political secularists have insisted that religion is not something that should be expressed or acted upon by government and its agencies and institutions, especially including the public schools.

*B. Incompatible but (Sometimes) Indistinguishable*

Contemplated in their abstract purity, ecumenical providentialism and political secularism would seem to be fundamentally different and even incompatible outlooks.<sup>165</sup> Providentialists declare that God works in history, that it is important *as a people* to acknowledge this providential superintendence, and that the community should actively instill such beliefs in children as a basis for civic virtue. Secularists, by contrast, insist that acknowledgments of deity (if there is one) ought to be purely private, and that government acts improperly if it enters into religion or expresses or endorses religious beliefs. Thus, what one constituency views as imperative, the other regards as forbidden.

And yet, despite this apparent and at some level actual incompatibility, in some contexts the different positions can become blended—or blurred.

*Convergences.* The possibility of blending these positions results in part from the fact that each represents a family of related views, not a single unified creed; these various views may form more of a spectrum than a sharp divide. Moreover, each position has what we might call propositional or *creedal* dimensions and also *cultural* or traditional dimensions. So, it is possible for individuals to accept a position in one sense but not in other senses, and hence to embrace different aspects of the different positions.

In addition, perhaps in defiance of abstract logic, many Americans may simply find themselves drawn to incompatible positions.<sup>166</sup> Justice Sandra Day O'Connor, for instance, was the principal sponsor of the so-called “no

164. For an excellent recent example, see DARRYL HART, *A SECULAR FAITH: WHY CHRISTIANITY FAVORS THE SEPARATION OF CHURCH AND STATE* (2006).

165. *Cf.* HUNTER, *supra* note 133, at 128 (“Each side of the cultural divide . . . speaks with a different moral vocabulary. Each side operates out of a different mode of debate and persuasion. Each side represents the tendencies of a separate and competing moral galaxy. They are, indeed, ‘worlds apart.’”).

166. *Cf.* HENRY F. MAY, *THE DIVIDED HEART: ESSAYS ON PROTESTANTISM AND THE ENLIGHTENMENT IN AMERICA* 177 (1991) (“[During most of the nineteenth century] most Americans believed at the same time that man was a sinner dependent on unmerited grace and that he was endowed with the right and ability to govern himself. Anybody who can understand this paradox—if there is anybody—can claim to understand nineteenth-century America.”).

endorsement” doctrine, under which government is prohibited from doing or saying things that send messages endorsing religion.<sup>167</sup> The logic of that doctrine may seem—and *is*, I will suggest<sup>168</sup>—squarely on the side of the secularist conception of America. Curiously, however, O’Connor initially proposed the doctrine as a rationale for explaining why including a nativity scene in a municipal Christmas display was *permissible*. And not long after advocating the “no endorsement” test, O’Connor caused a minor stir by lending her support to a “Christian nation” initiative. (When criticism was offered, a seemingly surprised O’Connor promptly recanted, or rather clarified.)<sup>169</sup>

If O’Connor seemed to have a foot in both camps, she might point to a distinguished predecessor in Thomas Jefferson. Jefferson, of course, is often claimed by secularists as a founder and champion of their party.<sup>170</sup> And they can cite evidence in support of that characterization: Jefferson’s famous “wall of separation” letter,<sup>171</sup> for example, or his refusal as President to declare national days of thanksgiving and prayer,<sup>172</sup> or his opposition to the then common view (espoused by luminaries such as Justice Story and Chancellor Kent) that Christianity is embedded in the common law.<sup>173</sup> But Jefferson also firmly declared a providential role in America’s history,<sup>174</sup> and his eloquent use of religious language in his Virginia Statute for Religious Freedom<sup>175</sup> and in his presidential inauguration addresses<sup>176</sup> might easily support assigning him to the providentialist camp.

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167. See *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring).

168. See *infra* notes 352–59.

169. For a discussion of the incident, see Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 937–38 (1991).

170. See, e.g., SUSAN JACOBY, *FREETHINKERS: A HISTORY OF AMERICAN SECULARISM* 43 (2004).

171. See, e.g., KRAMNICK & MOORE, *supra* note 148, at 200 (asserting that “Jefferson’s metaphor . . . is a powerful statement about the need for a secular state”). The letter and associated letters and explanations are reprinted in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 157, at 525–29. For a different interpretation suggesting that Jefferson’s wall mostly separated federal from state jurisdiction, see DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 55–70 (2002).

172. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 622–24 (1992) (Souter, J., concurring).

173. Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 43 (1998).

174. See DANIEL J. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON: WITH A NEW PREFACE* 225–34 (1993).

175. Jefferson’s Statute began with the declaration that “Almighty God hath created the mind free” and that governmental coercion in matters of religion represented “a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.” Virginia Act for Religious Freedom, reprinted in *CHURCH AND STATE IN THE MODERN AGE: A DOCUMENTARY HISTORY* 63–64 (J.F. Maclear ed., 1995).

176. Consider Jefferson’s Second Inaugural Address:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the

*The ambiguity of the “secular.”* Another factor that facilitates a blurring of the positions is terminology, which is both variable and loose. One term in particular—“secular”—has often been a source of confusion.<sup>177</sup> I have tried to follow dominant current usage in describing the interpretation opposing government-sponsored religion as “secularist.” But in fact the term has various shades of meaning, and virtually everyone throughout American history (and indeed throughout western history, including in the era of Christendom) has believed that government is supposed to be “secular” in some important sense.<sup>178</sup> Thus, Nomi Stolzenberg has explained that “[t]he secular was, in fact, originally a *religious* concept, a product of traditional religious epistemological frameworks.”<sup>179</sup> In its classical meaning, the term referred to the here and now of this world, understood as a “a specialized area of God’s domain.”<sup>180</sup> In this sense, medieval governments were Christian but also “secular” in much the same way as were the so-called “secular clergy”—namely, priests who worked in parishes rather than retreating to monasteries. Both were “secular” *not* by being “not religious” but rather by working “in the world.”<sup>181</sup> Governments were to concern themselves with this world, not the next one, because the providential ordering had so ordained. But it in no way followed that governments should avoid considering, invoking, or acting on religious truths that were relevant to their this-worldly business.

necessaries and comforts of life, who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me . . . .

Thomas Jefferson, Second Inaugural Address (Mar. 5, 1805), *reprinted in* JOHN T. NOONAN JR. & EDWARD MCGLYNN GAFFNEY JR., *RELIGIOUS FREEDOM* 206 (2001).

177. Nomi Stolzenberg describes the “modern cultural deformity that finds expression in frightening levels of mutual incomprehension and antipathy between ‘the religious’ and ‘the secular’ that we see today.” Nomi Stolzenberg, *The Profanity of Law*, in *LAW AND THE SACRED* 35 (Austin Sarat et al. eds., 2007). Stolzenberg’s essay provides a valuable discussion of the ways in which the concept has been altered and, arguably, distorted.

178. See Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS* 31 (Rajeev Bhargava ed., 1998). For a discussion of how even during the period of Christendom government was expected to be “secular” and of how the dominant meanings of the term have changed, see STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 112–50 (2010).

179. Stolzenberg, *supra* note 177, at 30. Stolzenberg elaborates:

The concept of the secular always served the function of distinguishing religious from nonreligious domains. But nonreligious domains did not, in the premodern view, exist outside the religious epistemological framework. On the contrary, that framework of meaning was all-encompassing, overarching, comprehending within it *every* domain of human (and nonhuman) action and cognition, both the spiritual and the temporal, the holy and the unholy, the ecclesiastical and the secular, the sacred and the profane.

*Id.* at 30–31.

180. *Id.* at 31.

181. See JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* 13 (1994).

Virtually all Americans, whether inclined to the providentialist or secularist conception, have likewise believed that governments should be “secular” at least in this classical sense.<sup>182</sup> Consequently, the proposition that “government must be secular,” depending on what sense is being given to the term, may be either a bland platitude on which nearly all Americans can unite or a call to cultural and political battle. The term’s variableness has been both an ongoing cause of confusion and a source of sometimes rhetorically useful equivocation that contestants have unconsciously or perhaps deliberately exploited. We will see how this slippage facilitated the quiet transformation effected by the school prayer decisions.

The possibility of blending the competing conceptions is evident in a historical survey by John Jeffries and James Ryan. Jeffries and Ryan describe the political atmosphere of mid-twentieth-century America—the period just preceding the school prayer cases—in terms that systematically conflate the providential and secularist views.<sup>183</sup> If Jeffries and Ryan seem to overlook or obliterate vital differences, however, they are not simply being sloppy; rather, they are following and accurately capturing the thinking of mid-century Americans whose views they are trying to convey.

Indeed, writing in the middle of that period, Will Herberg noted that “[e]very aspect of contemporary religious life reflects this paradox—pervasive secularism amid mounting religiosity . . .”<sup>184</sup> Struck by the fact that “[t]he secularism characteristic of the American mind is implicit and is not felt to be at all inconsistent with the most sincere attachment to religion,” Herberg remarked: “So thoroughly secularist has American religion become that the familiar distinction between religion and secularism appears to be losing much of its meaning under present-day conditions.”<sup>185</sup>

*Blessed blurring?* An academician devoted to conceptual purity might deplore this mashing together of distinct and even incompatible views. But as a matter of practical politics, such obfuscation has arguably been of great value: it has permitted people of fundamentally different views and commitments to live together in relative peace without fully perceiving how different their views actually are.<sup>186</sup>

Mark Noll observes that “[d]uring and after the war for independence, a wide range of Americans joined together Protestant Christian beliefs and secular political convictions as they were joined nowhere else in the world,” and this “merger proved exceedingly useful for many projects, both religious

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182. For further discussion, see Steven D. Smith, *How is America “Divided by God”?*, 27 *MISS. C. L. REV.* 141, 149–51 (2007).

183. Jeffries & Ryan, *supra* note 4, at 309–11.

184. HERBERG, *supra* note 30, at 2.

185. *Id.* at 270.

186. A similar point might be made on a more personal level: an individual may hold radically incompatible views and commitments but feel no great internal dissonance because he or she does not perceive this incompatibility.

and political.”<sup>187</sup> The blurring of positions may also help account for the fact that different observers can look at contemporary American society and perceive either broad consensus or sharp cultural division, depending in part on whether they focus on society in general or on more careful and articulate spokespersons for the competing positions.<sup>188</sup>

Nonetheless, at bottom the fundamental difference in views is a deep one, even if it is often smudged or smoothed over in practice. Consequently, the roping together of these views always threatens to unravel; if some contexts serve to conceal the underlying conflict, others work to bring it into the open. The school prayer litigation would be one such context.

### C. *Patterns of Dominance?*

So, if American history has supported rival, and at some level incompatible, providential and secularist self-understandings, which of these contenders has had the upper hand? At least if we limit ourselves for now to the period preceding the school prayer decisions, the simple answer would seem to be . . . neither—not in any uniform and official way at least.

*Ups and downs.* To be sure, different observers and advocates discern (or think they discern) trajectories. A common view sees the nation as having been predominantly religious at its inception and through much of the nineteenth century, but as becoming steadily more secular as the twentieth century progressed.<sup>189</sup> This interpretation has the attractive feature of making American history conform to the way many eminent thinkers have believed history was supposed to unfold—namely, in the direction of an ever-increasing secularization.<sup>190</sup> A differently oriented (though not

187. Mark A. Noll, *The Contingencies of Christian Republicanism: An Alternative Account of Protestantism and the American Founding*, in *PROTESTANTISM AND THE AMERICAN FOUNDING* 225, 239, 238 (Thomas S. Engeman & Michael P. Zuckert eds., 2004).

188. See JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR?: A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE* (E.J. Dionne Jr. & Michael Cromartie eds., 2006).

189. See, e.g., JACOBY, *supra* note 170, at 6 (describing “a slow, uneven movement away from Americans’ original definition of themselves as a Protestant Christian people”).

190. José Casanova explains:

In one form or another, with the possible exception of Alexis de Tocqueville, Vilfredo Pareto, and William James, the thesis of secularization was shared by all the founding fathers: from Karl Marx to John Stuart Mill, from Auguste Comte to Herbert Spencer, from E. B. Tylor to James Frazer, from Ferdinand Toennies to Georg Simmel, from Émile Durkheim to Max Weber, from Wilhelm Wundt to Sigmund Freud, from Lester Ward to William G. Sumner, from Robert Park to George H. Mead. Indeed, the consensus was such that not only did the theory remain uncontested but apparently it was not even necessary to test it, since everybody took it for granted.

CASANOVA, *supra* note 181, at 17 (footnote omitted).



necessarily incompatible) interpretation insists that the nation's founders intended to institute a secular government and that this intention was largely honored through much of the nation's history but that an infusion of religious fervor diverted the nation from its prescribed secular course in the latter half of the twentieth century.<sup>191</sup> Both interpretations are sometimes offered for polemical purposes, of course, as advocates attempt to claim the nation's founders (or the Constitution itself) for their causes, and to depict contemporary developments that they oppose in terms of deviancy or decline.<sup>192</sup>

But in reality the nation's history has been more complicated—more confused, perhaps—so that (with an important exception, to be noted shortly) no simple generalization can come close to capturing what has happened.<sup>193</sup> It seems most accurate to say that providentialist and secularist visions have been in perpetual competition—often, as noted, in a somewhat muted or muddled competition in which fundamental differences have been blended or blurred—and that although each has achieved a fragile ascendancy from time to time and place to place, at least into the 1960s, neither position was able to establish itself securely as the official or clearly dominant national orthodoxy.

Thus, far from reflecting any smooth trajectory from “religious” to “secular” (or vice versa), the nation's history seems more accurately described as a series of swings or waves—or perhaps of lurches. Seeking to describe the ebbs and flows of religion and of religious influence on politics, historians frequently resort to the vocabulary of “revivals” and “Awakenings”<sup>194</sup> and, in the opposite direction, of a succession of “disestablishments.”<sup>195</sup> Even these images are simplifications,<sup>196</sup> of course, useful for picking out particular salient events or developments.

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191. See KRAMNICK & MOORE, *supra* note 148, at 200, 204 (asserting that “the Constitution created a secular state” but that religious intervention “has poisoned American politics in the past fifteen years”).

192. For a discussion of how cultural factions use “history as ideology,” see HUNTER, *supra* note 133, at 108–16.

193. Cf. Noll, *supra* note 187, at 226 (“Recent historical writing has made it abundantly clear that simplistic summaries cannot deal with the multivalent, tumultuous, and often extraordinarily fluid ideas of America's founding era.”).

194. A standard view discerns a major revival of religion, or “Great Awakening,” in the first half of the eighteenth century, and a Second Great Awakening in the early nineteenth century. See MARK A. NOLL, *A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA* 91–113, 166–90 (1992). As noted, Will Herberg described “the great and almost unprecedented upsurge of religiosity under way today” in the post-World War II period. HERBERG, *supra* note 30, at 256; see also I DOUGLAS LAYCOCK, *A Conscripted Prophet's Guesses About the Future of Religious Liberty in America* (Oct. 25, 2007), in *RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY*, *supra* note 5, at 445, 446 (“We have for some time been in the midst of a great outpouring of evangelical religious fervor, which I will call the Fourth Great Awakening . . .”).

195. For an interpretation indicating three “disestablishments”—the first in the founding period, the second in the early twentieth century, the third in the late twentieth century—see PHILLIP E. HAMMOND, *RELIGION AND PERSONAL AUTONOMY: THE THIRD DISESTABLISHMENT IN AMERICA* 8–

The early nineteenth century, for instance, experienced what is commonly described as the Second Great Awakening, involving a series of dramatic revivals in places like Cane Ridge, Kentucky. The antics produced in the converted by these revivals—jerking, dancing, barking, “treeing the devil,” and other remarkable behaviors<sup>197</sup>—seem perfectly designed to capture the attention of curious observers and historians. Still, it is not as if all Americans in the early 1800s were down on all fours barking at demons in trees any more than all Americans in 1969 were getting high or making love in the mud at Woodstock. In both instances, vivid or extreme behavior captures attention; meanwhile, most Americans presumably were staying at home, going to work, and on their Sabbath going to church (or *not* going to church), as they had always done.<sup>198</sup>

If public or visible religiosity has waxed and waned from one period to another, it has also varied among localities. Noah Feldman describes a generically religious “nonsectarianism,” implemented through Bible reading and school prayer, as the view that prevailed in public education in the nineteenth century.<sup>199</sup> As an effort to characterize a view that was prominent and that serves to distinguish nineteenth-century from contemporary pedagogy, Feldman’s description is helpful. Still, even in the nineteenth century, not all or perhaps even most schools subscribed to this regime. In western states, it seems, few public schools used religious exercises. Such exercises were more common in the East and South; nonetheless, in the post-Civil War period only about half of the school districts in New York maintained prayer or Bible-reading exercise.<sup>200</sup> Moreover, legal challenges to school prayer and Bible reading were brought; the challenges were accepted in some courts and rejected in others.<sup>201</sup>

11, 167–77 (1992).

196. Cf. JON BUTLER, *AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE* 165 (1990) (asserting that the Great Awakening “might better be thought of as an interpretive fiction and as an American equivalent of the Roman Empire’s Donation of Constantine, the medieval forgery that the papacy used to justify its subsequent claims to political authority”).

197. See ALICE FELT TYLER, *FREEDOM’S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY TO 1860*, at 37–39 (Univ. of Minn. Press 1970) (1944).

198. For a historical overview of Americans’ Sunday habits from the Puritan period through the 1950s, see CRAIG HARLINE, *SUNDAY: A HISTORY OF THE FIRST DAY FROM BABYLONIA TO THE SUPER BOWL* 278–367 (2007).

199. FELDMAN, *supra* note 128, at 61–92.

200. DIERENFIELD, *supra* note 7, at 15–16.

201. Jeffries and Ryan observe that “by the early twentieth century, a few state courts had outlawed Bible reading and other religious observances in public school as violative of state constitutions, though most courts continued to approve these practices.” Jeffries & Ryan, *supra* note 4, at 304 (citations omitted). For a list of state court decisions invalidating school prayer or Bible reading, see *id.* at 304 n.129.

*The secularization of the cultural elite.* The National Education Association (“NEA”) began in the mid-nineteenth century with a heavy emphasis on a “nonsectarian” but overtly religious agenda.<sup>202</sup> By the latter decades of the century, however, its leaders (though perhaps not its rank-and-file members) had shifted dramatically in favor of thoroughly secular schools, and this shift persisted and deepened in the twentieth century.<sup>203</sup>

This change in the NEA’s position reflects one social stratum in which the “crazy quilt” description may be inapt and in which history may indeed have followed a steadier trajectory from “religious” to “secular.”<sup>204</sup> Elites and professional associations, that is, do seem to have followed approximately this course of evolving secularization. Thus, George Marsden chronicles the transformation of American private universities, most of which were founded by churches and began with a distinctly religious conception of their mission but became steadily more secularized during the course of the twentieth century.<sup>205</sup> Sociologist Christian Smith describes the secularization of American educational, legal, media, and scientific institutions during the late nineteenth and early twentieth centuries through the efforts of “networks of activists who were largely skeptical, freethinking, agnostic, atheist, or theologically liberal; who were well educated and socially located mainly in knowledge-production occupations . . . .”<sup>206</sup>

The secular movement among cultural elites was a development of great importance for government and law, and we will need to return to this theme. But the secularization of cultural elites did not faithfully mirror a similar movement in the nation as a whole. For the nation, rather, it seems more accurate to describe an ongoing competition—sometimes congenial and sometimes more combative—between religious and more secular worldviews and between the providentialist and the secularist conceptions of America, beginning in the founding period and continuing to the present.

#### *D. The Conceptions as Quasi-Constitutional*

And what has been the legal status or quality of these competing interpretations or national self-conceptions? It seems accurate to describe them as “constitutional” in two important senses of the term, but not in a

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202. See Craig Beyerlein, *Educational Elites and the Movement to Secularize Public Education: The Case of the National Educational Association*, in *THE SECULAR REVOLUTION* 160, 160 (Christian Smith ed., 2003).

203. For a discussion of this change, see *id.*

204. See *id.*

205. See GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* (1994).

206. Christian Smith, *Introduction: Rethinking the Secularization of American Public Life*, in *THE SECULAR REVOLUTION*, *supra* note 202, at 1. The volume contains essays by a number of scholars chronicling the course of secularization in a variety of different institutions.

third and also crucial sense. Hence, the conceptions have had a sort of quasi-constitutional, or perhaps “subconstitutional,”<sup>207</sup> status. They have been closer in their character to the sort of eighteenth-century constitutionalism described by Larry Kramer that, compared to contemporary understandings of constitutional law, was “less rigid and more diffuse—more willing to tolerate ongoing controversy over competing plausible interpretations of the constitution . . . .”<sup>208</sup>

The competing conceptions—ecumenical providentialism and political secularism—have been “constitutional” in the sense that they have been embraced by their adherents as interpretations of what defines or “constitutes” the American republic as a political community. Noah Feldman observes that questions about the relation between government and religion “go to the very heart of who we are as a nation. They raise the central challenges of citizenship and peoplehood: who belongs here? To what kind of nation do we belong?”<sup>209</sup>

In a similar vein, James Davison Hunter observes that

[t]his is a conflict over how we are to order our lives together. . . .  
[It] is ultimately a struggle over national identity—*over the meaning of America*, who we have been in the past, who we are now, and perhaps most important, who we, as a nation, will aspire to become in the new millennium.<sup>210</sup>

Consequently, the struggle expresses itself, among other ways, in competing interpretations of the American founding. Orthodox interpreters “link[] the nation’s birth to divine will . . . . To them, America is, in a word, the embodiment of Providential wisdom.”<sup>211</sup> By contrast, “[t]hose on the progressive side of the cultural divide rarely, if ever, attribute America’s origins to the actions of a Supreme Being.”<sup>212</sup> Instead, they tend to suppose that “the American mind has been from the outset pragmatic, optimistic, and secular. . . .”<sup>213</sup>

This sense in which the competing conceptions have a “constitutional” status is closely linked to a second sense: proponents of each vision have

207. Cf. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008) (discussing the significance of “soft law” or “subconstitutional law”).

208. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 30 (2004).

209. FELDMAN, *supra* note 128, at 7.

210. HUNTER, *supra* note 133, at 50.

211. *Id.* at 109.

212. *Id.* at 113.

213. *Id.*

typically supported their views by invoking foundational documents and statements from American history—documents and statements that are “constitutional” or that are “organic,” as the Supreme Court once put the point.<sup>214</sup> Thus, supporters of the providentialist view regularly quote the Declaration of Independence, with its appeal to “Nature and nature’s God” and its bold assertion that men are “endowed by their Creator” with rights.<sup>215</sup> Other favorite texts include Jefferson’s Virginia Statute for Religious Freedom,<sup>216</sup> Presidential proclamations and inaugural addresses by early luminaries such as Washington and Jefferson,<sup>217</sup> and Lincoln’s celebrated Second Inaugural Address.<sup>218</sup> Conversely, proponents of the secularist interpretation point to an array of evidence,<sup>219</sup> including the studied omission by the Framers to include religious language in the Constitution itself,<sup>220</sup> Jefferson’s “wall of separation” letter<sup>221</sup> and his refusal to declare a national day of prayer and thanksgiving,<sup>222</sup> James Madison’s “Detached Memoranda,”<sup>223</sup> and a statement in the Treaty with Tripoli.<sup>224</sup>

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214. See *Holy Trinity Church v. United States*, 143 U.S. 457, 470 (1892).

215. See, e.g., JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION* 41 (1987).

216. See *supra* note 175.

217. For Jefferson’s Second Inaugural Address, see *supra* note 176. Washington’s First Inaugural Address contained these words:

[I]t would be peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe . . . . In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own; nor those of my fellow-citizens at large, less than either. No People can be bound to acknowledge and adore the invisible hand, which conducts the Affairs of men more than the People of the United States. Every step, by which they have advanced to the character of an independent nation, seems to have been distinguished by some token of providential agency . . . . These reflections, arising out of the present crisis, have forced themselves too strongly on my mind to be suppressed.

George Washington, First Inaugural Address (Apr. 30, 1789), *reprinted in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 157, at 446–47.

218. Lincoln’s address, now engraved on the wall of the Lincoln Memorial, was, as one historian observed, a “theological classic,” containing within its twenty-five sentences “fourteen references to God, many scriptural allusions, and four direct quotations from the Bible.” ELTON TRUEBLOOD, *ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH* 135, 136 (1973).

219. See KOPPELMAN, *supra* note 116.

220. See KRAMNICK & MOORE, *supra* note 148, at 26–44; JACOBY, *supra* note 170, at 28.

221. See *supra* note 171.

222. See *supra* note 172.

223. This memorandum, believed to have been written between 1817 and 1832 and not discovered and published until much later, advocates a strict separation of government from religion and opposes official chaplains and executive declarations of days of fasting and thanksgiving. The memorandum is reprinted in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 157, at 589–93.

224. The Treaty with Tripoli, ratified in 1797, declared that “the Government of the United States of America is not, in any sense, founded on the Christian religion . . . .” Treaty of Peace and Friendship Between the United States and the Bey and Subjects of Tripoli, of Barbary, U.S.-Tripoli, art. 11, Nov. 4, 1796, *reprinted in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 157, at 475–76.

In these ways, the competing conceptions have presented themselves as “constitutional” in the sense that they are descriptions or interpretations of commitments that are taken to be fundamental to or “constitutive” of the American republic. For much of the nation’s history, however, the conceptions have *not* been “constitutional” in another important sense: they usually have not been offered or taken as judicially enforceable interpretations of what the national Constitution itself formally and bindingly mandates. Thus, when nineteenth-century courts heard cases challenging prayer and Bible reading in schools, they considered and then accepted or rejected these claims as matters of state law, not federal constitutional law.<sup>225</sup> Because the decisions did not purport to be enforcing the United States Constitution, it was possible for one position to prevail in one place and another to govern in another place.

Similarly, when the nineteenth-century Supreme Court made pronouncements that today would likely be taken as having a constitutional character, the Court was not declaring what the Constitution required. In *Vidal v. Girard’s Executors*,<sup>226</sup> for example, the Supreme Court considered the validity of a will bequeathing property to the city of Philadelphia for the purpose of establishing a school for “poor male white orphan children” but prohibiting any “ecclesiastic, missionary, or minister of any sect whatsoever” from administering, teaching, or even being “admitted for any purpose, or as a visitor, within the premises” of the school.<sup>227</sup> Daniel Webster argued, eloquently and at length, that this prohibition rendered the will invalid as “antichristian.”<sup>228</sup> Though the Supreme Court managed to sustain the will by construing it to permit the teaching of Christianity by lay instructors, the Court seemed to accept Webster’s essential premise: if the will *had* been antichristian, then it would have been invalid.<sup>229</sup> Even so, the Court located the principle protecting Christianity in the law of Pennsylvania,<sup>230</sup> not in the federal Constitution.

Similarly, when in *Holy Trinity Church v. United States* the Supreme Court made its celebrated or notorious declaration that “this is a Christian nation,”<sup>231</sup> the Court did not purport to be interpreting the Constitution. Rather, the Court was relying on a range of laws and “organic utterances”

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225. See, e.g., *Vidal v. Girard’s Ex’rs*, 43 U.S. 127 (1844); see *supra* note 201.

226. 43 U.S. 127.

227. *Id.* at 129, 133.

228. *Id.* at 143–44.

229. *Id.* at 197–201.

230. *Id.* at 201 (holding the decision to be based on “the constitution or laws of Pennsylvania” and “the judicial decisions of its tribunals”).

231. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

(going all the way back to Columbus) to advance what was closer to being a claim about what might be thought of as the nation's political culture or sociology for the purpose of discerning Congress' likely or presumed intent in a particular piece of legislation regulating immigration.<sup>232</sup> Indeed, well into the twentieth century, when the Supreme Court rejected a challenge to state aid to parochial schools, the issue was considered under the Due-Process and Republican-Form-of-Government Clauses; it did not seem to occur to the Court even to raise an Establishment Clause issue.<sup>233</sup>

To be sure, there were all along citizens who believed that their favored conceptions *should* be constitutionalized in a more formal sense. Thus, some critics of the original Constitution insisted that it ought to have included some acknowledgment of the Almighty, as the state constitutions did and as the Articles of Confederation had done.<sup>234</sup> This position was again widely promoted during the Civil War.<sup>235</sup> Conversely, other citizens agitated for a more explicit constitutional affirmation of governmental secularism. In the latter half of the nineteenth century, consequently, sustained contrary movements developed in support of constitutional amendments that would have expressly acknowledged Christianity in the Constitution or, conversely, would have explicitly affirmed that the Constitution required governments to be secular (as the constitutions of other countries sometimes do)<sup>236</sup>. These movements ultimately came to naught: Americans evidently preferred to leave the Constitution in its noncommittal or agnostic condition.<sup>237</sup> Consequently, at least until the school prayer decisions, the competing orthodoxies retained a merely quasi-constitutional status.

### *E. The Virtues of Quasi-Constitutionalism*

This "crazy-quilt," quasi-constitutional condition may leave the intellectually fastidious feeling queasy. The condition may appear to be profoundly, and intolerably, "unprincipled."<sup>238</sup> Rodney Smith expresses a

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232. See *id.* at 470–72.

233. See *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 373–374 (1930).

234. For a discussion, see KRAMNICK & MOORE, *supra* note 148, at 26–44.

235. See HARRY S. STOUT, *UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE CIVIL WAR* 273, 373 (2006).

236. For example, the preamble to India's constitution expressly declares that India is a "secular democratic republic . . ." INDIA CONST. pmb., available at <http://lawmin.nic.in/coi/coiason29july08.pdf> (last updated July 29, 2008).

237. For a discussion of these movements for a Christian amendment and a secular amendment, see PHILLIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 287–334 (3rd prtg. 2002).

238. The objection to such a "crazy-quilt" community receives perhaps its most sophisticated articulation in Ronald Dworkin's claim that a legal regime can claim authority only if it reflects a "coherent set of principles." Conversely, Dworkin thinks a legal regime that adopted a "checkerboard" approach to issues (and "checkerboard" actually sounds somewhat more orderly and dignified than "crazy quilt") would be illegitimate. See RONALD DWORGIN, *LAW'S EMPIRE* 178–79,

common sentiment when he condemns, as an unacceptable “mishmash,” a situation in which the relation between government and religion can differ from one time or place to another.<sup>239</sup> More recently, but in a similar vein, Ira Lupu and Robert Tuttle worry that a tightening of standing requirements might leave more Establishment Clause adjudication in the hands of state courts. “[T]he loss of a unifying federal voice in these matters may eventually subvert the uniformity of federal law,” they suggest, adding that “[w]hatever one’s view of the Establishment Clause,” the loss of uniformity “cannot be seen as salutary for either religious freedom or the constitutional system as a whole.”<sup>240</sup>

So, how did such a disorderly condition manage to prevail for more than a century-and-a-half? Contrary to the judgments of critics like Smith, Lupu, and Tuttle, an apologist for this approach might have argued that the quasi-constitutional approach to matters such as the relation between government and religion had much to recommend it—of both a negative and a more positive nature.

### 1. Quasi-Constitutionalism as the Default Position

The quasi-constitutional approach might have been the best available alternative by default. That is because neither the providentialist nor the secularist position could—or can—claim the full qualifications that an official constitutional orthodoxy ideally ought to have.

In the first place, though both positions are *compatible with* the original Constitution and the First Amendment, neither can convincingly claim to be *mandated by* the original meaning or the intentions of the enactors. To be sure, advocates of both views have often attempted to claim an originalist mandate. But such claims overreach on each side.<sup>241</sup> The simple fact is that although the Constitution forbids—and was always understood to forbid—*certain types* of interactions between government and religion (the establishment of a national church, for example, or the imposition of religious tests for national office), it neither endorses any religious position nor commands that government must be secular in all of its operations.<sup>242</sup>

188, 211–16 (1986).

239. SMITH, *supra* note 153, at 187, 190.

240. Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 166.

241. *Cf.* FELDMAN, *supra* note 128, at 9 (“Both evangelicals and secularists like to claim that our constitutional past and tradition support their approach. Both are wrong.”).

242. Thus, at the conclusion of a recent exhaustive study not only of the original understanding of the Establishment Clause but of subsequent interpretations of that understanding, Donald Drakeman explains that



And, as noted, efforts to impose some more explicit and committed stance on the Constitution through amendment have repeatedly been rejected.<sup>243</sup>

The behavior of early Congresses and Presidents in instituting legislative chaplains and prayer, authorizing and issuing Thanksgiving proclamations, and so forth overwhelmingly attests that they did not understand the Constitution to impose any requirement that government must be secular. Advocates of the secularist construction typically try to circumvent such evidence by arguing that the enactors adopted a “principle” of secular government that they did not fully grasp and hence promptly proceeded to violate.<sup>244</sup> But what is the warrant for attributing to the Framers a “principle” that they never explicitly articulated and instead routinely, openly, and even proudly violated in practice? The argument works, it seems, only by assuming what is at issue—namely, that the United States is or should be a politically secular nation—and then by projecting that conclusion backwards onto recalcitrant framers.<sup>245</sup>

Neither, however, does the historical evidence convincingly show that the enactors or the founding generation embraced the providential position *as a constitutional orthodoxy or mandate*. Secularists point out, as noted, that the Framers studiously declined to include in the Constitution even the standard generic language acknowledging providence, despite demands and criticism from more pious citizens.<sup>246</sup> This deliberate omission surely counts against an interpretation of the Constitution as affirmatively embracing a providentialist position (even if the secularists’ own favored inference—that the Constitution, by its silence on the matter, mandated secular government—seems to be a brazen *non sequitur*).

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it is important to appreciate that [the Establishment Clause] was not the statement of a principle of secularism, separation, disestablishment, or anything else. It was the answer to a very specific question: Would the new government countenance a move by the larger Protestant denominations to join together and form a national church? The answer was no. . . .

. . . At the time it was adopted, the establishment clause addressed one simple noncontroversial issue, and the list of those who supported it demonstrates that it cannot reasonably be seen as encompassing a philosophy about church and state. . . .

DRAKEMAN, *supra* note 147, at 330 (2010).

243. See *supra* note 237.

244. We have already observed Justice Brennan making this familiar argumentative move. See *supra* notes 95–96 and accompanying text; see also 1 DOUGLAS LAYCOCK, *Original Intent and the Constitution Today*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 594, 595–99; cf. PHILLIP E. HAMMOND, DAVID W. MACHACEK & ERIC MICHAEL MAYER, RELIGION ON TRIAL 85 (2004) (“[T]he United States began as a de facto Protestant nation despite what its Constitution declares. The nation took a long time to awaken to the constitutional violations that even today some people cannot recognize.”).

245. In this vein, historian Sidney Mead concluded that “those who try to make secularists—in the classical sense—out of [the nation’s founders] are just as wrong [as those who argue for a ‘Christian nation’ interpretation].” MEAD, *supra* note 162, at 21 (footnote omitted).

246. See *supra* note 234. But see Seth Barrett Tillman, *Blushing Our Way Past History*, 2009 CARDOZO L. REV. DE NOVO 46 (arguing that the Constitution did acknowledge deity in the Attestation and Oaths and Affirmations Clauses).

A recent exchange between Justices Antonin Scalia and John Paul Stevens serves to illustrate the point. Resisting a secularist interpretation of the Establishment Clause, Scalia points to the mass of evidence of ecumenical public religious expression at the founding (and afterwards).<sup>247</sup> “With all of this reality (and much more) staring it in the face,” Scalia asks, “how can the Court *possibly* assert that the First Amendment mandates neutrality between . . . religion and nonreligion . . . ?”<sup>248</sup> In response, Stevens observes that not all public religious expression has been ecumenical in nature; some has been overtly sectarian.<sup>249</sup> Scalia in turn rejoins that Stevens’s evidence is irrelevant or counterproductive: how can it strengthen Stevens’s case for secularism, he asks, to show that governments and government officials have sometimes thought it permissible to favor Christianity or to engage in sectarian expression?<sup>250</sup>

In reality, it seems, both Justices are right—and wrong. Scalia is persuasive in claiming that evidence of pervasive public religious expression from the founding era onwards counts heavily against an interpretation that holds the Constitution was intended or understood to mandate governmental secularism. And Stevens’s evidence of overtly sectarian public expressions hardly strengthens the secularist interpretation. But his evidence *does* undermine Scalia’s apparent view that the Constitution somehow constitutionalized an ecumenically or generically theistic position. The upshot of the argument—and the most plausible conclusion—is that the Constitution (including the First Amendment) simply did not constitutionalize *either* ecumenical providentialism *or* political secularism.<sup>251</sup>

Perhaps more importantly, neither providentialism nor secularism can plausibly claim to express a strong consensus of Americans’ views, past or present, about how the nation is or should be constituted.<sup>252</sup> Once again,

247. See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 886–89 (2005) (Scalia, J., dissenting).

248. *Id.* at 889 (internal quotation marks omitted).

249. See *Van Orden v. Perry*, 545 U.S. 677, 726–28 (2005) (Stevens, J., dissenting).

250. *McCreary Cnty.*, 545 U.S. at 897 (Scalia, J., dissenting) (“I am at a loss to see how this [evidence] helps his case, except by providing a cloud of obfuscating smoke.”).

251. I have argued elsewhere that in the original understanding, the Establishment Clause was a purely jurisdictional measure, confirming in writing what the Constitution’s supporters had said all along: that religion would remain within the jurisdiction of the states, not the national government. See Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995). This interpretation is wholly consistent, I believe, with Donald Drakeman’s recent conclusion that the Clause was meant merely to prevent an established church at the national level. See *supra* note 147.

252. Cf. NOLL, *supra* note 194, at 248 (“The founding era of the United States was intellectually messy. No essentialist reading of its history—whether Lockean, republican, Enlightenment

proponents of both positions have often made such claims. Indeed, both have resorted to the same pattern of argument, which by now is wearisomely familiar. We might describe this strategy as the “spurious consensus argument.” The initial assertion is that the advocate’s preferred position—ecumenical providentialism or political secularism—reflects a settled consensus of American opinion. Then, faced with powerful contrary evidence in the form of dissenters who insist that *they* do not accept the ostensible consensus, proponents either ignore the dissenters or seek to dismiss or marginalize them by insisting that they are being unreasonable or perversely contrarian.

In the nineteenth century, and often in the twentieth century as well, this pattern of argument was regularly employed by advocates of providentialism. Thus, nineteenth-century supporters of “nonsectarian” public schools declared that everyone could or should be comfortable with a brief daily reading from the Bible. The Catholics who strenuously protested were simply being perverse: after all, they believed in the Bible, didn’t they? This stance studiously omitted to notice that to Catholics, a reading from the King James Bible unaccompanied by explanation or commentary clearly came across as a distinctly Protestant practice.<sup>253</sup>

In this respect, Martha Nussbaum castigates the proponents of nonsectarianism for failing to see that their position alienated citizens who did not accept the sort of generic Protestantism that the position reflected. “It’s rather extraordinary,” Nussbaum remarks, “that people had so little sense of history that they didn’t notice this, or perhaps they simply didn’t care.”<sup>254</sup> Nussbaum’s criticism seems cogent— but also ironic, because exactly the same comment might be applied to Nussbaum and others who deploy the same dismissive, marginalizing strategy against the numerous citizens today who do not share in the currently favored secularist orthodoxy and who insist that resolutely secular public schools or a secular public order are contrary to *their* beliefs and values.<sup>255</sup> Thus, Noah Feldman observes that “[i]ncreasingly, the symbolism of removing religion from the schools, courthouses, or the public square is experienced by values evangelicals as excluding them, no matter how much the legal secularists tell them that is not the intent.”<sup>256</sup>

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rationalist, or Protestant evangelical—can ever be faithful to the reality that actually took place.”).

253. See JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 7–42 (2003). Noah Feldman points out that “Catholic objections that nonsectarianism did not include them were met with little more than the naked insistence that it did.” FELDMAN, *supra* note 128, at 85.

254. MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* 218 (2009).

255. Thus, throughout her book on liberty of conscience, Nussbaum studiously declines to credit, respect, or even accurately describe the concerns of citizens associated with “the religious right,” but instead repeatedly dismisses them as motivated by “fear and insecurity,” “sheer selfishness,” and a “desire to lord it over others.” *Id.* at 8, 28.

256. FELDMAN, *supra* note 128, at 15.

Such marginalization is conspicuous in the influential political theorizing of John Rawls, who urged that important political decisions should be made on the basis of “public reason” grounded in an ostensible “overlapping consensus” that works (subject to various qualifications that Rawls introduced from time to time) to screen out direct reliance on “comprehensive doctrines,” including, most obviously, religion.<sup>257</sup> And what about the many Americans whose beliefs do not prompt or permit them to join in this thoroughly secular “overlapping consensus?” Rawls explained that the “consensus” does not include everyone, but only those whose views are “reasonable.”<sup>258</sup> The rest, it seems, are shunted to the political margins—Rawls compares them to “war and disease” as problems that need to be “contain[ed]”<sup>259</sup>—in the same way that Catholics and, later, secularists were marginalized in the nineteenth century.

By now it should be apparent that this pattern of argument is futile (except for rhetorical purposes, when “preaching to the choir”) and that the claims of consensus, whether coming from the providentialist side or the secularist side, are spurious. The fact is that both ecumenical providentialism and political secularism are congenial to millions of Americans and uncongenial to millions of other Americans. Neither view comes close to capturing a genuine consensus of the citizenry.

## 2. The Positive Advantages of Quasi-Constitutionalism

But the quasi-constitutional approach might be attractive not just on negative grounds or as a default position that might be acquiesced in absent anything better. On the contrary, quasi-constitutionalism offers important advantages in a large and religiously diverse political community.

In the first place, a quasi-constitutional orthodoxy (as opposed to a formal and official one) is supple and adaptable. The preceding discussion has suggested that the political-religious landscape of the country has varied from time to time and place to place and not according to any uniform pattern or steady trajectory. Given these variations, any formal, Procrustean orthodoxy, whether providentialist or secularist, will inevitably fail to fit well in some geographical or temporal localities. A floating menu of quasi-constitutional conceptions, by contrast, can better adapt to prevailing

257. See RAWLS, *supra* note 163, at 58–66.

258. *Id.*

259. See *id.* at 64 & n.19 (observing that “there are always many unreasonable views” and that the fact of doctrines that “reject one or more democratic freedoms”—as Rawls understands them, of course—“gives us the practical task of containing them—like war and disease—so that they do not overturn political justice”).

conditions. Thus, in recent years, a few constitutional scholars have argued for the value of such local adaptability in constitutional law and in Religion-Clause jurisprudence in particular.<sup>260</sup>

Beyond its adaptability, however, a quasi-constitutional approach has another important, though rarely noted, advantage. Because it is subordinate to the formal Constitution, a quasi-constitutional position allows citizens who dissent from the (at least temporarily) prevailing but objectionable (to them) quasi-orthodoxy to look beyond it and to focus their allegiance on a higher and non-offending authority and symbol. In this vein, I have argued at length elsewhere that the Constitution is prudently agnostic: it does not affirm either secularism or religion, atheism or theism. Moreover, the Constitution's agnosticism figures in an important strategy for securing the attachment of diversely minded citizens. As constituents of what Will Herberg aptly described as "pre-eminently a land of minorities,"<sup>261</sup> they—or rather *we*, all of us—will in different times and circumstances likely find ourselves out of harmony with the expressions and philosophies emanating from governments. But we can nonetheless remind ourselves that these expressions and philosophies are not ultimately constitutive of the political community. Above them in the hierarchy of legal and political authority stands the Constitution—the *agnostic* Constitution that steadfastly declines to align itself with either the providentialist or secularist visions of the country.<sup>262</sup>

#### *F. On the Eve of the School Prayer Decisions*

The preceding discussion has suggested that throughout most of American history, competing conceptions or families of conceptions that I have called ecumenical providentialism and political secularism have vied with each other for citizens' allegiance and governmental recognition—not at the level of formal constitutional doctrine, however, but rather as rival quasi-constitutional interpretations of the American political community. Moreover, in a pluralistic nation, a quasi-constitutional approach to such issues, though intellectually untidy, may have distinct political advantages.

This inelegant but practically serviceable situation prevailed on the eve of the school prayer decisions. The Supreme Court had already decided *Everson v. Board of Education*,<sup>263</sup> of course. But (and the point is crucial)

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260. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1888–89 (2004).

261. See *infra* note 433 and accompanying text.

262. These arguments are developed at much greater length in Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120 (2008).

263. 330 U.S. 1 (1947).

*Everson* had not elevated either of the competing conceptions to official constitutional status.

To be sure, *Everson* had extended constitutional nonestablishment to the states by ruling that the Establishment Clause was incorporated into the Fourteenth Amendment. This ruling departed from previous cases and arguably amounted to an effective repeal of the original meaning of the Clause, which had been calculated to leave the question of church-state relations in the state domain.<sup>264</sup> Even so, *Everson's* focus was institutional, not philosophical or cultural. *Everson* articulated a variety of ways in which institutional interference of church in state or state in church would not be permitted.<sup>265</sup> And the decision affirmed and constitutionalized a longstanding (though much contested) resistance to governmental financial support for churches or church-sponsored schools.<sup>266</sup> What is important for present purposes, however, is that *Everson* did *not* attempt to constitutionalize any general conception of the relation between government and religion or religious beliefs. More specifically, the decision nowhere commanded that government must be secular; indeed, the majority opinion quoted without apparent embarrassment Jefferson's eloquently theistic justification for religious freedom: "Almighty God hath created the mind free . . . ."<sup>267</sup>

Subsequent Supreme Court cases had followed *Everson* in this respect. To be sure, the decisions sometimes referred to government and public education as "secular."<sup>268</sup> Such references are hardly surprising; as noted, virtually everyone in this country agreed—as Western peoples had agreed throughout the period of Christendom—that government operated in the realm of the secular in an encompassing sense, in which "secular" meant "in and of this world," not "non-religious."<sup>269</sup> The references to "secular" education in *Everson* and immediately succeeding cases were casual,

264. This argument is developed in SMITH, *supra* note 251, at 17–50.

265. *Everson*, 330 U.S. at 16–17.

266. Opposition to financial support for churches was manifest, of course, in the celebrated defeat of the Assessments Bill in Virginia and the passage of Jefferson's Virginia Statute for Religious Freedom, which *Everson* effectively incorporated into the First Amendment. *See id.* at 12–13. The opposition to funding church-sponsored schools would have been constitutionalized by the so-called Blaine Amendment after the Civil War. Although that amendment was not enacted, similar amendments were adopted in many states. *See* FELDMAN, *supra* note 128, at 75–87.

267. *Everson*, 330 U.S. at 12–13.

268. *See, e.g., Everson*, 330 U.S. at 3, 7, 18; *McCullum v. Bd. of Educ.*, 333 U.S. 203, 216–17 (1948).

269. *See supra* notes 177–82 and accompanying text.

without evident intent to give the term any definitive or exclusionary meaning.<sup>270</sup>

In *McCollum v. Board of Education*, for example, the Court referred to public education as “secular,”<sup>271</sup> and a concurring opinion by Justice Frankfurter emphatically contrasted “secular” with “sectarian” teaching and praised “[t]his development of the public school as a symbol of our secular unity . . . .”<sup>272</sup> Today, this language might easily be read as an effort to constitutionalize a modern secular conception, and that may well have been Frankfurter’s intent. But at the time, and in the context of an opinion focusing not on generic and traditional exercises but rather on a program for providing explicit and sectarian religious instruction on school premises, this meaning was hardly obvious. After all, Frankfurter gave primary credit for the position he favored to Horace Mann, nineteenth-century champion of (as Frankfurter put it) “[t]he *non-sectarian* or secular public school . . . .”<sup>273</sup> Mann’s “nonsectarian” program could no doubt be described as “secular” in the classical sense, and it did indeed oppose “sectarian” religious instruction, but Mann had also insisted on an ecumenically religious character for public schooling.<sup>274</sup>

That the Court was not embracing a secular-as-not-religious constitutional conception was vividly apparent in *Zorach v. Clauson*,<sup>275</sup> decided five years after *Everson*. In that decision, the Court reiterated the prohibition forbidding government to “blend secular and sectarian education . . . .”<sup>276</sup> At the same time, the Court saw no apparent inconsistency between this prohibition and an explicit acknowledgment that “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>277</sup> And the Court enumerated as accepted and acceptable aspects of the American tradition “[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; [and] ‘so help me God’ in our courtroom oaths.”<sup>278</sup>

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270. See, e.g., *Everson*, 330 U.S. at 3, 7, 18.

271. 333 U.S. at 208–09.

272. *Id.* at 212, 217 (Frankfurter, J., concurring).

273. *Id.* at 215–17 (emphasis added).

274. Thus, Mann employed the practice of reading the Bible without commentary. He explained that “our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and, in receiving the Bible, it allows it to do what it is allowed to do in no other system—to *speak for itself*.” HORACE MANN, TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION TOGETHER WITH THE TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD 116–17 (1849), *quoted in* Jeffries & Ryan, *supra* note 4, at 298.

275. 343 U.S. 306 (1952).

276. *Id.* at 314.

277. *Id.* at 313.

278. *Id.* at 312–13.

Thus, when the plaintiffs in *Engel v. Vitale*<sup>279</sup> filed suit, the country remained in the condition that had characterized it from the outset—a condition in which both ecumenical and secularist quasi-constitutional understandings could jostle and join and could rise or fall as times, places, and circumstances might dictate. This condition extended to public education. Thus, approximately one-third to one-half of America's public schools conducted some sort of regular devotional service or Bible reading. The proportions varied by region: Bible reading was practiced in over two-thirds of schools in the East and in over three-quarters of the schools in the South, but the numbers were drastically lower in the Midwest and West—less than twenty percent.<sup>280</sup> Such local variations were constitutionally permissible; neither the more devotional nor the more secularist regimes enjoyed (or were afflicted with) official constitutional status.

The school prayer decisions would quietly but decisively change all that.

#### IV. THE SIGNIFICANCE OF THE SCHOOL PRAYER DECISIONS

Considering the school prayer decisions against the backdrop of the preceding quasi-constitutional, crazy-quilt pattern, we can appreciate how those decisions were transformative and yet how their transformative character was largely invisible to those who rendered and supported the decisions.

##### A. *How the Decisions Transformed Constitutional Doctrine*

*Engel* and *Schempp*<sup>281</sup> disapproved school prayer, but there was nothing especially novel or momentous simply in that outcome. As noted, some state courts had reached a similar conclusion, under state law, almost a century earlier.<sup>282</sup> Nor was the mere outcome—namely, the declaration that school prayer was unconstitutional—in itself any major innovation. The Court might easily have invalidated school prayer on the ground that the classroom prayer is inherently coercive<sup>283</sup> without making any significant change in constitutional doctrine.

279. 370 U.S. 421 (1962).

280. See the figures given in FRANK SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* 297 (1976).

281. 374 U.S. 203 (1963).

282. See *supra* note 201.

283. The Court would later use this rationale in declaring graduation prayer unconstitutional. See *Lee v. Weisman*, 505 U.S. 577 (1992). The rationale would seem to apply *a fortiori* to classroom prayer involving younger students.



Indeed, what gave the Supreme Court's decisions their transformative significance was not even simply their preference for the secularist conception of America over its long-time rival. The central and seminal significance of the decisions, rather, lay in their elevation of that secularist conception to *formal constitutional status* (importing it as the baseline for judging whether a practice met the constitutional demand for "neutrality"). The constitutionalization of the neutrality-as-secularism position meant that in the future, the secularist conception would dominate not only school prayer cases, and indeed not only Religion Clause cases, but would come to govern (albeit erratically, and usually *sub silentio*) constitutional discourse generally.

The school prayer cases were not single-handedly responsible for this change, of course. Like all decisions, they occurred against and were permitted or elicited by a political and cultural background. Moreover, the shift to a secularist constitutional conception is discernible in other decisions as well, including *McGowan v. Maryland*,<sup>284</sup> decided the year before *Engel*. Nonetheless, the school prayer decisions were especially powerful in importing and solidifying the new understanding, in part because of three features that a decision like *McGowan* lacked.

### 1. Secularism as the Doctrinal "Test"

First, in *Schempp*, the Court formulated its position in terms of what it explicitly described as a two-part, secular-purpose and secular-effects "test."<sup>285</sup> Conventional lawyerly wisdom understands that what binds in a judicial decision is the "holding" (or, sometimes, the *ratio decidendi*<sup>286</sup>); other statements in a decision, described as the "dicta," are not binding and can more readily be ignored or distinguished in future cases. To be sure, efforts to articulate any precise method for distinguishing between "holding" and "dicta" have proven unavailing.<sup>287</sup> Nonetheless, a court's use of the term "test" (especially when the test is formulated with multiple and numbered components, or "prongs") is usually taken as a reliable sign that in articulating this formulation the court understands itself to be declaring law, not just talking or persuading. Just as law students' lethargic laptops

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284. 366 U.S. 420 (1961). In *McGowan* the Court rejected a challenge to a Sunday-closing law, but it did so on the assumption that the law served "secular" purposes. The decision declared that such a law would violate the Establishment Clause if its purpose were "to use the State's coercive power to aid religion." *Id.* at 453.

285. *Schempp*, 374 U.S. at 222.

286. *Ratio decidendi* is Latin for "the reason for deciding"; it is "the principle or rule of law on which a court's decision is founded." BLACK'S LAW DICTIONARY 1376 (9th ed. 2009).

287. See STEVEN D. SMITH, LAW'S QUANDARY 55–56 (2004); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 8 (1997) (observing that "what constitutes the 'holding' of an earlier case is not well defined and can be adjusted to suit the occasion").

suddenly go into overdrive as soon as the professor utters something that sounds like a rule or “doctrine,” lawyers and judges pay close attention when the Supreme Court declares a multi-part “test.” The “test” will typically be cited and will serve to frame the analysis in future briefs and cases.<sup>288</sup>

By embodying the secular purpose and effect requirements in a “test,” therefore, the Supreme Court solidified its constitutionalization of the secularist position. When the *Schempp* test was later incorporated into the *Lemon* test,<sup>289</sup> that constitutionalization was ratified and extended. And indeed, hundreds or thousands of later cases, state and federal, have taken that “test” as authoritative.

## 2. The Significance of the Public Schools

The decisions’ impact on constitutional law and culture was strengthened by the fact that the cases involved public schools. As has often been noted, public schools have an especially central and even mythic place in American democracy, on both practical and symbolic levels. Noah Feldman observes that by the mid-1800s,

public schools mattered so centrally because those schools, still in their infancy, were already understood as sites for the creation of American identity . . . . This was true as a practical matter, since compulsory public schooling was the only time in an American’s life when one was subjected, like it or not, to the propaganda of the state. But the public schools were also centrally important symbolically, because there the government revealed what values it intended to support . . . .

Both the practical and symbolic centrality of the public schools to the creation of American values has remained consistent through the rest of American history.<sup>290</sup>

Justice Brennan emphasized the point in *Schempp*: “Americans regard the public schools,” he declared, “as a most vital civic institution for the preservation of a democratic system of government.”<sup>291</sup>

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288. For a critical discussion of the modern Supreme Court’s practice of expounding constitutional law in the form of “carefully framed doctrine expressed in elaborately layered sets of ‘tests,’ ‘prongs,’ ‘requirements,’ ‘standards,’ or ‘hurdles,’” see ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 121–55 (1989).

289. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

290. FELDMAN, *supra* note 128, at 70.

291. *Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

Indeed, scholars have sometimes suggested that public schools are the American equivalent of an established church; they are “the high church of the Religion of Democracy,” as John Jeffries and James Ryan put it.<sup>292</sup> Thus, public schools are a civic institution that Americans look to for the formation of future citizens, where core democratic conceptions and values are supposed to be inculcated in the rising generation.<sup>293</sup> In this way, the schools link past, present, and future in the democratic venture.<sup>294</sup> In addition, by contrast to state and national governmental institutions and agencies, public schools are the democratic institution in which many citizens can directly participate, either as students, parents, teachers, or simply involved citizens.

Not surprisingly, therefore, public schools have often been viewed as the crux and the quintessential carrier of American democracy, and controversies over the content of school programs and curricula have intensely engaged the arguments and passions of Americans. In a study of all church-state cases between 1951 and 1971, political scientist Frank Sorauf reported that “the overwhelming majority of the cases (43 of the 67) in some way or another involved the elementary and secondary schools, either public or private religious schools.”<sup>295</sup> Sorauf added that “[t]he school cases . . . attract considerably more extensive and intense group activity than do the others, and they also attract greater numbers of amicus curiae . . . .”<sup>296</sup>

Decisions ruling that the Constitution imposed a secular regime on the public schools thus carried special significance, both practical and symbolic.

### 3. The Importance of Prayer

In addition, it was crucially significant that the decisions concerned the permissibility of prayer. Prayer is the activity in which religious believers

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292. Jeffries & Ryan, *supra* note 4, at 312. In support of this characterization, they quote Martin Marty’s explanation that democracy “has few temples or churches or synagogues. But it has an ‘established church’ in the field of public education.” *Id.* at 312 n.175 (quoting MARTIN E. MARTY, *THE NEW SHAPE OF AMERICAN RELIGION* 72 (1958)). The distinguished historian of religion Sidney Mead observed that “[t]he public schools in the United States took over one of the basic responsibilities that traditionally was always assumed by an established church. In this sense the public school system of the United States *is* its established church.” DIERENFIELD, *supra* note 7, at 19.

293. As the Court memorably explained in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

294. *Cf.* HUNTER, *supra* note 133, at 198 (noting “the intrinsic link between public education, community and national identity, and the future (symbolized by children)”).

295. SORAUF, *supra* note 280, at 6.

296. *Id.* at 254.

do not merely assert, explain, defend, or even act upon their faith, but in which they actually and actively acknowledge and commune with deity (as they believe).<sup>297</sup> Prayer is thus a sort of performative embrace of providential governance: the person who intones the words of a prayer is comparable to the person who does not merely wish or intend to marry, but who actually says “I do.” The point can be appreciated from the perspective of the non-believer; a person without religious faith might nonetheless read and discuss scripture or theology—atheists are by no means debarred from participating in biblical hermeneutics or philosophy of religion<sup>298</sup>—but the non-believer will find it difficult to pray to a being who (in his opinion) does not exist.<sup>299</sup> Consequently, a daily prayer conducted in public schools is an especially salient affirmation of the providentialist point of view.

To observe this performative dimension of prayer is not to claim anything about the efficacy of the exercise in instilling genuine piety in students. Critics question, usually in disdainful tones, the practical value of school prayer in infusing real religiosity or understanding into students.<sup>300</sup> Ellery Schempp, a plaintiff in the *Schempp* case, complained that the prayer in his Pennsylvania school was like “peeing—you just do it; it has no meaning.”<sup>301</sup> The assessment is likely accurate but also in a sense beside the point. For many students, no doubt, something like the Regents’ Prayer was largely a rote exercise devoid of any genuine spirituality. Even so, the prayer enlisted students in a daily performative acknowledgment of providence; presumably it was for just this reason that opponents found the exercise so unacceptable. In this vein, Francis Roth, a plaintiff in the *Engel* case, indicated that she was not opposed to the national motto “In God We

297. Cf. ABRAHAM JOSHUA HESCHEL, MAN’S QUEST FOR GOD 12 (1954) (“Prayer is not thinking. To the thinker, God is an object; to the man who prays, He is the subject.”).

298. A representative book of readings on philosophy of religion thus contains writings by a number of thinkers known for their anti-religious or skeptical tendencies, such as David Hume, J.L. Mackie, Richard Dawkins, and Kai Nielsen. See, e.g., PHILOSOPHY OF RELIGION: SELECTED READINGS (Michael Peterson et al. eds., 1996).

299. Difficult, but perhaps not impossible. Anthony Kenny, a philosopher and professed agnostic, maintains that “[b]eing agnostic does not mean that one cannot pray. In itself, prayer to a God about whose existence one is doubtful is no more irrational than crying out for help in an emergency without knowing whether there is anyone within earshot.” ANTHONY KENNY, WHAT I BELIEVE 64 (2006).

300. Stephen Monsma describes the Regents’ Prayer invalidated in *Engel* as “innocuous (some would say insipid).” STEPHEN V. MONSMA, POSITIVE NEUTRALITY 74 (1993); cf. Frederick Mark Gedicks, *The Ironic State of Religious Liberty in America*, 46 MERCER L. REV. 1157, 1158 (1995) (commenting on “the theologically vacuous nature of most organized public school prayers”).

301. DIERENFIELD, *supra* note 7, at 164.

Trust.” “It’s the actual act of praying I object to,” she explained, “no matter how innocuous the prayer was.”<sup>302</sup>

If school prayer not only reflected but performed the providentialist view, the elimination of prayer and Bible reading aligned the schools with the secularist conception. But the change was more than simply the substitution of one view for another. As noted, school prayer had been optional, both with schools or school districts and with individual students.<sup>303</sup> A Nassau County school district could elect to use the Regents’ Prayer; a few miles away, New York City schools had opted *against* the prayer.<sup>304</sup> Accordingly, no one could suppose that the prayer exercise or the providentialist conception it reflected was *constitutionally* approved or compelled. By contrast, the elimination of school prayer in *Engel* and *Schempp* displaced the providentialist conception by the secularist one. But more importantly, the new orthodoxy was now being imposed as the position and mandate of the United States Constitution. Public secularism had become the official, constitutive orthodoxy.

*B. Why the Significance of the School Prayer Decisions Went Largely Unnoticed (by Their Supporters)*

In constitutionalizing political secularism, the school prayer decisions effected a major change not only in Establishment Clause doctrine, but in the nation’s official self-understanding. The outrage with which many Americans reacted to the decisions suggests that these citizens perceived the significance of this change.<sup>305</sup> But that significance seems to have been less apparent to the Justices who rendered the decisions, and to many of the decisions’ supporters (Justice Douglas and the ACLU being notable exceptions).<sup>306</sup> And their failure to appreciate what had been wrought is understandable.

For one thing, as discussed, virtually all Americans had long assumed that government was supposed to be “secular” in some sense.<sup>307</sup> And for many Americans in the 1960s, “secular” had simply come to mean “not religious” (as it typically does today). In this respect, the term has undergone dramatic changes. Real effort is required to recover older and other senses of the term: not many Justices, scholars, or citizens will have occasion or cause to make that effort.<sup>308</sup> Hence, it was easy for the Justices

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302. *Id.* at 137.

303. *See supra* notes 24–25.

304. DIERENFIELD, *supra* note 7, at 70.

305. *See supra* note 7 and accompanying text.

306. *See infra* notes 118–20 and accompanying text.

307. *See supra* note 182 and accompanying text.

308. On rare occasions, even the Supreme Court may use the term in a different and more classical sense, but when it does, many readers (and dissenting justices) may find the usage almost

and like-minded citizens, in declaring that government must be “secular” in the more common contemporary sense of the term, to believe that they were simply reiterating an understanding that had prevailed all along.

In addition, as discussed, the secularist conception had long been one of the leading quasi-constitutional interpretations of America—one that in the twentieth century had become dominant in the more elite classes to which Supreme Court Justices (and law professors) typically belong.<sup>309</sup> But the distinction between a “quasi-constitutional” and a fully “constitutional” understanding, though crucially important, is also subtle and easy to overlook. Those who adhered to the secularist view had long regarded it as constitutive of the political community, and hence as “constitutional,” at least in the lower case sense of the term. From the perspective of those who held the secularist view, in reading that view into the Constitution the Court was simply articulating what had long or always been true—even if this truth had somehow been rampantly disregarded or violated throughout much of American history. In effect, the Court had simply taken a familiar view—that the American constitution mandates secular government—and capitalized the “C” in Constitution.

We can also appreciate why many of those who supported the Court’s decisions did not anticipate any very wide-ranging implications. Of course, it is hard to know just how much of what later ensued was anticipated or hoped for; as noted, Justice Douglas fondly foresaw a sweeping elimination of public religious expression, and Justice Brennan’s later opinions in cases like *Marsh v. Chambers* at least raise the suspicion that he may have had intimations of more than he acknowledged in *Schempp*.<sup>310</sup> Still, many supporters denied that the decisions would have any far-reaching consequences,<sup>311</sup> and these denials may well have been sincere. After all, the various incidents and practices of what is sometimes called “civil religion”<sup>312</sup> had persisted throughout the country’s history despite the country’s commitment to political secularism (as people with this view

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incomprehensible. For further discussion, see Steven D. Smith, *Nonestablishment “Under God”?* *The Nonsectarian Principle*, 50 VILL. L. REV. 1 (2005).

309. See *supra* notes 203–06 and accompanying text.

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

311. See, e.g., DIERENFIELD, *supra* note 7, at 136 (reporting Professor Philip Kurland’s view that *Engel* was “important but narrow in breadth”). A *New Republic* essay found the critical public reaction “remarkable,” adding that “[m]ost authoritative observers believe that the practical consequences of *Engel v. Vitale* in our school system will be negligible.” *Engel v. Vitale*, THE NEW REPUBLIC, July 9, 1962, at 3, reprinted in RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE, 142, 142–43 (Terry Eastland ed., 1993).

312. For a seminal discussion, see ROBERT N. BELLAH, *Civil Religion in America*, in BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD 168 (1970).

supposed). So why should the explicit acknowledgment of that long-standing position threaten such practices and expressions?

This mindset would be vividly manifest a generation later in Justice O'Connor's evident inability to see any inconsistency between a constitutional doctrine prohibiting governmental endorsement of religion and a traditional municipal Christmas crèche. O'Connor initially proposed the "no endorsement" doctrine, we may recall, precisely because she thought (albeit to the dismay of baffled critics)<sup>313</sup> that the doctrine provided a convincing justification for *permitting* the crèche.<sup>314</sup>

In short, it is entirely understandable that many supporters of the school prayer decisions did not see them as especially radical or momentous. To these people, the outraged reaction of many other Americans naturally seemed excessive, even hysterical.<sup>315</sup> And indeed, as with many transformative developments—the Fourteenth Amendment is a leading example—the full implications of the decisions were not immediately manifest. Law often takes time, as the saying goes, to "work itself pure." Decades later, however, we can attempt to appreciate how the decisions and the secularist conception that they embraced altered the landscape not only of Religion Clause jurisprudence but of constitutional discourse generally.

#### V. TRANSFORMATIONS: THE CONSEQUENCES OF THE SCHOOL PRAYER DECISIONS

Almost half-a-century has passed since the school prayer decisions were announced. Two generations of citizens have been raised and formed under the secular pedagogical regime that the decisions ordained. So, what have been the results?

Most obviously, the decisions themselves have survived. Despite their enduring unpopularity with the general public, they have not been overruled, and repeated efforts to undo them through constitutional amendment have failed.<sup>316</sup> The example they set, specifically with respect to prayer in the public schools, has been faithfully followed: thus, the Supreme Court has

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313. Mark Tushnet noted, with apparent understatement, that O'Connor's conclusion that the crèche did not endorse Christianity "came as a surprise to most Jews." Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 n.52 (1986).

314. *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring).

315. Philip Kurland commented acerbically that "[t]o read into this decision the implications that have been read into it is to expound a parade of imaginary horrors." DIERENFIELD, *supra* note 7, at 136.

316. Cf. 1 DOUGLAS LAYCOCK, *Church and State in the United States: Competing Conceptions and Historic Changes*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 399, 423 ("There have been innumerable proposals to amend the Constitution to permit school-sponsored prayer, none of which has passed Congress, and endless efforts to restore school-sponsored prayer while disguising and denying government sponsorship.").

invalidated a moment of silence law,<sup>317</sup> a graduation prayer,<sup>318</sup> and a custom of praying before high school football games.<sup>319</sup> Douglas Laycock observes that “the Supreme Court . . . has not wavered from those [school prayer] decisions in 40 years.”<sup>320</sup>

But the consequences of the decisions have hardly been limited to prayer. When we consider large historical movements, of course, chains of cause and effect are hard to corroborate with certainty. It is difficult to know whether particular decisions and events that appear to have led to later occurrences were genuinely causative or merely reflective of less visible historical currents that might have produced the later developments in any case. Such questions are inherently speculative and subject to competing interpretations; they provide the murky matter from which historians make their living. Acknowledging such uncertainties, we can nonetheless appreciate the likely influence of the school prayer decisions—and, more specifically, of the regime of political secularism that they elevated to constitutional status—in a variety of important legal and cultural developments.

#### A. *Establishment Clause Jurisprudence*

Beyond their direct influence on later school prayer cases, the school prayer decisions, by constitutionalizing the conflation of neutrality with secularism, diverted Establishment Clause jurisprudence away from the path that *Everson* seemed to have set for it and that Justice Douglas contemplated. We can describe this redirection in terms of the oft-noted displacement of “no aid separationism” by a commitment to neutrality-as-secularism.<sup>321</sup>

##### 1. Subverting *Everson*

The dominant theme of *Everson* had been separationism, and separationism had been interpreted to mean that government could not aid religion. To be sure, *Everson* also foreshadowed future developments, and its own subversion, by ruling that the particular form of aid considered in the case—a subsidy supporting transportation of students to and from schools,

317. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

318. *Lee v. Weisman*, 505 U.S. 577 (1992).

319. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

320. 1 DOUGLAS LAYCOCK, *Vouching Towards Bethlehem*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 390, 392–93.

321. *See infra* note 343.



including religious schools—was permissible as a manifestation of state “neutrality” toward religion.<sup>322</sup> “Neutrality” was nonetheless presented as a secondary theme in *Everson*: most of the rhetoric in the majority opinion and even more so in the dissenting opinions emphasized “separation” and “no aid.”<sup>323</sup> The school prayer decisions, by contrast, reoriented the doctrine by making neutrality the primary theme and by effectively equating neutrality with governmental secularism.

The significance of this reorientation was not readily apparent, in part because modern judges, advocates, and scholars have often supposed that “separation” and “secularism” are equivalent or mutually entailing ideas.<sup>324</sup> But the supposition is unsound. Separation neither depends on nor entails secularism. As a historical matter, from the Papal Revolution of the eleventh century through Roger Williams and up through Jefferson and Madison, a commitment to church-state separation was most often defended on religious grounds as a sort of theological commitment.<sup>325</sup> Indeed, such theological rationales for separation are still sometimes offered.<sup>326</sup> Conversely, a commitment to secularism need not entail any prohibition on aid to religion so long as religion is serving some secular function (as in the so-called “charitable choice” or “faith-based initiatives” supported by recent administrations, both Republican and Democratic). Thus, by innocently substituting secularism for separationism at the center of Establishment doctrine, the Supreme Court foreshadowed a significantly altered direction for Establishment jurisprudence.<sup>327</sup>

At least one astute contemporary observer noticed the significance of this shift. Pointing out the inconsistency between *Everson*’s no-aid separationism and the neutrality mandated by *Schempp*, Michigan law professor Paul Kauper perceived an implicit rejection of the *Everson* theme.<sup>328</sup> “The emphasis on neutrality,” he observed, “indicates that the no-aid-to-religion test, as a principle of construction, has lost its significance. It is not a viable test.”<sup>329</sup>

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322. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

323. *Id.* at 15–16.

324. See, e.g., KRAMNICK & MOORE, *supra* note 148, at 206; JOHN M. SWOMLEY, RELIGIOUS LIBERTY AND THE SECULAR STATE 17 (1987) (interpreting “[t]he constitutional doctrine of separation of church and state” to mean that “[t]he Constitution . . . provides for a wholly secular government”).

325. See SMITH, *supra* note 178, at 112–27.

326. See HART, *supra* note 164, at 13.

327. Of the Justices involved in the cases, Justice Douglas seems to have perceived this shift most clearly. As noted, Douglas wrote a separate concurring opinion in *Engel*; in it he repented of voting with the majority in *Everson*, and he emphasized money and the “no aid” theme as the central commitment of the Establishment Clause. See *supra* note 323 and accompanying text.

328. Kauper, *supra* note 71, at 14, 27.

329. *Id.* at 38.

Kauper was unusual, however, in grasping the significance of this shift. Several years after the school prayer decisions, in *Lemon v. Kurtzman*, the Court announced a new, three-part Establishment Clause test that in its wording reflected and ratified the shift in emphasis from “no aid” separationism to secularism.<sup>330</sup> Once again, though, neither the Court nor its observers seemed initially to assimilate this alteration.

The primary emphasis on governmental secularism was plainly expressed in *Lemon*’s first and second requirements, taken verbatim from *Schempp*, that a challenged law must have a secular purpose and a principal effect that neither advances nor inhibits religion.<sup>331</sup> And the “neither advances nor inhibits” formulation reflected *Schempp*’s commitment to neutrality.<sup>332</sup> By contrast, the separationist commitment from *Everson* was relegated to *Lemon*’s third requirement, which prohibited government from becoming excessively entangled with religion, and was stated in murky terms: indeed, the Court itself proceeded to demonstrate that it was wholly unsure what this prohibition meant.<sup>333</sup> Thus, the *Lemon* formulation followed *Schempp* in explicitly giving secular neutrality pride of place over separation. And yet early applications of the test failed to reflect this change; the decisions continued to resonate primarily with *Everson*’s more separationist orientation.

Thus, during the decade and a half following *Lemon*, the Court invalidated a variety of programs for giving aid to religious schools.<sup>334</sup> With the benefit of hindsight, it seems that the decisions invalidating aid programs were more the lingering manifestation of a residual commitment to *Everson*’s “no aid” separationism than the product a logical application of the *Lemon* test in its explicit terms. In almost every case, the Court found that the challenged aid satisfied the first *Lemon* requirement: governments were acting with the entirely legitimate and secular purpose of promoting education. The difficulties most often arose, the Court thought, under the second, “effects” prong.<sup>335</sup> At least in its explicit formulation, though, the

330. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

331. *Id.* at 612.

332. *Id.*

333. *Id.* at 613–15.

334. The Court upheld some forms of aid, however, and the hairline or perhaps illusory distinctions developed in these cases were a frequent subject of ridicule. Characteristic of such criticism was Leonard Levy’s complaint that the decisions turned on “distinctions that would glaze the minds of medieval scholastics.” LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 128 (1986).

335. See, e.g., *Sch. Dist. v. Ball*, 473 U.S. 373, 382, 394 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *Wolman v. Walter*, 433 U.S. 229, 236 (1977), *overruled by* *Mitchell v. Helms*, 530 U.S. 793 (2000); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975), *overruled by* *Mitchell*, 530 U.S.

second prong prohibits only laws or programs that have a “*principal or primary* effect” of advancing religion: advancement of religion as a secondary or “incidental” effect is not prohibited.<sup>336</sup> But if the *purpose* of an aid program is the legitimate and secular purpose of promoting education, as the Court repeatedly concluded it was, then why was it not plausible to suppose that the *primary* effect of the program would correspond to its permissible purpose (even if religion also received some benefit as a secondary effect)? In the school aid cases, the Court never satisfactorily answered or even squarely addressed this question. Its invalidating decisions, in effect, treated the second prong basically as equivalent to *Everson’s* “no aid” prohibition.

Indeed, sometimes the effects prong proved insufficient, so that a decision to invalidate aid was forced to invoke the more obviously separationist “no excessive entanglement” prong.<sup>337</sup> Even so, this residual separationist motif was frail, because in fact the Court never seemed quite sure just what this “entanglement” prong meant, or what its function was.<sup>338</sup> At times the Court seemed to equate “entanglement” with political divisiveness;<sup>339</sup> but in other cases the Court expressed reservations about this construction.<sup>340</sup> In one case, the third prong was formally collapsed into the second, “secular effects” requirement,<sup>341</sup> though it was later extracted again (at least in the lower courts).<sup>342</sup>

Overall, it seems fair to say that the third prong has been more vacillating and less influential than the first two prongs. This relative importance reflects a substantial and often noted shift in which the residual separationist commitment began to wane, displaced by the “secular neutrality” logic first announced in the school prayer cases and later adopted in the *Lemon* test.<sup>343</sup> As a consequence, after 1985 the Supreme Court began

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793.

336. *Lemon*, 403 U.S. at 612 (emphasis added).

337. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini*, 521 U.S. 203.

338. Cf. 1 LAYCOCK, *supra* note 5, at 305 (“But ‘entanglement’ has been a vague term with changeable meaning. Sometimes it seems to mean contact, or the opposite of separation. Sometimes it seems to mean church regulation. Sometimes it seems to mean government surveillance of churches.”)

339. E.g., *Lemon*, 403 U.S. at 622–24.

340. In *Lynch v. Donnelly*, 465 U.S. 668, 684–85 (1984), for example, the Court worried that a litigant might, “by the very act of commencing a lawsuit, . . . create the appearance of divisiveness and then exploit it as evidence of entanglement.”

341. *Agostini*, 521 U.S. at 232–35.

342. See, e.g., *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1017 (9th Cir. 2010); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 100 (3d Cir. 2009).

343. For scholarly treatments of the decline of separationism, see Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097 (2006); Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994); see also Angela C. Carmella, *Everson and Its Progeny: Separation and Nondiscrimination in Tension*, in *EVERSON REVISITED: RELIGION,*

to uphold aid to religious schools in case after case, repeatedly ruling that so long as religious schools were included in a neutral and secular program for aiding education, constitutional demands were satisfied.<sup>344</sup> Douglas Laycock overstates the situation only slightly: “Federal constitutional restrictions on funding religious institutions have collapsed.”<sup>345</sup> Indeed, in several cases the Court went further, holding that neutrality meant that governments were constitutionally *required* to treat religious recipients as eligible for assistance available to comparable secular institutions or programs.<sup>346</sup>

To be sure, dissenting opinions (and concurring opinions by Justice O’Connor) often attempted to preserve the “no aid separationist” theme left over from *Everson*.<sup>347</sup> But this theme could gain little traction in a constitutional framework centrally devoted to *neutrality*, understood as governmental *secularism*, rather than to separation or “no aid” as independent constitutional commitments.

## 2. The Emergence of the “No Endorsement” Doctrine

The relaxation of “no aid separationism,” however, did not mean that Establishment doctrine had lost its bite. Instead, its principal force came to be directed against a different set of practices—namely, governmental endorsements of religious ideas or traditions—that have been endemic to American political life and that the Justices in the *Everson* period seemingly had not regarded as problematic. As noted, *Everson* had quoted without apparent embarrassment the declaration in Jefferson’s Virginia Statute that “Almighty God hath created the mind free . . . .”<sup>348</sup> And it was after all the Supreme Court itself, speaking through Justice Douglas, that had declared in 1952 that “[w]e are a religious people whose institutions presuppose a Supreme Being”<sup>349</sup>—surely (despite Douglas’s later apologetic

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EDUCATION, AND LAW AT THE CROSSROADS, *supra* note 6, at 103.

344. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

345. 1 DOUGLAS LAYCOCK, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 126, 127.

346. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Cent. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

347. See, e.g., *Zelman*, 536 U.S. at 663 (O’Connor, J., concurring); *Mitchell*, 530 U.S. at 841 (O’Connor, J., concurring in judgment).

348. *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947).

349. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

disclaimer<sup>350</sup>) an endorsement of religion. But such expressions are hard to square with the assumption that government is constitutionally required to be secular in the sense of “not religious.” In the years following the school prayer decisions and the *Lemon* test, therefore, governmental religious expression increasingly came to seem suspect.

Critics of public religious expressions argued, initially without much success, that such expressions violated the secular purpose and effect requirements.<sup>351</sup> This argument gained force when in 1984 Justice O’Connor proposed that the Establishment Clause be formally reconceived in terms of a prohibition on governmental actions or messages which endorse or disapprove of religion.<sup>352</sup> Despite difficulties in implementation, O’Connor’s proposal resonated strongly with the “secular neutrality” logic of *Schempp* and *Lemon*. Unsurprisingly, therefore, within a few years the “no endorsement” test had been accepted by a majority of Justices.<sup>353</sup> Since that acceptance, controversies involving alleged endorsements of religion—in the Pledge of Allegiance, Ten Commandments monuments, and crosses on federal property—seem to have pushed aside the older financial aid cases to occupy center stage in the public gaze and the Supreme Court’s docket.<sup>354</sup>

Rigorously implemented, the “no endorsement” doctrine would seem to condemn a great deal of expression that has been practiced and valued in the American political tradition,<sup>355</sup> including the national motto (“In God We Trust”), the official use of prayer in legislative sessions and Presidential inaugurations—even, ironically, Jefferson’s celebrated Virginia Statute for Religious Freedom<sup>356</sup> (which *Everson* had read into the first amendment as the basis for modern Establishment jurisprudence).<sup>357</sup> In reality, neither the Court nor most supporters of the secularist conception have wanted to push secularism to these extremes. Often, therefore, they have tried to save entrenched and revered expressions by interpreting them as having primarily historical or cultural significance. But the interpretations often exhibit a strained quality. Thus, Justice O’Connor’s explanation of how the words “under God” in the Pledge of Allegiance do not send any religious message

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350. See *supra* note 46.

351. The argument was made but rejected in cases such as *Citizens Concerned for Separation of Church and State v. Denver*, 526 F. Supp. 1310 (D. Colo. 1981), and *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (rejecting constitutional challenge to national motto “In God We Trust”).

352. *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring).

353. See *Allegheny Cnty. v. ACLU*, 492 U.S. 573 (1989).

354. See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

355. For a forceful argument for this conclusion, see Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

356. See *supra* note 175 and accompanying text.

357. *Everson v. Bd. of Educ.*, 330 U.S. 1, 11–13 (1947).

left readers incredulous.<sup>358</sup> And Douglas Laycock pronounces the contention that the Ten Commandments monuments are erected and maintained for their secular significance “undoubtedly a lie.”<sup>359</sup>

### B. *Constitutional Law Outside the Establishment Clause*

The influence of the school prayer decisions, and of the conception of secularism that they constitutionalized, is most conspicuous in later Establishment Clause cases, especially in cases concerned with school prayer. But the decisions’ influence<sup>360</sup> outside the Establishment Clause area, though less overt, may be even more important.

We might start by noticing a linkage that is casually alluded to in Noah Feldman’s book *Divided by God: America’s Church-State Problem—And What We Should Do About It*.<sup>361</sup> As its title suggests, the book is primarily about the relations between religion, politics, and government in this country; its legal focus is on the First Amendment’s Establishment Clause. Early on in the book, however, Feldman notices a connection between his subject and some controversies that are not officially Establishment Clause matters: “same-sex marriage, . . . stem-cell research, abortion, euthanasia, and the death penalty.”<sup>362</sup> Later in the book, Feldman reaffirms that connection.<sup>363</sup> Nor is he alone in perceiving such a connection. For example, Susan Jacoby observes that “the split over school prayer was a precursor of the bitter division over the 1973 *Roe v. Wade* abortion decision.”<sup>364</sup> Douglas Laycock describes a “polarized debate that extends to a wide range of religious liberty issues and also to social issues such as

358. *Elk Grove Sch. Dist. v. Newdow*, 542 U.S. 1, 33–45 (2004) (O’Connor, J., concurring); cf. 1 LAYCOCK, *supra* note 345, at 211 (observing that “[t]his rationale is unconvincing both to serious nonbelievers and to serious believers”). Steven Shiffrin observes, “I am sure that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine.” Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 70–71 (2004). And he adds that “pretending [that this and similar expressions] are not religious is simply insulting.” *Id.* at 71.

359. 1 LAYCOCK, *supra* note 316, at 425.

360. By “influence” I mean “influence,” not something like “sole or determinative cause.” Andy Koppelman has suggested to me, in response to claims made in this section, that some of the developments described here were products of other movements such as the so-called Sexual Revolution. He is surely right. But that observation in no way negates the possibility of influence from other factors as well.

361. See FELDMAN, *supra* note 128.

362. *Id.* at 6.

363. *Id.* at 195–98, 224–25.

364. JACOBY, *supra* note 170, at 324.

pornography, abortion, feminism, and gay rights.”<sup>365</sup>

But how are nonestablishment, and the school prayer cases in particular, relevant to these other controversies? Disputes over abortion, euthanasia, and same-sex marriage present constitutional issues, to be sure, but not Establishment Clause issues—not on their face, at least. These disputes have been addressed by the courts mainly under the Fourteenth Amendment’s Due Process and Equal Protection Clauses.<sup>366</sup> How might these controversies be affected by decisions in a wholly different area of constitutional law?

Once we appreciate the significance of the school prayer decisions in constitutionalizing a secular conception of American government, the connection becomes apparent. Through much of the nation’s history, to be sure, religion pervasively and openly influenced political opinion and debate on divisive issues from abolition to temperance to women’s rights to the movement for racial equality.<sup>367</sup> The Supreme Court did not regard such influence as impermissible; on the contrary, the Court itself appealed to religious values and premises from time to time with no apparent sense of impropriety.<sup>368</sup> As political secularism became entrenched as constitutional orthodoxy, however, these appeals to religious values or premises as a basis for political decisions came to seem problematic, perhaps forbidden.

Thus, recent decades have seen a wide-ranging debate, on the levels both of political philosophy and constitutional law, about the permissibility of religious belief as a basis for political decisions.<sup>369</sup> Perhaps surprisingly, the debate did not reach full vigor until about the mid-1980s. But preliminary sparring occurred earlier. One of the first major books dealing with the question in a systematic way was Kent Greenawalt’s *Religious Convictions and Political Choice*, published in 1988.<sup>370</sup> In his preface, however, Greenawalt explained how the question of the permissibility of religion in political decision-making was first raised for him when as editor-

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365. 1 DOUGLAS LAYCOCK, *Continuity and Change in the Threat to Religious Liberty*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 651, 673. See also PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 7 (2011) (observing that religious freedom controversies are skirmishes in a larger cultural struggle).

366. See *infra* notes 387–92 and accompanying text.

367. See generally Michael E. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087 (1986).

368. See *supra* notes 231, 349 and accompanying text.

369. The literature is vast, but some particularly incisive or influential contributions include CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002); ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000); MICHAEL J. PERRY, *RELIGION IN POLITICS* (1999); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); cf. 1 LAYCOCK, *supra* note 365, at 684–85 (observing that scholars who believe “religious arguments are excluded, limited, or at least somehow suspect, in the political process” include Bruce Ackerman, Robert Audi, Christopher Eisgruber, Kent Greenawalt, Abner Greene, William Marshall, Michael Perry, Lawrence Solum, and Kathleen Sullivan).

370. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

in-chief of the *Columbia Law Review* he closely read Louis Henkin's article challenging obscenity regulation as an imposition of religion.<sup>371</sup> Henkin's article was published, as it happens, in 1963,<sup>372</sup> a year after *Engel* (which Henkin cited) and in the same year as *Schempp*,<sup>373</sup> and it tentatively proposed what Henkin himself described as a "novel" doctrine—namely, that legal regulations based on moral prohibitions that were grounded in religion and that had not evolved into a more secular form violated the First Amendment.<sup>374</sup>

Academic contributions to the debate over "religion in the public square" by scholars like Greenawalt, Robert Audi, Michael Perry, and others<sup>375</sup> are often searching, intricate, sometimes ponderous. Judicial pronouncements are typically much more casual, perhaps evasive—and understandably so. That is because on the practical level, there seems to be no very satisfactory resolution of the issue.

In the abstract, it would be easy enough to conclude that if government is required to be secular, then political decisions simply cannot be based on religious rationales; decisions that *are* so based would be constitutionally invalid. And, again in the abstract, such a conclusion might find a cozy doctrinal home in the *Lemon* test's "secular legislative purpose" requirement. But though straightforward enough in theory, this conclusion also provokes powerful practical objections. For one thing, given the country's religious history and composition, it seems likely that numerous laws have in fact been based to a significant extent on religious beliefs.<sup>376</sup> Consequently, a flat prohibition on laws based on religious rationales might threaten numerous necessary laws. A constitutional interpretation that might have the effect of invalidating, say, murder laws is plainly not viable.<sup>377</sup> In

371. *Id.* at viii. Greenawalt acknowledged that "some of [the article's] possible broader implications for secularizing political decisions escaped me at the time." *Id.*

372. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

373. The article did not cite *Schempp*, presumably because the article was written before the *Schempp* decision was announced, but it did cite *Engel* (along with other Establishment Clause decisions). *Id.* at 408 n.52, 412 n.67.

374. *Id.* at 412. Henkin added: "What is important is that the underlying questions be recognized and considered, . . . in the light of new facts, new insights, new views of morality, *new readings of the Constitution.*" *Id.* at 414 (emphasis added).

375. See *supra* note 369.

376. Cf. Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 788–89 (1986) ("Even two generations ago, if one had asked Americans where our Constitution—or indeed, our whole concept of law—came from, on what it was ultimately based, the overwhelming majority would have said, 'the Ten Commandments,' or 'the Bible,' or perhaps 'the law of God.'").

377. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) ("Chaos



addition, such a prohibition might burden or even effectively disenfranchise large numbers of citizens who cannot or will not bracket their religious convictions when voting or debating public issues.<sup>378</sup> Moreover, nearly everyone favors some laws—civil rights legislation, for instance—that were passed in part on the strength of openly religious justifications and with the support of religious leaders like Martin Luther King Jr.

Theorists sometimes try to avoid these embarrassments by maintaining that legislation in fact enacted on the basis of religious reasons is nonetheless permissible so long as an adequate secular rationale can be supplied for such laws; Rawls calls this qualification “the proviso.”<sup>379</sup> But this position is difficult to implement in practice. How strong, and how widely held, must an alternative secular rationale be to save a law in fact enacted with religious support and on the strength of religious reasons? Surely it cannot be enough that one single citizen sincerely supports a measure based on a non-religious rationale: in a large and diverse nation, such a requirement would be negligible. But who is to say whether a secular rationale that *might* be given, or that at least a few citizens actually believe, is sufficient to justify a law that likely would not have been passed without the support of religious citizens acting on their religious beliefs? These are hard questions, and so in practice, the courts have tended to ignore them or deflect them with the observation (as unhelpful as it is unobjectionable) that a law is not rendered invalid merely because its purpose or rationale “happens to coincide” with some citizens’ religious beliefs.<sup>380</sup> Whether in a given case religious beliefs *actually* supplied or merely “happen[ed] to coincide” with a law’s rationale is a question the Court most often studiously avoids.

Within this doctrinal black box, however, something like the Rawlsian proviso may well be at work, in a rough and intuitive way. Many laws that as a historical matter may have been adopted on the basis of religious belief—laws against theft and murder, for example—seem easy enough to justify on secular grounds because it is hard to imagine any society, religious or not, that would not prohibit citizens from robbing or murdering each other. By contrast, in the popular mind, and perhaps even more so in the

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would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing.”)

378. Cf. Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 656 (arguing that “[t]he principle of secular rationale degrades religious persons from the status as equal citizens”).

379. The proviso holds that reasons based on reasonable comprehensive doctrines can be offered in political discourse regarding important public decisions so long as “in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support.” RAWLS, *supra* note 163, at li–lii.

380. See *Bowen v. Kendrick*, 487 U.S. 598, 599 n.5 (1988); *Harris v. McRae*, 448 U.S. 297, 319 (1980).

academic and judicial mind, there are positions on controversial public issues that are understood (or perhaps misunderstood) to be primarily based on religious belief, and for which non-religious justifications seem weak or contrived. Opposition to artificial contraception, for example, is widely perceived to be derived from religious belief or religious authority.<sup>381</sup> Abortion is more complicated, perhaps, because the moral status of the fetus can be a difficult issue for the religious and non-religious alike; nonetheless, opposition to abortion is widely associated with religious groups, especially the Roman Catholic Church.<sup>382</sup> Opposition to euthanasia *in principle* (as opposed to more pragmatic opposition based on fears of undue pressure or slippery slopes) is another position commonly associated with religious groups and religious belief.<sup>383</sup> Condemnation of consensual same-sex intimacy is another such instance.<sup>384</sup>

In a nation of 300 million people, to be sure, it is possible to find non-religious citizens who sincerely oppose contraception, euthanasia, homosexual intimacy, and especially abortion. However, it is commonly supposed that such individuals tend to be unusual; by-and-large, such opposition comes from religion, or from religious constituencies. I am not asserting that the supposition is definitely correct, but only that it is widely held.<sup>385</sup> On this view of things, and on the premise that government is constitutionally confined to the domain of the secular, laws prohibiting contraception, abortion, euthanasia, and homosexual sodomy seem deeply problematic.<sup>386</sup> So it should not be surprising that such laws have suffered from hard treatment in the courts in the years since the “political secularism” position was constitutionalized.

381. See JACOBY, *supra* note 170, at 274–75, 353.

382. See *id.* at 342–47.

383. See RONALD DWORKIN, *LIFE'S DOMINION* 195 (1994) (“The Roman Catholic church is the sternest, most vigilant, and no doubt most effective opponent of euthanasia, as it is of abortion.”).

384. In *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009), the Iowa Supreme Court declared that “[w]hile unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage . . . .” See also MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* 152–53 (2010) (asserting that “[t]he argument that not only could but almost certainly does account—indeed, the only argument, other than an implausible secular argument, that could account—for the judgment of state lawmakers that same-sex sexual conduct is immoral is not secular but religious: Such conduct . . . is ‘in direct opposition to God’s truth as He has revealed it in the Scriptures.’”).

385. See ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION* 257 (2003) (describing the common perception that “religious believers” are “hell-bent on prohibiting abortion, throwing Darwin out of public schools, denouncing homosexuals, and imposing their prayers on others”).

386. In this vein, Edward Rubin argues that laws restricting abortion or same-sex marriage and laws prescribing abstinence-based sex education are unconstitutional under the Establishment Clause. Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 4 (2005).

Two years after *Schempp*, the Court struck down Connecticut's rarely enforced law prohibiting the sale of contraceptives.<sup>387</sup> Less than a decade later, the Court invalidated laws prohibiting abortion.<sup>388</sup> Later, after an initial refusal, the Court struck down a law prohibiting homosexual sodomy.<sup>389</sup> The Court also indicated that states cannot prohibit persons from refusing medical assistance necessary to preserve their lives, thus recognizing one strand of what is sometimes popularly called a "right to die."<sup>390</sup> And though the Court rejected challenges to laws prohibiting physician-assisted suicide,<sup>391</sup> most of the Justices ruled largely on factual or prudential grounds while indicating their willingness to reconsider and perhaps reach the opposite conclusion upon a proper factual showing.<sup>392</sup>

These decisions were not on their face based on the Establishment Clause, much less on the school prayer decisions; officially, at least, they were Due Process and Equal Protection cases. Nonetheless, the "political secularism" conception loomed large in the background. Thus, the results in the cases were not dictated by anything in the particular language or history of the Due Process or Equal Protection Clauses. Instead, the Court extracted from those clauses a requirement of legislative rationality—one that applied with heightened force to laws impinging on particularly important human interests. Such laws, the Court said, had to be justified by legitimate and important state interests.<sup>393</sup> The interests asserted by the states in support of the challenged laws were found to be insufficient<sup>394</sup> (or, in the assisted suicide cases, provisionally sufficient on the factual record that had been developed).<sup>395</sup>

At least as important in this calculus as the interests actually presented by the states were the rationales that were *not* presented. Many citizens and legislators may have supported restrictions on abortion, or euthanasia, or same-sex intimacy, in part on the basis of reasons that would have sounded in religion. But these religious rationales were either not noticed by the Court or else were peremptorily dismissed as inadmissible. Justice Stevens

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387. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

388. *Roe v. Wade*, 410 U.S. 113 (1973).

389. *Lawrence v. Texas*, 539 U.S. 558 (2003), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

390. *Cruzan v. Dir.*, 497 U.S. 261, 277 (1990).

391. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

392. For a review and analysis of the various opinions, see Yale Kamisar, *Foreword: Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1459–66 (2008).

393. *See, e.g., Lawrence*, 539 U.S. at 578–79; *Roe*, 410 U.S. at 148–52.

394. *See Lawrence*, 539 U.S. at 578–79 (finding no legitimate interests to support Texas sodomy law); *Roe*, 410 U.S. at 148–52 (assessing state interests, which the Court found sufficient to justify some restrictions on abortion but not a complete prohibition).

395. Although the Court listed a number of interests supporting a prohibition on assisted suicide, various Justices indicated skepticism about some of these interests. *See* Kamisar, *supra* note 392.

believed that religious rationales were the basis for restrictions on abortion or euthanasia, and that some of the secular-sounding rationales presented by the states were simply camouflage for “theological” commitments.<sup>396</sup> On that understanding Stevens voted to invalidate such laws.<sup>397</sup>

In this way, the political secularism constitutionalized in *Engel* and *Schempp* likely influenced the arguments and deliberations in cases on matters such as abortion, euthanasia, and sodomy, even when the lawyers and the Court made no direct reference to religion or to the Establishment Clause. Secularism had become axiomatic; it therefore required no explicit discussion or defense, but was nonetheless (or perhaps *a fortiori*) a powerful influence on constitutional decision-making.

The same phenomenon is operative in cases dealing with other issues including, most recently, same-sex marriage. Defenders of challenged legal restrictions understand that in attempting to support such restrictions they must avoid invoking anything that sounds like a religious justification.<sup>398</sup> Consequently, the judicial discussions of objections and supporting rationales can have a rarefied quality: the debate about the pros and cons of, say, restrictions on same-sex marriage that occurs in a judicial opinion can seem denatured or truncated in comparison to the more full-blooded exchange that can occur in more unofficial settings.

In sum, despite the absence of explicit reliance on the face of the judicial opinions, observers like Noah Feldman and Susan Jacoby are likely correct in connecting the controversies over issues such as abortion, euthanasia, and same-sex marriage to the understandings of the Religion Clauses—understandings announced and established in the school prayer decisions.

### C. *Divided Discourse*

As we have just noted, the secularist conception influences legal discourse, even on matters not overtly presenting Establishment Clause issues. More generally, the conception influences public discourse that is “constitutional” in a broad sense. This influence has contributed to two sorts of constitutional divides.

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396. *Cruzan v. Dir.*, 497 U.S. 261, 347 (1990).

397. *Cruzan*, 497 U.S. at 347, 350 (Stevens, J., dissenting); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 566 (1989) (Stevens, J., dissenting).

398. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 904–06 (Iowa 2009) (finding that religious opposition to same-sex marriage cannot count as a legitimate state interest).

## 1. The Historical Divide

First, the constitutionalization of political secularism has in a complicated but important sense distanced those who accept the secular conception from a major part of the nation's past, including some of the more revered expressions and manifestations that have helped to constitute the American political tradition. The plain fact is that, historically, religion has figured prominently and unapologetically in much political and legal discourse. Political officials, including presidents and judges, have cited scripture and invoked Providence in their official explanations and justifications for their actions and decisions.<sup>399</sup> Leading jurists such as Chancellor Kent and Justice Story declared without embarrassment that Christianity was part of the common law.<sup>400</sup> To be sure, as we have already seen, not all Americans and not all political figures embraced the providentialist conception; some, such as Jefferson, resisted it (or at least some aspects of it) from the beginning. Nonetheless, the conception was clearly and sometimes eloquently manifest in some of the most important and revered—and “constitutive”—expressions of the American creed and spirit: Jefferson's Virginia bill, the Declaration of Independence, and Lincoln's Second Inaugural.<sup>401</sup>

The elevation of public secularism to constitutional status leaves these revered expressions in an awkward and ambiguous position. Such expressions have long been taken as forming—as *constituting*—the American political tradition and community. Yet they also appear to be in open violation of the conception of that community as secular. How then to regard them? Adherents of the secular conception can attempt to overlook such expressions,<sup>402</sup> or to criticize or dismiss them,<sup>403</sup> or to translate them into secular terms, thereby explaining away their religious significance.<sup>404</sup> The powerful providentialist language of the Declaration of Independence

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399. See *supra* notes 217–18 and accompanying text.

400. See Banner, *supra* note 173, at 43.

401. See *supra* notes 216–18 and accompanying text.

402. For an instance, see *infra* notes 411–15 and accompanying text.

403. This is a common modern response to the “Christian nation” declarations of the *Holy Trinity Church* case. Anita Krishnakumar explains that “the Christian-nation portion of the *Holy Trinity* opinion generally has been dismissed as a nineteenth-century embarrassment beyond which we as a nation have grown.” Anita S. Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1058–59 (2009).

404. Justice O'Connor's explanation of how the words “under God” in the Pledge of Allegiance is a case in point. See *supra* note 358. In a more rigorous and scholarly vein, Michael Zuckert acknowledges the religious language in the Declaration of Independence but emphasizes that “[t]he Declaration . . . depends on an appeal to the God known by reason in and through nature,” and he infers that the Declaration's assertions “point toward a secular society open to the rational as such; they point toward a cosmopolitan, not a closed or sectarian, society.” Michael P. Zuckert, *Natural Rights and Protestant Politics*, in *PROTESTANTISM AND THE AMERICAN FOUNDING* 21, 33, 26 (Thomas S. Engeman & Michael P. Zuckert eds., 2004).

can still be recalled and perhaps even celebrated for its literary and historical value (much in the way that the Bible can still be read in the public schools for literary or historical purposes). And the conclusions drawn from such religious affirmations—conclusions favoring rights and human equality—can of course be accepted. What the secularist conception seemingly renders problematic are statements by public officials, speaking as public officials, that whole-heartedly affirm the Declaration’s religious claims as *true*.

But it was precisely as spirited affirmations of what Americans took to be true that such expressions served to inspire and constitute the new political community.<sup>405</sup> And it is just that sort of earnest affirmation— one in which present-day citizens would actually join with their predecessors rather than patting them on the head for having somehow gotten to noble conclusions by dubious means—that the secularist conception renders problematic.<sup>406</sup> The conception thus has the effect of causing its adherents to affirm much of the American past not in “bad faith,” exactly, and not in full “good faith” either, but rather in a sort of awkward suspension of faith.<sup>407</sup>

Two small manifestations of this awkwardness can be chosen from among many to illustrate the embarrassment. In a recent book on Establishment Clause issues, Kent Greenawalt acknowledges that “assertions about a beneficent God were prevalent at our country’s founding, are contained in the Declaration of Independence, and remain in many state constitutions.”<sup>408</sup> Nonetheless, Greenawalt declares that such assertions by government would be impermissible today.<sup>409</sup> Greenawalt does not explain exactly why what was once common and acceptable is now constitutionally forbidden; an explanation presumably would include references to the

405. See WEBB, *supra* note 159, at 35–38; MICHAEL NOVAK, ON TWO WINGS 8–24 (2002).

406. John Rawls tentatively suggests two reasons why Lincoln’s Second Inaugural, which Rawls aptly describes as offering a “prophetic (Old Testament) interpretation of the Civil War as God’s punishment for the sin of slavery,” was permissible. RAWLS, *supra* note 163, at 254. But Rawls’s first reason—that the speech had “no implications bearing on constitutional essentials or matters of basic justice”—seems starkly implausible. *Id.* Slavery? The reconstitution of the Republic? Rawls’s second reason—that Lincoln’s basic message “could surely be supported firmly by the values of public reason”—even if plausible, suggests that the speech was permissible only because similar points could have been made without the profound and pervasive theological speech. *Id.*

407. For a more detailed discussion, see Steven D. Smith, *Justice Douglas, Justice O’Connor, and George Orwell: Does the Constitution Compel Us to Disown Our Past?* (San Diego Legal Studies Research, Paper No. 06-17, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=728663](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=728663) (last visited Mar. 5, 2011).

408. 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 65 (2008).

409. *Id.*

nation's expanded religious pluralism and perhaps to the Supreme Court's evolving interpretations of the First Amendment.<sup>410</sup> Whatever the explanation, the gulf separating us from our political predecessors is starkly apparent in Greenawalt's judgments.

A second subtle but intriguing manifestation of the constitutional divide occurs in a majority opinion written by Justice David Souter invalidating a display of a Ten Commandments plaque that had been posted in courthouses in Kentucky. The plaques were part of a collection of documents (including a section of the Magna Carta, the Star-Spangled Banner, the Declaration of Independence, and other historic documents) that had been displayed under the heading of "Foundations of American Law and Government." Based in part on the evolving history of the displays, which had originally featured only the Ten Commandments plaques and had been supplemented upon advice of counsel in response to the legal challenge, Souter and his colleagues discerned no legitimate secular purpose.<sup>411</sup>

In Souter's lengthy and wide-ranging opinion, one palpably scornful passage criticized the counties' "odd," "baffling," and "perplexing" selection of documents for the Foundations exhibit.<sup>412</sup> Why these particular documents? Souter asked. Why the Magna Carta? Why the national anthem but not the Fourteenth Amendment? In this vein, Souter found it "perplexing" that the counties could suggest an influence of the Ten Commandments, which were "sanctioned as divine imperatives," when the Declaration of Independence, also included in the exhibit, explicitly "holds that the authority of government to enforce the law derives 'from the consent of the governed.'"<sup>413</sup> Evidently these ideas—divine imperative and consent of the governed—struck Souter as incompatible.

In reality, what is remarkable is Souter's cultivated incapacity to grasp what either the counties or the Declaration of Independence itself sought to convey. Whether a belief in Providence as an ultimate source of law and government can be satisfactorily reconciled with a commitment to popular sovereignty is no doubt a debatable question. Tocqueville noted that the joinder of such beliefs was pervasive in American thought: to the Europeans who doubted the possibility, Tocqueville's recommendation was that they visit America and see for themselves.<sup>414</sup> But whether or not these beliefs are ultimately compatible, what seems indisputable is that the Declaration of

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410. Greenawalt elsewhere suggests such factors as the reason why school prayer is unacceptable today, even though the Framers were not opposed to public prayer. GREENAWALT, *supra* note 7, at 42–44.

411. *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005).

412. *Id.* at 872.

413. *Id.* at 872–73.

414. 1 TOCQUEVILLE, *supra* note 161, at 392–93. Mark Noll explains how the American merger of religion with republican notion was an exceptional achievement, surprising to most Europeans. MARK A. NOLL, *AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN* (2005).

Independence itself explicitly linked human rights and the consensual basis of political legitimacy to the “Creator”<sup>415</sup>; governments, based on consent, are instituted to protect the “rights” with which men are “endowed by their Creator.” It was precisely this tradition of harmonizing providentialism and popular sovereignty that the counties were attempting to present by displaying the Declaration, the Decalogue, and other documents as ingredients of the “Foundations of American Law and Government.”

David Souter, by contrast, peremptorily brushed aside this longstanding and distinctive American tradition as “perplexing.” He sarcastically depicted the Kentuckians—who, like the Declaration of Independence, attempted to conjoin providential and democratic premises—as either disingenuous or obtuse. But the depiction might with better justification be turned around. In effect, it seems that Souter could see only the closing words of the Declaration’s portentous passage, which assert the consensual basis of government, but he somehow was unable to read or remember the first part of the passage attributing the rights—that government exists to protect—to the “Creator.” Whatever the explanation, Souter’s performance stands as a striking example of how the secularist conception forces its adherents to re-render American history—in this particular case, effectively editing the Declaration more than two centuries after its publication by striking out its explicitly providentialist premise.

## 2. The Cultural Divide

Of course, Greenawalt and Souter were not making merely abstract or academic statements about what is and is not proper; they were criticizing—and in Souter’s case, officially invalidating—expressions and practices that many of their fellow citizens continue to favor even today. This conflict reflects another sense in which the constitutionalization of political secularism has created a constitutional divide: the divide is not only chronological but also cultural or sociological.

By embracing the secularist conception and rejecting the providentialist conception of America, *Engel* and *Schempp* imposed a view generally accepted in elite culture but widely rejected in more popular culture.<sup>416</sup>

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415. GEORGE FLETCHER, OUR SECRET CONSTITUTION 102 (2001):

“We hold these truths to be self-evident, that all men are *created equal*.” Behind those *created equal* stands a Creator—the source as well of our basic human rights. . . . This is the basis for the American people’s claiming that no government may rule them without their consent. The end of the Philadelphia Declaration resonates with another invocation of a higher power: “with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor.”

416. See *supra* notes 7–8 and accompanying text; see also HUNTER, *supra* note 133, at 63–64 (“In



Thus John Jeffries and James Ryan observed that “the controversy over school prayer revealed a huge gap between the cultural elite and the rest of America.”<sup>417</sup> The cultural divide was evidenced by the fact that the school prayer decisions were generally supported not only by secularists but also by Jewish and Protestant *leaders*<sup>418</sup>—though not, it seems, by most rank-and-file religious Americans—and by *elite* secular conservatives. Even the respected and generally conservative constitutional scholar, Philip Kurland, described opponents of the school prayer decisions as “religious zealots” and lumped them together with “racists” and John Birch Society extremists.<sup>419</sup>

In one respect there is nothing new in this situation. From the beginning, Americans have been divided among each other, and often within themselves, about whether the providentialist or secularist conception better expresses the nature of the U.S. political community. The sometimes cordial, sometimes combative conversation between those conceptions has been a source of debate and self-examination that has driven important developments in American law and politics. As we have seen, however, in the period since *Engel* and *Schempp*, that conversation has been transformed in one crucial respect: the secularist conception has officially been declared to be the constitutional orthodoxy—binding on local, state, and national governments.

This transformation has altered the character of the debate. For one thing, at least when issues are discussed in a judicial forum (as most heated controversies eventually are), proponents of the providential view are forced either to talk the language of secularism or else be ruled out of court. This constraint gives the debate a strained and artificial quality. Critics often suspect the proponents of providentialist measures of being disingenuous—

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general, however, the progressive alliances tend to draw popular support from among the highly educated, professionally committed, *upper* middle classes, while the orthodox alliances tend to draw from the *lower* middle and working classes. The association is anything but perfect, yet it generally holds . . .”).

417. Jeffries & Ryan, *supra* note 4, at 325; see also 1 LAYCOCK, *supra* note 365, at 679 (observing that “nonbelievers are disproportionately in elite positions, where they have disproportionate influence on public discourse”).

418. Jeffries & Ryan, *supra* note 4, at 325–26.

419. *Id.* In any large-scale cultural conflict, of course, the lines of division are often murky. Some Americans have no doubt accepted the holdings of the school-prayer decisions but have failed to perceive, or have resisted, the decisions’ broader secularist implications. As those implications become visible, these citizens sometimes draw back. Justice O’Connor is a conspicuous example: she proposed the doctrine prohibiting governmental endorsement of religion in the spirit of *Engel* and *Schempp* but then offered strained rationalizations for the conclusion that the Pawtucket Christmas crèche and the words “under God” in the Pledge of Allegiance did not send religious messages. See *supra* note 313 and accompanying text. Kent Greenawalt is unconvinced by O’Connor’s rationalizations; but he wonders whether the Pledge case is one of those rare instances in which judicial dissimulation might be warranted to leave “under God” in the Pledge. GREENAWALT, *supra* note 408, at 95–102. By contrast, Martha Nussbaum would like to strike out the words “under God,” but she would leave “In God We Trust” alone. NUSSBAUM, *supra* note 254, at 308–16.

as Justice Souter implied Kentucky officials were<sup>420</sup>—or of concealing their religious motivations.<sup>421</sup> But if these citizens are less than forthright, their reticence occurs under duress, because it is only by adopting a secularist vocabulary that these citizens are able to participate in the legal conversation.

As a result, believers in the providential conception often feel beleaguered and alienated.<sup>422</sup> How can it be, they wonder, that the Constitution somehow forbids officials and citizens today—when acting in their public capacity—to advance and act upon the same openly religious rationales that are so evident on the face of the celebrated writings and enactments of Jefferson, Madison, and Lincoln? This dynamic of suspicion, resentment, and bewilderment is pervasively manifest in the “escalating series of provocations and legal claims from both sides”<sup>423</sup> that are often called, in an increasingly apt description, the “culture wars.”<sup>424</sup>

#### VI. CONCLUSION: THE IRONIES OF THE SCHOOL PRAYER DECISIONS

The significance of the school prayer decisions is not that they invalidated school prayer or even that they acted on a secularist conception of American government. The majority of public schools probably did not conduct prayer exercises anyway, and some state courts had ruled against school prayer almost a century earlier. Moreover, a secularist interpretation of America has been present in one form or another from the Republic’s beginnings. The crucial, or perhaps fateful, achievement of the school prayer decisions is that they formally *constitutionalized* this interpretation. It is not an exaggeration to say that the decisions “established” political secularism as the nation’s constitutional orthodoxy.

This development was attended with ironies—perhaps more apparent now than at the time. It is often and plausibly said that by foreswearing any established religion, the United States has managed to avoid the sort of destructive political conflicts that have so often accompanied established religion elsewhere.<sup>425</sup> If one religion is to be established as the officially

420. See *supra* notes 411–13 and accompanying text.

421. See, e.g., Stanley Fish, *When is a Cross a Cross?*, N.Y. TIMES, May 3, 2010, <http://opinionator.blogs.nytimes.com/2010/05/03/when-is-a-cross-a-cross/?emc=eta1>; see also 1 LAYCOCK, *supra* note 316, at 425, 440.

422. See *supra* notes 255–59 and accompanying text.

423. 1 LAYCOCK, *supra* note 316, at 423.

424. 1 LAYCOCK, *supra* note 365, at 672–89.

425. See DIERENFIELD, *supra* note 7, at 11 (“In short, the Founding Fathers created the world’s first secular government as the best way to minimize the religious tensions that had perpetually plagued Europe.”).

preferred faith, then devotees of the various faiths will fight for that honor—and, perhaps more urgently, will fight not to be among the losers.<sup>426</sup> The Wars of Religion in early modern Europe gave bloody testimony of that propensity. Conversely, if the government forbears from designating any religion as the official or preferred religion, then the various faiths can flourish or flounder in accordance with their respective merits and energies. That was the hope of the proponents of disestablishment, in any case, and with hindsight most observers might agree that their experiment in nonestablishment has for the most part succeeded admirably.<sup>427</sup> Religious pluralism has flourished;<sup>428</sup> political community has not collapsed.

By constitutionalizing one of the major competing visions of America, however, and, thus, effectively establishing political secularism as an official national orthodoxy, the Supreme Court ignored this lesson and risked instigating just this kind of destructive dynamic. The current state of the “culture wars” suggests that this risk was, and is, more than speculative.

To be sure, the Court’s intention was not to exacerbate conflict—quite the contrary. A principal attraction of the school prayer decisions was, and is, that they attempted to relieve the sense of exclusion or alienation felt by American citizens who did not believe in prayer, or at least in collective public prayer.<sup>429</sup> Literature celebrating the decisions often describes, in poignant terms reminiscent of old martyrologies, the suffering and exclusion inflicted on students who did not want to participate in the prayers.<sup>430</sup> At least in some circumstances that suffering was surely very real. A major purpose of the decisions was to eliminate this exclusion and alienation. And this purpose has persisted. Thus, the main professed rationale for the ban on governmental endorsement or disapproval of religion—a prohibition directly derived from the political secularist conception—has been to prevent any citizen from feeling like an “outsider” in the political community.<sup>431</sup>

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426. See 1 DOUGLAS LAYCOCK, *Religious Liberty as Liberty*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY, *supra* note 5, at 54, 70 (“If the government is allowed to take sides, the two sides will fight to control the government, and the government will disapprove of, discriminate against, or suppress the losers.”).

427. Thus, in the 1830s, Tocqueville observed that “[i]n the United States there is no religious animosity, because all religion is respected, and no sect is predominant.” 1 TOCQUEVILLE, *supra* note 161, at 157.

428. See 1 LAYCOCK, *supra* note 17, at 646 (“It has long been a common observation that religion has thrived in America without an establishment, and declined in Western Europe with an establishment.”).

429. See EISGRUBER & SAGER, *supra* note 35, at 163 (arguing for ban on school prayer because such prayer tells non-Christians that they “lack the status of full membership” in the community).

430. See ALLEY, *supra* note 7. See also FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION 206 (1999) (“I fear for children like those involved in [school prayer controversies]. I fear for the victims because of the pain they will endure at the hands of their tormentors. . . . I can see in my mind’s eye a school child in turmoil.”).

431. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

In a large and diverse democracy, however, minorities—and hence “outsiders”—are inevitable. Some citizens will surely feel like disfavored minorities, and indeed it appears that nearly all citizens often feel like embattled minorities.<sup>432</sup> Even citizens with minority or idiosyncratic views are assured the rights to believe and speak and vote as they wish, of course. Still, at least in a cultural or sociological sense “outsiders” are probably inevitable in a pluralistic society. Courts cannot eradicate that reality. But they *can* ratify and entrench the “insider/outsider” division—by selecting one among the competing interpretations of the nation and elevating it to official constitutional orthodoxy, thereby relegating the competing conception and its adherents to heretical status.

That is what the Court did in the school prayer cases. Millions of Americans have evidently subscribed to the providentialist conception of the country. Millions almost surely still do subscribe to it. These citizens may or may not constitute a “minority”—it is hard to tell, for both empirical and definitional reasons<sup>433</sup>—but there is little question that many of these citizens now regard themselves as outsiders. Noah Feldman observes that “[t]he constitutional decisions marginalizing or banning religion from public places have managed to alienate millions of people who are also sincerely committed to an inclusive American project.”<sup>434</sup> The often impassioned struggle to preserve the vestiges of that providentialist conception—the religious expressions conveyed in such things as historical crosses or the words “under God” in the Pledge of Allegiance—is almost inexplicable to some. What difference do these small, almost meaningless gestures and symbols really make?<sup>435</sup> But the passions are understandable as manifestations of the apprehensiveness and resentment felt by people who, as Feldman observes, have often come to view themselves as strangers in their own land.

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432. See 1 LAYCOCK, *supra* note 365, at 688 (observing that “each group perceives itself as a mistreated minority”); HERBERG, *supra* note 30, at 231.

Since each of the three [religious] communities recognizes itself as fitting into a tripartite scheme, each feels itself to be a minority, even the Protestants who in actual fact constitute a large majority of the American people. In this sense, as in so many others, America is pre-eminently a land of minorities.

*Id.*

433. For a discussion of some of the complexities, see generally Smith, *supra* note 182.

434. FELDMAN, *supra* note 128, at 15.

435. Richard Schragger argues that concern about governmental religious expression “distracts away from more significant Establishment Clause concerns.” Schragger, *supra* note 260, at 1880. “Government-sponsored religious messages are literally symbolic acts, and while such acts may have effects on the distribution of social power, they should not be considered more significant than government actions that favor religious institutions with concrete financial or regulatory power.” *Id.*

To be sure, the opponents of such symbols often express a similar sense of alienation.<sup>436</sup> To an atheist like Michael Newdow, the persistence of official religious expressions such as the national motto “In God We Trust” understandably provokes such a reaction.<sup>437</sup> But there is an important difference. Adherents to the providentialist view are alienated by the establishment of political secularism as an official constitutional orthodoxy: they sense that their understanding of what America essentially is has been officially declared to be heretical and inadmissible. Conversely, those (like Newdow) who are alienated by governmental religious expressions are distressed by what they view as a failure to live up to the secularist orthodoxy—an orthodoxy that they embrace and that they believe (with the support of Supreme Court teachings since *Engel* and *Schempp*) the Constitution embraces. America is supposed to be a secular nation, they insist, but in practice it continues to maintain a “*de facto* establishment,”<sup>438</sup> as Mark DeWolfe Howe described it. It is with respect to that *de facto* but officially illicit establishment that these citizens feel oppressed.

In short, one constituency is alienated by the official, or *de jure*, secular orthodoxy; another is aggrieved by what it perceives as an ongoing illicit, but *de facto* establishment of religion. It is hard to say which kind of alienation is more severe or widespread—the alienation felt by citizens whose providentialist conception is officially disapproved, or the exclusion felt by citizens who embrace the official secularist conception but believe that the nation fails to live up to that commitment. In a complicated way, both sorts of alienation are the legacy of the subtle but powerful constitutional transformation effected by the school prayer decisions.

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436. For a collection of “horror stories,” as he calls them, recounting the persecution suffered by opponents of school prayer and related practices and offering virtual hagiographies of a number of such opponents, see ALLEY, *supra* note 7.

437. See *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) (rejecting constitutional challenge to use of national motto on coins). Newdow once demonstrated this point to me in a vivid way over lunch, pointing out that he could not even pay the tip without being reminded (if he happened to look at the coins or bills) that the political community insisted on proclaiming a belief (“In God We Trust”) antithetical to his own.

438. HOWE, *supra* note 12, at 11.