MAJORITARIANISM RUN RIOT: CHRISTIAN SUPREMACISM AND THE RELIGION CLAUSES

David N. Wecht*

William Orville Douglas was a brilliant son of the State of Washington. There are many stories of course, not all of which focus on the serial divorces and remarriages that the great jurist embarked upon relatively late in life. Time constraints won't permit me to engage in storytelling here. Just two fun tidbits will have to suffice. First, although prolific judge and scholar Richard Posner once sniffed that "Douglas' judicial oeuvre is slipshod and slapdash,"[1] Justice William Brennan, for whom Posner had clerked, once remarked that he—Brennan—had met only "two geniuses" in all his years, one of whom was Douglas, with the other being Posner himself.[2] Second, Douglas famously opined for the Court in *Griswold v. Connecticut*[3] that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[4] Years later, this would induce Justice Clarence Thomas to hang a sign in his chambers reading: "Please don't emanate in the penumbras."[5]

Okay, okay, it's perhaps law nerd fun, but fun, nonetheless.

Brilliant though he was, Justice Douglas never forgot his humble roots in Yakima. He championed the common person, and he was highly protective of the rights and liberties that we enjoy as Americans. I understand that the William O. Douglas lecture traditionally focuses on the First Amendment to our United States Constitution, a provision that the Justice championed throughout his career, and especially over his long tenure on the Supreme Court of the United

* Justice, Supreme Court of Pennsylvania. This Article is adapted from the author's presentation of the William O. Douglas Lecture at Gonzaga University School of Law on November 10, 2022.

1. Richard A. Posner, *The Anti-Hero*, NEW REPUBLIC (Feb. 23, 2003), https://newrepublic.com/article/66752/the-anti-hero (reviewing BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003)).

2. John Giuffo, *Judge Posner Profiled in Columbia Journalism Review*, UNIV. OF CHI. L. SCH. (Nov. 10, 2005), https://www.law.uchicago.edu/news/judge-posner-profiled-columbia-journalism-review.

3. 381 U.S. 479 (1965).

4. *Id.* at 484.

5. David J. Garrow, *The Tragedy of William O. Douglas*, THE NATION (Mar. 27, 2003), https://www.thenation.com/article/archive/tragedy-william-o-douglas.

States. As many of you know, Douglas fearlessly vindicated the expression clauses of that Amendment—the ones safeguarding our rights of speech, press, petition, and assembly—and those are among the Bill of Rights provisions with which he is often associated.

But I will not speak here today of those clauses. Instead, I want to talk with you about the religion clauses of the First Amendment—the Establishment and Free Exercise Clauses.

The First Amendment, ratified in 1791, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[6]

Many states have similar provisions, including specific protections for religious freedom. For example, the Washington Constitution provides, in pertinent part:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.[7]

As you know, I'm a Pennsylvanian. Our Commonwealth's Constitution, drafted partly (and perhaps primarily) by Benjamin Franklin, and first adopted in 1776, long before the ratification of the United States Constitution, provides:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and

6. U.S. CONST. amend. I.

7. WASH. CONST. art. I, § 11.

> no preference shall ever be given by law to any religious establishments or modes of worship.[8]

I will focus today on the United States Constitution because I am concerned here with the jurisprudence of the United States Supreme Court, although we all should recognize the growing interest in state constitutionalism.[9] The First Amendment has of course been the subject of much litigation and controversy over the years. A great deal of that has concerned the expression clauses, but a not inconsiderable number of cases have concerned the religion clauses. Douglas himself was interested in those clauses, as one would expect of a Supreme Court Justice.

The son of a minister who died when the future Justice was still a boy, Douglas was reared by a hardworking single mother in a churchgoing household. "We are a religious people," he would write in 1952, "whose institutions presuppose a Supreme Being."[10] But, as James Simon, Douglas' finest biographer, wrote:

> That did not stop him later, however, from constructing the highest walls separating church and state of any member of the modern Court. He voted "no" to public school prayers and "no" to government loans of textbooks to parochial schools. And in a case challenging a tax exemption for property used solely for religious purposes, Douglas, alone, voted to strike down the exemption. In his dissent, Douglas wrote: "The present involvement of government in religion may seem *de minimis*. But it is, I fear, a long step down the Establishment path."[11]

Douglas' words were prophetic. Since he retired forty-seven years ago, the Supreme Court has ambled very far down the Establishment path indeed.

Now what do I mean? What's wrong with public invocations of the Divine, with acknowledgements of the fact that most of us are believers of one sort or another and that most of us profess a faith in a higher power and adhere to one religious tradition or another?

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8. PA. CONST. art. I, § 3.

9. For a superb discussion of the topic, see JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022), and JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2020).

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

11. JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 435 (1980).

On one level, nothing at all. Faith gives our lives meaning and roots us in traditions that nourish our lives and the lives of our loved ones. Most of us cherish and value some faith tradition.

But on another level, something is wrong. We do not expect or want our courts and our government to meddle in worship, to incant faith homilies or feel the need to use the public fisc to support religion or its institutions. That is what faith communities do for themselves, asking nothing more than that government leave them alone.

This distinctly American recognition that government and religion exist in separate realms was something that long found purchase in the precedents of our Supreme Court. Why, we even had a name for it: we called it "separation of church and state." We took it as a given; we learned it in school back in the days when civics was taught, and we traced it all the way back to Thomas Jefferson. It felt like a part of the American creed—the idea that we Americans resist orthodoxy, challenge government intrusions into our privacy, defy any efforts to coerce us in our personal or spiritual lives.

To be sure, there has always been an important strain of religious fervor in this nation. We were the City on a Hill, the rock that the Pilgrims saw as their Promised Land, the country that experienced the Second Great Awakening, the place in which Presidents, from Washington to Lincoln to contemporary incumbents, have invoked divine guidance and sought heavenly blessing.

But we always seemed to understand—or perhaps, after all, we didn't—that to mix the two worlds (the religious and the secular, the church and the state, the sacred and the mundane) is to cheapen the one without elevating the other. That is at least part of the reason why, unlike their ancestral Britain, the founders of our nation declined to establish a national church and, indeed, promulgated the Establishment Clause to ensure against such a behemoth in the future. And the Free Exercise Clause was intended not to weaken the Establishment Clause, but rather to protect against the same kind of abuses and discriminations that the Establishment Clause was meant to prevent. Here, there would be no Church of England. Here, there would be no persecution of the Huguenots. Every American would, as George Washington wrote to the Newport Hebrew Congregation in 1790, "sit in safety under his own vine and figtree [sic]," in a country that "gives to bigotry no sanction, to persecution no assistance."[12]

Today, we hear increasing demands that America be declared a "Christian nation." Indeed, a Pew Research Center report published just two weeks ago (October 27, 2022) stated that 45% of Americans polled subscribe to such a

12. Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 21, 1790), https://constitutioncenter.org/the-constitution/historic-document-library/detail/george-washington-letter-to-the-hebrew-congregation-in-newport-rhode-island-1790.

view.[13] So, perhaps the Supreme Court understands this better than I do, perhaps much better, and on a much more intuitive level. But this demand for the establishment and validation of a "Christian nation" is a demand that our Founders—from Franklin to Washington to Adams to Jefferson and so many others—would roundly reject. Indeed, many of these men were deists, people profoundly concerned that religious coercion would afflict our polity as it had—with disastrous and bloody consequences—for centuries in Europe. Listen to what Benjamin Franklin had to say:

> If we look back into history for the character of the present sects in Christianity, we shall find few that have not in their turns been persecutors, and complainers of persecution. The primitive Christians thought persecution extremely wrong in the Pagans, but practised [sic] it on one another. The first Protestants of the Church of England, blamed persecution in the Roman church, but practised [sic] it against the Puritans: these found it wrong in the Bishops, but fell into the same practice themselves both here [England] and in New England.[14]

Virginia's James Madison, the prime mover behind the Constitution and the draftsman of the First Amendment, elaborated on this in his *Memorial and Remonstrance against Religious Assessments* in 1785, stating:

> During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution . . . What influence, in fact, have ecclesiastical establishments had on society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been the guardians of the liberties of the people.[15]

13. Gregory A. Smith, Michael Rotolo, & Patricia Tevington, *45% of Americans Say U.S. Should Be a "Christian Nation"*, PEW RSCH. CTR. (Oct. 27, 2022), https://www.pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation.

14. *Letter from Benjamin Franklin to the Printer of the London Packet* (June 3, 1772), *in* 19 THE PAPERS OF BENJAMIN FRANKLIN (Yale Univ. Press ed., 1954).

15. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* 2 THE WRITINGS OF JAMES MADISON 183, 187–88 (Gaillard Hunt ed., 1901).

Two years later, in 1787, John Adams himself rebuffed any notion that the newly independent United States were conceived in religion rather than in reason:

> It will never be pretended that any persons employed in that service had any interviews with the gods, or were in any degree under the influence of Heaven, any more than those at work upon ships or houses, or laboring in merchandise or agriculture; it will forever be acknowledged that these governments were contrived merely by the use of reason and the senses . . . Thirteen governments [of the original states] thus founded on the natural authority of the people alone, without a pretence [sic] of miracle or mystery, which are destined to spread over the northern part of that whole quarter of the globe, are a great point gained in favor of the rights of mankind.[16]

And that is why a long line of Supreme Court decisions entrenched the separation of church and state. The mainstay of this jurisprudence, though hardly its sole embodiment, was of course the Court's seminal precedent in *Lemon v. Kurtzman*.[17] That 1971 case, striking down a Pennsylvania statute unanimously, and a Rhode Island statute by an 8-1 margin,[18] articulated a three-prong test. To avoid violating the Establishment Clause, a challenged law or act was required to have a secular purpose and to have as its primary effect neither the promotion nor the inhibition of religion, and was required as well to avoid "foster[ing] 'an excessive government entanglement with religion.'"[19] Justice Douglas authored a lengthy joining concurrence in *Lemon* explaining in detail how the statutory schemes challenged in that case injected government into parochial schools through funding and aid, and demonstrating that this created precisely the entanglement that the Establishment Clause was meant to forbid.[20]

16. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AGAINST THE ATTACK OF M. TURGOT, IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778, *reprinted in* 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 271, 292–93 (Charles C. Little & James Brown eds., 1851).

17. 403 U.S. 602 (1971).

18. *Id.* at 625.

19. *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

20. *Id.* at 625–42 (Douglas, J., concurring).

Members of the U.S. Supreme Court in January 1971.

The principle is that religion does not need or want the government to interpose itself, even if this interposition is somehow proffered in the kindly guise of giving religion a leg up. This enmeshment of government in religion, this entanglement, cheapens and weakens both entities. Again, centuries of European history, of bloody and often ecclesiastical wars, of horrible persecutions, of feuding fiefdoms and sectarian conflicts, all informed the people who founded this nation and who authored its seminal documents. This turbulent history was very real for our founders, but we seem to have forgotten it quite entirely.

Seventy years ago, Justice Douglas wrote that the United States "sponsor[s] an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[21] "Fine," you say, "no partiality to any one group." So, what is the problem? In a nutshell, the problem is that government support of religion inevitably comes to favor the will of the majority. That is to say, when religion is established in this country it tends inevitably to be Christian by default. So, when religious displays or observances are allowed on government property, as they were in the Bladensburg Cross case,[22] or the Boston City Hall crucifix flag case,[23]

21. Zorach v. Clauson, 343 U.S. 306, 313 (1952).
22. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).
23. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1593 (2022).

or the Bremerton high school football coach prayer case,[24] or the Town of Greece prayer invocation case,[25] they will be Christian by default.

This presupposes no malice. Indeed, we may assume that the intentions are all sound and good and well-meaning. But they demean and denigrate those who profess other beliefs, as well as those who choose not to profess any particular faith. Now, you may say, "too bad for them, the majority rules." But remember, that is very clearly *not* what our Constitution provides. Indeed, as scholars and jurists from Justice Robert Jackson to Professor Alexander Bickel have famously observed, the American idea is that certain principles are placed beyond the reach of temporal majorities. These principles are enshrined in our Charter, our founding document, our Constitution. Most prominently, they are embedded in our Bill of Rights. And the very first of those—the very first—are the rights that we all share to be free from government establishment of religion and from government interference with the free exercise of whatever religion we choose to pursue or not to pursue.

Let us look at how the creeping majoritarianism and Christian supremacism of which I speak has advanced in recent years:

First, in *Marsh v. Chambers*,[26] the Supreme Court rejected a challenge to sectarian prayers that open legislative sessions.[27] The Court effectively walked away from its own *Lemon* test and instead gave its seal of approval to publicly funded prayers based on some alleged "unique history" and traditions, deeming

24. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022).
25. Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014).
26. 463 U.S. 783 (1983).
27. *Id.* at 794–95.

the chaplaincy custom "part of the fabric of our society."[28] Instead of hewing to the Constitution's separation of church and state—a separation that the Court's *Lemon* test respected and protected—the Court embarked upon a crassly majoritarian approach, predicating its ruling on "beliefs widely held among the people of this country."[29] This flouting of *Lemon* and replacement of that precedent with cherry-picked history would prove to be a useful jurisprudential technique for the Court's majority in future cases.

Consider *Town of Greece v. Galloway*,[30] where the Court approved overtly sectarian Christian opening prayers at municipal government meetings in an upstate New York hamlet, relying on dubious claims that the town presumably would allow clergy of other religions to sponsor opening prayers as well if they would only show up and request an audience[31]—as if this solved the obvious Establishment Clause violation. The Court opined that the Establishment Clause must be interpreted by "reference to historical practices and understandings."[32] Once again, vague invocations of "history" (made by non-historians) were deployed to defeat the Constitution's text itself.

28. *Id.* at 792.

29. *Id.* ("To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.").

30. 572 U.S. 565 (2014).

31. *Id.* at 582–83.

32. *Id.* at 576.

And then there is the Bladensburg Cross case, *American Legion v. American Humanist Ass'n*.[33] There, because a massive forty-foot-tall cross had stood in the middle of a city's traffic circle for decades, the Court essentially grandfathered it, insulating it—again, via "history" and "tradition"—from an Establishment Clause challenge.[34] Perhaps most outrageously, Justice Samuel Alito's plurality opinion asserted that the towering public cross had "a secular meaning" as a war memorial,[35] with no apparent thought given to the implicit yet patent subordination and denigration of minority religions, some of whose adherents have been persecuted under the sign of the cross over millennia.

33. 139 S. Ct. 2067 (2019).

34. *Id.* at 2089.

35. *Id.* ("That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.").

In its most recent term, the Supreme Court in *Shurtleff v. City of Boston*,[36] rejected a challenge to a crucifix flag flying at Boston City Hall, claiming that this posed no Establishment Clause violation.[37] For Boston to deny believers the right to fly this sectarian flag from City Hall was deemed by the Court to discriminate against the Christian majority.[38] The opinion made no mention of the message conveyed to non-Christians by this government endorsement.

And in *Carson v. Makin*,[39] the Court held for the first time that a state *must* fund religious training as part of an educational program.[40] I repeat, the decision was not merely that a state *may* fund parochial schools (which is already a constitutional bridge too far), but rather that it *must* do so. The *Carson* ruling was unprecedented, and it flew directly in the face of James Madison's warnings that taxpayer funding of religious education would be the first step on the road toward government compulsion and forced conformity. As Justice Sonia Sotomayor noted in dissent, the Court has now brought "us to a place where separation of church and state becomes a constitutional violation."[41] This reversal might be merely absurd if it was not so patently dystopian.

36. 142 S. Ct. 1583 (2022).
37. *Id.* at 1593.
38. *Id.*
39. 142 S. Ct. 1987 (2022).
40. *Id.* at 2002.
41. *Id.* at 2014 (Sotomayor, J., dissenting).

And then the *pièce de rèsistance*, the case that marks perhaps the greatest travesty of all, and that makes a mockery of American jurisprudence concerning religious freedom: *Kennedy v. Bremerton School District*.[42] This case, issued by the Supreme Court just before its summer recess began in late June of this year, originated right here in the State of Washington.[43] The Court, in a 6-3 opinion authored by Justice Neil Gorsuch, approved of public prayer by a public-school coach on a public-school football field, notwithstanding expressly sectarian overtones in the record and notwithstanding the inherently coercive circumstances.[44]

What do I mean by coercive circumstances? I don't think Justice Gorsuch ever played high school football. I did, and I'm going to guess that others here may have done so as well. So, here's an insight that must have escaped the imagination of Justice Gorsuch and his colleagues in the majority: when your coach runs out on the field and takes a knee, you had better do so yourself. And that's exactly what happened in the case. The District Court record, which the Supreme Court majority sized and cut to fit, included evidence that players specifically feared losing playing opportunities (and, presumably, recommendations and college recruitment support) if they did not participate.[45] Indeed, during a brief gap in time when Coach Joseph Kennedy had desisted from his demonstrative fifty-yard line prayer routine, no players had taken the field to pray, and none had sought to do so.[46] Kennedy was both coach and evangelist, rolled into one. Roused by Kennedy's religious fervor, players from both teams ran out and circled around Coach Kennedy to pray with him.[47] After Kennedy staged a media blitz, members of the public, politicians, and sundry others rampaged onto the field, knocking over members of the marching band in the process.[48] It was a heavenly spectacle indeed.[49]

42. 142 S. Ct. 2407 (2022).

43. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1223 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022), *vacated and remanded*, 43 F.4th 1020 (9th Cir. 2022).

44. *Kennedy*, 142 S. Ct. at 2432–33.

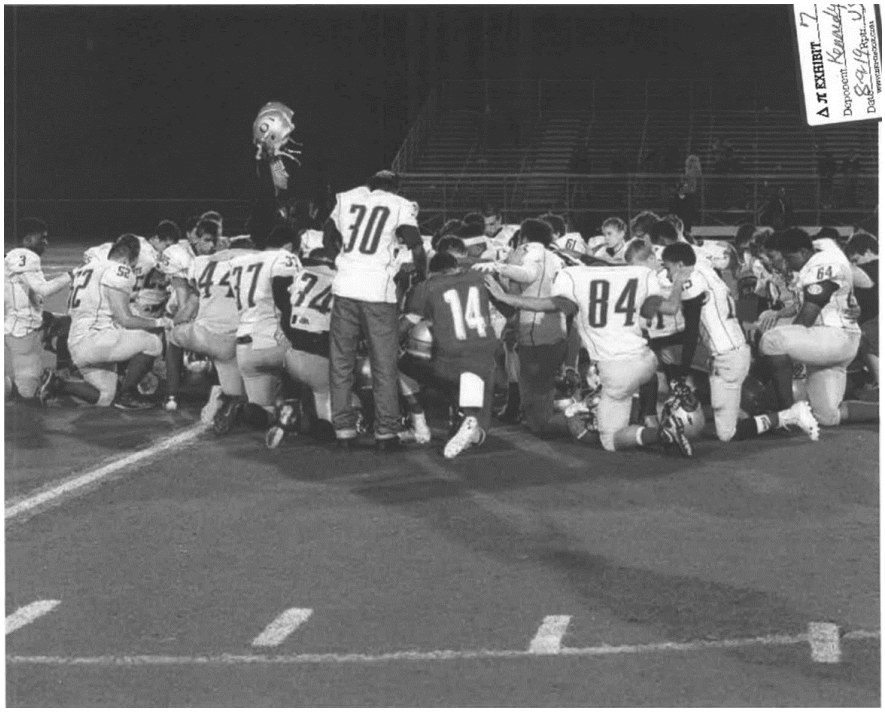
45. *Id.* at 2430.

46. *Id.* at 2440 (Sotomayor, J., dissenting).

47. *Id.* at 2416, 2430.

48. *Id.* at 2438 (Sotomayor, J., dissenting).

49. The accompanying photos, included in the district court record and published by Justice Sotomayor in her dissent, provide some glimpse of this spectacle.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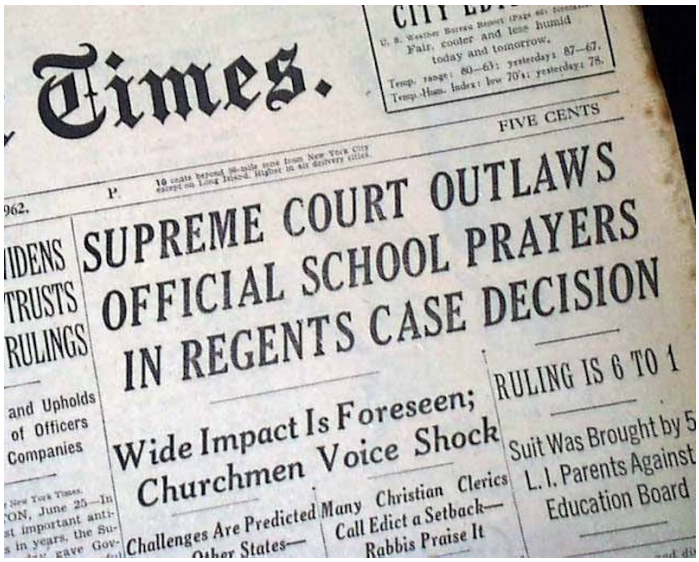
After ignoring or glossing over these and other troubling facts in the record, Justice Gorsuch proceeded to champion Coach Kennedy's open defiance of the school administration and the coach's rallying of players and the public to the fifty-yard line for Christian worship. The opinion asserted that *Lemon* had in any event been abandoned, and once again invoked what it declared to be "history" and "tradition" that supported its distortion of the jurisprudence concerning the religion clauses.[50]

In the wake of the *Kennedy* bombshell, there's ample basis for thinking that the Supreme Court must soon proceed to approve in-school prayer by public school teachers, something that it has expressly disapproved for at least six decades, as seen in *Engel v. Vitale*.[51] *Engel* now seems likely to join *Lemon* on the chopping block in some near-future term of the Court.

50. *Kennedy*, 142 S. Ct. at 2428.

51. 370 U.S. 421 (1962).



Times.

FIVE CENTS

SUPREME COURT OUTLAWS OFFICIAL SCHOOL PRAYERS IN REGENTS CASE DECISION

Wide Impact Is Foreseen; Churchmen Voice Shock

RULING IS 6 TO 1

Suit Was Brought by 5 L. I. Parents Against Education Board

Challenges Are Predicted

Many Christian Clerics Call Edict a Setback— Rabbis Praise It

New York Times article dated June 26, 1962.

Let us conclude by assessing the broader picture. The essential problem and the evident reality is that, by dint of evolving SCOTUS jurisprudence, the Free Exercise Clause is now well into the process of devouring the Establishment Clause. When that devouring is complete, the Free Exercise Clause will be so engorged that believers—and especially believers in the majority—will receive not merely accommodation of their beliefs but government endorsement and support. This is what *Lemon*, now overruled or euphemistically "abandoned" by the Court, sought to prevent. And at the end of that process as well, the Establishment Clause will be an empty vessel, effectively a dead letter.

Does anyone believe that American Christianity needs bolstering by the Supreme Court? There are places in this world—like Pakistan, Nigeria, Egypt, and Iraq, just to name a few—where Christians are indeed threatened or persecuted or attacked. Thankfully, that is not the case in the United States, and it never has been. Is there any evidence that Christians are being denied the right to worship, to congregate, to propagate and cherish their faith, to inculcate it in their children, indeed, to proselytize and to spread the Gospels as they deem fit and proper? Must the power of government and of all taxpayers be yoked to this effort? What does this say about Christianity? What does this say about government?

If the Supreme Court validates a message—whether to the millions of Americans who adhere to minority faiths or to the millions who profess no faith—that is a message of subordination, derogation, denigration, and second-class status, then it advances a notion of an America entirely different from the one

envisioned by this nation's founders. If so, the Court moves us closer to an America that resembles—at best—the England against whom we fought a War of Independence and, more likely, closer to the nations of the world that establish a government religion—countries that sometimes tolerate faith minorities on sufferance while relegating them to their "proper" subordinated place, and at other times countenance or even encourage their persecution. That is the road to theocracy.

We Americans have always distinguished ourselves from such regimes. We have always understood that, unlike almost every other country on this planet, we are bound together by a shared ideal (let's call it "liberty," or perhaps "liberty and justice for all"), rather than by a majority religion or a majority ethnicity or a majority race. If that understanding is changing, and if our Supreme Court champions that change, we will experience a different kind of America, and in the end, we will all be poorer for it.