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THE PRAYER AMENDMENT
By THE COMMITTEE ON FEDERAL LEGISLATION

On March 24, 1983, six senators introduced S.J. Res. 73,[1] which proposes to amend the Constitution as follows:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

This resolution in the 98th Congress is identical to proposals which were introduced in the 97th Congress[2] and recommended for passage by President Reagan.[3] S.J. Res. 73 is but the most recent of a number of proposed constitutional amendments introduced over the past two decades and intended to reverse[4] the Supreme Court's landmark school prayer cases of 1962 and 1963, Engel v. Vitale [5] and School District of Abington Township v. Schempp.[6] In Engel and Schempp, the Court held that government sponsorship of prayer in public schools, even if nondehominational, violates the First Amendment prohibition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Since 1963, every Congress has considered and rejected attempts, whether through legislation or constitutional amendment,[7] to reverse Engel and Schempp, although only two bills and one such amendment have ever been reported out of committee.[8]

In 1974, after a decade in which scores of resolutions proposing prayer amendments to the Constitution were introduced in Congress, this Committee issued a report[9] on two alternative proposals. One of these proposals would have established the right in schools and other public buildings to "participate voluntarily in nondenominational prayer or meditation." The other would have declared that nothing in the Constitution prohibits the States "from providing for voluntary prayer in the public schools" or abridges "the right of persons lawfully assembled in any public building to participate in voluntary prayer." In our 1974 Report, we concluded that these then current attempts to amend the Constitution were "ill-advised--at best likely to generate endless controversy and litigation, and at worst a breach of the traditional wall separating Church and State in this nation."[10]

The introduction of proposed constitutional amendments concerning school prayer continued without interruption in the second decade after Engel and Schempp. In the last Congress, ten such proposed Constitutional amendments were introduced.[11] Additionally, in the 96th and 97th Congresses, bills were proposed that would have stripped the federal courts, including the Supreme Court, of jurisdiction over school prayer disputes but these controversial jurisdiction-stripping bills -- for reasons which did not reach the merits of either prayer in public schools or constitutionally permitting government sanctioned prayer in public schools -- were never enacted.[12]

S.J. Res. 73 raises once again the question whether

there can be governmental support of religion without giving rise to indoctrination, coercion and serious discrimination against religious minorities. As noted in our 1974 Report, debate over the appropriate relationship between religion and government has a long history in this country.[13] Many of the earliest American colonists left Europe in order to avoid punishment for nonparticipation in established church services; and many settlers, once here, in turn fled from American settlements in order to be free to express their own religious beliefs.[14] Neither the adoption of the First Amendment religion clauses in the Bill of Rights nor more than a century of Supreme Court interpretation of those clauses has stemmed the controversy which continues to follow the subject of church-state relations in this country.

Yet, notwithstanding the continuing controversy, there already exists considerable latitude for the practice of religion and expression of religious beliefs and ideas in this country. Under current law, both majority and minority religious groups are generally free to practice their religions and to pray in nondisruptive ways without governmental interference. Those who do not wish to attend public school may satisfy public education requirements by attending parochial schools where prayer can be made an integral part of the program of education.[15] Children do not have to attend public schools on their religious holy days.[16] The Supreme Court has even interpreted the free exercise clause to exempt Amish children from attending any public school program after the eighth grade.[17]

The Court has also upheld released time programs that permit students to leave school during public school hours to attend churches of their choice for a period of instruction.[18] Financial aid to religious schools has repeatedly been upheld in cases where a bona fide secular purpose for such aid exists and there is no appearance of official sponsorship of religion.[19] Public schools are free to teach about the cultural, artistic and historical aspects of religion.[20] Finally, nothing now prevents individual students from deciding, on their own, to pray silently or privately in study halls, during their lunch hours, and perhaps even at other times during the daily public school schedule.

We believe that the prayer amendment proposed in S.J. Res. 73 or any similar proposal endorsing prayer in public schools and other public institutions is unnecessary to enhance religious freedom, and we oppose it for that reason. But we oppose S.J. Res. 73 for another important reason as well. We also believe that, in application, a constitutional amendment of this kind, intended to encourage not only "religion" in general but certain forms of religious expression, could actually undermine the religious freedom of millions of Americans, do a disservice to religion, and prove divisive to the body politic. These are precisely the effects that the principle of separation of church and state was designed to prevent. As we said in our 1974 Report about similar proposals, the Prayer Amendment proposed in S.J. Res. 73 is extremely ill advised.

In our view, by permitting the official sponsorship of prayer, S.J. Res. 73 would seriously endanger both the political process and religious liberty -- without providing any corresponding benefit. In fact, a substantial number of organized religious groups and theologians have consistently opposed amendments such as that proposed in S.J. Res. 73 because they believe that official prayer demeans the function of prayer in religion and the religious belief embodied in prayer.[21] We believe that implementation of a prayer amendment would divide communities along religious lines on the issue of what prayer or prayers school children and others should be told or permitted to say. Given the number of religious sects in this country,[22] it is almost inconceivable that a community of any size would agree on the proper content of publicly sponsored prayer.

Under any of a number of possible interpretations of the language of the amendment proposed in S.J. Res. 73, implementation is likely to entail excessive entanglement of government and religion, to prove coercive to religious believers and non-believers alike, and to vary widely in result from state to state and community to community. In our judgment, adoption of the proposed amendment is also unnecessary because, as we noted in our 1974 Report and above, existing law already provides extensive opportunity for students and others to engage in religious expression.

Accordingly, we strongly believe that S.J. Res. 73 and all similar proposals designed to encourage prayer in public institutions should be rejected. Set forth below is our detailed analysis of the applicable legal principles and the undesirable consequences that would flow from the adoption of the Prayer Amendment.

I. The Prayer Amendment Conflicts with Basic Political Principles of this Country and Will Engender Political Divisiveness Along Religious Lines

Proponents of S.J. Res. 73 argue that adoption of the amendment it proposes would merely restore to public life the expression of religious belief which has formed an important part of the American tradition.[23] They point to the acknowledgment of a Supreme Being in our national anthem and Pledge of Allegiance, and to the use, since 1865, of the words "In God We Trust" on our coinage as examples of our strong religious heritage.[24] However, though these acknowledgments exist, and though our nation clearly has a strong religious heritage, it is equally clear that attempts to institute programs of public prayer have frequently led to political dissension and discord[25] and that the ever-increasing diversity in our religious heritage[26] is totally at odds with the idea of government sponsorship of prayer. In this respect, the amendment to the Constitution proposed in S.J. Res. 73 would reverse not only the Engel and Schempp school prayer decisions, but also a long and consistent development of Supreme Court doctrine[27] under which the establishment clause has stood, in part

as a response to our religious diversity, as a bulwark against the use of governmental power or prestige to encourage any one set of ideas over another in matters of religious belief.

As already noted, the impetus for a Prayer Amendment was Engel v. Vitale.[28] There, the Supreme Court held unconstitutional the recitation of the following "nondenominational" prayer[29] as part of the daily program of New York public schools, even though participation in such prayer was ostensibly voluntary:[30]

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

The New York State Board of Regents had recommended the prayer to all local school boards in 1951, and in 1958 the New Hyde Park Board of Education instructed all teachers that the prayer was to be recited aloud by each class at the beginning of every school day. In invalidating the regulation, the Supreme Court stated:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[31]

Noting the early recognition by the Colonies of the extent to which political strife and personal hardship arise from governmental approval of particular forms of worship, the Court concluded that the framers intended the First Amendment "to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say."[32]

One year later, in School District of Abington Township v. Schempp,[33] the Supreme Court again considered and invalidated the selection by government of public forms of religious expression. At issue in Schempp was the constitutionality of a Baltimore school board rule that required "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer"[34] and a Pennsylvania statute that prescribed: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day."[35] The Pennsylvania Bible reading was either conducted by the homeroom teacher or broadcast by students under teacher supervision to each classroom over the loudspeaker system and was followed by a standing recitation of the Lord's Prayer and the Pledge of Allegiance.[36] Supporters of these school exercises argued that they aided the legitimate, secular purpose of "the promotion of moral values, the contradiction to [sic] the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."[37]

The Court ruled that the regulations requiring these practices violated the First Amendment even though students could be excused from participating on written request of a parent or guardian,[38] because of the undeniably religious character of the activity.[39] According to the Court, both the free exercise and establishment clauses of the First Amendment embody a principal of "wholesome" neutrality between church and state: The establishment clause prohibits government from placing "official support

. . . behind the tenets of one or all orthodoxies."[40] The free exercise clause guarantees "the right of every person to freely choose his own course . . . free of any compulsion from the state."[41]

Writing for the majority in Schempp, Justice Clark rejected the argument that "unless these religious exercises are permitted a 'religion of secularism' is established in the schools,"[42] or that the Court's decision would interfere with the majority's right to religious free exercise.[43] Justice Clark noted that the decision did not, for example, bar the "study of the Bible or of religion, when presented objectively as part of a secular program of education."[44] All that was prohibited were "religious exercises, required by the States,"[45] because such exercises violate the command of the First Amendment that government maintain strict neutrality in matters of religious worship or non-worship. According to the Court:

> [T]he [Establishment] clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[46]

In two recent cases involving the constitutionality of conducting religious exercises in public schools, the Court has reaffirmed this understanding that the Establishment Clause

withdrew from government the power to act with a religious, as distinguished from a secular, purpose. In Stone v. Graham,[47] a majority of the Court invalidated a Kentucky statute requiring the posting of a copy of the Ten Commandments in each public classroom in that state, because the "pre-eminent purpose" of the practice was "plainly religious in nature"[48] and its effect one of inducing "schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[49] The Court noted: "However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."[50]

Most recently, in Treen v. Karen B.,[51] the Court affirmed without opinion a decision of the United States Court of Appeals for the Fifth Circuit invalidating a regulation providing for an optional minute of prayer in public school classrooms. The prayer at issue in Treen was to be offered by a student volunteer or, if no one volunteered, by the teacher, if he or she chose to do so. The lower courts had found that the purpose and primary effect of the regulation were impermissibly religious in character.[52]

The principles embodied in the school prayer decisions in Engel, Schempp, Stone, and Treen -- neutrality between religion and government and the impermissibility of governmental regulation absent both a secular purpose and a secular primary effect -- are consistent with Supreme Court interpretations in other establishment clause cases not involving prayer. Indeed, the neutrality principle was articulated by the Court in its first

consideration of the meaning of the establishment clause in Everson v. Board of Education.[53] Everson involved a challenge to a school board resolution that authorized the reimbursement of parents' costs for transporting their children to private and parochial as well as public schools. The Court in Everson enunciated a doctrine of neutrality between church and state that has been adhered to[54] ever since:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[55]

Since Everson, the Court has developed and applied[56] the following three-part test for determining whether the requisite neutrality between religion and government has been maintained: A governmental regulation must (a) be adopted for a valid secular purpose, (b) have a primary effect that neither enhances nor inhibits religion,[57] and (c) not contain the potential for excessive entanglement, in the sense of sustained supervision and surveillance, of government with religion. The Court has applied

one or more parts of this test in establishment clause cases involving diverse issues, including public aid to parochial schools,[58] Sunday closing laws,[59] the tax exemption accorded property used for religious purposes,[60] and disputes within church hierarchies.[61]

It is, of course, open to those who so choose to try to amend the Constitution in order to remove public prayer from the operation of the neutrality principle. However, we believe that to do so would unwisely depart from Supreme Court doctrine that, for the past 35 years, has afforded a principled accommodation of widely divergent religious views. The Court's adoption of the neutrality principle is in no sense equivalent to a "constitutional requirement which makes it necessary for government to be hostile to religion."[62] Rather, existing law simply requires government to remain as neutral as possible, leaving every citizen free to choose and to practice his or her own devotions.[63] Indeed, in the past 35 years, programs of public aid to private (including parochial) schools have frequently been upheld[64] so long as the supported activities of those schools have involved "secular, neutral, or nonideological services, facilities, or materials."[65] As the Court has stated: "Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."[66] In the context of universities and public property other than public schools, the Court also has held that once public facilities are made freely available as a public

forum for the activities of a wide variety of nonreligious groups, they must also be made available for voluntary activities of religious groups, subject only to reasonable restrictions as to time, place, and manner of expression (unrelated to the content of expression).[67]

The principle of government neutrality in matters of religion, including the doctrine of excessive entanglement,[68] which underlies the school prayer and other establishment clause cases is firmly rooted in practical and historical considerations. By bringing prayer into public institutions, the amendment proposed in S.J. Res. 73 threatens to resurrect a bitter legacy of political division along religious lines. Though supporters of S.R. Res. 73 and similar legislation frequently have claimed to be returning to the principles of our founding fathers,[69] the proposed amendment in fact runs counter to the views of many of the framers on church-state relations.[70] James Madison, for example, opposed every form and degree of official relation between religion and civil authority.[71] In his view, conflicts among religious groups "tend to enervate the laws in general and to slacken the bands of Society."[72]

Long before the Court's invalidation of government sponsored school prayer in Engel and Schempp, the discord which attended attempts to impose public school prayer at the state and local level showed the wisdom of Madison's perception that religious issues can seriously divide the political community. Even prior to Engel, state courts and administrators had often observed

that such programs tend to impose religious views on unwilling minorities and to foster divisiveness as well as discrimination against nonbelievers or minority sects.[73] The Supreme Court, too, has noted the danger that division of communities along religious lines tends to obscure other "issues of great urgency":

> Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.[74]

Such fears are more than justified by this country's actual experience with school prayers, bible readings and religious celebrations in public schools.[75] In 1854, for example, when a Jesuit priest in Maine advised his parishioners to defy a school committee regulation requiring all children to read the King James Bible, "a mob broke into his house, dragged him out, tore off his clothing, tarred and feathered him, and after two hours of cruel treatment, finally released him."[76] The history of the simple non-demoninational prayer struck down in Engel is similarly instructive. The Engel decision ended years of controversy that had begun as soon as the New York Board of Regents announced the wording of the suggested prayer:

> The announcement aroused a storm of controversy. The proposal was opposed by the leading Protestant weekly, The Christian Century, which deemed the practice ineffectual, and the prayer "likely to deteriorate quickly into an

> empty formality with little, if any, spiritual significance." The leaders of the Lutheran Church of Our Redeemer in Peckskill, New York, charged that Christ's name had "deliberately been omitted to mollify non-Christian elements," and that the prayer "therefore is a denial of Christ and His prescription for a proper prayer. As such it is not a prayer but an abomination and a blasphemy."
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> Opposition, but for different reasons, was also voiced by all the major Jewish organizations, . . . , as well as such nonsectarian organizations as the American Civil Liberties Union, the New York Teachers Guild, the United Parents Association, and the Citizens Union.[77]

Recent experiences confirm that passage of the amendment proposed in S.J. Res. 73 would increase rather than end religious controversy. An Oklahoma resident and member of the Church of the Nazarene, who asked the American Civil Liberties Union to file suit to stop religious activities begun in February 1981 in her child's school, was assaulted on the school grounds and has since moved to another school district to avoid harassment and threats.[78] In New Jersey, a school board member said, "Neighbors are fighting neighbors"[79] as a result of a proposed requirement to observe a "moment of reverent silence" (later changed to a "moment of silent meditation" and then simply to a "moment of silence"). An Alabama agnostic was reportedly threatened with death after challenging in court a law of that state requiring recital of a prayer written by the governor's son before meals in the public schools.[80]

The constitutional amendment proposed in S.J. Res. 73 does not purport to state what prayers or prayer programs should be instituted. These decisions are left to the members of each

"public institution."[81] The proposed amendment guarantees, therefore, that the social and political problems inherent in selecting religious exercises for public expression will be resolved in many different and unexpected ways across the country.[82] In our view, controversy and confusion of the most bitter and personal sort, and of a nature least amenable to mediation through the political process, would proliferate throughout the country if any amendment allowing officially sanctioned public prayer were to become law.

II. The Undesirability of Any of the Possible Interpretations of S.J. Res 73

S.J. Res. 73 does not require public prayer. It simply states that nothing in the Constitution shall prohibit individual or group prayer in public institutions. The decision to conduct prayer and selection of the content of permissible prayer are left to each public institution to determine as best it may.[83] Undoubtedly it is this absence of religious content that accounts for some of the appeal of S.J. Res. 73, since the amendment it proposes nowhere designates any particular form of prayer for public recitation.

Though simple on its face, the amendment invites a number of interpretations, each of which raises serious practical as well as constitutional problems. One could, for example, interpret the amendment proposed in S.J. Res. 73 to mean that, in any public institution, a single official prayer (presumably either a sectarian prayer selected by a majority or one intended to be "nondenominational") constitutionally may be selected for

recitation or observance by an entire group. This understanding seems to be shared by many supporters of the amendment.[84] The language of S.J. Res. 73 may also, however, sanction the right of any individual to have his or her personal choice of prayer recited aloud. Or, because the latter approach could result in hours of daily public prayer, S.J. Res. 73 might be interpreted to require or permit some system of simultaneous or rotational prayer or "equal time" for the use or alternating use of any religious prayer sincerely suggested by any individual desiring to have his or her choice of prayer recited aloud.[85]

It is the stated premise of many who support this amendment[86] that religion and religious prayer are forces for moral good and therefore to be encouraged by the body politic. However, implicit in such views are preferences for specific religions as sources for the moral good to be encouraged.[87] This illustrates part of the problem with the proposed amendment. In our pluralistic society, opening schools and other public institutions to religious observances will authorize far more than the simple homilies, nondenominational prayers, or moments of silence apparently anticipated by the amendment's sponsors.[88] However the amendment proposed in S.J. Res. 73 may be interpreted, its moral effect is neither clearly predictable nor desirable.

A. The Undesriability of an Interpretation Which Sanctions the Recitation of a Single Nondenominational or Majority-Composed Prayer

It is likely that many of those who favor adoption of the amendment proposed in S.J. Res. 73 expect that its result will be the composition by public groups of non-denominational prayers that will then be recited in public institutions or at public events.[89] As a practical matter, it is difficult to imagine any prayer or series of prayers recited in a second-grade class, for example, that would not be some sort of officially composed prayer. Such a prayer was precisely what the New York Board of Regents attempted to compose amid much controversy and what the Supreme Court invalidated in Engel v. Vitale.[90]

In fact, however, it is far from clear that the words "individual or group prayer" which appear in the amendment proposed in S.J. Res. 73 are entirely consistent with the imposition of any single "official" prayer, particularly given the continued presence in the Constitution of the establishment clause. Further, it is difficult to imagine the contents of any one such prayer which could take into account the religious dogma not only of the hundreds of sects, factions, and cults in this country, but also of each of the less formalized belief systems that may be religiously held by isolated groups and individuals. In this country, "In 1960 there existed 'more than 400 more or less definitely organized bodies . . . [not including] the multitude of store-front churches, local sects, cults, and unclassifiable

quasi-religious associations.'"[91] One commentator has said that "the 'spiritual explosion' of the 1960's and 1970's has generated untold additional diversification."[92]

Further, even if some form of nondenominational prayer could be successfully devised, the amendment clearly would remain unacceptable to a number of recognized and orthodox religious groups.[93] Even a prayer as succinct as the one at issue in Engel offended many established religions.[94] Public use of such a prayer would necessarily offend those religious sects who believe in no divinity,[95] as well as many others for whom that prayer's omission of particular sacred words may be highly objectionable, if not sacreligious.[96]

Requiring the public recitation of a non-denominational prayer reflects a preference for a more latitudinarian over a more fundamentalist approach to religion. There are many who believe that any attempt to make prayer "acceptable" to as many religious groups as possible simply weakens prayer, reducing prayer to the lowest common denominator of religious expression.[97] In fact, James Madison's opposition to any official relationship between religious and civil authority stemmed as much from the threat that governmental support would degrade and dilute the religion of a majority as it did from his fears of any threat to religious minorities. Madison observed that "experience witnesseth that ecclesiastical establishments, instead of maintaining purity and efficacy of Religion, have had a contrary operation."[98] The results of such establishments have been "pride and indolence in

the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution."[99] The relationship between political support and political trivialization of religion has not gone unnoticed by the Supreme Court; the decision to strike down the "nondenominational" prayer in Engel rested, in part, on that view.[100]

The language of S.J. Res. 73 also might permit the public recitation of a group prayer composed by a simple majority of that group.[101] Clearly, implementation of such an interpretation would cause the kind of divisiveness and strife historically experienced by communities that have attempted to adopt forms of public prayer.[102] Such an interpretation would also prove even more antithetical to existing establishment clause doctrine than any nondenominational requirement, since it would permit a majority to "establish" its particular religious views for an entire community.

Because a "public institution" may well embrace a relatively small group of people, it is also impossible to predict the types of prayers or prayer programs that could be publicly sponsored under this amendment. The amendment proposed in S.J. Res. 73 could have the effect of sponsoring as many varied minority views as there are "public institutions."[103]

B. The Undesirability of an Interpretation which Sanctions a Rotational or an "Equal Time" Approach to Public Prayer and the Problem of Defining Religion

The reading of the amendment proposed in S.J. Res. 73 that is perhaps most consistent with the history of this country and with Supreme Court doctrine in both establishment and free exercise cases would grant anyone the opportunity to have his or her prayer included among a public institution's prayers -- perhaps on some kind of alternating or rotational basis, or by granting individuals an opportunity to pray either separately or simultaneously at a common period set aside for prayer.[104] As with any other interpretation of the amendment proposed in S.J. Res. 73, however, this approach raises serious difficulties: Most troublesome is the problem of how to define "religious" beliefs and "prayer."[105]

This definitional problem is not new and has been analyzed by the Court most notably in the conscientious objector cases. Under the Selective Service Act, conscientious objectors are exempt from combatant training if they oppose participation in war "by reason of their religious training and belief" -- defined by statute as an individual's belief in relation to a Supreme Being, rather than "essentially political, sociological, or philosophical views or a merely personal moral code."[106] This statutory distinction between religious and essentially philosophical views has not in practice been an easy one to draw. As the Court said in United States v. Seeger:

> [T]he task of discerning the intent of Congress in using the phrase "Supreme being" [is] a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss.
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> . . . .
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> Moreover, it must be remembered that in resolving these . . . problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. . . . The validity of what [registrant] believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government.[107]

Similarly, in cases brought under the free exercise clause, where members of religious groups have sought to be exempted from the operation of general regulations on the basis of unusual religious principles or practices, the Court has found it difficult not to defer to an individual's or group's own sincere characterization of its belief-system as "religious."[108] In Thomas v. Review Board of the Indiana Employment Security Division,[109] for example, the Court recently required the extension of unemployment benefits to a Jehovah's Witness whose religious scruples against warfare prevented him from assembling

tank turrets for an employer who could not provide alternate employment. The Court held in Thomas that state courts and administrative officials had erred in refusing to accept Thomas' beliefs as religious: the illogic or incomprehensibility of his beliefs, or even their inconsistency with those of other Jehovah's Witnesses, were held to be irrelevant to proper governmental regulation. According to the Court:

> . . . Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ. . . . Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[110]

The problem of defining "religious" belief cannot be avoided even under a majoritarian or non-denominational interpretation of S.J. Res. 73, although the difficulties will be most pronounced where multiple prayers are to be recited. Once orthodox prayer is permitted in the public schools, those of less orthodox or even highly idiosyncratic or personal religious faiths will surely seek to accommodate the official prayer to their own forms of belief. As stated recently by one federal court:

> The dividing line between what is, and what is not, a religion is difficult to draw. . . . [C]ourts must be ever careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception.[111]

In fact, because it is so difficult to distinguish between religious belief and strongly held moral belief, the proposed amendment can be expected to invite the use of schools and other public institutions as a forum for proselytizing by diverse religious groups, and by many whose views, however principled, may not -- even in their own scheme of things -- be truly religious. Unusual or even sham religious groups may also seek to use the public schools as a vehicle for the dissemination of their views.[112] By constitutionally permitting group prayer in settings where it is not now permitted, the school prayer amendment will almost certainly provide a public relations platform for many groups whose beliefs and practices are probably not even perceived to be religious, much less moral, by the supporters of S.J. Res. 73.

Malnak v. Yogi,[113] involving the teaching of transcendental meditation in New Jersey public schools, is instructive in this regard. In Malnak, plaintiffs challenged the teaching of TM in the public schools as an establishment of religion, and defendant organizations attempted to show that TM is not a religion and could, therefore, be freely taught. Their defense failed because the ceremony at which each student was given his or her mantra (that is, the word or phrase recited while practicing TM), although conducted on Sundays and not on school premises, involved the invocation in Sanskrit, accompanied by many accoutrements of religion, of a divine being.[114] Under a public prayer amendment, many of the TM practices removed from the New Jersey schools as

expressions of religion could return as constitutionally permitted, perhaps even mandated, prayers, to be given "equal time" alongside more traditional religious faiths.

Linked to the problem of defining religion is the problem of determining what constitutes "prayer." Not all religious groups pray silently or individually. Some pray collectively; some pray aloud; others chant; still others engage in public testimony. Some practice nonverbal rituals, including candlelighting, incense burning, the playing of musical instruments, or the public solicitation of funds. In every instance of public prayer, someone will have to determine whether such verbal and nonverbal forms of religious exercise are to be permitted as part of that form of "prayer" sanctioned by the proposed amendment. Given our very broad understanding of free speech within the meaning of the First Amendment, resolution of this issue is not necessarily simplified by interpreting the amendment proposed in S.J. Res. 73 to permit only spoken forms of prayer. Yet the determination of what constitutes "prayer" will force public administrators and ultimately the courts to decide questions of religious doctrine and church practice -- issues which courts, in keeping with the neutrality principle, have heretofore tried to avoid.[115]

We do not suggest that any one religious group or any one form of sincere prayer is more worthy than any other of public recognition. We merely suggest that once public institutions, including schools, are made available for the publication of

prayers acceptable to some religious groups, they may have to be made available in some fashion for the prayers of all religious claimants. As the Supreme Court explained nearly forty years ago, government cannot lightly decide that some sincerely held beliefs are religious while others are not:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . The religious views espoused by [some] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[116]

Even if S.J. Res. 73 were revised to protect only silent forms of prayer and meditation,[117] these difficulties would not be removed. Government still would be engaging in religious as distinguished from secular activity, and it would still be elevating certain beliefs about religious things over others: religious beliefs favoring public and silent prayer would be elevated over those advocating other forms of religious expression, just as religious belief would be elevated over atheism, agnosticism or other forms of skepticism. In addition, fundamentalists and

others still could legitimately complain that such restrained expression demeans the true religious experience.

Under any interpretation of S.J. Res. 73, the amendment will involve the courts and other branches of government in determining what constitutes religious belief and prayer -- questions touching upon the most personal and fundamental interests. Surely, even those who disagree with many particulars of the Court's analysis of the establishment clause agree that government embarks on an unwise course when it undertakes to act as arbiter of what is orthodox in matters of religious belief or endeavors to judge the religious character of asserted liturgical practices. Amending the Constitution to permit simple prayers in public institutions, including schools, may seem a small, politically appealing step. But it is not. Not everyone in the United States believes in the same simple things. Our country was built on the principle that people may believe what they wish by right, not sufferance, and are not to be encouraged by government to pay lip service to religious beliefs which they do not share.[118]

C. Prayer Permissible Under the Proposed Amendment Would Be Impermissible in Some States

The amendment to the Constitution proposed by S.J. Res. 73 does not purport to supercede state law. Many states have and may continue to have constitutional provisions similar to the First Amendment or which provide in even stricter and more extensive terms for the separation of church and state.[119] Long before the Supreme Court's invalidation of government sponsored school prayer in Engel and Schempp, state courts ruled on controversies

about school prayer or religious instruction, and in several states[120] such programs were invalidated under state law. These state courts perceived the same problems with regard to school prayer under state constitutional or statutory law as the Supreme Court found under the establishment clause: the appearance of state support for one religious view over another,[121] the inherently and ineradicably coercive effect on minorities,[122] the tremendous potential for political divisiveness,[123] and the difficulty in defining permitted prayer.[124]

These state determinations would appear to be unaffected by an amendment to the Federal Constitution such as that proposed in S.J. Res. 73. Even if the proposed amendment were adopted, therefore, government sponsored prayer might still be held impermissible in some jurisdictions. Indeed, the fact that the same prayer program might well be treated differently by courts in different jurisdictions is itself an extremely undesirable feature of S.J. Res. 73. Religious questions would remain politicized at all levels of government for years to come, and confusion, uncertainty, and resentment about the place of religion in the public schools would abound.

III. Interference with Religious Freedom

The First Amendment religion clauses afford a two-pronged approach to protecting religious liberty. The establishment clause protects individual choice from the pressures of an official viewpoint. The free exercise clause proscribes more direct interference with a particular belief. In combination, the

two clauses free the individual from the weight of government opinion and from oppressive governmental regulation.[125] The amendment proposed in S.J. Res. 73 contravenes the principle of individual religious freedom embodied in both the establishment and free exercise clauses.[126]

Any program of public prayer necessarily raises difficult issues relating to the protection of non-participants. S.J. Res. 73 purports to deal with the problem of coercion by stating that "no person shall be required by the United States or by any State to participate in prayer." No matter how the amendment is implemented, however, nonparticipation could force individuals to reveal their beliefs about religion. Refusal to participate in a nondenominational, Engel-type prayer -- or even in a brief period of silent prayer -- might tend, for example, to isolate and perhaps to stigmatize those who do not believe in religion, those whose religious beliefs may not be reflected in the selected form of prayer, those who do not believe in public expressions of religion, or those who do not believe in nondenominational or diluted forms of prayer.[127] If a simple majority is permitted to choose the form of public prayer, the amendment would operate to isolate those individuals, potentially a small and perhaps already unpopular minority, who do not agree with the majority's religious views. This isolation is particularly troublesome with respect to officially sanctioned prayer in the schools.

> [T]he majority of cases which have considered this problem have said that no real choice is offered in the case of young children who have

> not reached the maturity to practice nonconformity. The onus attached to leaving the room during an exercise which the rest of the class believes is part of a good upbringing, it is argued, is too great for the average child. The choice of risking the censure of classmates by adhering to one's religious beliefs or of compromising by conforming to the practice of the group has been held to be no choice at all.[128]

Certainly any implementation of the amendment involving the prayers of many interested groups would have the effect of publicly identifying adherents to various minority as well as majority religious views.

The Supreme Court alluded to these problems in 1948 in deciding to invalidate a released time program conducted within the public schools.[129] As Justice Frankfurter then noted, merely to provide for non-participation in such programs would not dissipate the coercion inherent in bringing particular forms of religious activity into the schools: "The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents."[130] Proponents of S.J. Res. 73 reject such a theory of "implied coercion."[131] However, as the Supreme Court of Nebraska has stated with respect to a teacher's role in leading "voluntary" devotional exercises, "A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form."[132] A similar effect was alleged by the plaintiffs in Schempp[133] and has been found to exist by state and

lower federal courts in cases involving "voluntary prayer" programs.[134]

We do not believe that our governments should require any individuals, let alone young children, publicly to reveal their religious beliefs, any more than our governments should require adult voters to disclose the manner in which they vote or their other affiliations.[135] The fact that children are so impressionable and also so reluctant to be seen as nonconformists renders any school supported program of public school prayer -- whether recitational or silent -- inherently coercive. In our judgment, "voluntarism" or "voluntary nonparticipation" in no way mitigates the pressures to conform. Even devoutly religious students may be unwilling to absent themselves from a program of prayer which their parents find objectionable because of a fear that fellow students might regard them as atheists or just different. To allow such a result would be inconsistent with more than half a century of constitutional interpretation protecting parents' First Amendment right to form the religious views of their children without state interference.[136] Even "voluntary" prayer meetings conducted during non-school hours in public elementary or high school facilities may be impermissible if their effect is to give the appearance of school support for particular religious activity.[137]

Coupled with such inherent coercion is the real possibility of overtly coercive practices. Though the proposed amendment states that no person shall be required to participate

in prayer, the implementation of a truly noncoercive program surely is problematic, especially in the public school classrooms of young children. How a student is excused from prayer, what is said, where the student is required to go, and the treatment generally accorded those who choose not to participate in prayer are all factors which can be expected to vary tremendously not only from jurisdiction to jurisdiction, but from classroom to classroom within the same school.[138] Without doubt, government and the courts will be involved in monitoring these activities on a local level.

In a political context, the Supreme Court has warned against the dangers of a "pall of orthodoxy over the classroom."[139] Those dangers would seem nowhere more acute than in the area of religious belief. Yet, at a stage in life when one is most susceptible to pressure to conform, the proposed amendment would permit state sanctioned pressure to conform to alien modes of religious worship and ultimately perhaps to alien religious thoughts.[140] If government may pressure skeptics or dissenters to conform at such an early age to majority views in this most personal area of life, it may be in a position to pressure them to conform in other fundamental respects as well.[141]

CONCLUSION

The divisiveness and strife which this country has heretofore experienced in connection with public prayer, coupled with the difficulty of dealing with issues of religious definition in a pluralistic society such as our own, strongly militate

against any unnecessary and uncertain constitutional change in matters of religious conscience -- especially where, as here, implementation of the proposed amendment is fraught with serious practical and constitutional problems. We urge rejection of S.J. Res. 73 or any similar proposal endorsing prayer in public schools and other public institutions.

April 28, 1983

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[1] 129 Cong. Rec. S3973 (daily ed. March 24, 1983). At least ten other resolutions or bills have been introduced in Congress during the present session seeking to permit and even to recommend the use in the public schools of some form of public prayer or religious activity, including silent prayer, the reading of Scriptures and the recitation of prayer aloud. See, e.g., H. Con. Res. 53, 98th Cong., 1st Sess. (1983); H. Con. Res. 38, 98th Cong., 1st Sess. (1983); H. Con. Res. 14, 98th Cong., 1st Sess. (1983); H. Con. Res. 13, 98th Cong., 1st Sess. (1983); H. Con. Res. 5, 98th Cong., 1st sess. (1983); H.J. Res. 133, 98th Cong., 1st Sess. (1983); H.J. Res. 104, 98th Cong., 1st Sess. (1983); H.J. Res. 100, 98th Cong., 1st Sess. (1983); H.J. Res. 81, 98th Cong., 1st Sess. (1983); S. 88, 98th Cong., 1st Sess. (1983).

[2] 128 Cong. Rec. S5428 (daily ed. May 18, 1982) (introducing S.J. Res. 199); 128 Cong. Rec. H2852 (daily ed. May 25, 1982) (introducing H.J. Res. 493). Neither resolution was reported out of Committee during the last session of Congress.

[3] See President's Message to Congress Transmitting Proposed Constitutional Amendment--Prayer in Public Schools, 1982 U.S. Code Cong. & Ad. News D45 (May 17, 1982) (hereinafter cited as "President's Message").

[4] Id. at D46; Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings on S.J. Res. 199 before the Senate Comm. on the Judiciary, 97th Cong., 2nd Sess. 253 (1982) (hereinafter cited as "Hearings") (Statement of E.C. Schmults, Deputy Attorney General, U.S. Department of Justice).

[5] 370 U.S. 421 (1962).

[6] 374 U.S. 203 (1963).

[7] See Ackerman, Legal Analysis of President Reagan's Proposed Constitutional Amendment on School Prayer, Library of Congress Congressional Research Service Report CRS-22 (June 2, 1982) (hereinafter cited as "Ackerman").

[8] A bill sponsored by Senator Dirksen failed to receive a two-thirds majority in the Senate in 1966, and, in 1971, a House bill failed to receive a two-thirds majority in the House. The only other proposed school prayer amendment to be considered on the floor of either house was one added as a rider to the equal rights amendment in 1970 and widely perceived as an effort to kill the ERA. See Id. at CRS-22-25.

[9] Committee on Federal Legislation, The Prayer Amendment, 29 Rec. A.B. City N.Y. 87 (1974) (hereinafter cited as "1974 Report").

[10] Id. at 88.

11 Ackerman, supra note 7, at CRS-22 n.45.

12 H.R. Res. 20, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981); H.R. 1335, 97th Cong., 1st Sess. (1981); H.R. 989, 97th Cong., 1st Sess. (1981); H.R. 865, 97th Cong., 1st Sess. (1981); H.R. 408, 97th Cong., 1st Sess (1981); H.R. 326, 97th Cong., 1st Sess. (1981); H.R. 72, 97th Cong., 1st Sess. (1981); H.R. Res. 354, 96th Cong., 1st Sess. (1979); H.R. 1082, 96th Cong., 1st Sess. (1979); S. 438, 96th Cong., 1st Sess., 125 Cong. Rec. 2268 (1979). Committee on Federal Legislation, Jurisdiction - Stripping Proposals in Congress: The Threat to Judicial Constitutional Review, 36 Rec. A.B. City N.Y. 557 (1981).

13 1974 Report, supra note 9, at 92.

14 See Everson v. Board of Educ., 330 U.S. 1, 8-14 (1947), and authorities cited at notes 70-72 infra.

15 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

17 Wisconsin v. Yoder, 406 U.S. 205 (1972).

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

19 See, e.g., Committee for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (testing and reporting services); Wolman v. Walter, 433 U.S. 229 (1977) (textbooks; testing, diagnostic and therapeutic services); Meek v. Pittenger, 421 U.S. 349 (1975) (textbook loans); Hunt v. McNair, 413 U.S. 734 (1973) (revenue bond financing of colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (grants for construction of college facilities); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (bus transportation).

20 See School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (dictum). See also Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980) (secular purpose found in school board policy permitting reference to social or cultural aspects of religion and "observance" of religious ceremonies such as the singing of Christmas carols. There is even some authority that a moment of silence for purposes of meditation (including prayer) might be instituted in public institutions, including schools, without violation of the establishment clause, provided a showing can be made that it has been instituted for a bona

fide secular purpose. See Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976). In Gaines, a three judge court sustained the constitutionality of a Massachusetts statute which required a "period of silence not to exceed one minute" for "meditation or prayer." Id. at 339. The decision was based on findings that the statute had a legitimate secular end and did not impermissibly advance religion. Some twenty-one states have passed some form of "moment of silence" legislation in the wake of the Gaines decision although it is not clear how often such legislation is observed. Ackerman, supra, note 7, at CRS-9 n.24. The New York Times reported that a Connecticut silent-meditation law "is believed by state education officials to be observed only casually, if at all." N.Y. Times, Oct. 19, 1982, at A1, col. 4. The Massachusetts statute was amended in 1979 to replace the "moment of silence" with a period for prayer exercises led by student volunteers. This statute was struck down as violative of the establishment clause by unanimous vote of the Supreme Court of Massachusetts. Kent v. Commissioner of Educ., 380 Mass. 235, 402 N.E.2d 1340 (1980). That court subsequently advised the Massachusetts legislature that a proposed statute providing for a minute of prayer or meditation "offered by a student volunteer" would also violate the establishment clause. Opinions of the Justices to the House of Representatives, 387 Mass. 1201, 440 N.E.2d 1159 (1982). As noted infra text accompanying notes 51-52, the Fifth Circuit struck down a similar program in Louisiana, and this action was affirmed in a per curiam opinion of the Supreme Court dispensing with oral argument. Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 455 U.S. 913 (1982). One part of the program at issue in Treen permitted voluntary observance of a minute for silent meditation at the start of the school day provided that the observance was neither intended nor identified as a religious exercise; this part of the program was not challenged by the plaintiffs and was unaffected by the decision.

More recently, a federal district court in Tennessee ruled unequivocally that a program calling for a moment of silent prayer or meditation violates the establishment clause. The court, after reviewing the leading Supreme Court cases and examining the legislative history, determined that the program would have the primary effect of fostering religion and had in fact been enacted by the Tennessee legislature for that purpose. Beck v. Mcelrath, No. 82-3577 (M.D. Tenn. October 7, 1982). A similar program enacted recently in New Jersey is currently the subject of litigation in the Federal courts.

A district court in Alabama recently dissolved its own order enjoining prayer programs conducted by teachers in the Mobile, Alabama school system. The Court reasoned that the many previous Supreme Court decisions applying the establishment clause and other provisions of the bill of

rights to the states all had been incorrectly decided. Jafree v. Board of School Comm'rs, 554 F.Supp. 1104 (S.D. Ala. 1983). Justice Powell, sitting as Circuit Justice, stayed the order of the district court (which had dissolved the injunction) pending final disposition of the appeal before the 11th Circuit. Jaffree v. Board of School Comm'rs, No. A-663, slip op. (S. Ct. Feb. 11, 1983) (Powell, Circuit Justice).

The Supreme Court has also upheld the use of a state university's public facilities for student initiated religious activity in a case where that university generally served as a public forum and made its facilities available for the extracurricular activities of all religious and secular groups. Widmar v. Vincent, 454 U.S. 263 (1981). Courts have frequently drawn a sharp distinction between university and public school education in establishment clause cases based on the age and sophistication of the students involved. O'Hair v. Andrus, 613 F.2d 931, 936 (D.D.C. 1979); see Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981); Tilton v. Richardson 403 U.S. 672, 685-86 (1971). In addition to alluding to the possible distinction between public schools and colleges based on the maturity of the students, the Supreme Court in Widmar v. Vincent emphasized that the same facilities sought to be used in Widmar by student religious groups were, as a matter of long-standing university policy, deliberately made available to a wide variety of other student groups, more than 100 of which were officially recognized by the university. Widmar v. Vincent, supra, 454 U.S. at 270-75.

21 See, e.g., Hearings, supra note 4, at 182-96 (Testimony of Reverend D. M. Kelly of the National Council of the Churches of Christ in the United States of America); at 203-04 (Testimony of Reverend C. V. Bergstrom of the Lutheran Council in the U.S.A.); at 206-25 (Statement of N.Z. Dershowitz on behalf of the National Jewish Community Relations Advisory council and the Synagogue Council of America); and at 312-30 (Statement of G. Bushnell representing the Stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A.); Shriver, "Against School Prayer", N.Y. Times, Oct. 7, 1982, at A27, col. 2. See 112 Cong. Rec. 23203 (1966)(Remarks of Senator Bayh); Prayers in Public Schools Opposed, 69 Christian Century, January 9, 1952, at 35; Cahn, On Government and Prayer, 37 N.Y.U.L.Rev. 981, 993-94 (1962). Roger Williams and James Madison insisted on the complete separation of church and state, in large part because they believed that state sponsorship of religious views offends true believers and breeds disrespect for the state sponsored religion. See

infra notes 72, 98-99 and accompanying text.

22 See Note, Toward a Constitutional Definition of Religion, 91 Harv. L. rev. 1056, 1069 (1978). See also United States v. Seeger, 380 U.S. 163, 174-75 (1965); School Dist. v. Schempp, 374 U.S. 203, 214 (1963).

23 President's Message, supra note 3, at D45-46. Accord H. Con. Res. 13, 98th Cong., 1st Sess. (1983) ("Resolved . . . that public school authorities should recognize the historic importance of religion to our civilization by encouraging short periods of silence").

24 Hearings, supra note 4, at 82 (Memorandum of Department of Justice Office of Legal Policy) (hereinafter cited as "Justice Department Memorandum"); President's Message, supra note 3, at D45; see also Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.")

25 See infra notes 73-81 and accompanying text.

26 See Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1069-72 (1978); United States v. Seeger, 380 U.S. 163, 174-75, 180-83 (1965).

27 See infra notes 53-68 and accompanying text.

28 370 U.S. 421 (1962).

29 The prayer was composed by the New York State Board of Regents, the governmental agency that supervises New York State's public school system.

30 School officials could not comment on participation or non-participation, nor could they suggest or require that any posture or language or dress be used or not used. Upon written request from the parent, students were to be excused from saying the prayer or from the room. Engel v. Vitale, 370 U.S. 421, 438 (1962).

31 Id. at 425.

32 Id. at 429.

33 374 U.S. 203 (1963).

34 Id. at 211.

35 Id. at 205.

36 Id. at 207-08.

[37] Id. at 223.

[38] Id. at 205, 211-12 n.4.

[39] Id. at 224.

[40] Id. at 222.

[41] Id.

[42] Id. at 225.

[43] Id. at 225-26.

[44] Id. at 225.

[45] Id.

[46] Id. at 222 (citations omitted).

[47] 449 U.S. 39 (1980).

[48] Id. at 41.

[49] Id. at 42.

[50] Id.

[51] 455 U.S. 913 (1982), aff'g 653 F.2d 897 (5th Cir. 1981).

[52] 653 F.2d at 901.

[53] 330 U.S. 1 (1947).

[54] See, e.g., Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510-12 (1982); Larson v. Valente, 456 U.S. 228, 244-46 (1982); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 (1973); Tilton v. Richardson, 403 U.S. 672, 687-88 (1971); Lemon v. Kurtzman, 403 U.S. 602, 611-13 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668-70, 676 (1970) (benevolent neutrality); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Board of Educ. v. Allen, 392 U.S. 236, 242-43 (1968); School Dist. v. Schempp, 374 U.S. 203, 222 (1963); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (neutrality not equivalent to hostility). See generally Note, The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus, 33 Rutgers L. Rev. 1008, 1012-21 (1981).

[55] 330 U.S. 1, 15-16 (1947) (citation omitted). In Everson, the Court upheld the reimbursement program by analogy to other general public benefit programs, such as police and fire

protection, which also served the schools. Id. at 17.

56 See, e.g., Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510-12 (1982); Larson v. Valente, 456 U.S. 228 (1982); Widmar v. Vincent, 454 U.S. 263, 271-75 (1981); Stone v. Graham, 449 U.S. 39, 40 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (secular purpose test); School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (primary effect).

57 The primary effects test may operate as a double-check on the application of the more fundamental secular purpose test. See Merel, The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment, 45 U. Chi. L. Rev. 805, 825-26 (1978) (hereinafter cited as "Merel").

58 See, e.g., Committee for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980); Wolman v. Walter, 433 U.S. 229, 235-44, 248-49, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 358 (1975); Sloan v. Lemon, 413 U.S. 825, 829-32 (1973); Hunt v. McNair, 413 U.S. 734, 741 (1973); Levitt v. Committee for Pub. Ed. & Religious Liberty, 413 U.S. 472, 481-82 (1973); Committee for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973); Tilton v. Richardson, 403 U.S. 672, 678-79 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

59 McGowan v. Maryland, 366 U.S. 420, 449 (1961) (secular purpose and effect); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617, 630 (1961) (secuar purpose and effect); Braunfeld v. Brown, 366 U.S. 599, 607-08 (1961) (secular purpose).

60 Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970) (secular purpose, entanglement). The Court based its decision on its fear that the tax valuation of church property, including items used in ceremonies of worship, would inappropriately embroil the state in assigning value to things of a religious nature, and ultimately, in making judgments about religious things:

> We must also be sure that the end result -- the effect [of taxation or exemption] -- is not an excessive government entanglement with religion.
>
> . . . the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

The entanglement criteria were further developed in Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971), where the Court also

pointed to the dangers of divisiveness and factionalism engendered whenever government interfaces directly with religion. The Court recently reaffirmed the importance of guarding against the political and social risks of entanglement in Larson v. Valente, 456 U.S. 228, 244-55 (1982). See also NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

61 Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (secular purpose).

62 Zorach v. Clauson, 343 U.S. 306, 314 (1952).

63 See Larson v. Valente, 456 U.S. 228, 244-55 (1982).

64 See cases cited supra note 19.

65 Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

66 Id. at 616-17.

67 Widmar v. Vincent, 454 U.S. 263 (1981); see Cox v. New Hampshire, 312 U.S. 569 (1941); O'Hair v. Andrus, 613 F.2d. 931 (D.C. Cir. 1979) (sustaining use of National Park for celebration of Roman Catholic Mass by the Pope). See also Heffron v. International Soc'y for Krishna Consciousness, Inc. 452 U.S. 640 (1981) (sustaining regulation limiting manner of solicitation of donations to booths, as applied to members of religious group claiming that peripatetic solicitations constituted observance of its religious tenets).

68 Walz v. Tax Comm'n, 397 U.S. 664 (1970).

69 See, e.g., Hearings, supra note 4, at 153-54 (Testimony of G. L. Jarmin of the Project Prayer Coalition); and at 255-56 (Statement of E. C. Schmults, Deputy Attorney General, U.S. Department of Justice).

70 See generally United States v. Ballard, 322 U.S. 78, 86-88 (1944). It is true that the framers' primary concern was to prevent the formation of an official federal church of the type that had existed in England. School Dist. v. Schempp, 374 U.S. 203, 237-38 (1963) Brennan, J. concurring. There was also, however, a widespread awareness among many colonists of the dangers of any union between church and state. Engel v. Vitale, 370 U.S. 421, 429 (1962). In Virginia, in 1785-86, Thomas Jefferson and James Madison led the fight in opposition to Virginia's attempt to renew its tax levy in support of the established church. Madison wrote his famous To the Honorable the General Assembly of the Commwealth of Virginia, A Memorial and Remonstrance (1785), reprinted in Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947), citing II Writings of James

Madison 183-91 (hereinafter cited as "Memorial and Remonstrance") which received strong support. When the proposed tax levy came up for consideration, not only did it die in committee, but the Assembly enacted Jefferson's Virginia Bill for Religious Liberty. Everson v. Board of Educ., supra, 330 U.S. at 12-13, citing 12 Hening, Statutes of Virginia 84 (1823); Commager, Documents of American History 125 (1944).

71 Memorial and Remonstrance, supra note 70, ¶9.

72 Id. ¶13. Roger Williams, described as "the truest Christian among many who sincerely desired to be Christians" and one of the earliest exponents of the doctrine of separation of church and state, believed that such a separation is necessary in order to protect religion from the danger of destruction which inevitably flows from control by even the best intentioned civil authority. See Engel v. Vitale, 370 U.S. 421, 434 n.20 (1962), citing 1 Parrington, Main Currents in American Thought 74 (1930).

73 See, e.g., Tudor v. Board of Educ., 14 N.J. 31, 48, 100 A.2d 857, 868 (1953), cert. denied, 348 U.S. 816 (1954); O'Connor v. Hendrick, 109 A.D. 361, 368, 96 N.Y.S. 161, 167 (4th Dep't 1905), aff'd, 184 N.Y. 421, 77 N.E. 612 (1906); People ex rel. Ring v. Board of Educ., 245 Ill. 334, 346-47, 92 N.E. 251, 255 (1910); see also State ex rel. Finger v. Weedman, 55 S.D. 343, 357-58, 226 N.W. 348, 354 (1929); cases cited infra note 120. As Justice Brennan noted in his scholarly concurrence in School District of Abington Township v. Schempp, 374 U.S. 203, 271 (1963): "Almost from the beginning religious exercises in the public schools have been the subject of intense criticism, vigorous debate, and judicial or administrative prohibition."

74 Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

75 See generally L. Pfeffer, Church, State and Freedom 436-46, 449-50, 456-63, 479-95 (rev. ed. 1967).

76 Id. at 438. Pfeffer points to other examples of such violence and strife. For example, according to Pfeffer, when a Catholic bishop in 1843 petitioned the Philadelphia school board to allow Catholic children to use the Catholic version of the Bible:

> The immediate effects of the Bishop's petition were both dramatic and tragic. For several months the controversy simmered, and then suddenly erupted in riots. Catholic churches were attacked; two in the Philadelphia suburb of Kensington were reduced to ashes. A convent was completely destroyed. Bishop Kenrick ordered all Catholic worship suspended and every Catholic church in the city

closed; but this action did not avert the more serious consequences that the Bishop hoped it would. Many houses in the Irish section were destroyed by fire, some of the residents were shot down as they ran out, and a number of non-Catholic bystanders likewise lost their lives. Id. at 437.

In 1949 in Chelsea, Massachusetts where the population was about 45% Catholic, 45% Jewish and 10% Protestant, a request by two non-Catholic mothers to appear before the Chelsea School Committee to present their views against the singing of Christmas carols and the presentation of Christmas pageants in the schools caused serious controversy:

> The press immediately took up the issue. The Chelsea Record printed a banner headline, "Seek to Ban Singing of Carols in Public School." Boston papers carried similar headlines and slogans. Feelings ran high in Chelsea and Boston. The Wolpers and the Rollers received scores of threatening letters (many from Jews) and anonymous telephone calls. An indignant citizen clipped the Chelsea Record's account of the petition and forwarded it to the House Committee on Un-American Activities in Washington.
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> . . . .
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> It is highly probably that the not too subtle hint of a boycott of Jewish merchants contained in the last paragraph of the editorial [published in an official organ of the Catholic archdiocese of Boston] was expressed often and much more directly in Chelsea.
>
> The intensity of community feeling and the threats of violence caused the Wolpers to leave Chelsea and go into hiding in a neighboring community. Mrs. Roller, the cosignor of the petition, was reported to have become almost hysterical as a result of the numerous telephone calls received.

Id. at 483-85.

77 Id. at 462 (citations omitted). See also id. at 461-63.

78 N.Y. Times, Dec. 12, 1982, §1, at 39, col. 1.

79 N.Y. Times, Dec. 8, 1982, at B1, col. 1.

80 B. Moyers, Commentary on CBS Evening News with Dan Rather 12 (Aug. 16, 1982). Significantly, the kindergarten teacher of the plaintiff's son did not realize she was causing discomfort to the child: "Actually, I didn't ever know that there were people that didn't say grace before they -- at least grace before they ate." The school board president saw the issue as

one of majority rule: "We're a nation founded under one God, and the majority of us believe in it. If there's a few people that don't, the majority has always ruled in this country." One caller to a local radio station stated: "And anybody that don't think there's a God, I mean, that doesn't think there's a God, I think that they are very, very sick." Another caller, when asked why she supported the law said, "Because I think it's right. I -- I just think it's something that should be. And any parent that is against that should not be allowed to live in this country." Id. at 12-13.

81 Justice Department Memorandum, supra note 24, at 107.

82 The recent growth in this country in the number of unusual religious claims may render such political divisiveness over public prayer more likely than ever before. See infra text accompanying notes 90-96.

83 See supra note 81.

84 See Hearings, supra note 4, at 116 (Questions and Answers [of the White House] on the President's Proposed Voluntary School Prayer Amendment 2-3 (May 6, 1982)) (hereinafter cited as "Questions and Answers"); Justice Department Memorandum, supra note 24, at 107-11.

85 Cf. Justice Department Memorandum, supra note 24, at 106, 109 (student-initiated prayer at appropriate, nondisruptive times).

86 Id. at 82, 103.

87 Questions and Answers, supra note 84, at 116: "The Lord's Prayer and the Ten Commandments are reflections of our Judaeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on school children."

88 See, e.g., Hearings, supra note 4, at 138 (Testimony of R. P. Dugan of the Office of Public Affairs of the National Association of Evangelicals).

89 See, e.g., Hearings, supra note 10, at 132 (Testimony of Rabbi S. Siegel of the Jewish Theological Seminary of America); at 152 (Statement of E. F. McAteer of the Religion Roundtable. See also Questions and Answers, supra note 84, at 116-17.

90 See supra text accompanying notes 28-32 & 77.

91 Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1069 (1978), quoting Jamison, Religions On the Christian Perimeter, in 1 Religion in American Life 162 (J. Smith & A. Jamison eds. 1961).

92 Id. (Citations omitted).

93 See authorities cited supra note 21.

94 See supra text accompanying note 77.

95 See Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

96 See supra text accompanying note 77.

97 See authorities cited supra note 21.

98 Memorial and Remonstrance, supra note 70, ¶ 7.

99 Id.

100 See Engel v. Vitale, 370 U.S. 421, 431 (1962). See also Larson v. Valente, 456 U.S. 228, 253-54 (1982).

101 Justice Department Memorandum, supra note 24, at 107-08.

102 See supra notes 73-80 and accompanying text. The Supreme Court has recognized that aid to religion which benefits relatively few relgious groups intensifies political fragmentation and divisiveness along religious lines. See Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) (aid to religion neutral on its face but beneficiaries 95% Catholic); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795-96 (1973) (beneficiaries 85% Catholic). The mere use of religious exercises acceptable even to a very large majority certainly cannot eliminate, and may perhaps even exacerbate, the danger of coercion of religious minorities. Hence the danger, even in a predominantly Christian nation, of proposals to permit readings from the Christian Bible. See, e.g., H.J. Res. 16, 98th Cong., 1st Sess. (1983) (reading from or listening to Biblical Scriptures).

103 The phrase "public institutions" is undefined in the proposed amendment and could be quite broad. Proponents of S.J. Res. 73 apparently intend by this language to ensure that prayers or religious invocation will continue to be possible in courts and legislatures. See, e.g., Justice Department Memorandum, supra note 24, at 111; Questions and Answers, supra note 84, at 116; Hearings, supra note 4, at 152 (Statement at E. F. McAteer of the Religion Roundtable); at 255 (Statement of E. C. Schmults, Deputy Attorney General, U.S. Department of Justice); and at 154 (Testimony of G. L. Jarmin of the Project Prayer Coalition). It would appear, however, that an amendment for this purpose is not necessary since this type of activity has never been proscribed by the Supreme Court. See Zorach v. Clauson, 343 U.S. 306, 312-13 (1952). In Chambers v. Marsh 675 F.2d 228 (8th Cir.), cert. granted, 103 S. Ct. 292 (1982), the Eighth Circuit held that the Nebraska legislature's practices of engaging the same Presbyterian minister to say an opening prayer every day and of paying for printed copies of such opening prayers amounted to a forbidden establishment of a religious viewpoint. Citing its earlier decision in Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979), the Eighth Circuit indicated in dictum that the practice of having clergymen recite brief ceremonial prayers at the beginning of each legislative session might not offend the establishment clause if participation in the exercise were voluntary, clergymen from different faiths were invited to conduct the prayers, no payment was made for the services and the prayers were not recorded or published. 675 F.2d at 234. The Supreme Court has granted certiorari in the case. 103 S. Ct. 292 (1982).

The payment of salaries and certain expenses to chaplains employed by the United States Congress has also been challenged recently by a United States taxpayer. The taxpayer's standing to maintain the action was upheld by a panel of the District of Columbia Circuit in Murray v. Buchanan, 50 U.S.L.W. 2534 (D.C. Cir. Mar. 9, 1982), but this decision has been vacated pending rehearing en banc. See 674 F.2d 8 (D.C. Cir. 1982). The panel also held that the practice was not immune from judicial review as a political question.

The use of the term "public institution" could have unanticipated and far ranging effects, since one may read the language as applying to any institution that receives public funds or is subject to public regulation. The history of the phrase "public accommodation" in civil rights legislation certainly suggests the extent to which a phrase such as "public institutions" may take on an extremely broad meaning. See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) (club held not to be private where only restrictions on membership to a swimming club were geographical and a stated maximum number of memberships);

Nesmith v. Young Men's Christian Ass'n, 397 F.2d 96 (4th Cir. 1968) (Since places of public accommodation differ markedly in their operation, a factual determination must be made on the circumstances of each case). Cf. S. 88, 98th Cong., 1st Sess. (1983) (religious meditation to be permitted "in any public building or in any building which is supported in whole or in part through the expenditure of Federal funds.")

The potential breadth of the term "public institution" could result in the various problematic aspects of the amendment being multiplied many times throughout a potentially vast number of "public institutions." Arguments will doubtless be made that there is a need to compose nondenominational prayers or to select majority approved prayers or to allow for the participation of multiple prayers or to protect nonparticipants from coercion could arise in all sorts of circumstances in all sorts of publicly funded institutions, including clubs, parks, libraries, dormitories, athletic facilities, post offices, airports and possibly even some apartments and commercial buildings. Cf. Questions and Answers, supra note 84, at 116 (indicating intention to permit prayer in public parks, prisons, hospitals and legislatures). Although many of such arguments will be rejected by the courts, some will be accepted and we are concerned about the potential for government mandated religious exercises intruding into so many aspects of life.

104 There is some authority for this interpretation of the amendment. See authority cited supra note 85.

105 See generally Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056 (1978).

106 Universal Military Training and Service Act, 50 U.S.C. App. §456(j) (1958).

107 United States v. Seeger, 380 U.S. 163, 174,84 (1965).

108 See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). See also Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977) (exemption from the requirement of obtaining Social Security numbers which respondent regarded as mark of the devil).

109 450 U.S. 707 (1981).

110 Id. at 715-16.

111 United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968) (citation omitted).

112 Members of the Church of the New Song or Eclatarian faith, a prisoners' movement, have, for example, sought an

accommodation of their beliefs in the federal prisons on religious free exercise grounds. The Church professes a belief in "Eclat," a being superior to Jesus and other spiritual leaders. The central principle of the Eclatarian faith is anti-authoritarian, concerned primarily with the destruction of repressive rulers particularly within the prison system and more generally within government and the judiciary. The lower federal courts have split on whether these tenets constitute a religion under the First Amendment. See, e.g., Theriault v. Silber, 453 F. Supp. 254 (W.D. Tex. 1978), on remand from 547 F.2d 1279 (5th Cir. 1977), vacat'g and remand'g 391 F. Supp. 578 (W.D. Tex 1975), on remand from 495 F.2d 390 (5th Cir. 1974), appeal dismissed, 579 F.2d 302 (5th Cir. 1978), cert denied, 440 U.S. 917 (1979); Hundley v. Sielaff, 407 F. Supp. 543 (D. Ill. 1975); Loney v. Scurr, 474 F. Supp. 1186 (S.D. Iowa 1979), on remand from Remmers v. Brewer, 529 F.2d 656 (8th Cir. 1976), remand'g Remmers v. Brewer, 396 F. Supp. 145 (S.D. Iowa 1975); Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), aff'd per curiam, 494 F.2d 1277 (8th Cir.), cert. denied, 419 U.S. 1012 (1974). A member of the Krishna Consciousness Branch of Hinduism claimed in United States v. Silberman, 464 F. Supp. 866, 870 (M.D. Fla. 1979), that the distribution of literature and solicitation of donations were aspects of his practice of religion. See also Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981), which considered the extent of the First Amendment right of the Krishna Consciousness Branch of Hinduism to disseminate its religious materials. And members of the Native American Church argued successfully in People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), that the use in the ceremonies of their church of peyote, a hallucinogen with a long history of use in the religious ceremonies of North American Indians, was religious within the meaning of the free exercise clause. In State ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 954 (1976), snake-handling as a rite undertaken to confirm the word of God under the tenets of the Holiness Church was carefully analyzed for its religious significance before being enjoined as a nuisance for which no method of accommodation could be found. In United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968), defendant, the primate of the Potomac of the Neo-American Church, a California not-for-profit corporation dedicated to use of marijuana and LSD as the true sacraments, sought to use her religious beliefs as a defense to a criminal prosecution for illegal use and possession of controlled substances. The court took extensive evidence of the rituals and organization of the Neo-American Church, which paralleled and indeed seemed to parody that of established religions, before deciding that defendant's use of marijuana was not protected under the free exercise clause.

113 440 F. Supp. 1284 (D.N.J. 1977), aff'd per curiam, 592 F.2d 197 (3d Cir. 1979).

114 440 F. Supp. at 1305-12, 1323.

115 For example, the Supreme Court has ruled that disputes within hierarchical churches must be determined exclusively by ecclasiastical courts, because state and federal courts are not competent to determine which faction, under church doctrine, has been faithful to the charter of the church. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960). See also Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); United States v. Ballard, 322 U.S. 78 (1944); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979), the Court refused to allow the NLRB to assume jurisdiction over teachers in parochial schools. The Court reasoned, in part, that the assertion of jurisdiction by the NLRB would inevitably require both that body and the courts to determine the merits of defenses to alleged unfair labor practices based on assertedly religious grounds. Justice Stevens has emphasized the wisdom of doctrines such as "neutrality" and "entanglement" that avoid litigation of religious doctrine. Larson v. Valente, 456 U.S. 228, 257 n.4 (1982) (concurring opinion); United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (concurring opinion).

116 United States v. Ballard, 322 U.S. 78, 86-87 (1944) (citation omitted); accord, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940).

117 Silent prayer is the focus of at least four of the proposed constitutional amendments now before the Congress. See, e.g., H. Con. Res. 53, H. Con. Res. 38, H. Con. Res. 13, H. Con. Res. 5 cited supra note 1.

118 See Torcaso v. Watkins, 367 U.S. 488 (1961); cf. Wooley v. Maynard, 430 U.S. 705, 713-15 (1977) (state motto on license plate); Board of Educ. v. Barnette, 319 U.S. 624 (1943) (recitation of Pledge of Allegiance prior to inclusion of phrase "under God").

119 See, e.g., Mo. Const. art. I, §§6, 7, art. IX, §8, interpreted to be more restrictive than the First Amendment in Paster v. Tussey, 512 S.W.2d 97, 101-02 (Mo. 1974) (en banc), cert. denied, 419 U.S. 1111 (1975); Tenn. Const. art. I, §3. In Fox v. City of Los Angeles, 22 Cal.3d 792, 796, 587 P.2d 663, 665, 150 Cal. Rptr. 867, 869 (1978), the Supreme Court of California noted that the then current United States Supreme Court interpretation of the

establishment clause in the area of public funding might not be as comprehensive as Article I, Section 4 of the California constitution forbidding any preference for any religious doctrine.

120 State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (1930); State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918); Herold v. Parish Board of School Directors, 136 La. 1034, 68 So. 116 (1915); People ex rel. Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); State ex rel. Freeman v. Scheve, 65 Neb. 876, 93 N.W. 169 (1903); State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890).

121 People ex rel. Ring v. Board of Educ. 245 Ill. 334, 349, 92 N.E. 251, 255-56 (1910).

122 Herold v. Parish Board of School Directors, 136 La. 1034, 1049-50, 68 So. 116, 121 (1915); State ex rel. Weiss v. District Board, 76 Wis. 177, 199-200, 44 N.W. 967, 975 (1890):

> The answer of the respondent states that the relators' children are not compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

123 People ex rel. Ring v. Board of Educ., 245 Ill. 334, 346-47, 92 N.E. 251, 255 (1910); State ex rel. Dearle v. Frazier, 102 Wash. 369, 381, 173 P. 35, 39 (1918) ("it was known that religious opinion is a thing that men will fight for, and sometimes in most insidious ways").

124 State ex rel. Dearle v. Frazier, 102 Wash. 369, 381, 173 P. 35, 39 (1918):

To compromise opinion in these matters is to lead to confusion, which would make the courts the arbiter of what is and what is not religious worship, instruction, or influence, which would be as intolerable to the citizen as it would be to leave a decision to a school board.

125 See Merel, supra note 57, at 810-11.

126 Wisconsin v. Yoder, 406 U.S. 205 (1972); see Thomas v. Review Board of Indiana, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398, 410 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940); cf. Wooley v. Maynard, 430 U.S. 705 (1977) (state motto on license plate).

127 Such practical difficulties surely cannot be resolved by constitutional amendments, such as H. Con. Res. 14, 98th Cong., 1st Sess. (1983), which simply proclaim "that individual religious conscience should not be violated or compromised in the establishment or operation of such periods of stillness and silence."

128 Note, School Prayer and the Becker Amendment, 53 Geo. L.J. 192, 219 (1964).

129 Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

130 Id. at 227-28 (separate opinion of Frankfurter, J.)

131 Justice Department Memorandum, supra note 24, at 105.

132 State ex rel. Freeman v. Scheve, 65 Neb. 876, 880, 93 N.W. 169, 170 (1903).

133 374 U.S. 203, 208 (1963).

134 See, e.g., Tudor v. Board of Educ., 14 N.J. 31, 48-51, 100 A.2d 857, 866-68 (1953), cert. denied, 348 U.S. 816 (1954); State ex rel. Weiss v. District Board, 76 Wis. 177, 199-200 44 N.W. 967, 975 (1890).

135 See Larson v. Valente, 456 U.S. 228 (1982); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

136 In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Supreme Court upheld the right of parents to send their children to private and parochial schools in satisfaction of public education requirements. In the more recent case of Wisconsin v. Yoder 406 U.S. 205 (1972), Amish children were excused from public education requirements beyond the eighth grade because of the extent to which the public school system interferes with the inculcation by the Amish community of

religious values in their children. See also Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944) (dictum).

137 Permitting such voluntary prayer before meals or before or after school is one purpose of the proposed amendment. See Justice Department Memorandum, supra note 24, at 109. Several courts have addressed the constitutionality of student-initiated prayer in school facilities during non-school hours. The most recent decisions indicate that, while truly voluntary prayers might be possible in theory, it will be very difficult in practice to satisfy the requirements of neutrality. For example, in Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), the "Students for Voluntary Prayer" sought permission to conduct communal prayer meetings in a high school classroom immediately before the morning homeroom period. The meetings were wholly student initiated and were to be unsupervised and separated from all other school functions. The school board had refused to grant permission. The court concluded that, since the voluntary prayer meetings would have to be conducted after the arrival of the school buses at school, and therefore after the official school day began, "[t]he prayer meetings would create an improper appearance of official support." Id. at 979. Accord Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), cert. denied, 103 S. Ct. 800 (1983); Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 455 U.S. 913 (1982); Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981), cert. denied, 454 U.S. 863 (1981). One early case, Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965), conditionally suggested a detailed regime of a pre-school day, voluntary, student initiated school prayer program as a means of resolving a school prayer litigation without trial. Neither the prayer sessions nor the participants were to be highlighted in any way, and the teachers' only responsibility was to maintain order. The court had to set forth rather elaborate precautions and methods of monitoring the program to avoid any appearance of official sponsorship or stigma for nonattendance. Id. at 54-55. Whether a public school normally functions as a "public forum" comparable to that of a park or college campus may rightly be determinative. See Widmar v. Vincent, 454 U.S. 263, 271 n.10 (1981). Presumably a high school, the facilities of which were made available during nonschool hours without distinction to a large number of speakers and organizations, could make the facilities equally available to religious groups, for conducting voluntary prayer and other religious activities, provided steps were taken to avoid any overlap with school hours or appearance of sponsorship by the school.

138 See Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971):

> [A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.
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> . . . .
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> A comprehensive, discriminating, and continuing state surveillance will inevitably be required. . . . Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.

139 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

140 It has been suggested that school districts will not, under S.J. Res. 73, impose particular religious doctrines on school children because, in part:

> The Lord's Prayer and the Ten Commandments are reflections of our Judaeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow secretarian dogmas on school children. Indeed, any reference to a "personal" God who is more than a mere "life-force" might be "denominational" insofar as it reflected the general beliefs of Judaism and Christianity to the exclusion of those who reject the idea of a personal God.

Questions and Answers, supra note 84, at 116-17.

141 See Memorial and Remonstrance, supra note 71, ¶9: "Instead of holding forth an asylum to the persecuted, [the Bill] is itself a signal of persecution . . . . Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in a career of intolerance." The Supreme Court warned in Engel v. Vitale, 370 U.S. 421, 429-30 (1962):

> [O]ne of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services . . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say -- that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.