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UNITED STATES CATHOLIC CONFERENCE
Department of Education
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 (202) 659-6718

Files
School Prayer

Office of the Secretary

MEMORANDUM

May 25, 1983

TO: Superintendents of Catholic Schools
Diocesan Directors of Religious Education

FROM: Rev. Thomas Gallagher, Secretary for Education TG.
Sr. Mariella Frye, Representative for Catechetical Ministry SMF

RE: Proposed Constitutional Amendment to Permit Voluntary Prayer in Public Schools

During the past year and a half, the Conference staff has been engaged in a consideration of the prayer amendment to the Constitution proposed by President Reagan. The purpose of the study was to provide documentation for review and decision by the Administrative Board of Bishops. For your information, therefore, we have put together a short history of the Conference's position on this issue which we are sending with a copy of the recent statement submitted by Monsignor Hoye. We hope this will keep you abreast of the policy on this issue.

AN AMENDMENT TO PERMIT VOLUNTARY PRAYER IN PUBLIC SCHOOLS

HISTORICAL BACKGROUND

1971: A "school prayer" amendment is proposed in Congress. It reads:

> Nothing contained in this constitution shall abridge the right of persons lawfully assembled in any public building supported in whole or in part through the expenditure of public funds to participate in nondenominational prayer.

The USCC opposed the proposal on the grounds that (1) it would have accomplished nothing on behalf of the goals it purported to serve and (2) it would have represented a threat to the existing legality of denominational prayer.

1973: The Senate was holding hearings on an amendment which would have authorized voluntary prayer in public schools.

The Administrative Board of the USCC called for the following constitutional amendment permitting religious instruction and prayer in public schools and other public institutions.

> Nothing in this Constitution shall be construed to (i) forbid prayer in public places or in institutions of the several States or of the United States, including schools; (ii) forbid religious instruction in public places or in institutions of the several States or of the United States, including schools, if such instruction is provided under private auspices whether or not religious.
>
> The right of the people to participate or not to participate in prayer or religious instruction shall never be infringed by several States or the United States.

The USCC believed that an amendment limited to allowing prayer would be inadequate to meet the national need. Moreover, the Board's intent was to correct the situation created by the Supreme Court decision in the 1960's barring prayer from public schools and also the 1948 Supreme Court decision (McCollum v. Board of Education) against a program for releasing children with parental consent from public school classes so they could receive religious instruction on public school premises from representatives of their own faith.

1981: The Committee on Education reviewed the 1973 policy and reaffirmed it.

1982: The Committee on Education initiated discussions on the proposed amendment of the Reagan Administration which reads:

> 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

While no vote was taken, the minutes show "that most of the Committee preferred that religious instruction be included."

STATEMENT ON

SENATE JOINT RESOLUTION 73

submitted by

MONSIGNOR DANIEL HOYE

on behalf of the

UNITED STATES CATHOLIC CONFERENCE

to the

SUBCOMMITTEE ON THE CONSTITUTION

of the

SENATE JUDICIARY COMMITTEE

May 9, 1983

On behalf of the United States Catholic Conference I express sincere appreciation for the opportunity to comment on Senate Joint Resolution 73, a proposal to amend the Constitution to permit voluntary prayer in public schools or other public institutions. The intent of the proposed amendment is a positive step towards assuring the efficacy of the Religion Clauses of the First Amendment. However, in failing to include the right to receive religious instruction, the amendment omits a component which is essential to the integrity of the right to pray.

The United States Catholic Conference has always given unqualified support to the public expression of faith in God through voluntary prayer. This is a fundamental part of the American heritage. This support stems from the concern of the Catholic Church for the moral and civic responsibility of all Americans. Catholic education in this country is grounded in the Church's commitment to nurture civic strength and awareness under religious auspices. Because two thirds of the Catholic school-age children in this country are enrolled in our public schools, and with a keen recognition of the interdependence all of us have upon one another, Catholic concern extends to public education and equals that for private education.

In this context, the United States Catholic Conference views the proposed constitutional amendment as a call to find opportunities for the spiritual and religious development of students enrolled in public schools while respecting the practices and structure of public education. Basic to our position, however, is the belief that there is no such thing as a value-free education. In fact, the question is not whether education inculcates values, but rather what values are inculcated by a particular educational program. A balanced response to this question has been made a practical impossibility by Supreme Court decisions concerning prayer and Bible reading. In effect, those decisions attempt to achieve neutrality in an educational context which, as a practical matter, defies true neutrality.

Against this background the United States Catholic Conference believes that the amendment in Senate Joint Resolution 73 does not adequately and effectively assure the right of America's children to express their faith. In the context of public schools this right must include the right voluntarily to receive religious instruction consistent with their beliefs and the practices of their own faith traditions.

Prayer in school is significantly different than prayer at other public functions because it involves teachers and students in a learning situation. For many children, prayer alone will not necessarily lead to a deeper understanding of faith, or even to the significance and importance of prayer itself. To this end religious instruction becomes an integral aspect of the prayer in schools issue. Prayer, without a framework of voluntary instruction in the child's religious tradition, is not sufficient fully to insure the individual's religious freedom. The present proposal would have mainly symbolic value and only minimal pedagogical value. As such, it is not of sufficient merit to justify the problems it might create in terms of the American diversity of religious beliefs and traditions and the right of religious minorities in our pluralistic society.

The United States Catholic Conference reaffirms the Church's commitment to protect religious freedom by submitting that any constitutional amendment of the kind under consideration should include religious instruction, on a voluntary basis and under non-governmental auspices, on the premises of public schools and other public institutions.

Incorporated as part of this statement is the attached memorandum of Wilfred R. Caron, the General Counsel of the United States Catholic Conference. After reviewing relevant judicial decisions and the history of the Religion Clauses of the First Amendment, it sets forth one possible formulation for an amendment which would protect the rights voluntarily to pray and to receive religious instruction under private auspices on public premises. The Committee may wish to consider that proposal, on the understanding that the United States Catholic Conference would support a proposed constitutional amendment of such tenor and effect.

Again, I express my appreciation for the opportunity to submit this statement on behalf of the United States Catholic Conference.

UNITED STATES CATHOLIC CONFERENCE
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 (202) 659-6690

Office of General Counsel

May 6, 1983

MEMORANDUM

TO: Monsignor Hoye

FROM: Wilfred R. Caron

RE: Senate Joint Resolution 73 ("S.J. Res. 73")

At your request, I have prepared this memorandum in aid of your statement to be filed concerning S.J. Res. 73 with the Subcommittee on the Constitution of the Senate Judiciary Committee. The primary focus is upon the constitutional law pertaining to prayer and religious instruction on public premises, and the legal effect of S.J. Res. 73 in those areas.

I. LEGAL BACKGROUND: MAJOR JUDICIAL OPINIONS

As a result of judicial interpretations of the Establishment Clause of the First Amendment, children are denied the right voluntarily to participate in prayer or to receive religious instruction in the faith of their choice at the public schools they attend. The exclusion of voluntary prayer and religious instruction from public education is rooted in decisions of the United States Supreme Court during the last four decades.

A. Religious Instruction

In McCollum v. Board of Education[1/] the Court held unconstitutional a released time program under which public school children in grades four through nine were permitted once a week to attend classes in religious instruction. The classes

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1/ 333 U.S. 203 (1948).

were conducted in regular classrooms during school hours by Protestant teachers, a Jewish rabbi, and Catholic priests, employed at no expense to school authorities by a private voluntary association of interested citizens. The Court held that the program utilized the tax-established and tax-supported public school system to aid religious groups to spread their faith in violation of the Establishment Clause.

Four years later, in Zorach v. Clausen[2/] the Court upheld a statutory program which permitted public schools to release students for one hour during the school day in order to attend religious centers for religious instruction or devotional exercises. Declining to read into the Constitution a philosophy of hostility to religion, the Court concluded that it would have to press the concept of separation of church and state to extremes to condemn the statute on constitutional grounds.[3/] Writing for the majority, Justice Douglas stated:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.[4/]

However, Zorach's theme of accommodation did not diminish the impact of McCollum in the slightest.

McCollum purged the value system at work in the public schools of the leavening influence of religious instruction under private auspices. Its progeny completed the work of secularization in the area of prayer.

B. Prayer

In Engel v. Vitale[5/] the Court struck down recitation of a short, non-denominational prayer composed by state officials. The practice had been upheld by the New York Court of Appeals provided no student was compelled to join in prayer. The

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2/ 343 U.S. 306 (1952).

3/ Id. at 313.

4/ Id. at 313-14.

5/ 370 U.S. 421 (1962).

Supreme Court disagreed, holding that under the Establishment Clause 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 the government."[6] The Court went on to note that the Establishment Clause was added to the Constitution to assure that the prestige of government would not be used "to control, support or influence the kinds of prayer the American people can say ...."[7]

One year later the Court decided the companion cases of School District of Abington v. Schempp and Murray v. Curlett.[8] The Court invalidated two state statutes requiring, respectively, (i) a daily reading from the Bible, and (ii) a daily reading from the Bible or the recitation of the Lord's Prayer. In both instances attendance at these exercises was voluntary. The Court concluded that both laws required religious exercises in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion.[9]

In a relatively recent case, Stone v. Graham,[10] the Court held unconstitutional the posting in public school classrooms of a copy of the Ten Commandments. The statute involved required that the cost of the copies be funded only through voluntary contributions made to the state for that purpose. The Court concluded that the statute had no secular legislative purpose and, therefore, was unconstitutional under criteria usually applied by the Court in Establishment Clause cases.[11]

6/ Id. at 426.

7/ Id. at 429.

8/ 374 U.S. 203 (1963).

9/ Id. at 225.

10/ 449 U.S. 39 (1980) (per curiam).

11/ The Court utilizes a three-part test. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third the statute must not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U. S. 602, 612-613, (1971) (citations omitted). Cf. Larson v. Valente, 102 S.Ct. 1673 (1982).

What can be gleaned from these decisions is that the Court will hold unconstitutional any voluntary program of prayer or religious instruction in public elementary and secondary schools. Certainly this is the message that has been received by lower courts, as evidenced by recent decisions of which the following are typical.

In Lubbock Civil Liberties Union v. Lubbock Independent School District,[12] the court invalidated a policy of a public school board that permitted students to meet on the same basis as other groups for any educational, moral, religious, or ethical purpose. In Karen B. v. Treen,[13] a state statute allowed classroom teachers to permit students to offer a prayer, or to offer a prayer themselves if no student volunteered. The statute was held invalid even though no student could be required to participate or to be present during the time prayer was being offered. In Collins v. Chandler Unified School District,[14] the court found unconstitutional a practice in a public high school allowing a student to open student assemblies (attendance at which was voluntary) with a prayer. In Brandon v. Board of Education,[15] a public high school's refusal to permit a student group to pray in a classroom before school hours was found not to violate the group's free exercise or free speech rights, even though other student organizations were allowed to use school facilities.

C. Places Other Than Schools

The wedge driven between religious values and the public education of children is but part of relentless efforts by some to empty all our public institutions of any sense of religious values. These activities include efforts to exclude chaplains

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12/ 669 F.2d 1038 (5th Cir. 1982), cert. denied, 103 S.Ct. 800 (1983).

13/ 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982).

14/ 644 F.2d 759 (9th Cir. 1981), cert. denied, 454 U. S. 863 (1981).

15/ 635 F.2 971 (2nd Cir. 1980), cert. denied, 102 S.Ct., 970 (1981).

and prayer from state and national legislatures,[16] to remove religious Christmas displays from public places,[17] and to prevent religious leaders from conducting religious services on public property,[18]. The results in the adjudicated cases amply warrant the inclusion of public places other than schools in a constitutional amendment.

II. MISCONSTRUCTION OF THE ESTABLISHMENT CLAUSE

Careful scholarship reveals that the Establishment Clause was meant to foster religious liberty by preempting religious tyranny, not to erect a wall of separation which renders our public institutions inhospitable to religion and religious values. The results in cases such as McCollum, Engel and Schempp lack fidelity to the actual purpose of the Founding Fathers. Annexed as an Addendum to this memorandum is a portion (pages 7 to 26) of the brief amicus curiae which we filed in Mueller v. Allen now pending in the Supreme Court of the United States, No. 82-195. Those pages state succinctly the precise history and purpose of the Religion Clauses, and demonstrate the interpretational errors which have so significantly influenced the decisional law.

A constitutional amendment to overcome the effects of the cases discussed above is essential to keep faith with our forbears whose vision of the work of religion in our public institutions embraced a proper harmony and condemned only oppression. Indeed, the Establishment Clause cases in other areas of concern strongly suggest a need for a constitutional amendment which would revive entirely the authentic spirit and purpose of the Religion Clauses.

16/ See Chambers v. March, 675 F.2 228 (8th Cir. 1982), cert. granted, No. 82-23, 103 S.Ct. 292 (1982); Murray v. Buchanan, No. 87-1301 (D.C. Cir. March 9, 1982).

17/ See Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982), cert. granted, No. 82-1256, 51 U.S.L.W. 3756 (1983); Citizens Concerned for Separation of Church and State v. City and County of Denver, 526 F. Supp. 1310 (D. Col. 1981).

18/ See O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

III. LEGAL EFFECT OF S.J. RES. 73

In essence, S.J. Res. 73 seeks to protect voluntary prayer in public schools and other public institutions from impingement by provisions of the Constitution, as construed by the courts. It does not, explicitly or by necessary implication, create a federal right to pray. In consequence, voluntary prayer in non-federal public places would be dependent upon the constitutional or statutory law of a state, subject to applicable federal constitutional guarantees (e.g., free speech and free exercise) whose probable effect is uncertain and cannot be adequately assessed in the absence of concrete circumstances. The legal situation with respect to prayer undoubtedly would vary among the several states, thereby creating diversity in an area of national, constitutional concern. Finally, S.J. Res. 73 does not, expressly or by necessary implication, extend its effect to religious instruction in public schools.

S.J.Res. 73 does not embody a policy which considers voluntary religious instruction in public schools a necessary concomitant to voluntary prayer in those schools. Such an objective would require a substantial modification, perhaps along the following lines:

> No person shall be denied the right voluntarily to engage in individual or group prayer, or to receive religious instruction provided by private auspices, in public places or institutions, including schools, of the several States or the United States.

In contrast to S.J. Res. 73, the foregoing does not explicitly prohibit compulsory participation. Such a provision seems superfluous because (a) the measure, limited to voluntary activities, could not reasonably be interpreted to authorize compulsory prayer or religious instruction, and (b) the First and Fourteenth Amendments already guard against compulsory participation in religious activities[19/] or in activities contrary to one's religious beliefs.[20/]

18/ See O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

19/ See Torcaso v. Watkins, 367 U. S. 488 (1961).

20/ See West Virginia v. Barnette, 319 U. S. 624 (1943).

The history which is most germane to the meaning of the Religion Clauses is the process of their evolution in the First Congress and the ensuing ratification process. Yet, because they were a product of reaction to the Constitution itself, it is necessary to begin at that threshold.

1. Constitutional Convention Of 1787 And Ratification By States

Religion was not a major concern of the Constitutional Convention of 1787. The only reference to religion in the proposed Constitution appeared in Article VI which provided, in part, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[9]

During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia[10] specifically addressed the issue of religious freedom. The ratifying acts of four of them (New Hampshire excepted) addressed the issue of an established religion in terms of preferring one religion over others. Virginia proposed the following amendment on June 27, 1788:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of

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[9] V *Debates on the Adoption of the Federal Constitution* 564 (2d ed. J. Elliot ed. 1836).

[10] Of these states Rhode Island and New York did not make a recommendation for a religious amendment but each did include in its ratifying act a declaration of principles which included statements on religious liberty. *See* notes 12 and 13 *infra*.

conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[11] (Emphasis added.)

The scored language appeared in virtually identical form in the ratifying acts of New York,[12] Rhode Island,[13] and North Carolina.[14] Desirous of protecting its own religious establishment,[15] New Hampshire proposed an amendment reading: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[16]

In contrast, there was substantial opinion that the explicit protection of religious liberty was unnecessary because the federal government lacked authority over religion, and because adequate protection was supplied by the ban on religious tests in Article VI and by the multiplicity of sects in the country. James Madison was among those who shared this view.[17]

2. Textual Development Of The Religion Clauses

The wording of the Religion Clauses was a compromise between the different texts finally approved by the House and Senate. The Religion Clauses evolved as follows:

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[11] III Elliot, *supra* note 9, at 659.

[12] I *id.* at 328.

[13] *Id.* at 334.

[14] IV *id.* at 244.

[15] *See* Corwin, *The Supreme Court As National School Board*, 14 Law and Contemporary Problems, 3, 11 (1949). New Hampshire's constitution on the date it ratified the Constitution contained a provision under which the legislature could authorize towns, corporate bodies, or religious societies to make provision at their own expense for the support and maintenance of public Protestant teachers of piety, religion and morality. N.H. Const. of 1784, Pt. I, Art. I, Section VI, 4 *American Charters, Constitutions and Organic Laws*— 1492-1908, 2454 (F. Thorpe ed. 1909).

[16] I Elliot, *supra* note 9, at 326.

[17] III *id.* at 330.

HOUSE LANGUAGE

Madison's Proposal — June 8

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Select Committee — July 18

No religion shall be established by law, nor shall the equal rights of conscience be infringed.

Livermore's Language — August 15

Congress shall make no laws touching religion, or infringing the rights of conscience.

Ames Language — August 20

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

Final Text — August 24

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

SENATE LANGUAGE

September 3

Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.

Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.

Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

Congress shall make no law establishing religion or prohibiting the free exercise thereof.

Final Text — September 9

Congress shall make no law establishing articles of faith or mode of worship or prohibiting the free exercise of religion . . . .

COMPROMISE

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof
> . . . .

Nothing in the House and Senate proceedings suggests that the thrust of the compromise differed in any material degree from the final House and Senate versions. It was directed against the preferment or establishment of religion.

3. The House Of Representatives

The major proceedings in the House took place on August 15, 1789, although final action did not occur until August 24th.

Madison Introduces First Version. The first version of the Religion Clauses was among a number of amendments to the Constitution proposed by Madison on June 8, 1789. It provided:

> The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789) (emphasis added). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution," *id.*, and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 433.

Select Committee's Version. The amendments were referred to a Select Committee. Because of the diversity of views on religious liberty among the states, it is important to note the Committee consisted of one representative (including Madison) from each state. *Id.* at 665. The Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been

deleted.[18] Deletion of that word reflected a concern that the new government might be viewed as national rather than federal, with authority over state practices beyond its enumerated powers (discussed below at 23).

Madison Explains Intent. On August 15th the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730. He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended." *Id.*

Concern Amendment Might Harm Religion. The language of the Select Committee's proposal ("No religion shall be established by law . . . .") evoked limited concern that it might be construed adversely to religion. Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." *Id.* at 729.[19] Benjamin Huntington of Connecticut agreed with Madison's statement of the intent, but he also expressed concern "that the words might be taken in such latitude as to be extremely harmful to the cause of religion." 1 *Annals* at 730. To illustrate, Huntington suggested the inability of a federal court to compel persons to support the religious societies to which they belonged, "for a support of ministers, or building of places of worship might be construed into a religious establishment."

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[18] National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

[19] At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. *See* W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 7 (1978).

Id. At the time, Connecticut authorized religious societies to tax their members for support.[20]

Madison Restates Intent. To assuage concerns such as those expressed by Sylvester and Huntington, Madison moved to insert the word "national" before religion which he thought "would point the amendment directly to the object it was intended to prevent." 1 *Annals* at 731. He "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.*

Samuel Livermore of New Hamshire was not satisfied with Madison's motion but did not elaborate on his objections. *Id.* Elbridge Gerry of Massachusetts also objected to the insertion of the word "national." Gerry's discussion reflected concerns expressed by opponents of the Constitution in state ratifying conventions that the Constitution established a national government rather than a federal government. *Id.* Madison withdrew his motion, but denied insertion of the word "national" would imply the government was a national one. *Id.*[21]

Livermore's Amendment. Livermore moved to amend the language to read "that Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals* at 731. This proposal is identical, except for a stylistic change, to that recommended by New Hampshire when it ratified the Constitution, above at 8, and can be attributed to a desire to protect her own religious establishment.[22] Livermore's proposal, which passed on August 15 without any recorded debate, was not the language finally adopted by the House.

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[20] *See* I A. Stokes, *Church and State in the United States* 411-12 (1950).

[21] In the course of debate, Gerry had suggested that the amendment would "read better if it was that no religious doctrine shall be established by law." 1 *Annals* at 730. Roger Sherman of Connecticut thought the amendment unnecessary because Congress had no authority whatever delegated by the Constitution to make religious establishments. *Id.* Daniel Carroll of Maryland was in favor of the amendment because it would tend to conciliate the minds of those who felt the rights of conscience were not well secured under the Constitution. *Id.*

[22] Corwin, *supra* note 15.

Final House Text. On August 20th the House passed the motion of Fisher Ames of Massachusetts (the last state to abandon an established religion in 1833) to change the wording to "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 1 *Annals* at 765. With minor stylistic changes, it was ultimately sent to the Senate on August 24th. *Id.* at 778. The *Annals of Congress* do not record the debate, if any, on the Ames wording.

Insofar as establishment is concerned, the Ames and House versions are indistinguishable in substance from that proposed by the Select Committee. Madison's explanations of intent give importance to this fact.

4. The Senate

On September 3rd the Senate twice agreed to amend the language approved by the House. First, it approved this language: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."[23] The Senate then rejected two other versions of the amendment[24] and a motion that the entire amendment be stricken. I DePauw, *supra* note 23, at 151. The Senate finally approved: "Congress shall make no law establishing religion or prohibiting the free exercise thereof." *Id.*

On September 9th the Senate passed its final version, to which it added other guarantees of liberty (free speech, free press, peaceable assembly and petition). The Religion Clauses read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ." *Id.* at 166. There are no records of the debates in the Senate.

[23] I *Documentary History of the First Federal Congress of the United States* 151 (L. DePauw ed. 1972).

[24] The rejected versions were (i) "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society," and (ii) "Congress shall make no law establishing any particular denomina-

5. Ratification By The States

The Bill of Rights was ratified by the states with a notable lack of comment on the First Amendment.[25] Only in the Virginia Senate was concern expressed that the First Amendment was not broad enough to prevent preferential treatment among religions (discussed below at 18).

C. DIVERSITY OF RELIGIOUS PRACTICES AMONG THE STATES—VIRGINIA ATYPICAL

The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, but of all the states. Their views and sentiments on the appropriate relation of government to religion varied greatly. The undue influence of Virginia's disestablishment history on Establishment Clause law (discussed below at 16-21) requires a sharp focus on the great diversity of religious practice among the states.

The panorama of opinion on church-state relations found expression in the laws of the states, as succintly catalogued by Sanford H. Cobb:

> Two out of thirteen, Virginia and Rhode Island, conceded full freedom; [o]ne, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical and civil; [s]ix, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina, adhered to religious establishment; [t]wo, Delaware and Maryland, demanded christianity; [f]our, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible; [t]wo, Pennsylvania and South Carolina, imposed a belief in heaven and hell; [t]hree, New York, Maryland, and South Carolina, excluded ministers from civil office; [t]wo, Pennsylvania and South Carolina, emphasized belief in one eternal God; [o]ne, Delaware, required assent to the doctrine of the Trinity; [f]ive, New

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tion of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

[25] C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment* 157 (1963).

> Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, insisted on Protestantism; [o]ne, South Carolina, still referred to religious 'toleration'.[26]

In their practices as well, states varied. For instance, while Virginia prohibited obligatory support of any religious place or ministry,[27] states such as Connecticut, Maryland, New Jersey, North Carolina, Pennsylvania, and Georgia recognized a right to refrain from taxation for the support of a church other than one's own, but permitted taxation for the support of a church which one had joined.[28] Massachusetts and New Hampshire empowered the legislatures to authorize towns and religious societies to provide for the support of public Protestant teachers of piety, religion, and morality, although certificates of dissent directing tax support to one's own church were permitted to be filed.[29]

Virginia opposed incorporation of churches, while Delaware, New Jersey, and Pennsylvania permitted incorporation. Maryland permitted incorporation but was reluctant to grant corporate status in practice. South Carolina opposed incorporation for dissenting churches. New Hampshire approved incorporation for all, but in practice favored the Congregational church.[30]

It thus is evident that the great number of people who ratified the First Amendment in the states did not share a church-state tradition in common with Virginia or each other. Rather, the experience of Virginia was unique to most early Americans. It cannot reasonably be presumed to have been the desired prototype of a people who with deliberation selected

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[26] I A. Stokes, *supra* note 20, at 444, citing S. Cobb, *The Rise of Religious Liberty i t America* 507 (1902).

[27] *Sources and Documents Illustrating the American Revolution* 207 (2d ed. S. Morison ed. 1929).

[28] Antieau, *supra* note 25, at 36-38.

[29] I Stokes, *supra* note 20, at 424, 429.

[30] Antieau, *supra* note 25, at 82-86.

very different models of church-state accommodation. The First Amendment, ratified by representatives and conventions of eleven states, was the product of all these models.

D. THE UNDUE INFLUENCE OF VIRGINIA'S HISTORY UNDER *EVERSON*

The interpretative importance of the generative history of the Establishment Clause was effectively blunted by its omission from consideration in *Everson*, the very threshold of Establishment Clause analysis.

The briefs in *Everson* did not treat the House and Senate proceedings. The principal historical discussion is found in the brief filed by the American Civil Liberties Union which concentrated on Virginia disestablishment history as it was recounted in the early free exercise polygamy case of *Reynolds* v. *United States*, 98 U.S. 145 (1879). Drawing on *Reynolds*, *Everson* tied its conclusions to Virginia history as it is revealed by the Virginia Bill for Religious Liberty, Madison's "Memorial and Remonstrance Against Religious Assessments," and Jefferson's "wall of separation" letter to the Danbury Baptists. The overriding importance attached to this history has been noted in subsequent cases.[31]

Everson's sweeping assertions against aid to religion, restated a year later in *McCollum* v. *Board of Education*, 333 U.S. 203, 210-11 (1948), have since been qualified. *See Walz* v. *Tax Commission*, 397 U.S. at 668; *Board of Education* v. *Allen*, 392 U.S. 236, 250-51 (1968) (Black, J., dissenting). However, they severely restricted the interpretative value of the precise generative history when it was discussed fourteen years later in *McGowan* v. *Maryland*, 366 U.S. 420, 440-42

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[31] *See Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 770; *Braunfeld* v. *Brown*, 366 U.S. 599, 602 (1961); *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961).

(1961). Although that history was fully briefed in *McCollum*,[32] it was not discussed in the majority opinion by Justice Black who had also authored the *Everson* opinion.

Although the Virginia experience is assuredly a relevant part of a balanced historical analysis, it has unduly influenced analysis in Establishment Clause cases. The *Everson* opinion could have given more effect to its observation (330 U.S. at 11) that the meaning of the Religion Clauses cannot be derived solely from the experience of any one colonial group or locale. The discussion which follows further assesses the probative value of Virginia history.

1. Virginia Bill For Religious Liberty.

Everson suggested that the Religion Clauses were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill for Religious Liberty enacted in 1786 ("Virginia Bill"). *Everson* v. *Board of Education*, 330 U.S. at 13. However, the operative language of the Virginia Bill reveals the difficulty with this view:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .

Id. This Bill differed greatly (a) from that which Virginia recommended two years later as an amendment to the Constitution, (b) from that which Madison proposed, and (c) from that which was finally included in the Establishment Clause. The history already discussed makes clear that a number of states would not have agreed to an amendment with the breadth of the Virginia Bill.

To the extent Virginia's estimate of *federal* establishment needs is relevant, no source is more conclusive than the amend-

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[32] Brief for Appellees, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

ment it proposed when it ratified the Constitution. Quoted in full above at 7-8, it bears restatement here:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[33] (Emphasis added.)

Virginia appreciated the very real difference between attending to its own concerns, and those of the federal government in its relations with all the states.

Finally, although its concerns seem unfounded in retrospect, on December 12, 1789 the Virginia Senate expressed grave disappointment over the First Amendement (then the third). Its recorded sentiments concluded that, in all respects including the Religion Clauses, the First Amendment "will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia."[34] The eleventh and last state necessary for ratification, Virginia postponed its acceptance until December 15, 1791, two years later.

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[33] III Elliot, *supra* note 9, at 659.

[34] The 3d amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time render it as powerful and dangerous as if it was established as the national religion of the country.

This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and *betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia* and other states, for the protection of these rights. Journal of the Senate of the Commonwealth of Virginia, 1785-1790, at 62-63 (1828) (emphasis added).

The point here is not substantive, but only that it is imprecise to consider the Religion Clauses as the embodiment of the spirit and accent of the Virginia Bill.

2. Madison's Memorial And Remonstrance Against Religious Assessments

Madison's Memorial must be assessed in context. It was written four years before the Religion Clauses were hammered out. His purpose was to oppose A Bill Establishing A Provision for Teachers of the Christian Religion ("Bill") pending before the Virginia Assembly.[35] It was "an impassioned reaction," *Flast* v. *Cohen*, 392 U.S. 83, 104 n.24 (1968), to a bill intended to impose a tax for the support of ministers at a time when Virginia was in the last stages of established Anglicanism. The Memorial itself indicates that Madison's concept of an established religion was one that enjoyed a preferred status and to which others might be obliged to conform.[36] Madison's opposition to the Bill accords with his stated understanding of the meaning of the Establishment Clause, discussed above at 11-12. It would seem futile to attempt to contradict or vary that understanding by reference to his Memorial.

As demonstrated, the Religion Clauses were the result of a political process which, typically, produced compromise. The Memorial cannot be considered as Establishment Clause bedrock anymore than the Virginia Bill can be so viewed.

3. Wall Of Separation - Jefferson's Metaphor

Thomas Jefferson was in France when the Religion Clauses were developed, debated and adopted.[37] Thirteen years later he employed the "wall of separation" metaphor when he declined a request of the Danbury Baptist Association to pro-

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[35] Both the Bill and Madison's Memorial are appended to Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 63-74.

[36] *See* Corwin, *supra* note 15, at 10.

[37] I. Cornelison, *The Relation of Religion to Civil Government in The United States* 93-94 (1895).

claim a day of fast and prayer in thanksgiving.[38] His refusal may be contrasted with President Washington's proclamation of a day of public thanksgiving and prayer,[39] pursuant to the House's resolution one day after Congress approved the text of the Religion Clauses, 1 *Annals* at 914-15, and with this Court's views in *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Like Madison's Memorial, Jefferson's metaphor should not be put in service of objectives beyond its purpose and intent. The principle he was expounding was government's lack of authority over religious practice or belief. *Reynolds* v. *United States*, 98 U.S. at 164. The hazard of undue reliance on Jefferson's metaphor becomes more apparent when it is considered in light of his demonstrated church-state philosophy.

In 1803, Jefferson submitted for Senate approval a treaty with the Kaskaskia Indians that provided for an annual payment, for seven years, of one hundred dollars for the support of a Catholic priest and a single payment of three hundred dollars to assist in the building of a church.[40] On three occasions Jefferson extended a 1796 act which had authorized the issuance of patents, without payment, for three tracts of land to the Society of the United Brethren for propagating the Gospel among the Heathen.[41] Jefferson was President when tax exemption was first given churches in Washington by Congress. *Walz* v. *Tax Commission*, 397 U.S. at 684 (Brennan, J., concurring). Jefferson had recommended that the various religious sects be allowed to establish schools of theology on the confines of Virginia's public university.[42] Finally, on May 15, 1804, Jeffer-

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[38] "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." *Reynolds* v. *United States*, 98 U.S. at 164.

[39] *See* I Stokes, *supra* note 20, at 487-88.

[40] R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-63 (1982).

[41] *Id.* at 41-46.

[42] *See McCollum*, 333 U.S. at 245-46 (Reed, J., dissenting).

son wrote to The Ursulines of New Orleans, a Catholic religious order of nuns. Responding to their request for assurance of the continued operation of an orphanage, President Jefferson stated: "[T]he charitable objects of your institution cannot be indifferent to any; and it's [*sic*] furtherance of the wholesome purposes of society, by training of it's [*sic*] younger members in the way they should go, cannot fail to ensure it the patronage of the government it is under. Be assured it will meet all the protection which my office can give it."[43] The texts of Jefferson's and The Ursulines' letters are appended.

If one should look to Jefferson, his actions are far more meaningful than his metaphor.

E. ESTABLISHMENT CLAUSE ANALYSIS WITHIN FRAMEWORK OF ESSENTIAL JUDICIAL PRINCIPLES AND GERMANE HISTORY

Before undertaking the necessary analysis, it is useful to establish the essential contours of the decisional context which it is meant to serve.

The Fourteenth Amendment makes the Religion Clauses applicable to the states. *Everson* v. *Board of Education*, 330 U.S. at 8. Although the "clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another," *Larson* v. *Valente*, 102 S.Ct. 1673, 1683 (1982), its reach embraces certain acts and practices which do not themselves constitute a formal establishment or preferment of a religion or religions. *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 216 (1963); *McGowan* v. *Maryland*, 366 U.S. at 442; *Everson* v. *Board of Education*, 330 U.S. at 15-16. Yet an hermetic separation of church and state is not required. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 614

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[43] *See* I Stokes, *supra* note 20, at 677. The original of Jefferson's letter is located in the archives of the Ursuline Academy, 2635 State Street, New Orleans, Louisiana, 70118.

(1971). There is ample room in society for government's benevolent accomomodation of religion which "derives from an accommodation of the Establishment and Free Exercise Clauses." *Walz* v. *Tax Commission*, 397 U.S. at 669-70. That benevolence may not go so far as to jeopardize the fundamental objectives of the Establishment Clause, but there is no transgression merely because aid may free the recipient "to spend its other resources on religious ends." *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. at 658; *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *see also Roemer* v. *Board of Public Works*, 426 U.S. at 747.

For present analytical purposes, there is no more useful framework than this statement of the Chief Justice in *Walz:*

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 669. This states precisely the two levels of operative principle, namely, the immutable and inviolable constitutional precepts against establishment or preferment, and ancillary principles whose implication is necessary to preserve those precepts. The principles which determine the zone of impermissible governmental action should derive their substance from the explicit Establishment Clause objectives.

1. Establishment Clause Language

Whatever may be said of the clarity of the Establishment Clause considered *in vacuo*, its precise meaning emerges when the words are illumined by the process which forged them. The language purposefully and precisely effectuates the readily identifiable objectives of its framers. Had the Establishment segment of the Religion Clauses emerged in the versions previously considered in House and Senate, there would be no doubt that its objectives were the actual establishment or preference

of one or more religions. That was the precise concern of four of the five states which requested such an amendment when they ratified the Constitution. That was the precise objective stated and restated by Madison as sponsor in the House.

There was no tension or doubt related to these objectives, but the choice of words to reach them did engender certain anxieties born of other concerns. References to "national" religion evoked fears of an implication that the new government would be "national" and not "federal." However, more important for present purposes was the concern that the Religion Clauses might interfere with the autonomy of the states in religious matters, particularly the states which still countenanced preferred religion to one degree or another. Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause.[44]

As noted, the Religion Clauses are a House-Senate compromise. The task was to agree on language that would meet the major objectives of the recommending states as described by Madison, but which would respect the concerns of his peers. The language finally selected accomplishes these objectives in a skillful manner and becomes quite unambiguous in light of the concrete realities. The phrase "respecting an establishment" had two jobs to do, *i.e.*, prevent Congress from establishing or favoring a national religion, and prevent Congress from interfering with state religious practices. It did both well, and only violence to its purpose can ensue if suggestions of basic ambiguity are allowed to force other basic objectives upon the Establishment Clause.

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[44] *See* Corwin, *supra* note 15, at 10; Malbin, *supra* note 19, at 17; J. Story, *Commentaries on the Constitution of the United States* 731 (1833).

The phrase "respecting an establishment" cannot reasonably be read to mean concerning or touching upon religion. Indeed, that was the terminology of Livermore's proposal which was eventually rejected. The word "establish," or its derivatives, was consistently used to refer to preferred religions in the amendments recommended by the states, by Madison in the House debate, and in versions of the measure in both House and Senate. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to expand the meaning of "an establishment of religion" or the scope of the Clause. As noted, the use of "respecting" made clear that Congress was also prohibited from passing laws affecting state establishments.[45]

The language of the Clause does not concern itself with religion in general but with the particular problem of *an establishment* of religion. There was no concern expressed during the August 15 debate that Congress might enact a law beneficial to religion or religious institutions. Such benevolence was not perceived as an evil. Had this been the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion" without introducing the more limited concept of "an establishment of religion."

It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon* v. *Kurtzman*, 403 U.S. at 612. However, as demonstrated, such terminology was rejected by the First Congress for the reasons assigned. This *amicus* respectfully submits that the Establishment Clause is clearer than as perceived in *McGowan*, 366 U.S. at 441-42, and a few other cases[46] under the influence of *Everson*.

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[45] Malbin, *supra* note 19, at 16.

[46] The language has been referred to as "opaque," *Lemon* v. *Kurtzman*, 403 U.S. at 612; and as "sparse," *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 820 (White, J., dissenting).

2. Establishment And Religious Liberty

The Establishment Clause is part of the Bill of Rights. The canon *ejusdem generis* suggests, and the history of the Religion Clauses requires, that the Establishment Clause be viewed as a means for protecting individual liberty. *See* Madison's explanation of intent, above at 11. Especially is this so under the Fourteenth Amendment which applies the Establishment Clause to the states. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom.

The Establishment Clause has a functional relationship to religious liberty. As the Court has noted, it reflects the experience of its framers that officially preferred or established religion generates religious intolerance and persecution. *School District of Abington Township* v. *Schempp*, 374 U.S. at 221-22; *Engel* v. *Vitale*, 370 U.S. at 430-32; *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961). Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities of religious institutions which serve the public interest and which pose not the remotest threat to religious freedom.

3. Analytical Impact Of Everson

To the precise objectives of the Establishment Clause, the opinion in *Everson* engrafted a third couched in terms of aid to religion. This is the root of the difficulty, for by so doing this mode of governmental accommodation was rendered opprobrious and was reduced to the level of inherent constitutional vice. The abiding effect is the anguished tension between the common sense and tradition of benevolent neutrality, and the demands of a rule which seems to frustrate more than Establishment Clause objectives could reasonably require. Thus we

have witnessed the invalidation of such benign legislative accommodations as the loan of maps and the payment for costs of field trips to governmental and cultural centers. *Wolman* v. *Walter*, 433 U.S. 229, 248-55 (1977).

In *Walz* the Court noted that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. The presence of any of these elements raises a concern, as observed in *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971). However, whether a particular instance of aid must be nullified calls for a value judgment which must "turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz* v. *Tax Commission*, 397 U.S. at 669.