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U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

May 13, 1982

TO: Edward C. Schmults
Deputy Attorney General

FROM: Jonathan C. Rose JCR
Assistant Attorney General
Office of Legal Policy

SUBJECT: School Prayer Package

Attached is a package of draft materials for the White House relating to the proposed Constitutional Amendment on school prayer. Upon analysis we were unable to find compelling reasons to suggest language different from that agreed upon last week by the Attorney General and Counsellor Meese. We therefore undertook to prepare a background memorandum and possible legislative analysis in support of that language as well as a draft Speaker letter.

The background memorandum is not intended as a dispassionate legal analysis of the possible pros and cons of the proposed language. Rather it is an advocate's brief in support of the position it is proposed that the President take.

Attachment

THE ADMINISTRATION'S PROPOSED CONSTITUTIONAL AMENDMENT RELATING TO SCHOOL PRAYER

May 14, 1982

THE WHITE HOUSE

WASHINGTON

IDENTICAL SUBMISSION
TO THE PRESIDENT
OF THE SENATE

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and referral is a proposal for a constitutional amendment to restore the simple freedom of our citizens to offer prayer in our public schools and institutions. The public expression through prayer of our faith in God is a fundamental part of our American heritage and a privilege which should not be excluded by law from any American school, public or private.

One hundred fifty years ago, Alexis de Tocqueville found that all Americans believed that religious faith was indispensable to the maintenance of their republican institutions. 1 de Tocqueville, Democracy in America 316 (Vintage ed. 1945). Today, I join with the people of this nation in acknowledging this basic truth, that our liberty springs from and depends upon an abiding faith in God. This has been clear from the time of George Washington, who stated in his farewell address:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . [R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940).

Nearly every President since Washington has proclaimed a day of public prayer and thanksgiving to acknowledge the many favors of Almighty God. We have acknowledged God's guidance on our coinage, in our national anthem, and in the Pledge of Allegiance. As the Supreme Court has stated: "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

The founders of our nation and the framers of the First Amendment did not intend to forbid public prayer. On the contrary, prayer has been part of our public assemblies since Benjamin Franklin's eloquent request that prayer be observed by the Constitutional Convention:

> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth -- that God governs in the affairs of men. . . . I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and bye word down to future ages. . . .
>
> I therefore beg leave to move -- that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business. . . .

1 The Records of the Federal Convention of 1787, 451-52 (M. Farrand ed. 1966).

Just as Benjamin Franklin believed it was beneficial for the Constitutional Convention to begin each day's work with a prayer, I believe that it would be beneficial for our children to have an opportunity to begin each school day in the same manner. Since the law has been construed to prohibit this, I believe that the law should be changed. It is time for the people, through their Congress and the state legislatures, to act, using the means afforded them by the Constitution.

The amendment I propose will remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools. However, the amendment also expressly affirms the right of anyone to refrain from prayer. The amendment will allow communities to determine for themselves whether prayer should be permitted in their public schools and to allow individuals to decide for themselves whether they wish to participate in prayer.

I am confident that such an amendment will be quickly adopted, for the vast majority of our people believe there is a need for prayer in our public schools and institutions. I look forward to working with Congress to achieve the passage of this amendment.

Sincerely,

Ronald Reagan

Proposed Amendment

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE ___

"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."

Analysis

ANALYSIS

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I. THE RELIGIOUS HERITAGE OF THE NATION

From the birth of the United States, public prayer and the acknowledgment of a Supreme Being have been a foundation of American life. Government officials have continually invoked the name of God, asked His blessings upon our nation, and encouraged our people to do the same. One of the most striking examples of this invocation of God's blessing and assistance is found in the Declaration of Independence, which proclaims it "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . ." The new nation was established, the authors of the Declaration said, "appealing to the Supreme Judge of the world for the rectitude of our intentions" and "with a firm reliance on the Protection of Divine Providence. . . ."

Similarly, the First Congress, which drafted the language of the First Amendment, not only retained a chaplain to offer public prayers, but, the day after proposing the First Amendment, called on President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many

signal favors of Almighty God." 1/ Nearly every President since Washington (including Lincoln, both Roosevelts and Kennedy) has proclaimed a national day of prayer and thanksgiving. 2/ The First Congress also amended and continued in effect the Northwest Ordinance of 1787, the original text of which provided in part: "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, 1 Stat. 50, 51-52 n.(a).

In his Farewell Address, President Washington urged: "[L]et us with caution indulge the supposition, that morality can be maintained without religion. . . . Reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." 3/ Thomas Jefferson wrote: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" 4/

1/ Rice, The Prayer Amendment: A Justification, 24 S. C. L. Rev. 705, 715 (1972).

2/ 3 Stokes, Church and State in the United States 180-93 (1950).

3/ 35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940).

4/ W. Berns, The First Amendment and the Future of American Democracy 13-14 (1976).

Coins have borne the legend "In God We Trust" since 1865, 31 U.S.C. § 324a, 5/ and this was made the national motto in 1956. 36 U.S.C. § 186. In 1952, Congress directed the President to proclaim a National Day of Prayer. 36 U.S.C. § 169h. In 1954, Congress added the words "under God" to the Pledge of Allegiance to acknowledge this heritage. 36 U.S.C. § 172. The House Judiciary Committee explained:

> This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs. 6/

Many patriotic songs similarly acknowledge dependence upon God and invoke His blessings. One stanza from the National Anthem, 36 U.S.C. § 170, includes the phrases "Praise the Pow'r that hath made and preserved us a nation" and "And this be our motto, 'In God is our Trust.'" 7/ The fourth stanza of "America" reads:

5/ Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting).

6/ H.R. Rep. No. 1693, 83d Cong., 2d Sess. (1954).

7/ Engel v. Vitale, 370 U.S. at 449 (Stewart, J., dissenting).

> Our fathers' God, to Thee, Author of Liberty,
> to Thee we sing.
> Long may our Land be bright with freedom's holy
> light,
> Protect us by Thy might, Great God our King. 8/

Most recently, the House of Representatives adopted a resolution, by a 388-0 vote, reaffirming its practice of retaining a chaplain to begin its sessions with prayer. 9/

These examples only confirm the tradition of publicly declaring and encouraging a belief in and dependence upon God. As the Supreme Court has stated: "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). 10/

8/ Note, Religion and the Public Schools, 20 Vand. L. Rev. 1078, 1094 n.89 (1967). Before Engel v. Vitale, 370 U.S. 421 (1962), the New York City public school students recited this verse each day. Id.

9/ 126 Cong. Rec. H1168-73 (daily ed. March 30, 1982).

10/ The Court's statement in Zorach was simply one example of the long tradition of judicial acknowledgment of our religious heritage. The cases are replete with other examples. See, e.g., Holy Trinity Church v. United States, 143 U.S. 457, 465 (1892):

> [N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.

II. TRADITION OF PRAYER IN THE PUBLIC SCHOOLS

In keeping with the nation's heritage of public prayer, there has been a long tradition of including some form of prayer in the public schools ever since their inception. 11/ As early as 1789, for example, the Boston school committee required schoolmasters "daily to commence the duties of their office by prayer and reading a portion of the Sacred Scriptures." 12/ A commission supporting the establishment of a public school system in New York in 1812 reported that "Morality and religion are the foundation of all that is truly great and good, and are consequently of primary importance." 13/ There was a considerable effort in the 19th century to avoid the use of "sectarian books and sectarian instruction." 14/ For example, the Massachusetts Board of Education headed by Horace Mann removed sectarian instruction from the schools but also prescribed a program of "daily Bible readings, devotional

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11/ See generally, L. Pfeffer, Church, State, and Freedom, 394-99 (1953); Beale, A History of Freedom of Teaching in American Schools 95 (1941); Note, supra note 8, at 1083-84.

12/ Hartford, Moral Values in Public Education: Lessons from the Kentucky Experience 31 (1958).

13/ 2 State of New York, Messages from the Governors (C. Lincoln ed.) 550-51.

14/ 2 Stokes, supra note 2, at 57, quoted in Brief of Intervenors-Respondents at 25, Engel v. Vitale, 370 U.S. 421 (1962).

exercises and the constant inculcation of the precepts of Christian morality." 15/ Thus, the requirement of nonsectarian instruction generally was not thought to preclude prayer or Bible readings without comment in the schools. 16/ Many states had allowed the recitation of nonsectarian prayers or Bible verses in public schools, as long as participation was not compelled. 17/

Prayer in the schools was, in many cases, patterned closely on public prayer in other contexts. For example, in Engel v. Vitale, 370 U.S. 421, 422 (1962), the school prayer

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15/ Id. See also L. Pfeffer, supra note 11, at 284-86.

16/ In 1876, the nonsectarian movement led to consideration of the so-called Blaine amendment in Congress, which would have imposed nonsectarian requirements on the states. In particular, the Senate version of the amendment would have forbidden the teaching of the "particular creed or tenets" of any religious group in the public schools, but it expressly stated that it would not prohibit "the reading of the Bible in any school or institution." 4 Cong. Rec. 5453 (1876). The House passed a version of the Blaine amendment, but the Senate version fell short of a two-thirds vote in the Senate. Id. at 5595. The amendment was defeated in part because of the belief that existing state constitutions were adequate to restrict sectarian instruction and in part because of partisan differences. See L. Pfeffer, supra note 11, at 131-32; Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 218 (1948) (opinion of Frankfurter, J.).

17/ See Abington School District v. Schempp, 374 U.S. 203, 277 nn. 52&53 (1963) (Brennan, J., concurring) (citing cases and source materials).

prepared by the New York State Board of Regents (the Regents' prayer) read:

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

The Regents, in their brief to the Supreme Court as amicus curiae, noted that the exact words "Almighty God" were contained in 34 state constitutions, that every state constitution acknowledged dependence on God in some form, and that an acknowledgment or invocation of "blessings" was contained in 29 state constitutions. 18/ Thus, the recitation of the Regents' prayer in New York schools closely mirrored other official statements reflecting the nation's religious heritage.

III. THE RELIGION CLAUSES OF THE FIRST AMENDMENT AND PUBLIC PRAYER

The First Amendment to the Constitution, which was proposed by the First Congress in 1789, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " In a 1947 decision, the Supreme Court construed the Establishment Clause to be applicable to the states through the due process clause of the Fourteenth Amendment. 19/

In concluding that the First Amendment forbids prayer in public schools, many courts and commentators have

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18/ Brief at 15-16.

19/ Everson v. Board of Education, 330 U.S. 1 (1947). See also Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause).

relied heavily upon James Madison's statement of his views on church and state in his Memorial and Remonstrance Against Religious Assessment. 20/ This document was written four years before the First Amendment was proposed, in opposition to a general tax for the support of religious education in Virginia. Considerable reliance has also been placed on Jefferson's assertion, made thirteen years after the Amendment was drafted, that the Establishment Clause was intended to erect "a wall of separation between church and State," 21/ although, as Justice Stewart has noted, that "phrase [is] nowhere to be found in the Constitution." 22/ Jefferson's statement, while a "powerful way of summarizing the effect of the First Amendment," was "clearly neither a complete statement nor a substitute for the words of the Amendment itself." 23/ Moreover, Jefferson's own subsequent writings, which reflect his belief that nonsectarian

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20/ 2 Writings of James Madison 183-91, reprinted in Everson v. Board of Education, 330 U.S. 1, 63-72 (1947) (Appendix to opinion of Rutledge, J., dissenting). The Supreme Court in Everson and Engel v. Vitale quoted the views of Madison in interpreting the religion clauses of the First Amendment. See Everson, 330 U.S. at 11-13 (opinion of the Court); id. at 37 (Rutledge, J., dissenting); Engel v. Vitale, 370 U.S. at 436.

21/ Everson v. Board of Education, 330 U.S. at 16. This phrase is drawn from a statement by Jefferson, dated January 1, 1802, to the Danbury Baptist Association. The full text appears at 16 Writings of Thomas Jefferson 281-82 (Lipscomb and Bergh, eds. 1903).

22/ Engel v. Vitale, 370 U.S. at 445-46 (Stewart, J., dissenting).

23/ Griswold, Absolute is in the Dark -- A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

religious exercises should not be totally excluded from public education, belie the absolute effect which some have sought to give these words. 24/

The Supreme Court, in holding prayer in public schools to be unconstitutional, embraced an absolutist interpretation of the First Amendment based on its reading of the historical context in which the Amendment was passed. 25/ The Court in Engel v. Vitale, 370 U.S. at 428-29 n.11, relies on the interpretation of history contained in Everson v. Board of Education, 330 U.S. at 11-13 (opinion of the Court), and 33-42 (Rutledge, J., dissenting). Justice Rutledge said:

> No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. . . . In the documents of the times, particularly of Madison, . . . is to be found irrefutable confirmation of the Amendment's sweeping content. . . . [Madison's] Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion." . . . [I]t behooves us in the dimming distance of time not to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise. 330 U.S. at 33-34, 37-38.

24/ See Griswold, supra note 23, at 174; R. Healey, Jefferson on Religion in Public Education 256 (1962).

25/ 370 U.S. at 425-30.

Thus, it is appropriate to examine the record of the First Congress, which proposed the First Amendment, in order to determine what was intended, and whether Justice Rutledge's assessment is correct.

Because Madison introduced the First Amendment in Congress, the Court appears to assume that the final product reflects only his personal views. While the personal views of the sponsor of any legislation may be accorded deference in analyzing congressional intent, one cannot ignore the plain language that emerged and the contribution of other members of Congress to the legislation. Madison's proposal was substantially amended in committee before it was considered by the whole House. 26/ When House floor debate began, the proposal read as follows: "No religion shall be established by law nor shall the equal rights of conscience be infringed." 27/

This language prompted concern among some representatives that the amendment would prevent nondiscriminatory state aid to religion. One voiced a fear that such language "might be thought to have a tendency to abolish

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26/ As introduced, Madison's proposal read: "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 (1789).

27/ Id. at 729.

religion altogether." 28/ Another thought that it should read "no religious doctrine shall be established by law." 29/ Another agreed

> that the words might be taken in such latitude as to be extremely hurtful to the cause of religion . . . . He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all. 30/

Madison explained his position by saying that

> he apprehended the meaning of the words 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 . . . .
>
> Mr. Madison thought if the word 'national' was inserted before religion, it would satisfy the minds of honorable gentlemen. 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. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent. 31/

These passages from the congressional debates prove two points. First, the concern the Congress wished to address by the amendment was the fear that the federal government might establish a national church, use its influence to prefer certain sects over others, or require

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28/ Id.

29/ Id. at 730.

30/ Id. at 730-31.

31/ Id.

or compel persons to worship in a manner contrary to their conscience. Second, in addressing that concern, Congress did not want to act in a manner that would be harmful to religion generally or would defer to the small minority who held no religion.

The version approved by the House read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof or to infringe the rights of conscience." 32/ The Senate specified more narrowly the scope of the clause: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion." 33/

The final version of the First Amendment contained the language "respecting an establishment of religion." The Supreme Court has given the word "respecting" a broad interpretation. 34/ It has forbidden not only a direct establishment of religion but also any act accommodated or even tolerated by state auspices that might encourage religious faith. 35/ It is doubtful, however, that the Congress intended such result. Moreover, in view of the objections raised during the debates that the states should

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32/ Id. at 766.

33/ 2 B. Schwartz, The Bill of Rights: A Documentary History 1153 (1971).

34/ See Engel v. Vitale, 370 U.S. at 428 n.11.

35/ Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

not be precluded from aiding religion, it is more likely that the final language was intended to prevent Congress from passing a law interfering with the existing state laws on the establishment of religion. 36/

Prior to its decisions of the 1960's, the Supreme Court had recognized that the Establishment Clause was not intended to result in absolute separation:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly. 37/

As stated by Justice Stewart, "as a matter of history and as a matter of the imperatives of our free society, . . . religion and government must necessarily interact in countless ways." 38/

36/ Malbin, Religion and Politics 15-17 (1978); Berns, supra note 4, at 8-9; Sky, The Establishment Clause, the Congress and the Schools: An Historical Perspective, 52 Va. L. Rev. 1395, 1418-19 (1966). Thus, as Justice Stewart has noted, "it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." Abington School District v. Schempp, 374 U.S. at 310 (Stewart, J., dissenting).

37/ Zorach v. Clauson, 343 U.S. 306, 312 (1952). The Court went on to suggest that prayers in legislative halls, thanksgiving proclamations, and "all other references to the Almighty that run through our laws, our public rituals, [and] our ceremonies" do not "flout . . . the First Amendment." Id. at 312-13.

38/ Abington School District v. Schempp, 374 U.S. at 309 (Stewart, J., dissenting).

Thus, the foregoing discussion supports the conclusion that the First Amendment was not intended to preclude a reference to or reliance upon God by public officials in prayer, as distinguished from government "establishment" of a particular sect. 39/ This interpretation of the language of the First Amendment is further supported by the fact that the same Congress that passed the First Amendment also retained a chaplain and called for a day of prayer and thanksgiving to God. 40/

IV. JUDICIAL RULINGS RESTRICTING SCHOOL PRAYER

In 1962 and 1963, the Supreme Court decided two cases that held it is an impermissible "establishment of religion" in violation of the First Amendment for a state to foster group prayer or Bible readings by students in the public schools. In Engel v. Vitale, 370 U.S. 421 (1962), the Supreme Court forbade the recitation of the New York State Regents' prayer in New York public schools. The Court ruled that "government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." 370 U.S. at 430. Although it was

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39/ See Berns, supra note 4, at 68-72; Rice, supra note 1, at 709-16.

40/ See text at 1-2, supra.

clear that students were not required to participate in the prayer, the Court appeared to adopt a theory of implied coercion:

> When the power, prestige and financial support of the government is placed behind a particular religious belief, the coercive pressure upon religious minorities to conform to the officially approved religion is plain. Id. at 431.

One year later, in Abington School District v. Schempp, 374 U.S. 203 (1963), the Court struck down a Pennsylvania law requiring that public schools begin each day with readings, without comment, from the Bible. Emphasizing the "complete and unequivocal" separation between church and state in its previous constructions of the First Amendment, 41/ the Court concluded that the purpose and primary effect of Pennsylvania's law was the advancement of religion in violation of the Establishment Clause. 374 U.S. at 222-26.

In construing the Establishment Clause to require strict "neutrality" of the state toward religion, the Court has forbidden the government from placing any support "behind the tenets of one or of all orthodoxies." Id. at 222. The Court also reaffirmed the rule that

> Neither [the states nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid

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41/ 374 U.S. at 219-20, quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952). See also Everson v. Board of Education, 330 U.S. at 18.

> those religions based on a belief in God as against those religions founded on different beliefs. 42/

The prohibition against favoring religion as against non-believers or favoring theistic religions as against nontheistic religions would appear to preclude any action by the states or the federal government affirming a belief in God.

The Court in Schempp rejected the view that religious practices may be defended as being in aid of legitimate secular purposes, and concluded that the provisions to excuse students from participation also provided, under its view of the Establishment Clause, no defense. 374 U.S. at 224-25. In short, any "religious exercises . . . required by the States," even though "relatively minor encroachments" on the Court's concept of neutrality, are to be forbidden. Id. at 225.

In the years following Engel v. Vitale and Abington School District v. Schempp, the courts have increasingly restricted the states from incorporating religious observances into the daily schedule of students in public schools. In one case, for example, a school principal's order forbidding kindergarten students from saying grace before meals on their own initiative was upheld. 43/ In

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42/ 374 U.S. at 220, quoting Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

43/ Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965).

another case, the recitation of a similar verse before meals, but without any reference to God, was held to be a prayer in violation of the Establishment Clause. 44/

More recently, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a one-minute prayer or meditation at the start of the school day. 45/ The lower court found that the practice of permitting student and teacher prayers in the public schools was inconsistent with the "absolute governmental neutrality" demanded by the Supreme Court's interpretation of the First Amendment. 653 F.2d at 901. The Supreme Court has also held that a state statute requiring the posting of the Ten Commandments on classroom walls in public schools was unconstitutional. Stone v. Graham, 449 U.S. 39 (1980).

The principles established in Engel v. Vitale and Abington School District v. Schempp have been extended recently to bar the accommodation or even toleration of students' desire to pray on school property even outside regular class hours. In one case, a court held that a

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44/ DeSpain v. DeKalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

45/ Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982). Accord, Kent v. Commissioner of Education, 402 N.E.2d 1340 (Mass. 1980).

school system's decision to permit students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" on school property before or after class hours violated the Establishment Clause. 46/ Similarly, a state court forbade the reading of prayers from the Congressional Record in a high school gymnasium before the beginning of school. 47/ In another case, a school district's decision to allow student initiated prayer at voluntary school assemblies that were not supervised by teachers was deemed a violation of the Establishment Clause. 48/ In each case, the court found no difference of constitutional dimension between the practice of permitting students to engage in individual or group prayer on public property and the active organization of prayer or readings

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46/ Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1042-48 (5th Cir. 1982); see also Brandon v. Board of Education, 635 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

47/ State Board of Education v. Board of Education, 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970), cert. denied, 401 U.S. 1013 (1971).

48/ Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981).

from the Bible by school authorities, as in Engel v. Vitale and Abington School District v. Schempp. 49/

Finally, with respect to prayer in public buildings other than schools, the Court of Appeals for the District of Columbia Circuit has ruled that atheists have standing to challenge the practice of the Senate and House of Representatives retaining Chaplains to open their sessions with a prayer, although the court has not yet decided whether the practice is unconstitutional. Murray v. Buchanan, No. 81-1301 (D.C. Cir. Mar. 9, 1982). Another court has ruled unconstitutional a state legislature's practice of retaining any particular chaplain to open legislative sessions with prayer. 50/

49/ Id. at 761; Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d at 1042-48; Brandon v. Board of Education, 635 F.2d at 978-79. The recent Supreme Court decision in Widmar v. Vincent, 102 S. Ct. 269 (1981), does not retreat from these principles. In that case, the Court held that a state university may not, consistent with the First Amendment's guarantee of free speech, exclude a student religious group from utilizing university facilities for meetings where those facilities were generally open for use by student groups. As the court pointed out, the question at issue in Widmar "is not whether the creation of a religious forum would violate the Establishment Clause." Id. at 276. Instead, given that the university opened its facilities to general student use, "the question is whether it can now exclude groups because of the content of their speech." Id. In this context, the Court did not believe that the primary effect of the open facilities policy would be to advance religion. Id.

50/ Chambers v. Marsh, No. 81-1077 (8th Cir. Apr. 14, 1982). But see Zorach v. Clauson, 343 U.S. at 312-13 (suggesting that "[p]rayers in our legislative halls" do not "flout[] the First Amendment").

V. THE NEED FOR A CONSTITUTIONAL AMENDMENT

The Supreme Court's decisions that state-composed prayer and Bible reading constitute an "establishment" of religion do not give adequate regard to our religious heritage and misinterpret the historical background of the First Amendment. The Establishment Clause was not intended to prohibit governmental references to or affirmations of belief in God. 51/ As Justice Story concluded, "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation" at the time the First Amendment was drafted. 52/ Thus, the history of the Establishment Clause and Free Exercise Clause do not support the Supreme Court's conclusion that public prayer in schools is unconstitutional. As stated by Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General of the United States: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." 53/

51/ See text at 7-14 supra. See also T. Cooley, General Principles of Constitutional Law of the United States, 224-25 (3d ed. 1898); 3 J. Story, Commentaries on the Constitution of the United States, § 1868 (1833).

52/ J. Story, supra note 51, § 1868.

53/ Griswold, supra note 23, at 174.

Moreover, the courts have extended the principles of Engel v. Vitale and Abington School District v. Schempp to proscribe not only government-sponsored prayer, but also voluntary prayer initiated by students. By prohibiting students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours, the courts' concern with the Establishment Clause has overshadowed the First Amendment right of students to free exercise of religion. As Justice Stewart has stated, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." 54/ Although it can be argued that those parents could send their children to private or parochial schools, the Supreme Court has stated that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." 55/

The unintended but inevitable result of current judicial interpretations of the Establishment Clause is not state neutrality but a complete exclusion of religion which, as Justice Stewart noted, is, in effect, state discouragement of religion:

54/ Abington School District v. Schempp, 374 U.S. at 312 (Stewart J., dissenting).

55/ Id. at 312-13, quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

> For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least as government support of the beliefs of those who think that religious exercises should be conducted only in private. 56/

Commentators have noted that the government neutrality between theistic and non-theistic beliefs that the Supreme Court has sought to achieve is, indeed, unachievable:

> The fallacy of the Supreme Court's "neutrality" concept is that it is impossible for the government to maintain neutrality as between theistic and non-theistic religions without implicitly establishing an agnostic position. Agnosticism, however, is a non-theistic belief. The choice, then, is not, as the Court and its apologists have said, between "neutrality" and government encouragement of theism. The choice is between government encouragement of theism and government encouragement of agnosticism. 57/

A constitutional amendment allowing school prayer is needed not only because it is consistent with and more accurately reflects the original intent of the First Amendment than the current judicial interpretations, but also because it would allow religious and educational

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56/ Abington School District v. Schempp, 374 U.S. at 313 (Stewart, J., dissenting).

57/ Rice, supra note 1, at 714. See also People ex rel. Vollmar v. Stanley, 255 P. 610, 616 (Colo. 1927).

decisions of essentially local concern to be made by states and localities rather than the federal judiciary. For over 170 years, school prayer issues were resolved at the state and local levels by the residents of the affected communities. Their choices regarding school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

Finally, and most importantly, this amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. 58/ Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of self-reflection and meditation. 59/ Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society. A prayer such as the one struck down in Engel v. Vitale, for instance, was promoted by the New York State Regents to encourage children to take

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58/ Polls have shown that public approval of voluntary school prayer ranges from 69 to 85 percent of the population. See New York Times, May 7, 1982, p. B 40. Such clear public sentiment in favor of school prayer supports the need for this constitutional amendment.

59/ For example, the brief Bible readings in Abington School District v. Schempp were designed to serve such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions, and the teaching of literature." Id., 374 U.S. at 223.

a moment to think of their blessings and the good fortune for which they should be thankful. 60/ Introducing children to such a practice can benefit the children and the public good.

VI. ANALYSIS OF THE PROPOSED AMENDMENT

The proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before Engel v. Vitale and Abington School District v. Schempp were decided; i.e., when prayers such as the Regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

A. Elimination of the Prohibition Against Prayer

The proposed amendment provides that "Nothing in this Constitution shall be construed to prohibit individual or group prayer. . . ." This language is intended to overrule Engel v. Vitale, which forbade the reading of brief

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60/ See "The Regents Statement on Moral and Spiritual Training in the Schools" (Nov. 30, 1951), Appendix A to Brief for Board of Regents as Amicus Curiae, Engel v. Vitale, 370 U.S. 421 (1962).

state-composed prayers, and Abington School District v. Schempp, which forbade readings from the Bible. The proposed amendment would, therefore, make clear that the Establishment Clause of the First Amendment could no longer be construed to prohibit the government's encouragement or facilitation of individual or group prayer in public schools, and that students should be allowed to participate in such prayer with the support of school authorities.

The language of the proposed amendment would also foreclose an argument that the Free Exercise Clause of the First Amendment could be construed to forbid group prayer. Thus, the amendment rejects the "implied coercion" theory advanced in Engel v. Vitale, 370 U.S. at 431, which presumes that any group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion, and that therefore no prayer is constitutionally permissible. 61/ However, as discussed below, the proposed amendment expressly protects the right of objecting students not to participate in prayer. This provision is sufficient to protect the rights of those who do not wish to participate without denying to all others who desire to pray an opportunity to do so.

61/ See also Abington School District v. Schempp, 374 U.S. at 288 (Brennan, J., concurring).

B. Availability of Prayer

The intent of the proposed amendment is to leave the decisions regarding prayer to the state or local school authorities and to the individuals themselves, who may choose whether they wish to participate. The proposed amendment would not require school authorities to conduct or lead prayer, but would permit them to do so if desired. Group prayers could be led by teachers or students. Alternatively, if the school authorities decided not to conduct a group prayer, they would be free to accommodate the students' interest in individual or group prayer by permitting, for example, prayer meetings outside of class hours or student-initiated prayer at appropriate, nondisruptive times, such as a brief prayer at the start of class or grace before meals. School authorities could, of course, develop reasonable regulations governing the periods of prayer, in order to maintain proper school discipline.

The language of the proposed amendment would remove the prohibition on prayer imposed by judicial construction of the First Amendment, but is not intended to create a new, affirmative constitutional right to prayer. The source of a right to prayer is found in the First Amendment's guarantees of free exercise of religion and freedom of speech, although most courts considering the question have rather narrowly construed the Free Exercise Clause as applicable only in the case of an "inexorable

conflict with deeply held religious beliefs." 62/ The proposed amendment would not, by its terms, alter past constructions of the Free Exercise Clause or the Free Speech Clause as a source of a right to prayer. Of course, to the extent that a right of prayer could be based on the Free Exercise Clause or the Free Speech Clause, the right would remain subject to reasonable state restrictions governing the time, place, and manner of its expression. 63/

C. Type of Prayer

If school authorities choose to lead a group prayer, the selection of the particular prayer -- subject of course to the right of those not wishing to participate not to do so -- would be left to the judgment of local communities, based on a consideration of such factors as

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62/ See Brandon v. Board of Education, 635 F.2d at 977-80; Stein v. Oshinsky, 348 F.2d at 999-1002; Hunt v. Board of Education, 321 F. Supp. 1263 (S.D. W.Va. 1971); Kent v. Commissioner of Education, supra.

63/ See, e.g., Stein v. Oshinsky, 224 F. Supp. 757, 760 (E.D.N.Y. 1963) ("The rights of [students] to say voluntary prayer must be subject to such reasonable rules and regulations as may be prescribed by the school authorities"), rev'd on other grounds, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965). Cf. Heffron v. International Society for Krishna Consciousness, 101 S. Ct. 2559 (1981) (restriction on distribution of religious literature upheld); Grayned v. City of Rockford, 408 U.S. 104 (1972) (restriction on demonstration near school upheld). Thus, school officials would be able to schedule periods of prayer in a manner so as not to cause disruptions during the school day; similarly, a judge or legislative committee could limit prayer to the opening of a day's session, not during the middle of a jury argument or a hearing.

the desires of parents, students and teachers and other community interests consistent with applicable state law. The amendment does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for intervention by federal courts to determine whether or not particular prayers are appropriate for individuals or groups to recite.

The proposed amendment also does not specifically limit prayer in public schools and other public institutions to "nondenominational prayer." A limitation to "nondenominational prayer" might well be construed by the federal courts to rule out virtually any prayer except one practically devoid of religious content. Because of the Supreme Court's current construction of the Establishment Clause, 64/ any reference to God or a Supreme Being could be viewed as "denominational" from the perspective of a non-theistic sect. 65/ Readings from the Bible and other identifiably Judeo-Christian sources similarly might be excluded as "denominational." 66/

64/ See Abington School District v. Schempp, 374 U.S. at 220; Engel v. Vitale 370 U.S. at 430-33.

65/ Such non-theistic religions might include "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others." Torcaso v. Watkins, 367 U.S. at 495 n.11. One court has construed Transcendental Meditation as a "constitutionally protected religion." Malnak v. Yogi, 592 F.2d 197, 214 (3d Cir. 1979).

66/ See Abington School District v. Schempp, 374 U.S. at 282 (Brennan, J., concurring) (asserting that "any version of the Bible is inherently sectarian").

Moreover, a limitation to "nondenominational prayer" would not only preclude arguably sectarian prayer that may be promoted by the state but also would prevent individuals or groups, acting on their own and with no encouragement from the state, from participating in sectarian prayer in public places. The amendment is intended to enable the state to allow voluntary, privately-initiated prayer in public places, such as saying grace before meals or attending an informal prayer meeting before or after school. 67/ It would clearly be inappropriate to constitutionally limit such privately-initiated prayer to "nondenominational" expression.

The determination of the appropriate type of prayer is a decision which should properly be made by state and local authorities. That was indeed the practice throughout most of this nation's history. In fact, the long history of prayer in public schools has produced a considerable body of state court decisions, decided before Engel v. Vitale and Abington School District v. Schempp, which clarify the scope of permissible prayers under state law. Because the proposed amendment merely would remove the bar of the Establishment Clause as construed by the Supreme Court, state laws which prohibit or restrict sectarian

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67/ Cf. Stein v. Oshinsky, 348 F.2d 971 (grace before meals); Brandon v. Board of Education, 635 F.2d 999 (prayer meeting before school).

instruction in public schools would not be affected. For example, a number of state courts construed state constitutions or laws to prohibit sectarian instruction but not to prohibit readings from the Bible without comment or other brief devotional exercises. 68/ In a few states, state courts ruled against prayer in public schools, 69/ and those decisions would not be affected by the proposed amendment. In other areas, the state and local authorities would be left to determine the appropriate rules for prayer in light of current conditions. Thus, the proposed amendment is not intended to establish a uniform national rule on prayer, but to allow the diversity of state and local approaches to manifest themselves free of federal constitutional constraints.

The national heritage of prayer in the public schools and elsewhere suggests the types of prayer that might be followed in particular areas. Prayers could be based upon established religious sources, such as the

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68/ See Abington School District v. Schempp, 374 U.S. at 277 n.52 (Brennan, J., concurring) (citing cases in Colorado, Florida, Georgia, Iowa, Kentucky, Kansas, Michigan, Minnesota, New Jersey, New York, Tennessee and Texas). The Appendix to the Brief for Appellants in Abington School District v. Schempp summarized 25 state laws or constitutional provisions which were construed to permit readings from the Bible. These laws are consistent with the experience of many states which, although removing sectarian instruction from the schools, nevertheless permitted readings from the Bible. See text supra at 6.

69/ See Abington School District v. Schempp, 374 U.S. at 275 n.51 (Brennan, J., concurring) (citing cases from Illinois, Louisiana, Nebraska, South Dakota, Washington State, and Wisconsin).

Bible, 70/ or could be suggested by school authorities in light of local circumstances. Examples of such prayers composed or selected by school officials are the Regents' prayer in Engel v. Vitale, and the fourth verse from "America," which was recited by New York City schoolchildren. 71/

D. Applicability of the Proposed Amendment

The amendment by its terms would apply to prayer in "public schools or other public institutions." The intent of this language is to make the remedial provisions of this amendment coextensive with the reach of the First Amendment's Establishment Clause as construed by the Supreme Court. The prohibitions of the Establishment Clause do not forbid prayer in private schools or institutions, and so the present amendment need not address the issue.

Although most controversies relating to public prayer arise in the context of public schools, the proposed amendment is drafted to apply to prayer in other public institutions, including prayers in legislatures. 72/ In

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70/ In Abington School District v. Schempp, 374 U.S. at 207, 211, the school authorities permitted the use of different versions of the Bible.

71/ See note 8 supra.

72/ One court has ruled unconstitutional a state legislature's practice of retaining a chaplain to offer prayers, and a similar challenge to chaplains in Congress is pending. See text at 19 supra.

such public institutions, prayer could be permitted to the extent and under the conditions determined by the authorities in charge.

E. No Person Can Be Required to Participate in Prayer

The second sentence of the proposed amendment guarantees that no person shall be required to participate in prayer. This prohibition assures that the decision to participate in prayer in public schools and other public institutions will be made without compulsion. Those persons who do not wish to participate in prayer may sit quietly, occupy themselves with other matters, or leave the room. Reasonable accommodation of this right not to participate in prayer must be made by the school or other public authorities. Thus, the exercise of the right to refrain from participating cannot be penalized or burdened.

The proposed amendment does not refer to "voluntary" prayer, but incorporates the concept of voluntariness into the second sentence, which assures that students or others will not be required to participate in prayer if they do not wish to do so. One reason for this formulation is to make clear that the amendment rejects the "implied coercion" theory of Engel v. Vitale, 370 U.S. at 431. The term "voluntary prayer" might, moreover, be read to refer only to student-initiated prayer. The amendment is intended to include more than this. Public authorities should have the right to conduct public prayers for those

who desire to participate, subject only to the express right of those who do not wish to participate not to do so.

The guarantee against required participation in prayer parallels and reaffirms the protection already afforded by the Free Exercise Clause of the First Amendment. 73/ It is intended to be analogous to the Supreme Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), which held that students cannot be compelled to recite the Pledge of Allegiance. 74/ Thus, the second sentence of the proposed amendment assures that students and others will never have to make a forced choice between their religious beliefs and participation in a state-sponsored prayer. Indeed, the second sentence of the proposed amendment provides greater protection than the Free Exercise Clause, because a person desiring not to participate in prayer need not show a

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73/ See McDaniel v. Paty, 435 U.S. 618 (1978) (state statute barring ministers from service in state legislature violates right to free exercise of religion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compulsory school attendance law violates free exercise rights of Amish parents); Sherbert v. Verner, 374 U.S. 398 (1963) (conditioning unemployment benefits on acceptance of Saturday work violates free exercise rights of a Seventh-Day Adventist).

74/ See also Torcaso v. Watkins, 367 U.S. 488 (1961) (state law requiring affirmation of belief in God as a condition to public employment violates free exercise rights).

religious basis for his belief. 75/ Accordingly, there would be no need for an inquiry into the religious basis for a person's decision not to participate in prayer.

The fact that one or more students do not wish to participate in prayer, however, would not mean that none of the students would be allowed to pray. The provision forbidding required participation in prayer is intended to be sufficient to protect the interests of those students. As the Supreme Court stated in West Virginia State Board of Education v. Barnette, 319 U.S. at 630, with respect to the Pledge of Allegiance, "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so." This would be the proper rule to apply with respect to school prayer: persons who do not wish to participate in prayer should be excused or may remain silent, but that should not interfere with or deny the rights of others who do wish to participate.

75/ A person relying only on the right to free exercise of religion must show a fundamental conflict between religious convictions and state-imposed obligations, but, even so, the state may justify an infringement upon religious liberty by showing that it is "essential to accomplish an overriding government interest." United States v. Lee, 102 S. Ct. 1051, 1055 (1982), citing, Thomas v. Review Bd. of Indiana Employment Sec., 101 S. Ct. 1425 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963). In Lee, the Court did not dispute that mandatory payment of social security taxes violates Amish religious beliefs. 102 S. Ct. at 1055. The Court nonetheless found that the overriding public interest in a strong social security system justifies this burden on religious beliefs, and that the imposition of such a burden did not violate free exercise rights. Id. at 1056-57.