LC 111

71-269 A
467/98 (R)

RECENT DEVELOPMENTS IN THE AREA OF RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS AND OTHER PUBLIC PLACES

HERBERT A. DANNER
February 28, 1969
Revised and Updated by
DAVID H. BARIS
Legislative Attorney
American Law Division
September 15, 1971
With Addendum November 9, 1971

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Introduction

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

U.S. Constitution, Amendment I

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws..."

U.S. Constitution, Amendment XIV

From the time that the Bill of Rights was ratified to the late 1940's, the Establishment Clause, as applied to the federal government, or to the states through the due process clause of the 14th Amendment, had not been the subject of consideration by the Supreme Court. It was not until 1948, in Illinois ex rel McCollum V. Board of Education, 333 U.S. 203 (1948), that the Supreme Court struck down some form of state action on the grounds that it had violated the Establishment Clause.[1/] However, the pace of litigation and public concern in this area picked up considerably only after the Supreme Court handed down its decisions in Engel v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963), where the Court found state-sanctioned devotional exercises in the public schools to be violative of the Establishment Clause. As lower courts applied the principles enunciated in Engel v. Vitale, supra, and Abington School District v. Schempp, 374 U.S. 203 (1963) to new fact situations, the public response became increasingly hostile to what was viewed by some as an encroachment on the essentially religious character of the American people.

1/ An attempt to define exhaustively the content of the Establishment Clause was undertaken by Justice Black in Everson v. Board of Education, 330 U.S. 1 (1947); however, the "state action" at issue, the reimbursement of transportation costs to parents of parochial school students, was not found to be violative of the Establishment Clause.

Instances of citizen resistance to the pronouncements of the courts are manifested in the Gallatin, Netcong, and Leyden cases. 2/ Recent activity in the Congress also reflects the fact that the controversy has not abated since 1962. Several bills in the Senate and numerous bills in the House calling for an amendment to the Constitution to permit prayers in the public schools and other public places have been introduced. In the House, a discharge petition has been circulating which, if signed by 218 members, would discharge H.J. Res. 191, a prayer amendment proposal from the jurisdiction of the House Judiciary Committee.

This report summarizes the Supreme Court cases on the subject of religious exercises in the public schools, and the lower court decisions which have applied the language of the Court to such diverse situations as erecting a cross on public property and saying a prayer in space. In addition, this report will detail the recent Congressional attempts to alter the effect of the Supreme Court decisions.

2/State Board of Education v. Board of Education of Netcong, N.J., 262 A. 2d 21 (1970), aff'd 270 A. 2d 413 (1970); Sullivan v. School Committee of the Town of Leyden, Mass. Super, Ct., Suffolk County, No. 91101 Eq. (March 31, 1970); American Civil Liberties Union v. Albert Gallatin Area School District, 307 F. Supp. 637 (W. D. Pa. 1969), aff'd 438 F. 2d 1194 (3rd Cir., 1971).

PART I

The Supreme Court decisions in Engel v. Vitale, 370 U.S. 421 (1962) and in Abington School District v. Schempp 374 U.S. 203 (1963), if read together, stand for the proposition that a state or its instrumentality cannot institutionalize or sanction any form of religious exercise in the public schools, notwithstanding the fact that students might have the option to refrain from participating. However, because the language of the Court in these opinions has not been unambiguous, an interpretation has been made by some governmental bodies that a state-sanctioned prayer in the public schools would not be violative of the First Amendment if only it were shown to be truly voluntary. Yet, in the majority decision in Engel, supra, Justice Black wrote:

> ...the fact that its [the prayer's] observance on the part of students is voluntary can[not] serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause ...The Establishment Clause...is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Despite this language, many of the school plans scrutinized by the lower courts in the cases that follow have involved an attempt by the school authorities to avoid the element of coercion. If a truly voluntary, non-coercive prayer program were devised, it was believed, this fact would place the program outside of the ambit of the Engel and Abington holdings. Nevertheless, the lower courts have consistently held that

a formal action by school authorities in providing for a prayer program in public schools cannot be constitutionally justified on the basis that the students are not coerced into attending the program.

It is important to note what Engel and Abington did not decide. They did not determine whether a religious exercise resulting from a spontaneous expression on the part of the students, without any overt encouragement from the state, would be violative of the Establishment Clause. In the cases which follow, some of the courts have pointed out that the participation of students in religious exercises in itself is not contrary to the Establishment Clause. It is only when the school authorities take an action in support of the exercise that the Establishment Clause has been deemed to have been violated.

The Engel and Abington decisions did not affect the right of school districts to hold non-religious activity on school premises. The study of the Bible as literature in the public schools, for example, would be untouched by the Establishment Clause. 3/ Cases in which the activities in issue were found to be non-religious, and therefore not inconsistent with the Establishment Clause are contained in section C of Part I.

3/Justice Clark, in Abington, supra, p. 225 wrote: "Nothing we have said here indicates that...study of the Bible...when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."

(A) Prayers and Bible Reading

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

On November 30, 1951, the New York State Board of Regents, a state agency which has broad powers over education, adopted "The Regents Statement on Moral and Spiritual Training in the Schools." This statement sponsored the following non-denominational prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country," and suggested that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverance to God." On July 8, 1958, the Board of Education of a Union Free School District in North Hempstead, resolved that the Regents prayer be said daily in the schools. The parents of ten children sought an order of mandamus prohibiting the use of the prayer. They argued that the practice violated the Establishment and Free Exercise Clauses of the United States Constitution. The trial court held that the School Board could authorize, but not require, the recital of the prayer, and had to take affirmative steps to assure that parents knew of the procedure available for getting their children excused from the recital.4/ On appeal the Court of Appeals of New York, that state's highest tribunal, upheld the lower court's ruling. 5/

4/Matter of Engel v. Vitale, 18 Misc 2d 659 (1960).

5/Matter of Engel v. Vitale, 10 N.Y. 174 (1961).

On June 25, 1962, the United States Supreme Court reversed the decision of the New York Court of Appeals. Writing the majority opinion for five members of the court, 6/ Mr. Justice Black held that the prayer recital was an establishment of religion prohibited by the Constitution. In his words,

> ...We think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. 7/

In reply to the respondent's argument that the non-denominational and voluntary character of the prayer withdrew it from the area of constitutional proscription, Justice Black noted some of the differences between the Establishment and Free Exercise Clauses of the First Amendment. Indicating that facts of voluntariness and non-denominational character might serve to withdraw such a prayer from the purview of the Free Exercise Clause, he said the same was not true of the Establishment Clause.

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. 8/

6/Mr. Justice Black was joined by Chief Justice Warren, and Justices Harlan, and Brennan. Justice Douglas concurred separately, Justice Stewart dissented, and Justices Frankfurter and White took no part in the decision.

7/Engel v. Vitale, 370 U.S. 421, 425 (1962)

8/Engel v. Vitale, p. 430

In the majority's view the Regents prayer established the religious beliefs espoused therein, and therefore, under the circumstances, its recitation was unconstitutional. Mr. Justice Stewart, the lone dissenter, felt that the activities were not sufficient to create an "official religion," and were, in fact, just one more expression of recognition of a Supreme Being, similar to the inscription "In God we trust" on United States coins.

Abington School District v. Schempp, 374 U.S. 203 (1963)
Murray v. Curlett

These two cases were joined by the Supreme Court because they presented the same constitutional questions.

In the Abington case, parents of several pupils in the defendant school district objected to the implementation of a Pennsylvania statute that provided for the compulsory reading, without comment, of ten verses of the "Holy Bible" as part of opening exercises in the public schools. 9/ Provision was made for excusing children from attending morning devotionals upon written request of the parents. Petitioners brought suit in federal district court to enjoin enforcement of the statute, on the grounds that it was both an establishment of religion and an interference with the free exercise of religion. In support of their contention, plaintiffs testified that although children could

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9/24 Pa. Stat. §15-1516, as amended by Public Law 1928 (Supp. 1960) December 17, 1959.

be excused from the readings, their absence would be noticed by their classmates, who would think them "oddballs" and possibly put an immoral connotation on their actions. The three-judge court held that the statute was an unconstitutional establishment of religion. Accordingly, it found it unnecessary to pass on the free exercise arguments.10/ The decision was appealed to the U.S. Supreme Court.

The Murray case involved a similar statute in Maryland. 11/ In 1905 the Baltimore Board of School Commissioners adopted a rule pursuant to a statute which provided for the "reading, without comment, of a chapter in the Holy Bible and/or use of the Lord's Prayer." The rule also provided that any child could be excused from the exercises upon the written request of his parents. The petitioners, professed atheists, alleged that the rule violated their freedom of religion, and sought a writ of mandamus in the state courts requiring its cancellation. The trial court sustained a demurrer by the defendants, and the Maryland Court of Appeals, that state's highest tribunal, affirmed by a four to three vote. 12/ The Supreme Court granted the appellant's writ of certiorari. 13

10/Schempp v. Abington School District, 201 F. Supp 815 (1962)

11/Annotated Code of Maryland, Art. 77, §202

12/Murray v. Curlett, 228 Md. 239 (1962)

13/Murray v. Curlett, 371 U.S. 809 (1962)

On June 17, 1963, Mr. Justice Clark delivered the opinion of the court. 14/ Holding both statutes unconstitutional, Justice Clark reasserted the test enunciated by Mr. Justice Frankfurter in the Sunday Blue Law Cases. 15/ He said:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion ...a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Noting that the lower courts in both cases had found Bible reading to be a religious exercise, the court concluded that the statutes violated the Establishment Clause by breaching the neutrality imposed upon government, federal and state, by the First Amendment and the Fourteenth Amendment. In words of the Court:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. 16/

14/Mr. Justice Clark's opinion spoke for himself and Chief Justice Warren, Justice Black, and Justice White; Justices Brennan, Douglas, Goldberg, and Harlan concurred separately. Justice Stewart dissented.

15/McGowan v. Maryland, 366 U.S. 420 (1961)

16/374 U.S. 203, 226.

Stein v. Oshinsky, 348 F. 2d 999 (2nd Cir., 1965) cert. den 382 U.S. 957 (1965).

In this case plaintiffs, parents of pupils in a New York public school, brought suit in the federal district court to enjoin school officials from preventing the recitation of prayers by pupils who were acting on their own initiative. The complaint alleged that the defendants, acting on their understanding of the rule laid down in Engel v. Vitale, had prevented kindergarten pupils from reciting two prayers:

> God is Great, God is Good
> and We thank Him for our Food, Amen.
>
> Thank You for the World so Sweet
> Thank You for the Food We Eat
> Thank You for the Birds that Sing--
> Thank You, God, for Everything.

The district court granted the plaintiff's motion for a summary judgment, and entered an order prohibiting any interference with the prayer, and requiring that a reasonable opportunity be provided for it each day. 17/

On appeal, the plaintiffs, who had prevailed in the lower court, argued that since the prayers were voluntary, to refuse to permit them was a restriction of the Free Exercise of religion guaranteed by the First Amendment. The court of appeals first noted that it was debatable whether voluntary prayers such as these could be conducted without the participation of teachers, thus converting

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17/Stein v. Oshinsky, 224 F. Supp. 757 (E.D.N.Y. 1963).

the activity into illicit State action. However, it did not decide the question. Instead it pointed out that the State of New York and its political subdivisions could refuse to permit prayers in schools unless the United States Constitution, under its Free Exercise and Freedom of Speech provisions, compelled a different result. The court held that "neither provision requires a state to permit persons to engage in public prayer in state-owned facilities wherever and whenever they desire." 18/ The plaintiff's suit was dismissed, and the Supreme Court refused to grant certiorari.

Hunt v. Board of Education of County of Kanawha, 321 F. Supp. 1263 (S.D.W. Va. 1971).

Six students at a high school in Kanawha County brought suit to enjoin the Board of Education from prohibiting them from meeting voluntarily on the premises of the school before classes began for the purpose of engaging in group prayer and to obtain a declaratory judgment that these acts were violative of their rights as guaranteed under the First and Fourteenth Amendments.

The meetings in question were initiated without the knowledge or permission of the faculty and the principal of the High School, and were not sponsored or supervised by any member of the faculty. Once having learned of the prayer meetings, the principal prohibited the participating students from using the school premises for these purposes.

18/Stein v. Oshinsky, 348 F. 2d 999, 1001 (1965).

Prior to the time that the meetings began, rules formulated by the Board of Education had provided that requests for the use of school buildings for religious purposes should not be granted by school authorities, and that no student should be in a school building without the supervision of a teacher.

The court determined that the two questions raised by the case were the following: (1) Whether the Board of Education had the authority to prohibit the use of school facilities for any religious purpose, and (2) Whether such prohibition was constitutionally permissible.

The county Board of Education, as a corporation created by the state legislature, was dependent upon the legislature for its powers. The court construed the relevant state statutes so as to find that the Board of Education did not have any authority to permit the use of its school facilities for the conduct of any meeting of a religious nature. And even if the Board had the authority, it could exercise its administrative discretion legitimately to prohibit all religious activities on the school premises.

Finally, in ordering a summary judgment in favor of the Board of Education, the court found that to deny the use of the school premises for a religious activity would not violate any provisions of the Constitution. The First Amendment guarantees did not promise that the individual could gather at any public place at any time to exercise his religious beliefs. The action of the principal in this case was consistent with the separation of Church and State enunciated in the Establishment Clause. And, as Justice Frankfurter wrote in McCollum v. Board of Education,

333 U.S. 203 at 231 (1949):

> In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.

Chamberlin v. Dade County Board of Public Instruction, 171 So. 2d 535 (1964).

At issue in this case, inter alia, was the constitutionality of a Florida statute requiring the reading of the Bible in the public schools. The statute, Sec. 231.09, F.S.A. (1961) stated in part:

> 231.09. Duties of instructional personnel
>
> Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the county board, shall perform the following functions:
>
> . . .
>
> 2) Bible reading.--Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment.

By appropriate regulation, the Dade County Board of Public Instruction required that pupils be excused from attendance upon request by the parents or guardians. In its original opinion, at 143 So. 2d 21 (1963), the Florida Supreme Court found that Bible reading in the public schools was not contrary to any constitutional provisions. The U.S. Supreme Court, at 374 U.S. 487 (1963) vacated that judgment and remanded the cause for further consideration in the light of the Abington case.

The Florida Supreme Court, at 160 So. 2d 97 (1964), then distinguished the Florida statute from the Pennsylvania statute found invalid in the Abington decision on the fact that the Florida statute was founded upon secular rather than sectarian considerations. To apply the Abington rationale to the present case, the court felt, would enlarge

the U.S. Supreme Court's holding, and the responsibility for any enlargement should have been left to that court. Therefore, the court affirmed the original Florida Supreme Court decision.

The plaintiffs appealed the decision to the U.S. Supreme Court. The Court remanded the case in 377 U.S. 402 (1964) in respect to the issues raised by Sec. 231.09, Flor. Stats. (1961), and at 171 So. 2d 535 (1965), the Florida Supreme Court, in construing the remand to mean that "prayer and devotional Bible reading in the public schools pursuant to a statute or as sponsored by the school authorities are violative of the Federal Constitution," held the Florida statute to be unconstitutional.

Sills v. Hawthorne Board of Education, 200 A. 2d 817 (Superior Court of New Jersey, 1963), aff'd 200 A. 2d 615 (1964).

Subsequent to the Supreme Court decision in Abington School District v. Schempp, supra, the Attorney General of New Jersey rendered an opinion in which he stated that the New Jersey statute requiring the reading without comment in each public school classroom of at least five verses from the Old Testament was unconstitutional. The Hawthorne Board of Education then passed a resolution to the effect that Bible reading was not to be halted. The N.J. Attorney General and the State Board of Education then sought an injunction to restrain the Hawthorne Board of Education from permitting Bible reading in public schools.

The Court found that the laws and facts surrounding the case were almost identical to those in the Abington case, supra, the only difference being that the reading of the New Testament was permissible

under the Pennsylvania statute, whereas the Old Testament was specified in the New Jersey statute. Because the Abington decision would apply to the New Jersey statutes, and thus make the practice violative of the Establishment Clause, the court enjoined the Hawthorne Board of Education directive. As the court wrote, "A reading of the Abington ...case leads the court to the conclusion that any law which requires religious exercises in the public schools is violative of the U.S. Constitution." 200 A. 2d at 818.

Adams v. Engelking, 232 F. Supp. 666 (S.D. Idaho 1964).

A class action was initiated by the plaintiffs as parents of public school children to have Sec. 33-1604 of the Idaho Code declared unconstitutional. That statute provided that

> Selections from the Bible, to be chosen from a list prepared from time to time by the state board of education, shall be read daily to each occupied classroom in each school district. Such reading shall be without comment or interpretation. Any question by any pupil shall be referred for answer to the pupil's parent or guardian.

Finding that the issue was settled by the Abington case, supra, Sec. 33-1604 was held to be in conflict with the First and Fourteenth Amendments and thus invalid.

Johns v. Allen, 231 F. Supp. 852 (D. Del. 1964).

Plaintiffs, parents of children who attended one of the public schools in Delaware, instituted suit to enjoin the reading of verses of the Bible as required by statute, and the recital of the Lord's Prayer

in unison, as required by a directive of the State Board of Education pursuant to authority conferred on it by a state statute.

The court interpreted the Abington case to mean that once an activity has been determined to be a religious one, and that activity is required in the public schools by state action, then it must be found to be unconstitutional. In view of the reverent character of the activities in question, as reflected by the participating teachers' testimony, there was no question but that the statutory provision (§4102) requiring Bible reading, and the State Board of Education directive, requiring the recitation of the Lord's Prayer, constituted an establishment of religion in light of the Abington decision.

Opinion of the Justices, 228 A. 2d 161 (1967).

Questions were propounded by the New Hampshire Senate relating to the validity of pending bills. The Justices, citing Abington, supra, at 281 and 303, found that the proposal to require a period of silence for meditation or to require each public school classroom to have a plaque bearing the words "IN GOD WE TRUST" would not violate any constitutional provision. However, the proposal to leave it to the discretion of the classroom teacher who is authorized to include "the use of the Lord's Prayer, or any other prayer of some general use, of readings from the Holy Bible or from other religious works..." would violate the Establishment Clause by virtue of the authority of Abington, supra, and Chamberlin v. Dade County Board of Public Instruction, 377 U.S. 402 (1964).

DeSpain v. DeKalb County School District, 384 F. 2d 836 (1967), cert. den. 390 U.S. 906 (1968).

Kindergarten children in a public school in DeKalb, Illinois, were required to recite the following poem before their morning snack:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.

Parents of one of the pupils filed suit in federal district court to enjoin this recitation on the grounds that it was a prayer and therefore prohibited under the rule announced in Engel v. Vitale. At an evidentiary hearing witnesses for both sides were heard. Witnesses for the plaintiff included two Protestant ministers, both professors of theology, who testified that in their opinion the poem in question was a prayer in form and intention. Witnesses for the defendant thought the poem was not a prayer. The teacher of the class testified that the verse was used as part of her program of good citizenship, and was intended to teach social manners. The district court decided the verse was not a prayer, relying, in large part, on the teacher's testimony, and dismissed the plaintiff's complaint for failure to state a cause of action. 19/

19/DeSpain v. DeKalb County School District, 255 F. Supp. 655 (1966).

In passing, the district judge stated he thought the case was de minimis (too small or trifling for the law to take notice of). On appeal the United States Court of Appeals for the Seventh Circuit, reversed, citing Engel v. Vitale and Stein v. Oshinsky. Noting with approval the trial judge's characterization of the case as de minimis, the court said:

> Certainly, this verse was as innocuous as could be insofar as constituting an imposition of religious tenets upon nonbelievers. The plaintiffs have forced the constitutional issue to its outer limits.

However, the court cited with approval the statement in Everson v. Board of Education, 330 U.S. 1 (1947):

> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.

Accordingly, the defendant school authorities were permanently enjoined from allowing the recitation of the verse.

Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Michigan, 1965).

Parents of public school children brought suit against the members of the Jenison Public School Board to enjoin religious exercises in the public schools permitted by a school board regulation. Instead of granting an injunction, the district court devised a substitute policy and plan which it determined would not conflict with the strictures of the Establishment Clause.

The court determined that if the practice or enactment had the net effect of placing the official support of the local or national government behind a particular denomination or belief, there would then be a violation of the Establishment Clause. However, the court argued that there are areas in which the interplay between government and religion does not constitute an establishment of religion. In Zorach v. Clauson, 343 U.S. 306 (1952), it was stated:

> When the state...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. Id. 343 U.S. at 314.

The plan devised by the district court to reach this accommodation between church and state consisted of providing for a room, before or after classes, for those students who wished to say a prayer or read scriptures according to their choice. The students would have to meet in a room other than their homerooms. There would be a five minute

gap between the completion of the prayer and the beginning of the school day in the morning, and the completion of classes and the beginning of the prayers in the afternoon. There should be a commingling of praying and non-praying students before classes begin and after they are completed. If a prayer is to be said during the lunch period, it should be a silent prayer. Finally, the role of the teacher at these prayer sessions should be one of merely keeping order. The teacher should not select the prayers or the readings. The students should determine what the prayers or readings should be by means of their own choosing.

American Civil Liberties Union v. Albert Gallatin Area School District, 307 F. Supp. 637 (W.D. Pa. 1969), aff'd 438 F. 2d 1194 (3rd Cir., 1971).

Six years after the Supreme Court ruled as unconstitutional required religious devotions in public schools, the Albert Gallatin Area School Board sought to test that decision by defiance, and acted in March, 1969, to "install Bible reading and some nondenominational mass prayer in the classrooms." The defiance was halted December 18, 1969, after the American Civil Liberties Union, acting in behalf of the Edwin J. Mangold family, obtained an injunction against the practice by the rural southwestern Pennsylvania school district. In his opinion, Judge Rosenberg pointedly said that "I make no ruling on what effect, if any, the free actions of children, meeting on their

own time and of their own volition, even though on school premises, would have." 20/ The crucial flaw in the school system's religious practices, the judge said, and the activity that made its programs vulnerable to injunction under the Supreme Court's school prayer rulings of 1962 21/ and 1963 22/, was that the school board had moved fromally to install Bible reading and nondenominational prayer in the classroom. This, Judge Rosenberg said, amounted to an "establishment of religion" by an agency of the government, an act forbidden by the First Amendment to the Constitution.

State Board of Education v. Board of Education of Netcong, New Jersey, 108 N.J. Super. 564, 262 A. 2d 21, aff'd 270 A. 2d 413 (1970), cert. den. 39 L.W. 3437 (April 6, 1971).

To evade the Supreme Court's pronouncements banning compulsory school prayers, the Netcong School in Netcong, New Jersey instituted a daily period for "free exercise of religion" at which time a pupil volunteer read from the Congressional Record the remarks of the chaplain of either the United States Senate or House of Representatives. This period was conducted on a voluntary basis each day at 7:55 a.m. in the high school gymnasium and pupils who did not wish to participate in the program were permitted to either enter the building and go to their homerooms or postpone their arrival at school until the conclusion of the program.

20/American Civil Liberties Union v. Albert Gallatin Area School District, 307 F. Supp. 637, 642 (W.D. Pa. 1969).

21/Engel v. Vitale, 370 U.S. 421 (1962).

22/Abington School District v. Schempp, 374 U.S. 203 (1963).

The State Commissioner of Education, Carl L. Marburger, requested an opinion on the constitutionality of the practice from New Jersey Attorney General, Arthur J. Sills. In his opinion, Sills found "...no rational distinction between prayer and Bible passages read from a prayer book or Bible and prayer and Bible passages read from the Congresssional Record," and decided that such practices violated the Constitution. 23/ Subsequent to the Attorney General's opinion, the Office of the State Commissioner of Education ordered the Netcong school to abandon the program. This the school refused to do until such time as the constitutionality of the program had been judicially determined.

In a suit brought by the State Board of Education against the Board of Education of Netcong, New Jersey Superior Court Judge Joseph H. Stamler ordered the school to cease immediately the daily classroom reading of prayers from the Congressional Record. Noting that the Board defended the practice as the reading of inspirational "remarks" the judge said:

> To call some of the beautiful prayers in the Congressional Record 'remarks' for a deceptive purpose is to peddle religion in a very cheap manner under an assumed name. This type of subterfuge is degrading to all religions. 108 N.J. Super. 564, 583.

In granting the injunction which ended the Netcong school prayer-reading programs, Judge Stamler held that the program violated the Establishment Clause of the First Amendment and rejected the

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23/Opinion of New Jersey Attorney General, Formal Opinion 1969--No. 3 p. 9 (November 24, 1969).

argument of the school board that it was defending the free exercise of religious belief as well as religious non-belief.

On November 9, 1970, the Supreme Court of New Jersey affirmed the lower court ruling in a per curiam opinion. 24/

Sullivan v. School Committee of the Town of Leyden, Massachusetts Superior Court, Suffolk County, No. 91101 Eq. (March 31, 1970), 267 N.E. 2d 226 (1971), cert. den. 40 L.W. 3164 (Oct. 12, 1971).

The small town of Leyden in western Massachusetts ignored the Supreme Court ban on religious exercises in public schools and reinstated Bible readings and recitation of the Lord's Prayer in the classrooms of the town's elementary school.

On August 21, 1969, members of the Leyden School Committee passed a resolution which stated:

> On each school day before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution.
>
> This freedom of religion shall not be expressed in any way that will interfere with another's rights.
>
> Participation may be total or partial, regular or occasional, or not at all.
>
> Non-participation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion.

24/ State Board of Education v. Board of Education of Netcong, N.J., 270 A. 2d 413 (1970).

> The purpose of this motion is not to favor one religion over another, nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility to contribute to the general welfare of the community and to preserve the values that constitute our American heritage. Mass. Atty. Gen'l Op. p. 1 (Oct. 21, 1969).

In a formal opinion, Attorney General Robert H. Quinn ruled the practice unconstitutional under the First Amendment to the United States Constitution because the committee's motion had as its purpose, "the advancement of religion." He argued that the practices in Leyden were primarily religious in nature and advanced religion in violation of the rule formulated by the Supreme Court in Abington School District v. Schempp (supra), and Murray v. Curlett, 374 U.S. 203 (1963) which stated:

> The test may be stated as follows, what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say, that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Id. at 222.

When the Leyden School Committee refused to discontinue the daily periods of religious devotion, the Commonwealth's Commissioner of Education, Neil V. Sullivan, brought an action in the Superior Court of Suffolk County to have the practice enjoined. In that action Justice Rutledge found the religious exercises conducted at Leyden school lawful and valid insofar as participation by students

alone is concerned but constitutionally objectionable insofar as participation by teachers with the students is concerned:

> The fact that during the five minutes immediately prior to the 8:45 a.m. bell (the designated official commencement of the school day) "some form of prayer or spiritual expression takes place in each of the classrooms" does not offend against the establishment clause of the First Amendment to the Constitution as applied to the states by the Fourteenth Amendment. The fact that during said period one of the children takes the initiative to read from a Bible, an anthology or other spiritual text or, on occasion, that prayers, traditional or innovative, are said or read aloud, does not in the Court's view offend against the United States Constitution.
>
> The authorization of participation by the teachers in the aforementioned "exercise of religion" by the vote of the respondents does, however, in the Court's opinion, violate the First Amendment. It is unrealistic to suggest that teachers are in the school buildings immediately before the start of the school day in their capacity as private citizens rather than as school teachers hired by the town. It also is unrealistic to suppose that the teachers, if they participate, would not tend to direct the activities which take place in the five minute period. Sullivan v. School Committee of the Town of Leyden at p. 11.

The Commissioner of Education appealed the Superior Court's decision finding that some of the practices allowed by the School Committee were permissible. The School Committee's position in the appeal was that since there was no requirement of student or teacher participation, and no prescribed form for the exercises, and since the voluntary exercises were wholly under student control, the practices were not within the prohibition of the Abington case. Despite these

facts, the court found that because the exercises were held on school property with school committee permission granted by a resolution the Establishment Clause would not permit either students or teachers to participate in the religious observances. The court felt controlled by the Supreme Court decisions:

> "The Supreme Court thus far has not limited the broad language with which (as in the Schempp case) it has held invalid substantially nondenominational and neutral religious observances on public school property. Until and unless such a limitation takes place (even if there is minimal State encouragement of only insubstantial school religious exercises), it would serve no useful purpose to attempt to draw any fine distinction between those observances which have hitherto been proscribed by the Supreme Court and the Leyden practices now presented for our scrutiny..." See 267 N.E. 2d at 228.

(B) Other Activities Deemed Religious in Nature

Tudor v. Board of Education, 100 A. 2d 857 (1953), cert. den. 348 U.S. 816 (1959).

The issue of what may constitute a religious exercise in the context of the public schools was raised directly by Tudor v. Board of

Education, 100 A. 2d 857 (1953) cert. den. 348 U.S. 816 (1954). The Board of Education passed a proposal permitting the Gideons International to furnish copies of the King James version of the Bible to students who requested them. The request forms had to be signed by a parent or guardian of the pupil. Evidence was introduced which indicated that the religious sensibilities of certain religious groups were offended by the King James version. Once it was determined that the Bible was a sectarian work, the Court was able to find that by permitting the distribution of the Gideon Bible, the Board of Education had "established" one religious sect in preference to another. The Board's proposal thus was struck down as a violation of the Establishment Clause of the First Amendment. 25/

(C) Activities Deemed Non-Religious in Nature

Smith v. Denny, 280 F. Supp. 651 (1968).

Section 5211 of the Code of Education of the State of California requires every secondary public school to start the school day with appropriate patriotic exercises, and indicates that the recitation of the pledge of allegiance to the Flag of the United States satisfies the requirement. Pursuant to this law Enterprise High School in Redding, California, adopted regulations requiring daily recitation of the pledge of allegiance, in the form which includes

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25/The New Jersey Constitution was also found to invalidate the proposal. For a recent case on distribution of Bibles in the public schools, see Brown v. Orange County Board of Public Instruction, 128 So. 2d 181, aff'd 155 So. 2d 371 (1963).

the words "...one nation, under God, indivisible..." (emphasis added). The plaintiffs, students at the high school, filed a complaint in federal district court, alleging that the statute and its supplemental regulations violated the First and Fourteenth Amendments by requiring the inclusion of the words "under God," and requested a three-judge court to hear the case and order the deletion of the disputed phrase.

The Chief Judge for the Eastern District of California dismissed the suit, holding the California law was neither an establishment of religion nor a deprivation of the right of free exercise of religion. 26/ The court distinguished patriotic exercises from religious ones, and quoted with approval from Mr. Justice Goldberg's concurrence in the Schempp case 27/:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Calvary Bible Church v. University of Washington, 72 Wash. Dec. 2d 900 (1968) cert. den. 393 U.S. 960 (1968).

26/For a similar case see Lewis v. Allen, 159 N.Y.S. 2d 807, aff'd 207 N.Y.S. 2d 862, aff'd 200 N.E. 2d 767, cert. den. 379 U.S. 923 (1964).

27/Abington School District v. Schempp, 374 U.S. 203, 308 (1963).

The Department of English at the University of Washington offers a course entitled "The Bible as Literature." Two churches in Tacoma brought suit to enjoin the course on the theory that the choice of texts and the methods of presentation would of necessity involve the University of Washington, an agency of the State, in religious or theological decisions, contrary to the Establishment Clause of the First Amendment. At the conclusion of the trial, devoted largely to hearing testimony on the way the course was conducted, the trial judge dismissed the complaint. The plaintiffs appealed the case to the Supreme Court of Washington. After reviewing the evidence, the court said:

> Telescoping the testimony of competent scholars, educators, professors, ministers, theologians, and students who had taken the course, we find that it was taught in a completely objective manner; had no effect on religious beliefs; was not slanted toward any particular theological or religious point of view; did not indoctrinate anyone; did not enter into the realm of belief or faith; and was not taught from a religious point of view.

Lacking these elements, the court found that the course was not constitutionally prohibited, and concluded that to forbid it because its contents were repugnant to certain persons of a particular religious persuasion might in fact be sectarian control of the educational system. Appellant's petition for review by the United States Supreme Court was denied November 25, 1968, thereby leaving untouched the judgment of the Washington Supreme Court.

PART II

Released Time and Dismissed Time in Public Schools:

McCollum and Zorach

Both "released time" and "dismissed time" are methods by which educators have allowed formal sectarian exercises during school hours. In "released time" programs the religious activities are conducted within the school building by representatives of the various faiths. State courts had reached divergent opinions on the constitutionality of the programs, when in 1948 the United States Supreme Court granted review in a case involving the Illinois practice. In Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948), eight justices joined in ruling that the use of tax-supported property for religious instruction together with the close cooperation between public and religious officials constituted an establishment of religion. Most recently, in another "released time" program, the court in Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970) held that the fact that state schools were being used by teachers paid and controlled by a religious group suggested that the state was aiding religion in violation of the Establishment Clause.

Three years after McCollum, the Supreme Court addressed itself to the problem of the constitutionality of the "dismissed time" program. Zorach v. Clauson, 343 U.S. 306 (1952) involved a challenge to a New York City program which released children during the school day so they could leave the school premises and go to religious centers for

sectarian programs if they so desired. Emphasizing the distinctions between this and the McCollum situation, namely, non-involvement of tax-supported property or expenditure of public funds, the Court, dividing 6-to-3, sustained the constitutionality of the program. See c.f. Moore v. Board of Education, 212 N.E. 2d 833 (Court of Common Pleas of Ohio, Mercer County, 1965).

PART III

Activities In Public Universities Hostile To Religion

Matter of Panarella v. Birenbaum, 60 Misc. 2d 95 (Supreme Ct., Richmond County, 1969).

Plaintiff, a student at a division of the City College of New York, sought an order directing the school to adopt and enforce regulations prohibiting derogatory attacks on religion in student publications. An article in the student newspaper had attacked the Roman Catholic Church. The school is a tax-supported public institution, the publication has a faculty member as an advisor, and has office space on campus.

The court argued that the Establishment Clause of the First Amendment erected an unbreachable wall separating Church and State. This neutrality required the government neither to favor religion nor to show hostility toward religion. The court felt that because the property, facilities, and employees of the State and City of New York were used for an attack on religion, there was a violation of the absolute neutrality required under the Establishment Clause. Therefore, the school authorities were directed to prevent publications of such articles in the future.

PART IV

Prayer in Service Academies

Anderson v. Laird, 316 F. Supp. 1081 (D.D.C. 1970).

Two cadets of the U. S. Military Academy and nine midshipmen of the U. S. Naval Academy brought a suit as a class action, claiming that the regulations of the Academies compelling Sunday attendance at Catholic, Protestant, or Jewish chapel services violated the Establishment/Free Exercise Clauses of the First Amendment and constituted a "religious" test in violation of Art. VI of the Constitution. They sought a declaratory judgment that compulsory church or chapel attendance violated these provisions of the Constitution and a permanent injunction forbidding the Academies from enforcing the regulations.

The court denied the motion for a declaratory judgment, and for a permanent injunction. The reasoning of the court was that (1) the purpose and primary effect of compulsory attendance could not be said to either substantially advance or inhibit religion, since the effect of attendance is no different than the effect of other regulations which aim towards the complete training of a military leader. Thus, although the incidental effect might advance religion, the dominant effect is secular; (2) the Free Exercise Clause is not violated, since there is no coercive effect which operated against the individual in the practice of his religion. Under the compulsory attendance regulation, the individual could choose which service to attend, and

whether to participate and worship or not. For sincerely held reasons, the individual could be excused from attendance; (3) since the regulation did not violate the Establishment Clause, it necessarily follows that it could not violate Art. VI, which provides that "No religious test shall ever be required as a qualification to any office or public trust under the United States."

PART V

Religious Activities on Publicly Owned Property

Lawrence v. Buchmueller, 40 Misc. 2d 300, 243 N.Y.S. 2d 87 (1963).

This action was instituted by a number of parents whose children attend public schools under the jurisdiction of the Board of Education of Union Free School District No. 7 to have the court declare that the board had no legal or constitutional authority to permit the erection or display on school premises of any symbol of any deity belonging to any religion. The Board had authorized a group of taxpayers to erect a creche or nativity scene on the grounds of one of the public schools within the district during the period of the Christmas holiday. School was not in session at the time, the school's personnel was not involved, and the activity did not cause any expense to the school district.

The court held that the resolution of the school board permitting the erection of the creche under the circumstances was not violative of any constitutional provision. The state legislature had directed the school boards within the state to "foster in the children of the state moral and intellectual qualities." To prohibit the school board from granting permission to private citizens to erect a creche would, according to the court, thwart the school board's efforts to instill "moral qualities" by denying that religion had played any role in the development of the moral standards of the community. The court approvingly

quoted from Justice Goldberg's concurring opinion in Abington School District v. Schempp, 374 U.S. 203, 306 (1963) :

> "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so."

Distinguishing the Abington case, supra, and Engel, supra, from the present case, the court felt that those cases concerned active involvement by government in religious exercises, whereas the present case was a passive accommodation of religion.

Paul v. Dade County, 202 So. 2d 833 (1967) cert. den. 390 U.S. 1041 (1968)

For approximately twenty years an illuminated cross has been placed atop the Dade County, Florida, Courthouse at Christmas time. In 1966 as in prior years, tax money was appropriated to finance the installation. In August, 1966, a Dade County taxpayer brought suit for injunctive relief, demanding that tax money not be spent for the installation and that the cross not be installed in any case. Before the trial the county announced that the installation of the cross would be financed by private donation. Consequently, at the trial, the only issue being whether the Establishment Clause forbids such a display, conflicting testimony was introduced as to whether the cross was actually a religious symbol. The trial court decided that the cross was not a religious symbol, and denied relief. The District Court of Appeal of Florida affirmed the decision, and both the Florida Supreme Court and the United States Supreme Court declined to review the matter.

Lincoln v. Page and the Town of Meredith, 241 A. 2d 799 (1968).

A resident and voter in the Town of Meredith, New Hampshire, brought suit in the New Hampshire Superior Court attempting to enjoin the practice of opening town meetings with invocations by ministers of various religions. Plaintiff claimed that the practice violated

the Establishment Clause of the First Amendment. The defendants filed a demurrer and the trial judge reversed and transferred all questions of law to the New Hampshire Supreme Court. The Supreme Court summarized the factual background as discerned from the pleadings, briefs and arguments as follows:

> The invocation at the opening of the town meeting by a guest clergyman is not composed, selected or approved by the defendants. The invocation is not pronounced by a town officer, no oath is taken, and no public funds are expended for the invocation. The invocation is not a part of the agenda of the town meeting, attendance thereat is not compulsory and the persons selected to pronounce the invocation are rotated. The invocation is not required by any state statute or local ordinance.

On these facts the court held: "We conclude that all the virtues of the First Amendment can be preserved and protected without condemning the invocation in this case as an encroachment of the First Amendment either minor, major, or incipient." The demmurer was sustained, and the case was dismissed.

Lowe v. City of Eugene, 459 P. 2d 222 (1969).

The Supreme Court of Oregon ruled on October 1, 1969, that a 51-foot electrically lighted cross, a symbol of Christianity, must be removed from a hilltop public park in Eugene, Oregon. The cross had been erected in 1964 at the expense of a group of private citizens to replace a wooden cross which had been installed in the same place since 1936. The City Council granted the required building and electrical permits but the cross was held to violate both United

States and Oregon constitutional provisions barring aid to religion. The Oregon Court said that government had no more right to place a public park at the disposal of the majority for a popular religious display than it would have, in response to a referendum vote, to put the lighted cross on the city hall steeple. The whole point of separation of church and state in a pluralistic society is to keep the majority from using the coercive power to obtain governmental aid for or against sectarian religious observances.

On April 21, 1970, the Supreme Court denied certiorari to review the case. 397 U.S. 1042 (1970).

Allen v. Hickel, 424 F. 2d 944 (D.C.Cir. April 19, 1970).

Plaintiffs in this action were five taxpayers, four clergymen and an atheist, who filed suit on July 14, 1969, in the District Court for the District of Columbia challenging the erection and maintenance of a creche on federal property in Washington, D.C. as part of a Christmas Pageant for Peace. The Pageant included, in addition to the creche, the national Christmas tree, and a burning yule log. On September 30, 1969, the District Court granted a motion to dismiss the case.

Reversing the District Court, the Court of Appeals for the District of Columbia held first that the plaintiffs had standing to sue. The Court then went on to say that the purpose of the creche was secular. The creche, it was argued, was related to a holiday season that clearly has a secular half, and it was but a part of a

larger display of secular symbols of the secular aspect of Christmas. Furthermore, an official pamphlet explained that the creche was intended simply to be one of a group of objects showing how the season is celebrated. As to the actual effect of the creche, the plaintiffs claimed that its placement and size gave it a significant religious impact. The Court remanded the case to the District Court in order that evidence be taken on the issue of whether the effect of exhibiting the creche would constitute a violation of the Establishment Clause.

PART VI

Religious Exercises in Space

O'Hair v. NASA, 312 F. Supp. 434 (W.D. Texas, 1969), aff'd 432 F. 2d 66 (5th Cir., 1970), cert. den. 39 L.W. 3385 (1970).

On August 5, 1969, Mrs. O'Hair and her husband, Richard F. O'Hair, individually and as founders of the Society of Separationists, Inc., a Maryland corporation doing business in Austin, Texas, filed a complaint in the U. S. District Court for the Western District of Texas seeking an order to enjoin NASA from permitting or conducting any religious activities in space. Mrs. O'Hair et al. alleged, inter alia, that the following violated the First Amendment:

1) The prayer for peace radioed to the world by Colonel Frank Borman while orbiting the moon aboard the Command Module of the Apollo 8 flight on December 24, 1968.

2) The reading of the Story of Creation from Genesis, Chapter I, verses 1-10, by Major William Anders, Captain James Lovell, and Colonel Frank Borman during the Apollo 8 flight on December 24, 1968.

3) The special arrangements necessitated by the carrying of four Bibles aboard Apollo 8 as well as religious medals and artifacts which were later presented to the Pope.

4) The placing on the surface of the moon on July 20, 1969, by Colonel Edwin Aldrin Jr. and Neil Armstrong, of a small disc which contained a prayer by Pope Paul and Psalm 8.

5) The transportation to the moon of certain other religious paraphernalia during the Apollo 11 flight.

The government filed a motion to dismiss the complaint because it failed to state a cause of action for which relief can be granted. Justice Roberts, presiding alone, granted the government's motion. As to Mrs. O'Hair's claim that her First Amendment right of freedom of religion had been abridged, the Court felt this claim to have no basis in fact, because there was no element of coercion. Since the purpose of the expenditure by NASA was secular, and the primary effect neither advanced nor inhibited religion, NASA did not violate the Establishment Clause of the First Amendment.

PART VII

Congressional Proposals to Permit Religious Exercises in Public Places

The decisions in Engel v. Vitale and Abington v. Schempp continue to attract widespread public interest. As noted at the outset, many legislative proposals have been introduced in Congress designed to alter the effect of the decisions. 28/ In the 88th Congress alone 156 Senate and House Joint Resolutions were introduced proposing Constitutional amendments to permit prayers in the public schools. These Resolutions ranged in scope from the very narrow to the extremely broad. For example, one of the narrowest, H.J. Res. 116, introduced by Rep. Fallon, would authorize "nondenominational religious observances through the invocation of the blessing of God or the recitation of prayer...if participation therein is not made compulsory." At the other extreme, possibly the best known of the proposed amendments, introduced by Rep. Becker (H.J. Res. 693), and by 60 other Representatives in identical form, provided:

> Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

28/For an exhaustive examination of all proposals made in the 88th Congress see Proposed Amendments to the Constitution Relating to School Prayers, Bible Reading, etc. [Committee Print], a staff study for the House Committee on the Judiciary, March 24, 1964. Pertinent excerpts are reproduced in the Appendix hereto.

> Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.
>
> Nothing in this article shall constitute an establishment of religion.

The House Judiciary Committee held extensive hearings on all the proposed constitutional amendments in April, May, and June of 1964.* The printed record of the hearings has 2774 pages, and included testimony from interested parties of every persuasion. A significant feature of the testimony was the widespread resistance to constitutional change on the part of religious leaders of virtually every faith. Their major objection seemed to be that the potential danger resulting from preferment of particular sectarian beliefs or practices outweighed the advantages of the proposals. None of the proposals was reported out of Committee.

In the 89th Congress 56 Joint Resolutions were introduced. They covered virtually the same range of language as the previous group. The best known of these was S.J. Res. 148, introduced by Senator Dirksen. It provided:

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*Hearings Before the Committee on the Judiciary, House of Representatives, Eighty-Eighth Congress, Second Session, On Proposed Amendments to the Constitution Relating to Prayers and Bible-Reading in the Public Schools. April, May, and June, 1964 Serial No. 9, Parts I, II, and III.

> Nothing contained in this Constitution shall prohibit the authority administering any school, school system, educational institution or other public building supported in whole or in part through the expenditure of public funds from providing for or permitting the voluntary participation by students or others in prayer. Nothing contained in this article shall authorize any such authority to prescribe the form or content of any prayer.

On September 19, 1966, the Senate began consideration of S.J. Res. 144, introduced by Sen. Bayh, calling for the establishment of October 31 of each year as National UNICEF Day. Mr. Dirksen introduced the language of S.J. Res. 148 as an amendment in the nature of a substitute, 29/ and an extensive debate ensued. 30/ On September 21, 1966, S.J. Res. 144, as amended by the Dirksen substitute, was defeated by a vote of 49 for, 37 against, and 14 not voting, or considerably short of the 2/3's required for resolutions proposing constitutional amendments. 31/

In the 90th Congress 56 Joint Resolutions were again introduced. In the Senate Mr. Dirksen introduced S.J. Res. 1 for himself and other Senators. This proposed Amendment differed significantly in language from his previous resolution, providing:

> Nothing contained in this Constitution shall abridge the right of persons lawfully assembled,

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29/122 Cong. Rec. 23084

30/112 Cong. Rec. 23063, 23086, 23122, 23155, 23202, 23531

31/112 Cong. Rec. 23556

> in any public building which is supported in whole or in part through the expenditure of public funds, to participate in nondenominational prayer.

However, no action was taken on any of these Resolutions before the 90th Congress adjourned.

Approximately one hundred bills were introduced in the 91st Congress relating to the subject of prayers in public schools and other public places. On Oct. 13, 1970, Sen. Baker of Tennessee proposed an amendment (No. 1048) to H.J. Res. 264, a joint resolution proposing an amendment to the Constitution of the United States providing for equal rights for men and women. Sen. Baker's amendment was identical to S.J. Res. 1 of the 90th Congress and S.J. Res. 6 of the 91st Congress, both introduced by Sen Dirksen. Sen. Baker's amendment to H.J. Res. 264 passed the Senate by a vote of 50 for, 20 against, 32/ but H.J. Res. 264 never came to a vote in the Senate.

In the 92nd Congress, 65 proposed amendments have, to date, been introduced. These resolutions are still in committee. However, an attempt to bring the proposals to a vote has prompted circulation of a discharge petition in the House of Representatives. 33/

32/116 Cong. Rec. S.17950 (Daily Ed., Oct. 13, 1970)

33/Rule XXVII, §4 of the Rules of the House of Representatives, House Doc. No. 439, 91st Cong., 2nd Sess. (1971) as interpreted in precedents provides that signatures on a motion to discharge a committee may not be made public until the requisite number have signed the motion. Thus, the number and identity of Congressmen who have signed the discharge petition can not be known with certainty. Newspaper reports indicate that 197 Congressmen have signed the petition. 218 signatures are required for the discharge petition to become effective.

Of the three proposals in the Senate, two (S.J. Res. 32, introduced by Sen. Baker and S.J. Res. 40, introduced by Sen, Byrd) are identical to Sen. Dirksen's bill introduced in the 90th and 91st Congress. The third proposal, S.J. Res. 34, introduced by Sen.Scott, reads:

> Nothing contained in this Constitution shall abridge the right of persons lawfully assembled in any public school or other public building which is supported, in whole or in part through the expenditure of public funds, to participate voluntarily in non-denominational prayer or meditation.

Of the 62 proposals in the House, several, including H.J. Res. 191, the bill at which the discharge petition is directed, are identical to Sens. Dirksen's and Baker's bill. Of the remainder, the wording most often used is that of either H.J. Res. 28, introduced by Mr. Ashbrook, or H.J. Res. 73, introduced by Mr. Flynt. H.J. Res. 28 provides:

> Sec. 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution or place.
>
> Sec. 2. Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.
>
> Sec. 3. Nothing in this article shall constitute an establishment of religion.

H.J. Res. 73 provides:

> Nothing contained in this Constitution shall prohibit the authority administering any school, school system, educational institution, or other public building supported in whole or in part through the expenditure of public funds from providing for or permitting the voluntary participation by students or others in prayer. Nothing contained in this article shall authorize any such authority to prescribe the form or content of any prayer.

ADDENDUM

Subsequent to preparation of this report, the discharge petition on the school prayer amendment, H.J. Res. 191, gained the requisite number of signatures to take it from the jurisdiction of the House Judiciary Committee and to bring it to the floor of the House for consideration by that body (See 117 Cong. Rec. H. 8624, Daily Ed. Sept. 21, 1971). The resolution was debated on the floor of the House on November 8, 1971 and, although receiving a majority, was rejected for failure to obtain the two-thirds vote required by the Constitution for approval of a proposed Constitutional Amendment. The roll-call vote was 240 yeas, 162 nays, 28 not voting. (117 Cong. Rec. H. 10657, Daily Ed. November 8, 1971).

November 9, 1971

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88th Congress
2d Session } COMMITTEE PRINT

PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYERS, BIBLE READING, ETC.

A STAFF STUDY

FOR THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

MARCH 24, 1964

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
30-028 O WASHINGTON : 1964

LETTER OF TRANSMITTAL

MARCH 24, 1964.

To Hon. EMANUEL CELLER,
Chairman, House Committee on the Judiciary.

DEAR MR. CHAIRMAN: One hundred and forty-six resolutions proposing amendments to the Constitution have been introduced during the 88th Congress in the wake of the recent Supreme Court decisions relating to the recital of prayers and Bible reading in public schools (*Engel* v. *Vitale*, 370 U.S. 421, and *Abington School District* v. *Schempp*, 374 U.S. 203). These resolutions have been referred to the Committee on the Judiciary. Thirty-five different forms of resolution have been proposed.

At your direction, we have prepared this staff study for the use of the committee in considering the pending resolutions. We have endeavored to set forth objectively the questions presented by the pending resolutions in the light of the relevant historical and legal background and the issues posed by the Supreme Court decisions. We have not attempted to deal with the policy problems which are solely within the province of the members of the committee.

No member of the committee participated in the preparation of this study, and the study does not necessarily represent the views of any member of the committee.

Respectfully submitted.

STUART H. JOHNSON, JR.,
R. FREDERICK JETT,
Counsel.

PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO PRAYERS, BIBLE READING, ETC.

INTRODUCTION

The first amendment to the Constitution of the United States begins:

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

The 14th amendment makes these commands applicable to the States (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108).

On June 25, 1962, the Supreme Court handed down its decision in *Engel* v. *Vitale* (370 U.S. 421).[1] The Court held that the establishment clause of the first amendment forbids a State "to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on a program of governmentally sponsored religious activity" in its public school system. The prayer at issue was composed by the New York State Board of Regents, and upon their recommendation, a local school board had directed that the prayer be recited aloud at the opening of every school day.

Engel v. *Vitale* gave rise to great interest and wide controversy. In its wake, a number of joint resolutions were introduced in the House of Representatives during the 87th Congress proposing amendments to the Constitution designed generally to permit the use of prayer in public schools. Some of these proposals were again introduced early in the 88th Congress.

Then on June 17, 1963, nearly one year after *Engel* v. *Vitale*, the Supreme Court rendered its decision in *Abington School District* v. *Schempp* (374 U.S. 203).[2] The Court there held unconstitutional a Pennsylvania statute and a rule of the Baltimore Board of School Commissioners requiring Bible reading and authorizing recitation of the Lord's Prayer in the public schools of Pennsylvania and Baltimore, respectively.

Additional broader resolutions to amend the constitution were introduced in the House following the *Schempp* decision. All these resolutions have been referred to the Committee on the Judiciary

I. THE PENDING RESOLUTIONS

One hundred and forty-six resolutions have been introduced following the Supreme Court decisions and are now pending before the Committee on the Judiciary. These resolutions differ widely in their language and scope. Altogether, 35 different forms of resolution

[1] The decision is set forth in Appendix A.
[2] The decision is set forth in Appendix B.

have been proposed, and these different forms have been classified into 7 different types in the legislative calendar of the committee.

1. The most limited type of resolution would permit prayers in public schools. One form of this type of resolution would authorize "nondenominational religious observances through the invocation of the blessing of God or the recitation of prayer * * * if participation therein is not made compulsory" (H.J. Res. 116, Representative Fallon; H.J. Res. 336, Representative Monagan; and H.J. Res. 481, Representative Dague). Such "nondenominational religious observances" would be authorized under these resolutions "as part of the activities of any school or educational institution supported in whole or in part from public revenue."

The other form of this proposal would permit "the authority administering any school, school system, or educational institution supported in whole or in part from any public funds" to provide for "the voluntary participation by the students thereof in regularly scheduled periods of nonsectarian prayers" (H.J. Res. 150, Representative Sikes, and H.J. Res. 342, Representative Widnall).

2. Another type of resolution remains confined to the public schools but would authorize Bible reading as well as prayers. One form of this type of resolution would provide that "prayers may be offered and the Bible read as part of the program of any public school in the United States" (H.J. Res. 98, Representative Matthews).[3]

A second form of this type of resolution would authorize "the authority administering any school, school system, or educational institution supported in whole or in part from any public funds" to provide for "the participation by the students thereof in the reading of the portions of the Holy Bible, or in the offering of nonsectarian prayer, if such participation is voluntary" (H.J. Res. 506, Representative Hemphill).

Another resolution almost identical to House Joint Resolution 506 would permit public school students to participate voluntarily "in any period of Bible reading or nonsectarian prayers" (H.J. Res. 595, Representative Jonas).

A fourth form of this type of resolution would permit public school officials to include "in the curriculum * * * scheduled periods of time during which the students thereof will be free to engage in religious worship" (H.J. Res. 488, Representative Davis of Georgia).

Finally, House Joint Resolution 897 (Representative Hutchinson) would provide that "State laws permitting the offering of prayer and scriptural readings within the public schools, if participation therein is voluntary, shall not be construed as laws respecting an establishment of religion."

3. A third type of resolution is confined to prayers but would authorize them in public schools or other public places. Thus, House Joint Resolution 9 (Representative Becker) would provide "that prayers may be offered in the course of any program in any public school or other public place in the United States."[4]

A second form of resolution of the same type would state that "nothing in this Constitition shall prohibit the offering of prayers

[3] Also H.J. Res. 179, Representative Fuqua; H.J. Res. 489, Representative Lennon; H.J. Res. 512, Representative Chenoweth; H.J. Res. 521, Representative Devine; H.J. Res. 534, Representative Murphy of New York; H.J. Res. 558, Representative Herlong; and H.J. Res. 631, Representative Rogers of Florida.

[4] Also H.J. Res. 217, Representative Fino; H.J. Res. 316, Representative King of New York; H.J. Res. 552, Representative Roberts of Alabama; H.J. Res. 556, Representative Adair; H.J. Res. 619, Representative Whalley; H.J. Res. 797, Representative Clawson; H.J. Res. 917, Representative Derwinski; and H.J. Res. 936, Representative Pirnie.

in any public school or other public place" (H.J. Res. 119, Representative Rivers of South Carolina, and H.J. Res. 480, Representative Broyhill of Virginia).

A third form of resolution of this type would specify that "the right to offer nonsectarian prayers in the public schools or other public places shall not be denied or abridged provided participation therein is voluntary" (H.J. Res. 219, Representative Fulton of Pennsylvania; H.J. Res. 487, Representative Roudebush; H.J. Res. 504, Representative Baring, and H.J. Res. 560, Representative Harvey of Indiana).

The last form of resolution of this type would provide that "nothing in this Constitution shall prohibit nonsectarian prayer in public schools or other public places if participation therein is not compulsory" (H.J. Res. 514, Representative Moore; H.J. Res. 617, Representative Staggers; H.J. Res. 770, Representative Rhodes of Pennsylvania; and H.J. Res. 790, Representative Clark).

4. A fourth type of resolution would permit both prayer and Bible reading in public schools and would apply both to public schools and other public places.

One resolution of this type would state that "nothing in this Constitution shall prohibit the offering of prayers or the reading of the Bible as part of the program of any public school or other public place in the United States" (H.J. Res. 70, Representative Williams).[5]

Another form of this type of resolution would permit "nonsectarian religious observances founded upon recognition of God in public schools or other places if participation therein is voluntary" (H.J. Res. 80, Representative Cramer).

A third resolution of this type would authorize "the offering of any prayer or any other recognition of God in connection with any activity in any public school or other public place" (H.J. Res. 92, Representative Huddleston).[6]

A fourth form of resolution of this type would permit "the offering of any nonsectarian recognition of God in connection with any activity in any public school or public place" (H.J. Res. 197, Representative Winstead).

Under a fifth resolution of this type "prayers may be offered and the Bible read as part of the program of any public school or other public bodies in the United States" (H.J. Res. 482, Representative Hagan of Georgia).[7]

A sixth resolution of this type would provide that "the right to voluntarily offer, receive, and to participate in the saying of nonsectarian prayers or the right to voluntarily read from or listen to the reading of the Holy Scriptures in the public schools and other public places and shall not be denied or abridged" (H.J. Res. 483, Representative Latta).[8]

A seventh form of this type of resolution would state that "prayers may be offered and portions of the Holy Bible may be read in the

[5] The second paragraph of this resolution would provide that "the right of each State to decide on the basis of its own public policy questions of decency and morality, and to enact legislation with respect thereto, shall not be abridged." Such a proposal appears to go far beyond the confines of this staff study.

[6] Also H.J. Res. 159, Representative Whitten, and H.J. Res. 687, Representative Abernethy.

[7] Also H.J. Res. 485, Representative Taylor; H.J. Res. 526, Representative Wharton; and H.J. Res. 528, Representative Kornegay.

[8] Also H.J. Res. 496, Representative Anderson; H.J. Res. 497, Representative Andrews; H.J. Res. 500, Representative Flynt; H.J. Res. 501, Representative Hoeven; H.J. Res. 507, Representative Leggett; H.J. Res. 509, Representative Baker; H.J. Res. 511, Representative Harrison; H.J. Res. 518, Representative Scott; H.J. Res. 523, Representative Lipscomb; H.J. Res. 530, Representative Ashbrook; H.J. Res. 531, Representative Hosmer; H.J. Res. 550, Representative Brock; H.J. Res. 557, Representative Glenn; and H.J. Res. 867, Representative Bloomfield.

course of any program in any public school or any public place in the United States" (H.J. Res. 486, Representative Curtin).

An eighth form of this type of resolution would provide that "the right to voluntarily offer, receive, and to participate in the saying of nonsectarian prayers, including the Lord's Prayer, or the right to voluntarily read from and listen to the reading of the Holy Scriptures in the public schools and other public places shall not be denied or abridged" (H.J. Res. 517, Representative Quillen).

A ninth form of this type of resolution would state that "the right to offer the Lord's Prayer or other nonsectarian prayer and to engage in readings from the Bible in the public schools or other public places shall not be denied or abridged, provided participation therein is voluntary" (H.J. Res. 553, Representative Waggonner).

A tenth form of this type of resolution would permit "the offering or reading of prayers or Bible Scriptures if participation therein is on a voluntary basis in any governmental or public school, institution, building or place" (H.J. Res. 810, Representative Morse).

The eleventh and last form of resolution of this type would authorize "the voluntary participation in prayer or the reading of Biblical Scriptures in any governmental or public school, institution, or place" (H.J. Res. 816, Representative Lankford).

5. One resolution would authorize any State to permit the Regents' prayer considered in *Engel* v. *Vitale* "to be offered in any public school or other public place within such States" (H.J. Res. 343, Representative Derounian).

6. Another resolution would permit "any reference to belief in or reliance upon God, or any invocation of the aid of God, in any governmental or public document, proceeding, or ceremony, or upon any coinage, currency, or obligation of the United States" (H.J. Res. 505, Representative Hemphill).

7. The seventh and last type of resolution generally would permit prayers, Bible reading, and references to belief in or reliance on God in public schools or other public places, and in governmental matters. Because the resolutions of this type are the most comprehensive, their substantive provisions are here set forth in full.

(*a*) H.J. Res. 515, Representative Short: "The right to voluntarily offer, read from, or listen to nonsectarian prayers, or to permit provision of time for prayerful meditation in public schools, public institutions, and other public places shall not be denied or abridged.

"The right to voluntarily read from or listen to the reading of sacred Scriptures in public schools, public institutions, and other public places shall not be denied or abridged.

"The right to make reference to belief in or reliance upon God, or to invoke the aid of God, in any governmental or public document, proceeding, or ceremony, or upon any coinage, currency, or obligation of the United States shall not be denied or abridged."

(*b*) H.J. Res. 603, Representative Wyman:[9] "Notwithstanding any other provision of this Constitution it shall be the right of all persons attending or otherwise participating in public schools, in public institutions, and in other public places, throughout the United States, its territories and possessions, to participate or to decline to participate in prayers, prayerful meditation, or the reading of sacred Scriptures or the Holy Bible and the right to decline to participate shall include the right, upon request, to be excused from the presence of participants.

"Notwithstanding any other provision of this Constitution reference to belief in or reliance upon God or a Divine Being may be made in any governmental or public document, proceeding, ceremony, or institution, or upon any coinage, currency, or obligation of the United States: *Provided, however*, That no citizen of the United States may be required, upon objection, to give oath or affirmation of such belief or reliance as a condition to entitlement to Federal or State rights, privileges, or public office."

(*c*) H.J. Res. 693, Representative Becker:[10] "Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

"Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"Nothing in this article shall constitute an establishment of religion."

(*d*) H.J. Res. 767, Representative Joelson: "Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to nonsectarian or nondenominational prayers or such Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

"Nothing in this Constitution shall be deemed to prohibit making references to belief in, reliance upon, or invoking the aid of, God or a Supreme Being, in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"Nothing in this article shall constitute an establishment of religion."

[9] Also H.J. Res. 527, Representative Tollefson; H.J. Res. 824, Representative Tupper; H.J. Res. 861, Representative Snyder; H.J. Res. 876, Representative Michel; and H.J. Res. 923, Representative Bates.

[10] Also 60 other resolutions: H.J. Res. 694, Representative Adair; H.J. Res. 695, Representative Broyhill; H.J. Res. 696, Representative Chenoweth; H.J. Res. 697, Representative Cramer; H.J. Res. 698, Representative Curtin; H.J. Res. 699, Representative Fuqua; H.J. Res. 700, Representative Harrison; H.J. Res. 701, Representative Hemphill; H.J. Res. 702, Representative Hoeven; H.J. Res. 703, Representative Jonas; H.J. Res. 704, Representative Kornegay; H.J. Res. 705, Representative Latta; H.J. Res. 706, Representative Lennon; H.J. Res. 707, Representative Matthews; H.J. Res. 708, Representative Milliken; H.J. Res. 709, Representative Quillen; H.J. Res. 710, Representative Schadeberg; H.J. Res. 711, Representative Short; H.J. Res. 712, Representative Sikes; H.J. Res. 713, Representative Waggonner; H.J. Res. 714, Representative Whitener; H.J. Res. 715, Representative Widnall; H.J. Res. 716, Representative Williams; H.J. Res. 717, Representative Baring; H.J. Res. 718, Representative King; H.J. Res. 719, Representative Rivers; H.J. Res. 720, Representative Taylor; H.J. Res. 721, Representative Whitten; H.J. Res. 722, Representative Henderson; H.J. Res. 728, Representative Baker; H.J. Res. 736, Representative Dague; H.J. Res. 737, Representative Whalley; H.J. Res. 739, Representative Goodling; H.J. Res. 740, Representative Monagan; H.J. Res. 741, Representative Poff; H.J. Res. 744, Representative Anderson; H.J. Res. 748, Representative Schweiker; H.J. Res. 751, Representative Slack; H.J. Res. 752, Representative Glenn; H.J. Res. 758, Representative Reid; H.J. Res. 758, Representative Moore; H.J. Res. 764, Representative Rodino; H.J. Res. 772, Representative Anchinclose; H.J. Res. 784, Representative Cederberg; H.J. Res. 792, Representative Battin; H.J. Res. 802, Representative Chamberlain; H.J. Res. 803, Representative Rooney; H.J. Res. 848, Representative Shipley; H.J. Res. 850, Representative Watson; H.J. Res. 857, Representative Dorn; H.J. Res. 862, Representative Chelf; H.J. Res. 863, Representative Dowdy; H.J. Res. 864, Representative Johnson; H.J. Res. 909, Representative Findley; H.J. Res. 911, Representative Roberts; H.J. Res. 912, Representative Bates; H.J. Res. 916, Representative Norblad; H.J. Res. 930, Representative Feighan; H.J. Res. 955, Representative Stinson; H.J. Res. 959, Representative Colmer.

(e) H.J. Res. 771, Representative Gallagher: "Nothing in this Constitution shall be deemed to prohibit the setting aside of a period of time in any governmental or public school, institution, or place for the purpose of spiritual contemplation, meditation, or silent prayer by any individual or group on a voluntary basis.

"Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"Nothing in this article shall constitute an establishment of religion."

(f) H.J. Res. 781, Representative Goodell: "Nothing in this Constitution shall be deemed to prohibit the offering or reading of prayers or Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, building, or place.

"Nothing in this Constitution shall be deemed to prohibit reference to reliance upon, belief in, or invocation of the aid of God or a Supreme Being, in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"Nothing in this article shall constitute an establishment of religion."

(g) H.J. Res. 869, Representative Chelf: "Nothing in the present Constitution or this amendment, if adopted thereto, shall be deemed to prohibit the offering, reading from, quoting, reciting, or in any other way or manner projecting, or listening to prayers or Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental, public school, institution, college, university or other place.

"Nothing in this proposed amendment to the present Constitution of the United States shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in or on any governmental property or in any public document, proceeding, activity, ceremony, school, institution, center of learning, or other place or thing; or upon any coinage, currency, medal, medallion, or any type or manner of obligation, monetary or otherwise, of the United States.

"Nothing in this article shall constitute an establishment of religion.

"It is the sense of this proposed constitutional amendment that the phrase 'governmental' as used herein shall mean and include any and all government of any type, kind, manner, or description on the precinct, city, county, district, State, Federal, or any other governmental level."

(h) H.J. Res. 913, Representative Robison: "Nothing in this Constitution shall be deemed to prohibit the offering or reading of prayers or Biblical Scriptures, in any governmental or public school, institution, building, or place, provided participation therein is on a voluntary basis: *And provided further*, That the right to decline to participate shall not be abridged.

[11] Also H.J. Res. 796, Representative Wilson of California, and H.J. Res. 819, Representative Utt.

"Nothing in this Constitution shall be deemed to prohibit reference to reliance upon, belief in, or invocation of the aid of God or a Supreme Being, in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"Nothing in this article shall constitute an establishment of religion."

(i) H.J. Res. 914, Representative Fountain: "Nothing contained in this Constitution shall be construed to prohibit the authority administering any school, school system, or educational institution supported in whole or in part from any public funds from making provision for participation by the students thereof on a voluntary basis in any periods of Bible reading and/or prayer.

"Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"Nothing in this article shall constitute an establishment of religion."

(j) H.J. Res. 924, Representative Broyhill of North Carolina: "Nothing in this Constitution shall be deemed to prohibit the offering of prayer or the reading from Scripture in any public school or other public place, if participation therein is on a voluntary basis, and if any person desiring not to participate in such prayer or reading is afforded a reasonable opportunity to refrain from doing so, and is afforded a reasonable opportunity to absent himself from the place where any such prayer is offered or Scripture is read.

"Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, oath, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States or obligation of any State."

(k) H.J. Res. 942, Representative Talcott: "Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers, religious Scriptures, or religious materials, provided participation therein is voluntary, in any governmental or public school, institution, or place.

"Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"Nothing in this article shall constitute an establishment of the United States."

II. Questions Presented by the Pending Resolutions

The number and variety of the resolutions which have been introduced preclude individual treatment of each resolution in this study. In considering these resolutions, however, the Judiciary Committee

will necessarily confront certain common questions which they raise.

The resolutions generally would qualify the establishment of religion clause in the first amendment to the Constitution.

The resolutions may also affect the free exercise clause, for the same word "religion," is the grammatical object of both the establishment clause and the free exercise clause. The sentence reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

It would seem difficult, therefore, to amend the establishment clause without at the same time affecting the free exercise clause, for as the Supreme Court observed in *United States* v. *Cooper Corp.* (312 U.S. 600, 606): "It is hardly credible that Congress used the term * * * in different senses in the same sentence."

Accordingly, if the establishment clause is qualified so that the word "religion" no longer includes prayers and Bible reading, the question arises whether the free exercise clause is not similarly qualified. This problem perhaps could be avoided by revising the text of the first amendment itself, but none of the pending resolutions proposes such a change. The committee may wish to consider whether the free exercise clause will be affected by adopting a new article of amendment to the Constitution with the proviso that "nothing in this article shall constitute an establishment of religion," as many resolutions suggest.

Most of the pending resolutions have as their primary objective legalizing the recital of prayers and the reading of the Bible in public schools, although some resolutions would go further. If this primary objective is to be reached, the committee must then consider whether and to what extent the language of the resolutions meets the intent of their authors.

The hearings on "Prayers in Public Schools and Other Matters," held by the Senate Committee on the Judiciary, 87th Congress, 2d session, on July 26 and August 2, 1962, reflect the difficulty of finding language which will definitively lay to rest the question of prayer recitation and Bible reading in public schools. Whether the language proposed in the various pending resolutions will avoid suits similar to *Engle* v. *Vitale* and *Abington School District* v. *Schempp*, *supra*, and the sort of controversy which gave rise to those cases is, perhaps, the basic problem which the pending resolutions present to the Judiciary Committee.

To assist in the consideration of this question by members of the committee, this staff study will consider the specific language used in the resolutions.

(1) The resolutions use a wide variety of language to describe the practices they would permit. They refer variously to "prayers," "nonsectarian prayers," "nonsectarian religious observances founded upon the recognition of God," "any prayer or any other recognition of God," "nonsectarian prayers, including the Lord's Prayer," "the Lord's Prayer or other nonsectarian prayers," "religious worship," "nondenominational religious observance through the invocation of the blessing of God or the recitation of prayer," "any reference to belief in or reliance upon God, or any invocation of the aid of God," "prayerful meditation," "making reference to belief in or reliance upon, or invoking the aid of God or a Supreme Being," "nonsectarian or nondenominational prayers," and "spiritual contemplation, meditation, or silent prayers."

Some resolutions would also authorize reading of "the Bible," "the Holy Scriptures," "Biblical Scriptures," "the Holy Bible," and "sacred scriptures or the Holy Bible."

Thus there is a wide range of choice in the language which has been proposed. To take Bible reading, for example, the words "Bible" and "the Holy Bible" presumably include both the Old and the New Testaments, but the question arises whether those terms also include all of the different translations of the Old and New Testaments or are intended to refer to the most widely used versions such as the King James and/or Douay. Other resolutions which refer to "the Holy Scriptures" and "sacred scriptures" may be confined to the Old and New Testaments—to the Judeao-Christian scriptures—or they may include the sacred books and writing of other religions—Islam, Buddhism, Taoism, Shinto, and others.

Thus in defining the type of Bible reading to be authorized, the committee will confront two questions: whether to specify certain particular translations of the Bible for public use and whether only the Judeao-Christian scriptures or the sacred writings of other religions are to be legalized as well.

In weighing the choice of language to be selected, the committee may wish to consider recent State cases holding that the Bible is a sectarian book: *Tudor* v. *Board of Education*, 14 N.J. 31, 100 A. 2d 857; *Brown* v. *Orange County Board of Public Instruction*, Fla. 128. So. 2d 181, affirmed 155 So. 2d 371 (1963).[12] In the *Tudor* case, *supra* (100 A. 2d at p. 865), the Supreme Court of New Jersey said that "the King James version of the Bible is as unacceptable to Catholics as the Douay version is to Protestants. * * * the Canon law of the Catholic church provides that 'editions of the original text of the sacred scriptures published by non-Catholics are forbidden *ipso jure*.'" Many of the early suits attacking Bible reading in the public schools were brought by Roman Catholic parents who objected to the King James version of the Bible. (See, e.g., *People ex rel. Vollmar* v. *Stanley*, 81 Colo. 276, 255 P. 610 (1927); *Herold* v. *Parish Board*, 136 La. 1034, 68 So. 116 (1915); *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608, 87 S.W. 792 (1905).)

In addition, the Supreme Court of New Jersey stated in the *Tudor* case, *supra* (100 A. 2d at p. 865) that "the King James version or Gideon Bible is unacceptable to those of the Jewish faith."

In *Brown* v. *Orange County Board of Public Instruction*, *supra*, the Court also referred to the differences between our great faiths and between the denominations within those faiths with respect to the scriptures they hold sacred. The Court said (128 So. 2d at p. 185):

> If the Gideons, instead of distributing the King James Bible had distributed the Douay version, exclusively, or the Koran, the Moslem Bible, or the Talmud, the body of Jewish civil and canonical law, through the school system of an area whose inhabitants were strongly Protestant, we surmise that

[12] The older State decisions divided on this question. Compare *People ex. rel. Vollmar* v. *Stanley*, 81 Colo. 276, 225 P. 610 (1927); *Hackett* v. *Brooksville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905); *Wilkerson* v. *Rome*, 152 Ga. 762, 110 S.E. 895 (1922); with *Ring* v. *Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910); *Weiss* v. *District Board*, 76 Wis. 177, 44 N.W. 967 (1890); *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 68 So. 116 (1915); *Freeman* v. *Scheve*, 65 Neb. 853, 91 N.W. 849 (1902), modified 65 Neb. 876, 93 N.W. 169 (1903).

> the Protestant groups would feel a sectarian resentment against the actions of the school authorities.
>
> This question could be narrowed by suggesting that if the doctrinaire books of either the Methodist, Baptist, Presbyterian, or other of the numerous divisions of the Protestant world were distributed through the school system to the exclusion of other groups, considerable legal action would justifiably ensue.

This problem of defining the version or versions of the "Bible" or of the "sacred scriptures" which would be authorized is complicated by a steady stream of new renditions of the Bible in the light of the discoveries of modern scholarship and archeology. Table I sets forth a list of recent translations and versions of the Bible compiled by the Legislative Reference Service of the Library of Congress.

TABLE I.—*The Bible in English, 1940–63—A selected list in chronological order*

The New Testament of Our Lord and Saviour Jesus Christ, newly translated from the Vulgate Latin . . . New York, Sheed and Ward, 1944. Translated by Ronald Knox.

The Old Testament, newly translated from the Vulgate Latin by Ronald Knox . . . New York, Sheed and Ward, 1948–50. 2 vols.

The Bible in Basic English. Cambridge [Eng.] University Press, in association with Evans Bros., 1949.

Published in the United States as—

The Basic Bible: Containing the Old and New Testaments in Basic English. New York, Dutton, 1950.

The Holy Bible: Revised standard version. New York [etc.] Thomas Nelson and Sons, 1952.

Holy Bible from ancient Eastern manuscripts . . . tr. from the Peshitta, the authorized Bible of the church of the East, by George M. Lamsa. Philadelphia, Holman, 1957.

The Holy Bible. [The Old Testament in the Douay text, the New Testament and the Psalms in the Westminister text . . .] New York, Hawthorn Books [1958].

The Holy Bible, the Berkeley version in modern English. Grand Rapids, Zondervan Pub. House, 1959.

The Holy Bible. New American Catholic ed. . . . New York, Benziger Bros. [1961]

"The Old Testament is the new Confraternity of Christian Doctrine translation for the books of Genesis to Ruth, Job to Sirach and the Prophetical books; the remaining books are the Douay version. The New Testament is the new Confraternity of Christian Doctrine translation." The Confraternity of Christian Doctrine translation is in process of completion.

The new English Bible. [New York] Oxford University Press, 1961. [1] New Testament.

The Old Testament in this translation has not yet been issued.

The words "Bible" or "sacred scriptures," which are used in some of the pending resolutions, might well be deemed to include all of these recent versions of the Bible.

Finally, none of the pending resolutions which would authorize Bible reading in public schools specify that this shall be done "without comment." A requirement that Bible reading in the public schools be "without comment" has been characteristic of State laws authorizing the practice and was included, for example, in the Pennsylvania statute and the rule of the Baltimore Board of School Commissioners which was considered by the Supreme Court in the *Schempp* case (374 U.S. at pp. 205, 211).

However, as Mr. Justice Brennan pointed out concurring in the *Schempp* case (374 U.S. at pp. 285–286):

> scriptural passages read without comment frequently convey no message to the younger children in the school. Thus there has developed a practice in some schools of bridging the gap between faith and understanding by means of "definitions," even where "comment" is forbidden by statute. The present practice therefore poses a difficult dilemma: While Bible reading is almost universally required to be without comment, since only by such a prohibition can sectarian interpretation be excluded from the classroom, the rule breaks down at the point at which rudimentary definitions of Biblical terms are necessary for comprehension if the exercise is to be meaningful at all.

In the light of these factors, the committee may wish to consider to include whether a requirement that Bible reading be "without comment."

(2) Similar definitional questions arise with respect to the language of the resolutions which would authorize "prayers," "nonsectarian religious observances founded upon the recognition of God," "religious worship," or "making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being," and the like.

In the *Schempp* case, *supra*, the Supreme Court noted (374 U.S. at p. 214) that there are in the United States today "83 separate religious bodies, each with membership exceeding 50,000 * * * as well as innumerable smaller groups." Table II lists the major denominations with the number of their membership, number of pastors, and Sunday School enrollments as compiled by the Bureau of the Census, Statistical Abstract of the United States at pages 46–47 (83d ed., 1962).

TABLE II.—*Religious bodies—Church membership, number of pastors, and Sunday School enrollment*

[Beginning 1959, includes Alaska and Hawaii. Represents latest information available from religious bodies; excludes a few groups giving no data, such as Church of Christ, Scientist. Totals include, substantially, those religious bodies reporting to Bureau of Census for Census of Religious Bodies in 1936. Not all groups follow same calendar year nor count membership in same way; some groups give only approximate figures. Roman Catholics count all baptized persons, including infants; Jews regard as members all Jews in communities having congregations; Eastern Orthodox Churches include all persons in their nationality or cultural groups; most Protestant bodies count only persons who have attained full membership, and previous estimates have indicated that all but a small minority of these are over 13 years of age; however, many Lutheran bodies and Protestant Episcopal Church now report all baptized persons, and not only those confirmed]

Religious body	Year	Number of churches reported	Church membership	Number of pastors with charges	Sunday or Sabbath School enrollment [1]
			Thousands		*Thousands*
Total		318,697	114,449	241,268	43,231
Bodies with membership of 50,000 or over		300,384	112,757	225,895	41,793
Adventist Bodies: Seventh-day Adventists	1960	3,032	318	2,499	322
Apostolic Overcoming Holy Church of God	1956	300	75	300	4
Armenian Church, Diocese of A.; Diocese of Calif	1960	51	125	43	6
Assemblies of God	1960	8,238	509	7,602	975
Baptist Bodies:					
American Baptist Association	1960	3,021	643	2,240	221
American Baptist Convention	1959	6,262	1,543	5,271	1,003
Baptist General Conference	1960	536	72	500	98
Conservative Baptist Association of America	1960	1,350	300	1,350	300
Free Will Baptists	1960	2,232	191	2,232	118
General Association of Regular Baptist Churches	1960	934	136	[2] 825	
General Baptists	1950	792	59	540	110
National Baptist Convention of America	1956	11,398	2,669	7,598	[3] 2,500
National Baptist Convention, U.S.A., Inc	1958	26,000	5,000	26,000	[4] 2,407
National Baptist Evangelical Life and Soul Saving Assembly of U.S.A	1961	264	58	128	[5] 46
National Primitive Baptist Convention of the U.S.A	1957	1,100	81	500	45
North American Baptist Association	1959	3,000	330	1,720	382
North American Baptist General Conference	1960	300	51	324	46
Primitive Baptists	1950	1,000	72		40
Southern Baptist Convention	1960	32,251	9,732	29,200	7,863
United Baptist	1955	586	64	416	15
United Free Will Baptist Church	1958	[6] 836	109	915	[6] 82
Brethren (German Baptist): Church of the Brethren	1960	1,074	200	885	167
Christian and Missionary Alliance	1960	1,016	60	910	137
Christian Churches (Disciples of Christ), International Convention	1960	8,001	1,802	4,244	1,109
Churches of God:					
Church of God (Cleveland, Tenn.)	1960	3,280	170	3,191	262
Church of God (Anderson, Ind.)	1960	2,278	143	1,803	247
The Church of God	1959	1,901	74	1,611	105
Church of God in Christ	1960	3,800	393	3,500	99
Church of the Nazarene	1960	4,458	308	3,997	671
Churches of Christ	1950	18,680	2,103	[7] 5,000	[7] 210
Congregational Christian Churches	1960	5,401	1,428	3,673	738
Eastern Churches:					
American Carpatho-Russian Orthodox Greek Catholic Church	1960	64	100	40	4
Bulgarian Eastern Orthodox Church	1960	22	95	[8] 10	1
Greek Archdiocese of North and South America	1960	382	1,200	417	57
Romanian Orthodox Episcopate of America	1960	52	50	34	1
The Russian Orthodox Church Outside Russia	1955	61	[9] 55	92	
The Russian Orthodox Greek Catholic Church of America	1957	352	765	340	11
Serbian Eastern Orthodox Church	1960	71	125	65	4
Syrian Antiochian Orthodox Church	1960	81	110	110	20
Syrian Orthodox Church of Antioch	1960	29	50	6	
Ukrainian Orthodox Church of U.S.A	1960	98	85	94	[8] 4
Evangelical and Reformed Church	1960	2,726	813	1,910	543
Evangelical Covenant Church of America	1960	510	60	440	79
Evangelical United Brethren Church	1960	4,266	748	3,046	733
Federated Churches	1936	508	88		70

See footnotes at end of table, p. 13.

TABLE II.—*Religious bodies—Church membership, number of pastors, and Sunday School enrollment*—Continued

[Beginning 1959, includes Alaska and Hawaii. Represents latest information available from religious bodies; excludes a few groups giving no data, such as Church of Christ, Scientist. Totals include, substantially those religious bodies reporting to Bureau of Census for Census of Religious Bodies in 1936. Not all groups follow same calendar year nor count membership in same way; some groups give only approximate figures. Roman Catholics count all baptized persons, including infants; Jews regard as members all Jews in communities having congregations; Eastern Orthodox Churches include all persons in their nationality or cultural groups; most Protestant bodies count only persons who have attained full membership, and previous estimates have indicated that all but a small minority of these are over 13 years of age; however, many Lutheran bodies and Protestant Episcopal Church now report all baptized persons, and not only those confirmed]

Religious body	Year	Number of churches reported	Church membership	Number of pastors with charges	Sunday or Sabbath School enrollment [1]
			Thousands		*Thousands*
Bodies with membership of 50,000 or over—Con.					
Friends: Five Years Meeting of Friends	1960	528	72	375	54
Independent Fundamental Churches of America	1960	754	90	[8] 700	[8] 148
International Church of the Foursquare Gospel	1960	721	68	721	88
Jehovah's Witnesses	1960	4,170	250		
Jewish Congregations	1960	[8] 4,079	5,307	[6] 2,902	[8] 265
Latter-day Saints:					
Church of Jesus Christ of Latter-day Saints	1960	3,491	1,487	[10] 2,869	1,413
Reorganized Church of Jesus Christ of Latter-day Saints	1960	948	156	948	94
Lutherans:					
Evangelical Lutheran Synodical Conference of N.A.:					
Lutheran Church, Missouri Synod	1960	5,216	2,891	4,198	576
Wisconsin Evangelical Lutheran Synod	1960	329	205	037	55
National Lutheran Council Constituents:					
American Lutheran Church	1960	4,625	2,242	3,461	613
Augustana Evangelical Lutheran Church	1960	1,207	998	964	248
Lutheran Free Church	1960	340	87	169	36
The United Lutheran Church in America	1960	4,308	2,355	3,437	1,045
Mennonite Bodies: Mennonite Church	1960	959	73	1,129	119
Methodist Bodies:					
African Methodist Episcopal Church	1951	5,878	1,196	5,878	353
African Methodist Episcopal Zion Church	1959	4,082	770	2,400	199
Christian Methodist Episcopal Church	1951	2,469	392	1,820	[8] 115
Free Methodist Church of North America	1960	1,193	55	1,200	136
The Methodist Church	1960	35,882	9,893	24,543	7,122
Moravian Bodies: Moravian Church in America (Unitas Fratrum)	1960	187	61	132	31
North American Old Roman Catholic Church	1960	64	65	64	
Pentecostal Assemblies:					
Pentecostal Church of God of America, Inc	1958	900	104	900	100
Pentecostal Holiness Church, Inc	1960	1,239	63	1,130	113
United Pentecostal Church, Inc	1950	1,900	175	1,900	[8] 130
Polish National Catholic Church of America	1960	162	282	151	[8] 24
Presbyterian Bodies:					
Cumberland Presbyterian Church	1960	975	88	600	70
Presbyterian Church in the U.S	1960	3,905	902	2,625	751
The United Presbyterian Church in the U.S.A	1960	9,383	3,259	7,407	2,046
Protestant Episcopal Church	1960	[8] 7,357	[8] 3,444	[8] 4,963	960
Reformed Bodies:					
Christian Reformed Church	1960	549	243	451	106
Reformed Church in America	1960	867	226	781	
Roman Catholic Church	1960	23,303	42,105	17,028	2,558
Salvation Army	1960	1,255	254	2,896	163
Spiritualists: International General Assembly of Spiritualists	1956	209	184	221	[8] 5
Triumph the Church and Kingdom of God in Christ	1960	670	67	500	27
Unitarian Churches	1960	392	101	350	67
Universalist Church of America	1959	387	71	350	16
Bodies with membership of less than 50,000		18,313	1,692	15,373	1,438

[1] Includes pupils, officers, and teachers enrolled. [2] 1959 data. [3] 1955 data. [4] 1957 data. [5] 1949 data. [6] 1952 data. [7] 1936 data. [8] 1951 data. [9] 1954 data. [10] 1956 data.

Source: National Council of the Churches of Christ in the United States of America: Yearbook of American Churches, November 1961.

In the *Schempp* case, Mr. Justice Brennan noted that (374 U.S., at p. 240) "our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorites not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all." This increase in the number and variety of our religious sects and denominations led Justice Brennan to refer (374 U.S., at p. 241) to "the much more highly charged nature of religious questions in contemporary society." [13]

Ours is also a mobile society and, as Mr. Justice Frankfurter pointed out concurring in *State ex rel. McCollum* v. *Board of Education* (333 U.S. at p. 217), our sects are often "shifting groups, varying from time to time, and place to place."

The number and variety of religious denominations and sects in our society today underscores the problem which confronts members of the Judiciary Committee in defining the nature of the religious observances which would be authorized by the pending resolutions.

If "prayers," "religious worship," or "any reference to belief in or reliance upon God, or any invocation of the aid of God" are to be authorized, as many resolutions propose, such general language would appear to permit almost any sort of religious observance in public institutions and on public occasions. Accordingly, the resolutions raise this question: What official or body is to prescribe the form of religious observance to be followed?

The resolutions variously propose that this decision would be left to each State, to each community, or in the case of the schools, to the "authority administering any school, school system, or educational institution."

House Joint Resolution 869 (Representative Chelf), which would authorize references to God and the like "in or on any governmental property" defines the word "governmental" to include "any and all government of any type, kind, manner, or description on the precinct, city, county, district, State, Federal, or any other governmental level."

Thus the pending resolutions offer the committee a wide range of choice as to which governmental bodies, from the precinct to the Federal level, should be authorized to prescribe the type of religious observances to be followed in public schools or on public occasions. If such questions are to be placed in the political arena, the committee may wish to consider whether to restrict the power of decision to larger entities, such as the States, or whether to leave the matter to each community, so that the form of public religious observances can be modified from time to time in accordance with the shifting religious complexion of each community.

The problem is also illustrated by those resolutions which would specify "nonsectarian prayers" or "nondenominational religious observances." Under those resolutions, public officials or bodies would have to determine what prayers or forms of worship are "nonsectarian" and "nondenominational" and to decide what criteria are to be followed in resolving this question.

[13] John Adams might not have agreed. On June 25, 1818 he wrote to Jefferson: "Every Species of these Christians would persecute Deists, as soon as either Sect would persecute another, if it had unchecked and unbalanced Power. Nay, the Deists would persecute Christians, and Atheists would persecute Deists, with as unrelenting Cruelty, as any Christians would persecute them, them or one another. Know thyself, human Nature!" Cappon, "The Adams-Jefferson Letters," vol. II, p. 334.

Some resolutions, for instance, would permit recitation of "the Lord's Prayer or other nonsectarian prayers." A non-Christian might not regard the Lord's Prayer as "nonsectarian." If, however, the Lord's Prayer is defined by the resolution as "nonsectarian" it is difficult to see under the rule of *eiusdem generis* what prayer would be "sectarian."

On the other hand, if a specific form of prayer, such as the Lord's Prayer, is to be authorized as other resolutions propose, the religious sensibilities of non-Christians may be offended. Indeed, there may be differences among Christians. As Senator Hart suggested during the hearings before the Senate Committee on the Judiciary on "Prayers in Public Schools and Other Matters" (p. 25):

> If the Bible that is read, and the Lord's Prayer that is recited, were not the Bible and the Lord's Prayer prayers of my children, although I am a Christian—does it not really do damage to my children to be exposed to that? How do I explain to them this inconsistency? You see, I am a Catholic; our Bible and our Lord's Prayer differ from the Protestant versions.

Bishop Pike, however, expressed a different view regarding recital of the Lord's Prayer in public schools. Bishop Pike, who suggested a form of amendment at the Senate hearings, said (hearings, *supra*, p. 62):

> * * * the Lord's Prayer obviously being in the New Testament and being in the words of Jesus Christ, is thought of as a Christian prayer. Yet, theologically speaking, Jesus was never more Jewish than when he uttered the Lord's Prayer. Every single concept in it is a summation of Judaism.

On the other hand, Bishop Pike felt that a resolution should not be so worded as to permit the use in public schools of a prayer associated with a particular church. He testified (hearings, *supra*, p. 64):

> I would think the adoption of the "Hail Mary," the "Ave Maria," even under my wording for an amendment would be a recognition of a given denomination as an established church. The Roman Catholics should be quite free to say this prayer; but it should not be selected, of course, as the official prayer for everybody.

Senator Robertson expressed the opposite point of view at the Senate hearings. When asked whether a local school board could provide for the recital of a "Hail Mary," Senator Robertson replied: "In my judgment, if it is voluntary, it is legal" (hearings, supra, p. 36).

In addition to differences in forms of prayer, there are differences among religions as to dress and attitude in prayer. As was pointed out in one statement submitted to the Senate Judiciary Committee hearings, supra (p. 100):

> Children of different religions pray in different ways. Some kneel and cross themselves, some clasp their hands and bow their heads. Some pray with head covered and some with head uncovered. And to some, the Friends, for example, all public oral prayer is theologically objectionable.

(3) Many resolutions would permit only "nondenominational" or "nonsectarian" prayer. Such a requirement poses the question whether it is possible to fashion a "common core" of agreement on a form of prayer "tolerable to all creeds but preferential to none." As Mr. Justice Brennan pointed out, concurring in the *Schempp* case (374 U.S. at pp. 286–287), many authorities in this field believe that "the notion of a common core suggests a watering down of the several faiths" [14] and "the moral code held by each separate religious community can reductively be unified, but the consistent particular believer wants no such reduction." [15]

Commenting on *Engel* v. *Vitale*, an editorial in Presbyterian Life, August 15, 1962, page 15, observed:

"(H)ardly anyone questioned the whole concept of 'nondenominational' prayer. A wise friend of ours once said, 'There is no religion that is not sectarian.' And this is true. If you have faith-in-general, you have no faith to speak of. Faith has to be in something-in-particular. A nondenominational prayer is doomed to be limited and circumscribed. If prayer starts soaring, it starts to be controversial, which is one thing a nondenominational prayer dares not be."

A final problem remains with respect to a requirement for "nondenominational" or "nonsectarian" prayer. Many public schools today permit Christmas pageants and Christmas carols as part of the school program. And in *Lawrence* v. *Buchmueller*, 243 N.Y.S. 2d 87, the New York Supreme Court, Westchester County, upheld a local school board resolution permitting private citizens to erect a nativity scene on the school lawn while the school was closed for Christmas vacation.

These practices might well be sustained under the reasoning suggested in Mr. Justice Brennan's concurring opinion in the *Schempp* case (374 U.S. at p. 278), because "however clearly religious may have been the origins" of Christmas or Thanksgiving, for example, those occasions have also become secular holidays, and the observances associated with them may have become a part of our national culture, to a point where "these practices today serve so clearly secular educational purposes that their religious attributes may be overlooked," as in the case of the Sunday closing laws upheld in *McGowan* v. *Maryland* (366 U.S. 420).[16]

Some of these practices might also be sustained, as the New York court suggested in *Lawrence* v. *Buchmueller*, *supra* (243 N.Y.S. 2d at p. 91), on the ground that they constitute "merely a passive accommodation of religion."

If the words "nondenominational" or "nonsectarian" were included in a resolution, however, those words might be deemed to preclude such practices which might otherwise be upheld as merely quasi-religious today, although plainly sectarian in their origins.

Accordingly, the question remains whether, under any of the pending resolutions, it would be possible to lay to rest controversy and

[14] Citing Father Gustave Weigel as quoted in Kurland, "The Regents Prayer Case: 'Full of Sound and Fury, Signifying . . .,'" 1962, Supreme Court Review (1962) 1, 31.

[15] Citing the American Council on Education as quoted in Harrison, "The Bible, the Constitution and Public Education," 29 Tenn. L. Rev. 363, 417 (1962).

[16] In *Chamberlin* v. *Dade County Board of Instruction* (32 U.S. Law Week 2393), the Supreme Court of Florida on Jan. 29, 1964, upheld the Florida statute authorizing Bible reading in the public schools on the ground that this statute "was founded upon secular rather than sectarian considerations," citing *McGowan* v. *Maryland*, *supra* (366 U.S. 420).

Since this decision was rendered on remand from the Supreme Court (374 U.S. 487) for further consideration in the light of the *Schempp* case, the Supreme Court may again be asked to rule on this case.

litigation such as *Engel* v. *Vitale*, the *Schempp* case, and earlier cases of the same type.

One resolution appears to avoid the problems canvassed above. It would permit the "setting aside of a period of time in any governmental or public school, institution or place for the purpose of spiritual contemplation, meditation, or silent prayer by any individual or group on a voluntary basis" (sec. 1 of H.J. Res. 771, Representative Gallagher; see also S. Res. 356, 87th Cong., 2d sess., hearings before the Senate Committee on the Judiciary on "Prayers in Public Schools and Other Matters," supra, pp. 39–40).

Engel v. *Vitale* and the *Schempp* case, *supra*, did not involve, and none of the opinions questions, the setting aside of a period for silent prayer or meditation. Indeed, Mr. Justice Brennan's concurring opinion in the *Schempp* case suggested (374 U.S. at p. 281) "the observance of a moment of reverent silence at the opening of class."

It does not appear necessary, therefore, to amend the Constitution to permit this practice in public schools and on public occasions, but such a resolution, if deemed appropriate, would seem to avoid both the difficulties of definition posed by other resolutions and the sort of controversy which has arisen in the past over prayers and Bible reading in public schools.

(4) The pending resolutions pose a fourth question: Where and when are religious observances to be authorized?

All 146 proposed resolutions would apply to public schools either expressly or by language which would necessarily include them. To this extent, they would overturn the decisions in *Engel* v. *Vitale* and the *Schempp* case, and some resolutions appear to be limited to this purpose. (See, e.g., H.J. Res. 897, Representative Hutchinson.) Indeed, the actual holdings in both cases were limited to public elementary and secondary schools where attendance is compulsory, and the implications of both decisions appear to be similarly confined. (See pp. 17–20, infra.)

Some resolutions would extend to "any school, school system, or educational institution supported in whole or in part by any public funds." (See, e.g., H.J. Res. 506, Representative Hemphill.) This broader language appears to include private schools and colleges which receive public assistance, either State or Federal. *Pierce* v. *Society of Sisters* (268 U.S. 510), however, established the right of parents to send their children to private sectarian schools and colleges. Since private schools and colleges can provide for religious observances without limitation, the question arises whether it is necessary to use broader language to include them.

Many resolutions would authorize religious observances in "public places," "public bodies," and "public institutions." In addition, some resolutions would expressly authorize "making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States." (See, e.g., H.J. Res. 693, Representative Becker.)

The majority opinions in *Engel* v. *Vitale* and the *Schempp* case, *supra*, expressly refrained from passing on such familiar institutions and practices as chaplains for our legislators, Armed Forces, and prisons; chapels in the service academies, and references to God in

oaths of office and of witnesses at the opening of courts and legislative sessions, on our coinage, currency, and public buildings, in our national anthem and the pledge of allegiance to the flag. Indeed, the concurring opinions of Justice Brennan and of Justice Goldberg joined by Justice Harlan in the *Schempp* case intimate that those familiar practices are not affected and that both decisions are limited to religious exercises in public elementary and secondary schools.

These reservations by the Court and its members are relevant to a determination by the committee whether to adopt such broader language from among the pending resolutions. For the Court's reservations may make the broader language unnecessary if these familiar institutions and practices are not questioned by the Court.

In *Engel* v. *Vitale* the majority opinion pointed out (370 U.S. at p. 435, note 21.)

> There is of course nothing in the decision reached here that is inconsistent with the fact that schoolchildren and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contains references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

And several weeks after *Engel* v. *Vitale* was decided, Mr. Justice Clark remarked: [17]

> Here was a state-written prayer circulated to state-employed teachers with instructions to have their pupils recite it in unison at the beginning of each school day. The Constitution says that the government shall take no part in the establishment of religion. No means no. As soon as people learned that this was all the Court decided—not that there could be no official recognition of a Divine Being or recognition on silver or currency of "In God We Trust", or public acknowledgement that we are a religious nation—they understood the basis which the Court acted.

Similarly in the *Schempp* case, the limitations of that decision—and hence of *Engel* v. *Vitale*—were stressed in the opinion of the Court in the concurring opinions of Mr. Justice Brennan and Mr. Justice Goldberg, joined by Mr. Justice Harlan.

The Court's opinion in the *Schempp* case referred, without suggesting any criticism, to the evidence of our spiritual heritage "today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication 'So help me God.' Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of

[17] Quoted in Butler, "The Regents' Prayer Case: In the Establishment Clause 'No Means No'", 49 A.B.A.J. 444 (1963).

military service wish to engage in voluntary worship * * *" (374 U.S. at p. 213).

The Court also specifically pointed out that the establishment clause does not forbid teaching about religion or study of the Bible in public schools. To quote the majority opinion (374 U.S. at p. 225):

> * * * it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment. * * *

With respect to chaplains in the Armed Forces, the Court added (374 U.S. at p. 226, note 10):

> We are not, of course, presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of Government facilities, military personnel would be unable to engage in the practice of their faiths.

Mr. Justice Brennan was even more explicit in limiting the *Schempp* case. He said the decision "does not clearly forecast anything about the constitutionality of other types of interdependence between religious and other public institutions" (374 U.S. at p. 294). He then added a rebuttal in detail to the charge that *Schempp* rendered "unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government" (374 U.S. at pp. 294–304). Justice Brennan set forth the various reasons why the establishment clause might not be thought to forbid military and prison chaplains, draft exemptions for ministers and divinity students, excusal of children from school on their respective religious holidays, and the like. Justice Brennan also canvassed the reasons for holding that the establishment clause does not apply to prayers at the opening of legislative sessions, nondevotional use of the Bible in public schools, tax deductions and exemptions for religious institutions, religious considerations involved in public welfare programs such as unemployment compensation,[18] and references to God on our coins, in the pledge of allegiance to the flag, and elsewhere.

Justice Goldberg, joined by Justice Harlan, also underscored the limits of the *Schempp* decision. Noting that "a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive from religious teachings," Justice Goldberg stated (374 U.S. at p. 306):

> * * * Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And

[18] In *Sherbert* v. *Verner*, 374 U.S. 398, decided on the same day as *Schempp*, the Court held that the free exercise clause of the first amendment forbade South Carolina to deny unemployment compensation to a Seventh-day Adventist who could not obtain employment because her faith forbade her to work on Saturday.

> it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools. The examples could readily be multiplied * * *.

The concurring opinions of Justices Brennan and Goldberg both intimate that *Engel* v. *Vitale* and the *Schempp* case are strictly limited to public school prayers and Bible reading. Thus Justice Brennan suggested that "religious exercises in the public schools present a unique problem" and that the impact of *Schempp* "is to be measured by the special circumstances under which these cases have arisen, and by the particular dangers to church and state which religious exercises in the public schools present" (374 U.S. at pp. 294, 295–296).

Justice Brennan contrasted (374 U.S. at pp. 252–253) "the compelled attendance of young children at elementary and secondary schools" with the "voluntary attendance at [a State college of young] adults" who, the Court has held, could be required to participate in military training against their religious convictions (*Hamilton* v. *Regents*, 293 U.S. 245).[19]

Again, discussing military and prison chaplains he emphasized (374 U.S. at pp. 298–299): "We are here usually dealing with adults, not with impressionable children as in the public schools."

Finally, in distinguishing legislative prayers, Justice Brennan noted (374 U.S. at pp. 299–300): "Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty direct or indirect."

Likewise Justices Goldberg and Harlan stressed that *Schempp* involved "young impressionable children whose school attendance is statutorily compelled" (374 U.S. at p. 307).

These reservations in the opinions of the Court and its members in *Engel* v. *Vitale* and the *Schempp* case may raise the question whether there is a need to adopt broad language to authorize religious observances in virtually all of our public activities and institutions, since the familiar practices which are suggested by such broad language do not appear to be questioned by either decision.

Narrower language proposed by some resolutions may be more appropriate if the objective is to overturn the decisions in *Engel* v. *Vitale* and the *Schempp* case, *supra*, so as to authorize prayers and Bible reading in public elementary and secondary schools or on public occasions.

(5) Many resolutions provide that participation in the religious observances they would authorize must be "voluntary" or "not compulsory."

Other resolutions appear to authorize only voluntary religious observances by providing that "the right to voluntarily offer, read from, or listen to nonsectarian prayers" and "the reading of sacred scriptures * * * shall not be denied or abridged." (See, e.g., H.J. Res. 515, Representative Short.)

[19] This distinction might have appealed to Jefferson who warned against "putting the Bible and Testament into the hands of children when their judgments are not sufficiently matured for religious inquiries * * *" although he proposed religious instruction and chapels at the University of Virginia. (See 374 U.S. at p. 236, note 4.)

Thus, the pending resolutions raise the issue whether only "voluntary" participation in religious exercises should be authorized. Implicit is the further question whether religious observances in the public schools can be truly voluntary or noncompulsory.

There are two opposing points of view on this latter question. Concurring in *McCollum* v. *Board of Education* (333 U.S. at p. 227), Mr. Justice Frankfurter observed: "The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure to attend." The same doubt as to the effectiveness of an excusal provision, or of a condition that participation in religious exercises by public school children be "voluntary" or "not compulsory," was expressed by Mr. Justice Brennan concurring in the *Schempp* case in these words (374 U.S. at pp. 289–290):

> By requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

Several State courts have also rejected the suggestion that it is enough to excuse public school children who do not wish to participate in religious exercises. For example, in *Tudor* v. *Board of Education*, *supra*, the Supreme Court of New Jersey concluded (100 A. 2d at p. 866) that it "ignores the realities of life" to suppose that the children of minority groups will not be subjected to pressures to conform, and to disadvantage in the eyes of their schoolmates, if they decline to participate in religious activities of the school.

Similarly, in *People ex rel. Ring* v. *Board of Education* (245 Ill. 334, 351, 92 N.W. 251, 256 (1910)), the Supreme Court of Illinois said:

> The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief.

And in *State ex rel. Weiss* v. *District Board* (76 Wis. 177, 199–200, 44 N.W. 967, 975 (1890)), the Supreme Court of Wisconsin stated:

> When * * * a small minority of the pupils in the public school is excluded for any cause, from a stated school exercise, particularly when such a cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult.

Finally, in *Knowlton* v. *Baumhover* (182 Iowa 691, 699–700, 166 N.W. 202, 205 (1918)), the Court said:

> Conceding, for argument's sake, that such attendance was voluntary in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exercises, yet, surrounded as they were by a multitude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a responsible person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly opened door of the church, and receive, with their companions, the instructions there given?

The opposite view was expressed by the Colorado Supreme Court in *People ex rel. Vollmar* v. *Stanley, supra*, 81 Colo. 276, 255 P. 610 at pp. 617–8:

> The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations but never one for neglecting them or absenting himself from them.

Mr. Justice Stewart, dissenting in the *Schempp* case (374 U.S. at p. 316), also considered the question of coercion. He noted that "the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises as affirmations in ceremonies attended by adults." Justice Stewart suggested, however (374 U.S. at p. 318), that—

> certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives, it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great. * * *

The trial court in *Engel* v. *Vitale* suggested certain specific criteria to guard against coercion while observing that "the exact provision to be made is a matter for decision by the board, rather than by the court * * *." To quote the trial court (18 Misc. 2d 659, 696; 191 N.Y.S. 2d, 453, 492–493):

> This is not to say that the rights accorded petitioners and their children under the "free exercise" clause do not mandate safeguards against such embarrassments and pressures. It is enough on this score, however, that regulations, such as were adopted by New York City's Board of Education in connection with its released time program, be adopted, making clear that neither teachers nor any other school authority may comment on participation or nonparticipation in the exercise nor suggest or require that any posture or language be used or dress be worn or be not used or not worn. Nonparticipation may take the form either of remaining silent during the exercise, or if the parent or child so desires, of being excused entirely from the exercise. Such regulations must also make provision for those nonparticipants who are to be excused from the prayer exercise. The exact provision to be made is a matter for decision by the board, rather than the court, within the framework of constitutional requirements. Within that framework would fall a provision that prayer participants proceed to a common assembly while nonparticipants attend other rooms, or that nonparticipants be permitted to arrive at school a few minutes late or to attend separate opening exercises, or any other method which treats with equality both participants and nonparticipants.

The pending resolutions pose an additional problem, that of the Catholic or Jewish teacher who is required to read the Protestant Bible, or vice versa, to children of all faiths in the public school classroom. See *Board of Education* v. *Minor*, 23 Ohio St. 211, 249–50 (1872). As one author points out "* * * the teacher is caught between two equally distasteful alternatives. If for reasons of conscience he refuses to conduct the Bible reading exercise, there is a good possibility he might lose his position. On the other hand, if he performs the exercise as prescribed by law, his religious beliefs and principles will be violated." [20]

Accordingly, in considering the pending resolutions, the committee may wish to consider whether their language would permit teachers, as well as pupils, to refrain from participating in Bible reading or prayer exercises.

The committee may also wish to consider whether any such resolution should undertake to specify guidelines of the sort suggested by the trial court in *Engel* v. *Vitale*, or whether to use the words "voluntary" or "not compulsory" and leave the interpretation of those terms to the States, to communities or to local schools, as the case may be.

If the latter alternative is followed, as many resolutions propose, the further question arises whether the words "voluntary" or "not compulsory" will give rise to controversy and litigations as to their meaning.

[20] Bolea, "The Bible, Religion, and the Public Schools," (new revised edition) Collier Books, 1963, pp. 123–124.

III. Some Practical Problems Posed by the Pending Resolutions

The definitional problems arising out of the language of the pending resolutions involve a number of practical questions. Some views pro and con on these questions are collected here solely for the convenience of members of the committee in considering the resolutions.

First, what sort of religious observances should be authorized in the public schools as proposed by the various pending resolutions?

Commenting on the decision in *Engel* v. *Vitale*, shortly after it was handed down, President Kennedy said:

> We have in this case a very easy remedy, and that is to pray ourselves. And I would think that it would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of all of our children (New York Times, July 16, 1962, p. 1).

President Grant, too, stated that matters of religion should be left "to the family altar, the church and the private school supported entirely by private contributions" (374 U.S. at p. 273).

And Theodore Roosevelt felt that "it is not our business to have a Protestant Bible, or the Catholic Vulgate, or the Talmud read in [public] schools." (See 374 U.S. at p. 273.)

Mr. Justice Stewart, dissenting in the *Schempp* case, expressed the opposite point of view. Justice Stewart said (374 U.S. at p. 313):

> 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.

In the light of these differing views as to the need for religious observances in the public schools, the question arises which of the broad range of proposals presented by the pending resolutions best accords with the needs of our public school children, the desires of their parents, and the scruples of their teachers. The choice ranges, as we have seen, from a provision for periods of silent meditation and prayer through the recitation of particular prescribed prayers and/or the reading of a prescribed version of the Bible to the broad provisions of many resolutions for religious observances generally, with the nature and form of those observances to be left to State and local authorities.

Second, is it enough that under existing decisions children may be sent to private sectarian (or nonsectarian) elementary and secondary schools where their attendance may be assisted to a limited extent by public funds?

In *Vidal* v. *Girard's Executors* (2 How. 127), the Supreme Court upheld Stephen Girard's bequest to the city of Philadelphia to establish a school for "poor male white orphan children" to provide instruction in specified secular subjects "and especially * * * a pure attachment to our republican institutions and sacred rights of conscience, as guarantied by our happy constitutions * * *" (2 How. at p. 132). The bequest was challenged on the ground that the public policy of a Christian society forbade the following restriction (2 How. at p. 133):

> * * * I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of said college.
>
> In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever, but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans * * * free from the excitement which clashing doctrines and sectarian controversy are so apt to produce * * *.

In sustaining the bequest, the Supreme Court relied on Girard's explanation which is quoted above, and it remarked on "the differences in opinion almost endless in their variety" on matters "connected with religious polity, in a country composed of such a variety of religious sects as our country" (2 How. at p. 198).

Pierce v. *Society of Sisters* (268 U.S. 510) upheld the right of parents to send their children to private sectarian schools of their own choosing. The Court stated that the due process clause of the 14th amendment "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only" (268 U.S. at p. 535).

Thus the *Girard* and *Pierce* cases give legal sanction to private nonsectarian and sectarian schools, respectively.

Cochran v. *Louisiana State Board* (281 U.S. 370) upheld the use of public funds to support a loan of free textbooks to students at public and private sectarian schools alike, while *Everson* v. *Board of Education* (330 U.S. 1) sustained the use of public funds to reimburse parents for the cost of transporting children to both public and private sectarian schools.

Mr. Justice Stewart, dissenting in the *Schempp* case, set forth the reasons why he felt that the right to send children to private schools was not an adequate alternative to some form of prayer and/or Bible reading in public elementary or secondary schools. Justice Stewart said:

> It might be argued here that parents who wanted their children to be exposed to religious influences in school could, under *Pierce*, send their children to private or parochial schools. But the consideration which renders this contention too facile to be determinative has already been recognized by the Court: "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way" (*Murdock* v. *Pennsylvania*, 319 U.S. 105, 111).

The right of parents to send their children to private sectarian or nonsectarian schools of their choice seems relevant, however, to the selection of language which members of the committee will confront in determining in what form and to what extent religious observances in the public schools may be authorized.

Third, another question posed by the pending resolutions is whether the religious needs of public school children can be met through "released time," "dismissed time," or through "shared time."

Justice Frankfurter's concurring opinion in *Illinois ex rel. McCollum* v. *Board of Education* (333 U.S. at pp. 213–225) traces the development of secular public education with particular attention to the released time and dismissed time methods of enabling public school students to receive religious instruction. In addition, Justice Brennan's concurring opinion in the *Schempp* case canvasses the legal history of controversies over prayers and Bible reading in the public schools (374 U.S. at pp. 267–278). These surveys need not be repeated here.

Zorach v. *Clauson* (343 U.S. 306) holds that public schools may "accommodate" themselves to demands for religious instruction through released time by letting children go to their churches, temples, or homes for religious training during school hours. Under a dismissed time system, the public schools close early on certain days for the same purpose. The only restraint placed by the Supreme Court upon the released time or dismissed time methods of providing religious instruction for public school children, is that public school property and facilities may not be used to provide religious instruction (*Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203).

"Shared time" has only recently become the subject of wide public attention. It has been defined as "an arrangement for pupils enrolled in non-elementary or secondary schools to attend public schools for instruction in certain subjects." [21]

The nature and purpose of "shared time" has been stated thus: [22]

> The basic concept is simple. Children enrolled in parochial schools would take some of their courses in public schools, and, conversely some public school students would spend some of each day at church-sponsored schools. Thus church and state would become partners in the educational task, and parents would no longer have to make an all-or-nothing choice between religious or secular schooling for their children.

Justice Stewart, dissenting in the *Schempp* case, however, appeared to feel that the availability of "released time," "dismissed time," and "shared time" is irrelevant to what he described as "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" (374 U.S. at p. 312). Speaking of religious observances in the public schools, Justice Stewart added (374 U.S. at p. 313):

> 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 the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

Once again, in weighing the language of the various pending resolutions, members of the committee may wish to consider whether the availability of these methods of giving religious instruction to

[21] "Proposed Federal Promotion of 'Shared Time' Education," Senate Committee on Labor and Public Welfare, 88th Cong., 1st sess., (committee print). See also "Shared Time: A Symposium," Religious Education, January–February 1962.
[22] Cassels, "A Way Out of Our Parochial-Public School Conflict," Look, Aug. 23, 1960.

those public school children who desire it affects the type of observance to be authorized.

Fourth, during the hearings of the Senate Committee on the Judiciary on "Prayers in Public Schools and Other Matters" (87th Cong., 2d sess.), Senator Keating stated (p. 27):

> It is the thinking of many that we should go slow in moving for a constitutional amendment and should wait until one or possibly other cases have come before the Court dealing with this same problem.

The reservations in the Supreme Court's opinions in *Engel* v. *Vitale* and the *Schempp* case have already been noted. In addition, the recent decision on January 29, 1964, by the Supreme Court of Florida in *Chamberlin* v. *Dade County Board of Instruction*, *supra* (32 U.S. Law Week 2399), after "further consideration in the light of" the *Schempp* case on remand from the Supreme Court (374 U.S. 487), suggests that the Supreme Court may again be asked to delineate its recent decisions in this field.

Indeed, the *Chamberlin* decisions of the Florida Supreme Court raise two questions: the latest opinion sustains Bible reading in the public schools as "founded upon secular rather than sectarian considerations" (32 U.S. Law Week 3299). The prior decision in the *Chamberlin* case (143 So. 2d at p. 35) approved the trial court's refusal "to enjoin the display of religious symbols in the schools * * * upon the ground that the religious displays were found by this court to be works of art created by the schoolchildren and were displayed on a temporary basis and not of a permanent nature."

The majority opinion in the *Schempp* case expressly approved "literary and historic * * * study of the Bible or of religion * * * as part of a secular program of education" (374 U.S. at p. 225), and Mr. Justice Brennan noted that "it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion (374 U.S. at p. 300). As Mr. Justice Jackson pointed out concurring in *McCollum* v. *Board of Education*, *supra*, 333 U.S. at p. 236, "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view."

Since the *Chamberlin* case seems headed for further review in the Supreme Court [23] further decisions may well be forthcoming as to how far the public schools may carry the secular study of religion and religious history, literature, art, and music.

Also in *Stein* v. *Oshinsky*, No. 63–C–260 (U.S.D.C., E.D.N.Y., December 20, 1963), the court upheld the right of kindergarten children to recite, voluntarily, two simple children's prayers.

Since these and similar cases may place concrete limits on the decisions in *Engle* v. *Vitale* and the *Schempp* case, members of the committee may wish to consider whether to await further clarification by the Supreme Court before acting on these proposals to amend the Bill of Rights for the first time since its adoption more than 170 years ago.

In order that the committee may view these proposals in the light of the decisions, there follows a brief summary of the majority opinions

[23] The office of the Clerk of the Supreme Court has so advised the committee staff.

of the Supreme Court in both cases. The limitations of those decisions as expressed in the reservations by the majority and concurring opinions have already been canvassed above.

IV. The Supreme Court Decisions

A. ENGEL v. VITALE

(1) In *Engel* v. *Vitale* (370 U.S. 421), the Supreme Court held that a State may not compose and prescribe a form of prayer to be recited daily at the opening of its public schools.

The majority (consisting of five Justices) concluded that "New York's program of daily classroom invocation of God's blessings * * * is a religious activity." This, said the Court, was a "practice wholly inconsistent with the establishment clause" (370 U.S. at p. 424).

According to the majority opinion, the establishment clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government" (370 U.S., at p. 425).

The Court concluded that under the establishment clause "* * * 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."

(2) To the argument that the New York regents' prayer was nonsectarian and that participation by pupils was voluntary, the Court replied:

> Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance * * * is voluntary can serve to free it from the limitations of the Establishment Clause (370 U.S., at p. 430).

The majority opinion summed up:

> The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate (370 U.S., at pp. 431–432).

(3) The Court also rejected the suggestion that its decision required government to be hostile to religion. "Nothing," it said, "could be more wrong. The history of man is inseparable from the history of religion. * * * It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance (370 U.S., at pp. 434, 435).

(4) The Court's actual decision was narrow. It held only that no State can compose and prescribe a form of prayer for daily use in its public school system.

Justice Douglas concurring, and Justice Stewart in dissent, debated a broader question: whether the establishment clause forbids such familiar institutions and practices as chaplains for our legislatures, Armed Forces, and prisons; chapels at the service academies, and

references to God in oaths of office and of witnesses, at the opening of courts and legislative sessions, on our coinage, currency, and public buildings, in our national anthem and the pledge of allegiance to the flag.[24]

Much of the discussion evoked by *Engel* v. *Vitale* has been addressed to this debate between two individual Justices. As noted above however, the majority opinion expressly disclaimed any such broad holding (370 U.S., at p. 435, note 21).

B. ABINGTON SCHOOL DISTRICT v. SCHEMPP

(1) *Abington School District* v. *Schempp* (374 U.S. 203),[25] held that the establishment clause also forbids a State or city to require the Bible to be read without comment and the Lord's Prayer to be recited each day at the opening of its public schools.

The Court decided (374 U.S., at p. 225) that these were "religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding or opposing religion." And as in *Engel* v. *Vitale*, a provision whereby "individual students may absent themselves upon parental request" was held to be "no defense to a claim of unconstitutionality under the establishment clause."

Thus in *Schempp*, the Court broadened its construction of the establishment clause so as to forbid religious exercises in the public schools whether State officials compose the prayer to be used (as in *Engel* v. *Vitale*), or whether they prescribe the prayer and the version or versions of the Bible from which daily selections are to be made by teachers or students (as in the *Schempp* case).

(2) The majority opinion by Mr. Justice Clark (for himself and seven of his colleagues) stressed that "religion has been closely identified with our history and government" (374 U.S., at p. 212); it reiterated the statement in *Zorach* v. *Clauson* (343 U.S., at p. 313), that "We are a religious people whose institutions presuppose a Supreme Being"; and it concluded (374 U.S., at p. 226):

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

(3) The Court did not agree with Mr. Justice Stewart's dissenting opinion "that the concept of neutrality, which does not permit a

[24] Contrast Justice Douglas' opinion for the Court in *Zorach* v. *Clauson*, 343 U.S. 306, at pp. 312-313: "The first amendment, however, does not say that in every and all respects there shall be a separation of church and state. * * * Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. * * * Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the first amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session 'God save the United States and this Honorable Court.'

"We would have to press the concept of separation of church and state to these extremes to condemn the present law on constitutional grounds."

[25] Actually the Court decided together two cases challenging similar daily school prayer and Bible reading exercises required in the Pennsylvania and Baltimore school systems respectively.

State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion." Justice Stewart's dissent argued that the Court's decision in *Schempp* deprived most of the children of their right of free exercise of their religion through the school prayer and Bible reading exercises. The Court replied (374 U.S., at p. 226):

> * * * While the Free Exercise Clause clearly prohibits the use of State action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in *West Virginia Board of Education* v. *Barnette* (319 U.S. 624, 638 (1943)):
>
> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to * * * freedom of worship * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

(4) As already noted, the limitations of the *Schempp* decision—and hence of *Engel* v. *Vitale*—were stressed in the opinion of the Court and in the concurring opinions of Mr. Justice Brennan and of Mr. Justice Goldberg, joined by Mr. Justice Harlan.

When all of these reservations are added together the two decisions appear to hold only that the establishment clause forbids religious or devotional exercises in public elementary and high schools. Neither *Engel* v. *Vitale* nor the *Schempp* decision challenges the longstanding "manifestations in our public life of belief in God," which are discussed in the individual opinions of Justice Douglas.

Justice Douglas was alone in both cases in questioning these practices, and the other Justices in the majority both times expressly disclaimed any such challenge.

Both decisions are based on the establishment clause, and this has given rise to much discussion as to the intent of the framers, notably Madison and Jefferson, and the meaning of its prohibition against "laws respecting an establishment of religion." (See, e.g., the views of Senator Robertson, Senator Thurmond and Bishop Pike in the Senate hearings, *supra*, at pp. 30–35, 37–38, 45–46, 52–53, 171–175, 180–183, 188–199.)

To assist in the consideration of the pending resolutions and the Supreme Court decisions against a historical perspective, there follows a brief review of the "legislative history" of the establishment clause.

V. "Legislative History" of the First Amendment's Establishment Clause

Introduction of the Bill of Rights into the first House.—A number of States, notably Massachusetts, ratified the Constitution only on the understanding that a bill of rights would be enacted and many supporters of the new government deemed such a bill necessary in order to placate fears that it might abuse individual rights.[25] In January 1789, Madison expressed his opinion that the First Congress should submit to the States for ratification amendments securing—

> all essential rights, particularly the rights of Conscience in the fullest latitude * * * [27]

Thus, on the eve of the convening of the First Congress, Madison affirmed his belief (1) that Constitutional protection of the "rights of conscience" was of paramount importance and (2) that such rights should be afforded complete protection "in [their] fullest latitude."

Accordingly, on June 8, 1789, Madison introduced in the House of Representatives in the First Congress a proposed bill of rights which he urged Congress to submit to the state legislatures for ratification.[28]

In his speech introducing the amendments,[29] Madison submitted eight proposed amendments. His fourth proposal contained the elements of what is now the first amendment.[30] This amendment would have inserted in article 1, section 9, of the Constitution, the following language:

> 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.

In his speech accompanying the introduction of the amendments, Madison described "rights of conscience" as one of the "choicest privileges of the people." [31] He added that his proposals were designed to secure those rights against "the community itself; or, in other words, against the majority in favor of the minority." [32] On this point, he elaborated:

> * * * I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.[33]

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[25] 6 Writings of Madison.

[27] *Id.*, at 349, footnote, (letter to George Eve, Jan. 2, 1789). [Emphasis supplied.] In this, Madison was apparently moved by very practical considerations. As a candidate for the first House of Representatives he was being attacked as opposed to any change in the Constitution, and, as a supporter of Federalism, he believed that a new convention to alter the Constitution, as some proposed, would be disastrous. *Ibid*; see also *id.* at 350.

[28] 1 Annals of Congress 448–460 (Gales and Seaton, 1834).

[29] The speech is found in 1 Annals of Congress, at 448–460, and in 5 Writings of Madison 370–389. Subsequent references to the speech are made only to the Writings.

[30] Writings., at 377.

[31] *Id.*, at 378.

[32] *Id.*, at 381.

[33] *Id.*, at 382.

Addressing himself to the effectiveness of the proposed Bill of Rights, Madison declared:

> If they [the amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[34]

House debate on the establishment clause.—There was considerable opposition in the first House to consideration of amendments to the Constitution, many Members feeling that the Congress should get on with the business of organizing the government, and exercising the panoply of powers conferred upon the Congress, before proceeding to alter the Constitution's basic framework.[35] Others, notably Madison, pressed for prompt consideration of the amendments.[36]

Following Madison's introduction of his proposed Bill of Rights and his continued appeals for action on the proposal,[37] the House on July 21, 1789, ordered the amendments referred to a select committee of 11 members, consisting of 1 member from each State. Madison was made a member of this committee.[38]

On August 13, 1789, the House resolved itself into a Committee of the Whole to consider the report of the select committee, and on August 15 the Members came to debate the language which the select committee recommended concerning religious establishments and freedom of conscience.[39] The committee had simplified and broadened Madison's original language somewhat, proposing an amendment to article I, section 9 of the Constitution, reading:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.[40]

In the short debate which followed, Representative Sylvester expressed fear that the clause might tend to the abolition of religion altogether, contrary to the intent of the committee.[41]

Representative Elbridge Gerry, of Massachusetts, suggested, on the other hand, that the amendment "would read better if it was, that no religious doctrine should be established by law." [42]

Representative Daniel Carroll, of Maryland, then made a number of remarks, reported as follows:

> As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words. He thought it would tend more toward conciliating the minds of the people to the Government than almost any other amendment he had heard proposed.[43]

[34] *Id.*, at 385.
[35] See 1 ANNALS OF CONGRESS 440–448, 460–468 (session of June 8, 1789) (Gales and Seaton, 1834).
[36] *Id.*, at 444–446, 448–449.
[37] *Id.*, at 459, 685 (July 21, 1789).
[38] *Id.*, at 690–691. On June 8, the House had voted to refer the matter to a Committee of the Whole. *Id.*, at 467–468. The July 21 vote discharged this committee and referred the Madison proposals to the select committee.
[39] *Id.*, at 730–734; 757–759.
[40] *Id.*, at 757.
[41] *Ibid.*
[42] *Id.*, at 757.

Carroll further stated that he would not contend about phraseology, his object being to secure the substance in such a manner as to satisfy the honest wishes of the community.[44]

Madison then spoke. He said that he apprehended the meaning of the words in the proposed amendment to be:

> Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship in any manner contrary to their conscience.[45]

Representative Huntingdon interposed a practical consideration. He pointed out that some ministers were supported by contributions from their denominations and that such obligations were regulated by by-laws of the societies. He is reported as saying:

> If an action was brought before a Federal Court on any of these cases, the person who neglected to perform his engagements could not be compelled to do it; for a support of ministers * * * might be construed into a religious establishment.[46]

Huntingdon also thought that the amendment should not patronize "those who professed no religion at all."

Madison replied that if the word "national" was inserted before religion, it would satisfy these objections. He stated his belief that one sect might gain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He therefore proposed the use of the word "national." [47]

But the House did not follow this advice. Instead, it appears to have broadened the language proposed by the select committee. Representative Livermore arose and stated that he was not satisfied with Madison's proposal. He is reported as saying:

> He thought [the amendment] would be better if it was altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.[48]

Elbridge Gerry also objected to the word "national," and Madison withdrew his motion.

[43] *Id.*, at 757–758. Daniel Carroll was a brother of Archbishop John Carroll, the first Catholic bishop in America. Stokes, CHURCH AND STATE IN THE UNITED STATES, 542, note 82 (1950). Archbishop John Carroll agreed with Representative Daniel Carroll on the importance of the first amendment's guarantees of the rights of conscience according to Msgr. Francis J. Lally in his article "Points of Abrasion" in the August 1962 edition of The Atlantic at page 78: " * * * the first amendment, even at the time of its writing, was hailed by Archbishop John Carroll with enthusiasm. He was the first Catholic bishop in America, and members of his family had been among the signers of the Declaration of Independence and the Constitution. From the eighteenth century until today, Catholic leadership in America has continued to praise the first amendment and its effects on religion in the United States."
[44] 1 ANNALS OF CONGRESS, at 758.
[45] *Ibid.*
[46] *Ibid.*
[47] *Id.*, at 758–759. Compare *McGowan* v. *Maryland*, 366 U.S. 420, 440. In later life, Madison wrote "The Constitution * * * forbids everything like an establishment of a national religion." Madison, Detached Memoranda, reprinted in 3 William And Mary Quarterly at p. 558 (1945).
[48] *Id.*, at 759. Representative Livermore's suggestion of the word "touching" recalls Representative Daniel Carroll's thought that the "rights of conscience * * * will little bear the gentlest touch of governmental hand."
In his authoritative work, CHURCH AND STATE IN THE UNITED STATES, vol. I, p. 317, Rev. Anson Phelps Stokes states, after noting this passage in the Annals, "This, it will be noticed, is in its first half a more inclusive prohibition than that proposed by Madison, and it had its important influence in the wording of the first amendment. Livermore wished not only to prevent a national Church but also the adoption of any Federal laws touching religion." See also Brant, JAMES MADISON, FATHER OF THE CONSTITUTION, 269–273 (1950).

The question was then taken on Representative Livermore's motion, and it passed in the affirmative, 31 to 20.[47] Thus, the House in its first vote on the language of the establishment clause, adopted phrasing which emphasized the broad reach of that clause. The objections to the establishment clause raised by Representative Huntingdon and others were satisfied not by qualifying the word "religion" but by substituting the phrase, "Congress shall make no laws," emphasizing that it was government support of religion that was being prohibited.

The final stages.—On August 18, 1789, the Committee of the Whole rose and reported the amendments as it had amended them.[50] On August 21, the House approved, without debate, the establishment and free exercise clauses of the [then] fourth amendment in the following form, on motion of Representative Ames:

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[51]

Finally, on August 22, a joint resolution was introduced providing that the amendments, when agreed to by two-thirds of both Houses, be submitted to the legislatures of the several States for ratification. This resolution was referred to a committee of three who were directed to arrange the said amendments and report back to the House. On August 24, the resolution was reported out and agreed to by the House and sent to the Senate.[52]

On September 3, 1789, the Senate discussed the proposed establishment clause as it had come over from the House. A motion was made to strike out the words "religion, or prohibiting the free exercise thereof" and to insert in lieu thereof the words: "one religious sect or society in preference to others." [53] Had this motion passed, the establishment clause would have read, "Congress shall make no law establishing one religious sect or society in preference to others." But this motion did not pass.[54]

A succeeding motion was pressed to adopt the following language:

> Congress shall not make any law * * * establishing any religious sect or society.

This failed.[55] Finally, a motion was made to amend the proposed establishment clause to read:

> Congress shall make no law establishing any particular denomination of religion in preference to another * * *.

Like its predecessors, this motion was defeated.[56]

Thus, three times the Senate was asked to approve, and rejected, language which would have limited the establishment clause to a prohibition against laws preferring one denomination over another. Separation of sect and state in the narrow sense was rejected in favor of a broader concept of separation of religion and government.

[47] 1 ANNALS OF CONGRESS 730.
[50] *Id.*, at 730.
[51] *Id.*, at 795.
[52] *Id.*, at 808-809.
[53] SENATE JOURNAL, 1st Cong., 1st sess., p. 70 (Gales and Seaton, 1820).
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*

On September 3 the Senate finally approved a motion adopting the House version except for the phrase "nor shall the rights of conscience be infringed," but on September 9, the Senate rewrote the clause as follows:

> Congress shall make no law establishing articles of faith or a mode of worship * * *.[57]

The House requested a conference with the Senate to consider, among other things, the wording of the establishment clause.[58] Oliver Ellsworth, of Connecticut, Charles Carroll, of Maryland, and William Patterson, of New Jersey, represented the Senate. The House conferees were James Madison, of Virginia, Roger Sherman, of Connecticut, and John Vining, of Delaware.[59]

The conferees adopted the formula:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[60]

On September 24, 1789, the House considered the conference report and decided to recede from certain disagreements to other amendments provided, *inter alia*, that the third amendment (now the first amendment) contain the foregoing language.[61] The Senate agreed to this on September 25.[62] In this form, the amendment was submitted to the State legislatures and was ratified by the requisite number of them on December 15, 1791.

[57] *Id.*, at 70, 77.
[58] 1 ANNALS OF CONGRESS 83, 86, 939.
[59] SENATE JOURNAL, 1st Cong., 1st sess., p. 84 (Gales and Seaton, 1820).
[60] *Id.*, at 88.
[61] 1 ANNALS OF CONGRESS 948.
[62] Ibid., p. 90.