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Charles E. Rice
Notre Dame University

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Charles E. Rice*

It is customary for each house of Congress to open its daily sessions with prayer delivered by its Chaplain. One might conclude that if the lawmakers of the nation are entitled to ask for divine blessing upon their work, so are the rest of us, including school children. Not so. For the Supreme Court of the United States has drawn the line. Legislators may pray, so far at least, but school children may not. Thus it was that the courts intervened to prevent the holding of "a period for the free exercise of religion" in the Netcong, New Jersey, public high school.[1] The period was conducted as follows:

> At 7:55 a.m. in the Netcong High School gymnasium, immediately prior to the formal opening of school, students who wish to join in the exercise either sit or stand in the bleachers. A student volunteer reader, assigned by the principal on a first come, first serve basis, then comes forward and reads the "remarks" (so described by defendants) of the chaplain from the Congressional Record, giving the date, volume, number and body whose proceedings are being read . . . The volunteer reader is free to add remarks concerning such subjects as love of neighbor, brotherhood and civic responsibility. At the conclusion of the reading the students are asked to meditate for a short period of time either on the material that has been read or upon anything else they desire.[2]

The court held that the Congressional chaplain's "remarks" were really prayers and that therefore the program violated the establishment clause of the First Amendment. Further, the court held that its prohibition of the program does not violate the free exercise of religion of students who desire to participate.

In 1965, a New York public school principal forbade kindergarten children to recite, on their own initiative, a simple grace before their morning cookies and milk. The grace was:

> "God is Great, God is Good, and we thank Him for our Food.
> Amen!"

* Professor of Law, Notre Dame University. A.B. 1953, Holy Cross; LL.B. 1956, Boston College; J.S.D. 1962, New York University.

1. State Bd. of Educ. v. Bd. of Educ. of Netcong, 108 N.J. Super. 564, 262 A. 2d 21, *aff'd*, 57 N.J. 172, 270 A. 2d 412 (1970), *cert. denied*, 401 U.S. 1013 (1971).

2. *Id.* at 568-569, 262 A. 2d at 23-24.

The afternoon kindergartners recited a different prayer:

"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."

When the parents of these children brought suit to compel the principal to allow them to say grace, the federal court upheld the principal.[3] A couple of years later a public kindergarten teacher in Illinois attempted to comply with the *Stein* decision by leaving the word, "God" out of the grace. The grace therefore read, "Thank you for the world so sweet, thank you for the food we eat, thank you for the birds that sing—thank you for everything." The federal court forbade her to have her pupils recite the amended grace before the snacks, because everyone knows that "you" means God and the intent is to offer thanks to God, which is forbidden in public schools.[4]

The Supreme Court's rulings barring prayer in public schools have been consistently opposed, if public opinion polls are a reliable indicator, by a clear majority of the American people.[5] And there has been an increasing disregard for the rulings by local school authorities and parents.[6]

The prayer decisions were handed down in 1962 and 1963, but it was not until 1971 that a constitutional amendment to rectify them was voted on by the House of Representatives. On November 8, 1971, the House voted 240 to 162 to approve a constitutional amendment to allow prayers in public schools and other public buildings.[7] Since an amendment to the Constitution requires the approval of two-thirds of each house of Congress, the vote fell 28 votes short of the required margin and the amendment was therefore defeated.[8]

As originally proposed by Representative Chalmers P. Wylie (R-Ohio), the prayer amendment read:

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

4. DeSpain v. DeKalb County Community School Dist., 384 F.2d 836 (1967), *cert. denied,* 390 U.S. 906 (1968).

5. *See* 117 Cong. Rec. H10595 (daily ed. Nov. 8, 1971); N.Y. Times, Nov. 14, 1971, §4, at 8, col. 1.

6. *See* U.S. News and World Report, Mar. 2, 1970, at 39-40.

7. N.Y. Times, Nov. 9, 1971, at 1, col. 5.

8. 117 Cong. Rec. H10657 (daily ed. Nov. 8, 1971).

"SECTION 1. Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in nondenominational prayer.

SEC. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."[9]

During the debate on November 8, 1971, the Wylie Amendment was amended, by consent of its sponsors, by changing the word "nondenominational" to "voluntary" and adding the words "or meditation" after "prayer," making it read:

". . . to participate in voluntary prayer or meditation."[10]

The Wylie Amendment was the latest in a long line of proposed amendments to allow school prayers.[11] Consideration of these amendments had previously been blocked in the House Judiciary Committee, but Congressman Wylie obtained the necessary 218 signatures on a discharge petition to bring the matter to the House floor for the November 8th vote without action by the Judiciary Committee.[12]

Since the prayer amendment is likely to continue as a legal and political issue, it will be useful to consider here its purpose, effect and desirability. In *Engel v. Vitale*,[13] the Supreme Court ruled in 1962 that the recitation, as part of a public school program, of the twenty-two word New York State Regents' Prayer, is a violation of the Establishment Clause of the First Amendment even though students were not required to participate in the recitation. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessings upon us, our parents, our teachers and our country." The Court majority said, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of

9. H.J. Res. 191, 92d Cong., 1st Sess. (1971).

10. 117 Cong. Rec. 10644 (daily ed. Nov. 8, 1971).

11. See for example: H.J. Res. 693, 88th Cong., 1st Sess. (1963) (introduced by Rep. Frank J. Becker (R-N.Y.)); S.J. Res. 6, 91st Cong., 1st Sess. (1969) (introduced by Sen. Everett M. Dirksen (R-Ill.)).

12. 117 Cong. Rec. H10592-93 (daily ed. Nov. 8, 1971); N.Y. Times, Nov. 9, 1971, at 1, col. 5.

13. 370 U.S. 421 (1962).

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."[14] The Court in *Engel* did not cite any cases in support of its determination. The ruling seemed to rest on an incapacity of government, under the First Amendment, to write or sanction "official prayers" of any type, at least in public schools. The Court did not spell out the reason for the incapacity, but it was indicated by Justice Black, speaking for the majority:

> "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[15]

Justice Black was hinting the concept of neutrality which was explicitly found controlling by the Court in the second school prayer case, in 1963, where the Court forbade the use of the Lord's Prayer and readings from the Bible as devotional exercises in public schools.[16] The Court ruled that the practices violated the First Amendment command that government shall be "neutral" in matters of religion. This concept of neutrality, wrote Mr. Justice Clark for the majority, operates to prevent a situation where the "official support of the State or Federal Government would be placed behind the tenets of one of all orthodoxies."[17]

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion. Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[18]

The Court in *Schempp* formulated the following test to measure the validity of enactments under the neutrality concept of the establishment clause:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement of inhibition of religion, then the enactment exceeds the scope of legislative

14. *Id.* at 435.
15. *Id.* at 431.
16. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
17. *Id.* at 222.
18. *Id.* at 220, quoting from the opinion of Justice Black for the Court in Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

> 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.[19]

There have been several later decisions applying the neutrality mandate of the prayer decisions in such areas as government aid to church-related schools and government tax exemptions for religious bodies.[20] It is beyond the scope of this article to discuss in detail the implications of the school prayer cases in these areas. For one thing, those implications are far-reaching and, in some respects, complex. This article, moreover, is concerned with the proposed constitutional prayer amendment. The amendment, if adopted, would have only a marginal impact, if any, on the government-aid issue. We ought, therefore, to limit this analysis to the restricted issue of public prayer as it is treated in the proposed amendment.

The school prayer decisions were wrongly decided and ought to be reversed by one means or another. But to understand the error and the danger of those rulings, we must first examine the content of the "neutrality" principle upon which they were based. The First Amendment religion clauses provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[21] The Fourteenth Amendment, adopted in 1868, provides that no State may ". . . deprive any person of life, liberty, or property, without due process of law . . . ."[22] The Court had held, prior to the school prayer case, that the Fourteenth Amendment subjected the states to the restrictions which the First Amendment had applied to the federal government.[23] The states thereby were forbidden by the Court, as was Congress by the First Amendment, from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[24] The First Amendment was prompted by the circumstance that, in the words of James

19. *Id.* at 222.

20. *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Walz v. Tax. Comm., 397 U.S. 664 (1970); Tilton v. Richardson, 403 U.S. 674 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971).

21. U. S. CONST. amend. I.

22. U. S. CONST. amend XIV.

23. Cantwell v. Conn., 310 U.S. 296 (1940).

24. U. S. CONST. amend. I.

Madison during the debate in Congress over its adoption, "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[25] It was the purpose of the establishment clause, then, to prevent the prescription by Congress of "a national faith," that is, a nationally established official church.[26] As Judge Thomas Cooley put it:

> "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied others."[27]

It has been incorrectly asserted, by the Supreme Court and others, that the establishment clause ordained a government abstention from all matters of religion, a neutrality between those who believe in God and those who do not. An examination of the history of the clause, however, will not sustain that analysis. Its end was neutrality, but only of a sort. It commanded impartiality on the part of government as among the various sects of theistic religions, that is, religions that profess a belief in God. But as between theistic religions and those nontheistic creeds that do not acknowledge God, the precept of neutrality under the establishment clause did not obtain. Government, under the establishment clause, could generate an affirmative atmosphere of hospitality toward theistic religion, so long as no substantial partiality was shown toward any particular theistic sect or combination of sects. Justice Joseph Story, who served on the Supreme Court from 1811 to 1845 and who was a leading Unitarian, confirmed this historical meaning of the First Amendment:

> Probably at the time of the adoption of the Constitution, and of the (First) Amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
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> The real object of the amendment was not to countenance, much less to advance, Mohammedianism, or Judaism, or infidelity, by prostrating

25. 1 ANNALS OF CONG. 731 (1789) (1789-1791).

26. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 11-12 (1949).

27. T. COOLEY, PRICIPLES OF CONSTITUTIONAL LAW 224 (1898).

> Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[28]

Logically, this means that for purposes of the establishment clause nontheistic beliefs were not considered to be religions. Otherwise, an affirmation by government that there is a God would be a governmental preference, through the assertion of the essential truth of theism, of a combination of religious sects, i.e. those that believe in God, to the disparagement of those other religions which do not profess such a belief. On the contrary, rather than regarding theism and nontheism as merely variant religious sects within a broadly defined category of "religion," the establishment clause regarded theism as the common denominator of all religions, and nontheism it considered not to be a religion at all. Government itself could profess a belief in God, and so long as a practical neutrality was maintained among theistic sects, the neutrality command of the establishment clause would not be breached.

The establishment clause evidently was based upon a definition of religion similar to that used by Chief Justice Hughes in his dissenting opinion in a case involving the eligibility of a pacifist for naturalization:

> . . . The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation . . . One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.[29]

Obviously, however, religion must be given a broader definition for purposes of the free exercise clause. Believers in nontheistic creeds, such as atheists and agnostics, should be and are protected in the free exercise of their religion as fully as are Baptists, Jews and Catholics. While the establishment clause, properly construed, permits government to encourage theistic religions, provided that a practical neutrality is maintained as among theistic creeds, the free exercise clause forbids an interference with the exercise of their beliefs by athiests and agnostics as sternly as it forbids an interference with the exercise of their religion by Protestants and members

28. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§1874, 1877 (5th ed. 1891).

29. U.S. v. Macintosh, 283 U.S. 605, 633-34 (1931).

of other theistic creeds. For purposes of the free exercise clause, therefore, "religion" includes non-theistic as well as theistic creeds, while for purposes of the establishment clause it includes only the theistic. It is true that in one free exercise case in 1890, the Supreme Court defined religion in theistic terms. The case was *Davis v. Beason*,[30] where the Court said, "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." In the *Davis* case, the Court held that the federal law prohibiting polygamy was not an infringement upon the religious freedom of the defendant. But the defendant in *Davis* was a theist, a member of the Mormon Church, and therefore the case did not require a definition of the rights of nontheists. Despite the broad language of the quoted dictum, it is fair to say that, if the issue had been presented to it, the Supreme Court would have accorded to atheists and agnostics the basic right to the free exercise of their beliefs.

The vice of the school prayer decisions of 1962 and 1963 lies in their importation into the establishment clause of the comprehensive definition of religion which is properly applied only to the free exercise clause. This process began with the case of *Torcaso v. Watkins*,[31] in which the Court invalidated a provision of the Constitution of Maryland requiring a state employee to declare his belief in God. The test, said Justice Black for the Court, unconstitutionally invaded the employee's "freedom of belief and religion."[32] The requirement was invalid because "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers —those who are willing to say they believe in 'the existence of God.' "[33] The Court went on to emphasize the character of nontheistic beliefs as religions:

> We repeat and again reaffirm that neither a State nor a Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[34]

30. 133 U.S. 333, 342 (1890).
31. 367 U.S. 488 (1961).
32. *Id.* at 496.
33. *Id.* at 490.
34. *Id.* at 495.

Appended to the last quoted clause was a footnote specifying that: "Among religions in this country which do not teach what would commonly be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[35]

The Court's reliance on Mr. Torcaso's "freedom of belief and religion" leaves some doubt as to whether the decision rests on establishment clause or free exercise clause grounds. However, it probably did rest on the latter, and the decision is supportable in that sense, because the free exercise clause ought to interdict states (assuming, as the Court has held, that the First Amendment is applied fully to the states through the due process clause of the Fourteenth Amendment) from barring nonbelievers in God from general state employment.

In the second school prayer case,[36] in 1963, however, the Supreme Court imported the broad *Torcaso* definition of religion into the establishment clause by quoting as a basis for its decision the excerpt just quoted above from the text of the *Torcaso* decision. In the mind of the Court, then, government is required by the establishment clause to maintain neutrality as between two great classes or religions: the theistic and the non-theistic. The theistic are those that profess a belief in God, however they variously regard Him. The non-theistic creeds, whether Ethical Culture, Secular Humanism or whatever, do not affirm a belief in the existence of God. It is reasonable also to include unorganized atheism and agnosticism within the *Torcaso* definition of non–theistic religion. While atheism flatly rejects a belief in the existence of God, agnosticism is:

> "the doctrine that the existence or nature of any ultimate reality is unknown and probably unknowable or that any knowledge about matters of ultimate concern is impossible or improbable; *specif*: the doctrine that God or any first cause is unknown and probably unknowable."[37]

Atheism and agnosticism are as much entitled to constitutional treatment as religions as are Ethical Culture and Secular Humanism.

35. *Id.*, n. 11.
36. Abington School Dist. v. Schempp, 374 U.S. 203, 220 (1963).
37. Webster's Third New International Dictionary (Unabridged ed. 1965).

The fallacy of the Supreme Court's "neutrality" concept is that it is impossible for the government to maintain neutrality as between theistic and non-theistic religions without implicitly establishing an agnostic position. Agnosticism, however, is a non-theistic belief. The choice, then, is not, as the Court and its apologists have said, between "neutrality" and government encouragement of theism. The choice is between government encouragement of theism and government encouragement of agnosticism. This reality is spelled out clearly in Justice William Brennan's seventy-four page concurring opinion in the 1963 *Schempp* case. Justice Brennan probed the deeper meaning of the Court's ruling and tried there to demonstrate that the decision was not a precursor of further extreme rulings. The words "under God" in the pledge of allegiance, for example, are not necessarily unconstitutional, according to Brennan, because "The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' "[38]

The pledge, in Justice Brennan's view, is merely one of ". . . the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning."[39] Justice Brennan has correctly analyzed the school prayer decisions and he has supplied the test by which the Supreme Court evidently wants us to decide if an exercise is "religious" and therefore dangerous or merely a harmless "patriotic or ceremonial" one. If the affirmation of the existence of God is to be taken seriously, it is therefore at least in part a "religious exercise," and as such it is prohibited by the First Amendment. Only if it is a mere affirmation of the historical fact that the founders believed in the overlordship of God, or that some Americans now so believe, and only if it scrupulously avoids any affirmation of the truth or falsity of that belief in God, can the observance be insulated from constitutional attack.

This rationale necessarily would prevent an affirmation by a teacher or other government official, that, in fact, the Declaration of Independence is true when it asserts that men

38. Abington School Dist. v. Schempp, 374 U.S. 203, 304 (1963).
39. 374 U.S. at 303-04.

are endowed "by their Creator" with unalienable rights or when it asserts the existence of "the laws of nature and of nature's God," a "Supreme Judge of the world" and "Divine Providence."

In the nature of things, governmental neutrality on the question of God's existence is unattainable. A governmental assertion that God does in fact exist is a preferential affirmation of the truth of theism. An assertion that God does not exist is a preference of atheism. And a perpetual suspension of judgment by government on the question is an adoption of the agnostic, non-theistic position through the implicit assertion that, as a matter of state policy, the existence of God is unknown or unknowable. In the school prayer cases, the Court appears to have adopted an agnostic approach which is incompatible, in its treatment of the basic question of God's existence, with the basic theistic affirmation which was theretofore embedded in our law and tradition.

It was clearly not a purpose of the establishment clause to forbid such a profession by government of the truth of theism, or to forbid all official governmental sanction of public prayer. This is shown by the fact that on September 25, 1789, the day after it approved the First Amendment, Congress called on the President to proclaim a national day of thanksgiving and prayer, in the following resolution:

> That a joint committee of both Houses be directed to wait upon the President of the United States to request that he would recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness.[40]

President Washington issued the thanksgiving proclamation on October 3, 1789, and every President, except Thomas Jefferson and Andrew Jackson, has followed suit. Would it not have been extraordinary for Congress to request a public day of prayer to be observed by "the people of the United States" and on the very same day to propose a constitutional amendment to prohibit that very type of prayer? In fact, the religious objection was raised by Representative Thomas Tucker of South Carolina in the debate preceding the adop-

40. *Annals of Cong.* 914 (1789) (1789-1791).

tion of the resolution. Mr. Tucker objected that calling on the President to proclaim a day of prayer "is a business with which Congress have nothing to do; it is a religious matter, and as such, is proscribed to us."[41] Congress, however, passed the resolution. If the question of Congress' competence in religious matters had not been raised, it could possibly be said that it had never occurred to the members, and therefore the action of Congress ought not to be conclusive on the point. When, however, the issue was squarely joined, the First Congress deliberately overrode the same objections that are voiced today and voted to offer public prayer to God. Numerous other examples of the meaning of the First Amendment in this respect are readily available to prove the point.[42]

The school prayer decisions, then, contradict the original understanding of the First Amendment, as well as prohibiting the generally accepted practice of the people. On the practical level, they have been harmful in their effect. They unduly infringe upon the right to the free exercise of religion, they implicitly establish a public religion of agnosticism and they prevent the American people, in their public functions, from affirming as a fact that there is a divine standard of right and wrong higher than the state.

The possible remedies for the decisions, however, are limited. Essentially there are two: a constitutional amendment and a withdrawal by Congress of the Court's appellate jurisdiction over the subject of public prayer. The Constitution, in defining powers of the Supreme Court, provides:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases . . . , the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.[43]

Under this section, Congress has the power to prohibit the Court from hearing appeals in specific areas. A simple Act of Congress, requiring a majority vote, or two-thirds in the event of a presidential veto, would be sufficient for this purpose. In one celebrated case, *Ex parte McCardle*,[44] Con-

41. *Annals of Cong.* 915 (1789) (1789-1791).
42. See *C. Rice, The Supreme Court and Public Prayer* chaps. 2-3 (1964).
43. U. S. CONST. art. III, §2.
44. 74 U.S. (7 Wall.) 506 (1869).

gress withdrew the appellate jurisdiction of the Court over a Reconstruction Act case after the Court had already heard the arguments of counsel and while the Court was formulating its decision. Obeying the Congressional mandate, the Court promptly dismissed the appeal.

Presumably, the Supreme Court today would follow the *McCardle* precedent in the event of a withdrawal by Congress of part of its appellate jurisdiction, at least to the extent that the withdrawal did not interfere with cases pending at the time of the withdrawal.[45]

However, submission by the Court to Congress in this regard cannot be foretold with certainty.[46] Needless to say, a refusal by the Court to accede to a limitation by Congress of its appellate jurisdiction would precipitate a constitutional crisis.

It is not the purpose of this article to examine in detail the feasibility and effect of a withdrawal of the Court's jurisdiction. The precise meaning and effect of such a withdrawal merit extended consideration. For instance, the question of the extent to which state courts and lower federal courts would consider themselves bound by the Supreme Court's appellate jurisdiction is worthy of study and consideration as an alternative or supplementary remedy for the prayer decisions.[47]

In any event, it is a matter of urgency to press for the adoption of a prayer amendment. A constitutional amendment can be adopted in two ways. It can be initiated by a two-thirds majority in the House of Representatives and Senate, in which case it must then be approved by three-fourths of the state legislatures. The second method is that, "on the application of the Legislatures of two-thirds of the several states," the Congress "shall call a Convention for proposing Amendments," which shall be valid upon ratification thereafter by the legislatures or conventions, as Congress may prescribe,

45. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 567-68 (1962); U.S. v. Klein, 80 U.S. (13 Wall.) 519 (1872).

46. *See* the statement by Mr. Justice Douglas in his concurring opinion in Glidden Co. v. Zdanok, 370 U.S. 530, 605, n. 11 (1962):

> There is a serious question whether the *McCardle* case could command a majority view today.

47. *See Manion, Cancer in the Constitution* (1972).

in three-fourths of the states.[48] The President cannot veto a constitutional amendment and his approval is not required. The amending process is a matter for the Congress and the states.

It is one thing to talk about a constitutional amendment and another to draft one. It is difficult to draft any law that cannot be misconstrued by the courts. This possibility of misinterpretation is particularly important in the drafting of an amendment which would ultimately go for interpretation to the same Supreme Court which occasioned the amendment by its misconstructions in the first place. A new amendment, moreover, ideally should be broad enough to cover all those government-sponsored religious observances which have been drawn into question by the school prayer decisions to date.

The operative language of the Wylie amendment, as amended on the House floor on November 8, 1971, is as follows:

> "Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in voluntary prayer or meditation."[49]

The main thrust of the amendment is to protect the free exercise rights of students and other citizens who desire to acknowledge God in the same way that Congressmen do, and this free exercise point is crucial. Under the Supreme Court's rulings, Americans are forbidden to affirm as a fact, in school or other public activities, that the Declaration of Independence is true when it says there is a God and that we receive our rights from Him and not from the state. This point is too often overlooked. The prayer amendment is needed to permit the American People to affirm in their public functions, that in fact there is a standard of right and wrong higher than the state. When that fact is obscured, particularly in the education of the young, citizens come to regard the rights of others and eventually even their own rights as gifts of the state or of a voting majority. Implicitly ingrained is the belief that the power of the state or of the majority is limited by no higher, external standard, because even the Constitution can be amended, whether formally or by judicial assumption

48. U. S. CONST. art. V.
49. 117 Cong. Rec. H10644 (daily ed. Nov. 8, 1971).

of the amending power. Ultimately, a major safeguard against legalized oppression is a widespread public conviction, especially among the young, that unalienable rights come from God and that some things, such as the murder of innocent babies, are unjust because they violate "the laws of nature and of nature's God," no matter with what forms of legal correctness they are enacted.

There are more specific questions, however, raised by the language of the Wylie Amendment. It will be useful to answer them in series:

1. QUESTION: Who is to determine whether a prayer will be said and if so, what will be its content?

   ANSWER: The local school authorities would determine this. In the usual case, this would be the elected local school board. The school board would have the power to delegate the task of composition or selection to a principal or teacher or, for that matter, a student, subject to judicial review which should be exercised in the event the authorities clearly abuse their discretion. The United States Constitution is premised in its division of powers upon the principle of subsidiarity, that governmental functions are best entrusted to the lowest level of government able to accomplish them. To be sure, there are powers that are denied therein to any government, state or federal, such as the right to deprive a person of life, liberty or property without "due process of law." But the issue of school prayer is one which, prior to the Supreme Court prayer decisions in 1962 and 1963, was safely left to the good sense of the people in the localities involved. It is not the sort of issue which requires a uniform national solution. Diversity here will be advantageous, and judicial remedies will continue to be available to prevent abuse.

2. QUESTION: Assuming a school elects to have a prayer, is it to be given during the regular school hours?

   ANSWER: It would be lawful under the amendment, for the school authorities to provide for the recitation of a prayer during school hours. Of course, it would be proper for the courts to intervene to prevent abuse, for example, if the practice were carried out in such a way and at such frequency and length as to interfere with the educational function of the school. Of course, too, the ordinary practice of opening the School Day with a prayer, or of otherwise including prayer as an incidental part of the school day, would not constitute such an abuse.

3. QUESTION: Who in the school will give the prayer?

ANSWER: This, too, should properly be left to the judgment of the local school authorities, subject to judicial review in cases of abuse. Clearly, no person could be compelled to give the prayer or otherwise participate. The person giving the prayer should be a volunteer from among the faculty, administration or student body of the school.

4. QUESTION: May it be given out loud or silently?

ANSWER: This should be left to the judgment of the local school authorities.

5. QUESTION: When are persons not "lawfully assembled" under the amendment?

ANSWER: Trespassers or disorderly persons would evidently not be "lawfully assembled." School children, members of a city council, participants at a public meeting and persons lawfully present at other lawful gatherings in public buildings would be included.

6. QUESTION: If the prayer is to be used in the classroom, and is voluntary or non-compulsory as far as the pupil is concerned, does the teacher have the same right as the pupil in this regard?

ANSWER: Yes. It would violate the teacher's right to the free exercise of his religion if he were compelled to participate.

7. QUESTION: If the prayer is voluntary, how is a dissenting pupil or teacher to respond while the prayer is being offered?

ANSWER: The teacher or pupil who chooses not to participate would be free to remain or to leave the room. Compulsion to participate would be forbidden, and judicial relief would be available in appropriate cases. However, the fact that a decision not to participate may result in some embarrassment to the non-participant would not be a sufficient reason to prohibit others from participating in the prayer. Also, there is a strong educational advantage to be attained by school prayer. Dean Erwin N. Griswold, now the Solicitor General of the United States, is a critic of the school prayer decisions, although he does not favor the constitutional amendment method of reversing them. Dean Griswold described the advantages of school prayer in an article in 1963:

> Let us consider the Jewish child, or the Catholic child, or the nonbeliever, or the Congregationalist, or the Quaker. He, either alone, or with a few or many others of his views, attends a public school, whose School District, by local action, has prescribed the Regents' Prayer. When the prayer is recited, if this child or his parents feel that he cannot participate, he may stand or sit, in

respectful attention, while the other children take part in the ceremony. Or he may leave the room. It is said that this is bad, because it sets him apart from the other children. It is even said that there is an element of compulsion in this—what the Supreme Court has called an "indirect coercive pressure upon religious minorities to conform." But is this the way it should be looked at? The child of a nonconforming or minority group is, to be sure, different in his beliefs. That is what it means to be a member of a minority. Is it not desirable . . . that, at the same time, he experiences and learns the fact that his difference is tolerated and accepted? No compulsion is put upon him. He need not participate. But he, too, has the opportunity to be tolerant.

He allows the majority of the group to follow their own tradition, perhaps coming to understand and to respect what they feel is significant to them.

Is this not a useful and valuable and educational and, indeed, a spiritual experience for the children of what I have called the majority group? They experience the values of their own culture; but they also see that there are others who do not accept those values, and that they are wholly tolerated in their nonacceptance. Learning tolerance for other persons, no matter how different, and respect for their beliefs, may be an important part of American education, and wholly consistent with the First Amendment. I hazard the thought that no one would think otherwise were it not for parents who take an absolutist approach to the problem, perhaps encouraged by the absolutist expressions of Justices of the Supreme Court, on and off the bench.[50]

8. QUESTION: If the right to pray is an inalienable right and government may not constitutionally prohibit prayer, will not all those who are lawfully assembled in a public building be denied their constitutional right if the appropriate public body has not decided upon a nondenominational prayer?

ANSWER: The basic right involved here is the individual right to the free exercise of religion. It would be the duty of the public body or officials involved to give due and reasonable recognition to that right. However, it still would be appropriate for that public body or those officials to conclude in a given case that the inclusion of prayer would interfere with the primary purpose of the assembly concerned. This decision would have to be based on reasonable grounds and it would be subject to judicial review to prevent serious abuse.

50. Griswold, *Absolute Is In the Dark,* 8 Utah L.Rev. 167-177 (1963).

9. QUESTION: If a public body was unable to determine what was a non-denominational prayer, or if a dissatisfied citizen disagreed with the decision, would this type of action be appealable to the federal courts?

ANSWER: The federal and state courts would have jurisdiction to prevent serious abuse here. The amendment does not in any way limit access to the courts for constitutional relief.

10. QUESTION: What is the advantage of the words, "or meditation"?

ANSWER: The purpose of the amendment is to restore the Constitution to the meaning it had before the Supreme Court distorted it. Under that meaning, the people in their communities, acting through their elected school officials, had the choice of providing prayer, meditation, or nothing, to open the school day. That system worked well and served to impress upon the rising generation the fact that God and not the state is the giver of rights. The system operated by consensus and it contributed to mutual understanding. The words, "or meditation" are especially useful in that they provide an alternative option that may more accurately reflect the desires and preferences of the local community.

The prayer amendment is worthy of support. It is sound in itself. And the campaign for the amendment reminds us all of the reality that this nation is indeed "under God". The school prayer decisions require this nation, in its public activity, to close its eyes to that reality. They ought to be reversed. We can rightly say with respect to them what Abraham Lincoln said of the Dred Scott case, where the Supreme Court held that a Negro could not be a citizen of the United States:

> "I believe the decision was improperly made, and I go for reversing it."[51]

51. 4 The Words of Abraham Lincoln 215 (Fed. ed. 1905).