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The Prayer Amendment: A Rebuttal

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THE PROPOSED PRAYER AMENDMENT

Men's minds are inspired to their sharpest activity when they are given good reason. Some type of stimulus is needed to spark the thoughts which lead us to form our opinions. We seldom have the time or incentive to consider issues simply because they exist. Men in different roles respond to stimuli in different ways. Their education, training and experience dictate these responses.

We in the Congress must be elected after regular periods of time, and if a Congressman is not responsive and effective in promoting his constituents' interests during the term, he will not be re-elected. Legislators are thus encouraged to act relatively quickly, and to judge their own effectiveness against relatively short-term goals. Legislation can, however, have long-range implications not readily apparent or discernible upon even the most studied short-term consideration. For this and other reasons, laws are interpreted and reviewed by courts. The judges are not subject to re-election and may, therefore, take a less hurried approach in considering decisions and their long-range implications.

The courts have been engaged in the continuous, ongoing task of developing principles for the implementation of the First Amendment and applying it to states' actions since 1940.[1] The so-called "school prayer" cases were presented to the Court as more problems to be resolved in the continuation of this development of principle. The decisions represent serious consideration of arguments on both sides of the issues, including all short and long-range implications, and the final drawing of well-considered conclusions.

The "school prayer" cases apparently represented an entirely different type of stimulus to some of my colleagues

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1. Cantwell v. Connecticut, 310 U.S. 296 (1940) (applying the First Amendment to the states by means of the Fourteenth Amendment).

in Congress, and the actions they took were illustrative of this difference. While the Court considered the cases in the process of extending the development of the First Amendment, my colleagues apparently considered these cases as a threat to religion, and the proposed amendment represented a reaction to the perceived injury. The thinking involved in this proposal was prompted by a desire to reach one specific conclusion—to defend that which was threatened—and later to support that conclusion, rather than by a desire to consider all the arguments and to reach whichever conclusion best resolved the problem. H.R.J. Res. 191, while it represented a serious effort on the part of its proponents, was but one of a flock of proposals designed and considered with one purpose in mind—to overturn the Court's prayer decisions. The reasoning behind it was mere justification or rationalization, rather than objective inquiry and deliberation. This amendment, as a reaction and not an action, would have flown in the face of long-term principles which have been developed as our Constitution was intended, with a view to long-range growth. It was the result of a legislator's quick reaction to promote one specific result, as opposed to the Court's careful study of a problem in a context of historical development, precedent, and future development.

The Congressional Record of November 8, 1971, when the proposed amendment was discharged from the House Judiciary Committee for one hour of debate and a final decision, illustrates the Procrustean character of Mr. Wylie's proposed amendment. He discussed some of the more publicized "school prayer" cases, and concluded: "This is the ludicrous extreme to which we have arrived about this matter of prayer in public schools, and that is why we need House Joint Resolution 191 to clarify the situation."[2]

There was a strong feeling throughout the country that the Court had banned prayer from the schools and made them hostile to religion. Nothing could be further from the truth. This author is not anti-religious. He is convinced that Washington was right when he said in effect in his farewell address that religion and morality are indispensable to political prosperity. It was the opinion of many, including myself, that the adoption of the Wylie Amendment would do violence to the

2. 117 Cong. Rec. H10590 (daily ed. Nov. 8, 1971).

religious guarantees of the First Amendment. This made the question extremely important. Now, let us analyze the facts.

The case of *Engel v. Vitale,*[3] while not the first case invalidating religious exercises in the public schools, was the stimulant of the most controversy over prayer, and brought on the first of the barrage of proposed Constitutional amendments.[4] In this case, the Court ruled that a prayer composed by the New York Board of Regents and required by a school district was an unconstitutional establishment of religion. Speaking through Justice Black, the *Engel* Court further developed the definition of an "establishment" of religion which Justice Black had offered in the case of *Everson v. Board of Education* fifteen years earlier.[5] The Court in *Engel* said that 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."[6]

Abington School District v. Schempp, together with a companion case, *Murray v. Curlett,*[7] apparently was a fan to the flames of public confusion and hostility which *Engel* had sparked. In this case, which many jurists regard as far more significant than *Engel,* the Court's previous establishment clause decisions were integrated and the Court's policy was made explicit.

3. 370 U.S. 421 (1962).

4. The reaction here was, in fact, instantaneous. The day after *Engel* was reported, June 26, 1962, eight Constitutional amendments to permit prayer in public schools were introduced. H.R.J. Res. 752-59, 87th Cong., 1st Sess. (1962).

5. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between Church and State.' " Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).

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

7. 374 U.S. 203 (1963).

In *Schempp*, a Pennsylvania statute provided for the compulsory reading, without comment, of ten verses of the *Holy Bible* as part of the opening exercises in the public schools. Provision was made for excusing children upon written request of the parents. In *Murray v. Curlett*, a similar Maryland statute provided for the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."[8] The cases were joined by the Court because they presented similar questions. The Court found that both statutes violated the establishment clause by breaching the neutrality imposed upon the Federal and state governments by the First and Fourteenth Amendments.

Justice Clark, writing the majority opinion, reviewed the significant prior cases and reaffirmed *Engel*'s holding that the establishment clause prohibits government-sponsored religious exercises in the public schools. The really crucial part of the establishment clause interpretation, and the part which fused the previous decisions into an explicit principle, was the statement that the First Amendment requires neutrality.[9]

Neutrality had become the Court's working model of the First Amendment's strictures, and the test for neutrality was this question: "What are the purpose and the primary effect of the enactment?"[10] Neutrality was neither a new nor an unnecessarily broad concept. The purpose and primary effect test had first been stated in the Sunday Blue Law Cases such as *McGowan v. Maryland*.[11] It was a logical outgrowth of the First Amendment's twin establishment and free exercise clauses. The First Amendment of the Constitution provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." These clauses simply represent the different sides of the same coin, the "establishment" clause prohibiting government from establishing or promoting its own religion, and the "free exercise" clause prohibiting government from impairing or limiting the religious freedom of the people. The effect of these clauses is an admonition that government should neither aid nor injure religion—in short, that government's relation to religion should be neutral.

8. *Id.* at 211.
9. *Id.* at 215.
10. *Id.* at 222.
11. 366 U.S. 420 (1961).

The Court's development of the establishment clause had really begun in the case of *Everson v. Board of Education*,[12] where Justice Black gave the oft-quoted definition of establishment and affirmed the Jeffersonian "wall of separation between Church and State."[13]

Separation of Church and State was certainly a clear-cut means whereby religion and the government would be protected from each other's influences. However, it gave little guidance to the Court for deciding upon specific limits upon the government in actual cases. Complete separation of Church and State would actually result in government hostility to religion; but, at the least, general public welfare services must be provided for religious institutions. The *Everson* Court recognized this, and said that public welfare services, such as fire protection, are legitimate examples of government involvement in religious institutions.[14] Accordingly, the Court by a five-four vote sustained New Jersey's program for paying for bus transportation of children to parochial as well as public schools. The Court characterized the program as a "public welfare" measure, and said it was within the state's constitutional power, "even though it approaches the verge of that power."[15] The government, said the Court, could not exclude citizens, because of their religion, from receiving the benefits of public welfare legislation.

The "separation of church and state" ideal, being of little practical value, later became workable when determined by the "purpose and primary effect" test. This formula was first used as the pivotal test in the case of *Illinois ex rel. McCollum v. Board of Education*,[16] where the Court invalidated a "released time" plan of religious instruction in public schools during regular school hours. The state could maintain an effective separation from the Church only if enactments had a secular purpose and a primary effect that neither advanced nor inhibited religion. In *McCollum*, the Court found that the state was using its public school program as a means of encouraging and pressuring children to attend religious classes. The majority pointed out that "[t]he State also af-

12. 330 U.S. 1 (1947).
13. *See* note 5 *supra*.
14. 330 U.S. at 17-18.
15. *Id.* at 16.
16. 333 U.S. 203 (1948).

fords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery."[17]

The "purpose and primary effect" doctrine was sharply limited in the case of *Zorach v. Clauson*,[18] where a similar "released time" program was upheld because it was held off the school premises. Government time and facilities were used neither to aid nor to impair religion, but were directed toward government's own ends, while the children were released before the close of the school day and were free to attend classes of religious instruction. The theory the Court used to distinguish this program and explain its constitutional validity was "accommodation."[19] The accommodation theory unquestionably shaded the lines drawn by the Court with its "purpose and primary effect" test in *McCollum*. While the purpose of the government action was by no means purely secular, the program's real effect was neither to promote nor to impair religion in such a way as to threaten the integrity of the First Amendment. The government was accommodating the spiritual and religious nature of the people; but whereas in *McCollum* the religious instructor was placed in precisely the same position of authority as the school teacher in the government's educational institution, the children were simply released from the government's control in *Zorach*.[20]

Justice Douglas explained that the state was not meddling in religion, but merely following "the best of our traditions" by respecting the "religious nature of our people" and accommodating the public service "to their spiritual needs."[21]

The introduction of the "accommodation" theory to balance the "purpose and primary effect" test brought the final demise of the general ideal of "separation of church and state." The state could now accommodate religion with released time programs as well as police and fire protection, and the integrity of the First Amendment would still be preserved. A new expression of the First Amendment's meaning was needed, and in the *Schempp* case "separation of church

17. *Id.* at 212.

18. 343 U.S. 306 (1952).

19. *Id.* at 315.

20. For a more detailed explanation distinguishing *McCollum* and *Zorach*, see Justice Brennan's concurring opinion in *Schempp*, 374 U.S. 203, 261-63.

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

and state" was replaced with "neutrality." Neutrality had been mentioned in several previous cases, including *Everson, Zorach,* and *Engel*; and in *Schempp,* neutrality became part of a concrete holding. Justice Clark explained that neutrality is called for by both clauses of the First Amendment, the establishment clause prohibiting official support "of one or of all orthodoxies," and the free exercise clause guaranteeing the right of each person to "choose his own course" and recognizing "the value of religious training, teaching, and observance."[22]

Also in *Schempp,* the concurring Justices further developed the accommodation theory which the Court had set out in *Zorach.* The accommodation principle, as balanced against the requirement of secular "purpose and primary effect," provided a ready-made limit, as well as the impetus; for the new ideal of neutrality, for as Mr. Justice Goldberg stated:

> [U]ntutored devotion to the concept of neutrality can lead to the invocation or approval of results which partake . . . of a brooding and pervasive devotion to the secular and passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it . . . . Government must inevitably take cognizance of the existence of religion and indeed, under certain circumstances the First Amendment may require that to do so.[23]

Justice Goldberg then explained that examples of government recognition of the people's religious nature could be expanded because "both the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other."[24]

In addition to Justice Goldberg, Justice Clark agreed that the State may not affirmatively oppose or show hostility to religion,[25] and Justice Brennan recognized that "[i]nevitably, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility."[26]

22. Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).
23. *Id.* at 306 (Justice Goldberg concurring).
24. *Id.*
25. 374 U.S. at 225.
26. *Id.* at 246 (Justice Brennan concurring).

Despite these Justices' careful balancing of neutrality with accommodation, some attacks have been made upon the neutrality principle as a misreading of the establishment clause which does exactly what the Court so carefully guarded against, by establishing a government "religion of secularism" in hostility to all religions.[27] Mindful of this argument, Justice Clark discussed the possibility of the state establishing a religion of "secularism" in the *Schempp* case, and specifically rejected the idea that the decision had that effect.[28] The flaw in the foundation of the "religion of secularism" argument is a misunderstanding of the Court's development of the First Amendment principles. Again, the Court has been deciding establishment clause cases involving the relationship of church and state in the context of well-developed principles while its critics, including legislators, have only been involved with the issues since their recent reaction to a few individual cases.

The neutrality ideal was developed because of the unavoidable hostility to religion the Court found in the "separation of church and state" language. The "accommodation" theory ushered in the new ideal because the Court found that government could accommodate the people's religious and spiritual nature, making total separation unnecessary, while remaining effectively neutral. In fact, the instances which critics point to as examples of government sponsorship of religion—the morning devotions in Congress and the Supreme Court, religious references in patriotic songs, religious mottos on our coins, etc.—can easily be distinguished from official prayers in public schools because they are simply more examples of government's accommodation of the religious and spiritual nature of the people. The government, rather than actively promoting religion through its public school system and its control over impressionable children, is simply accommodating the religion that already exists. Justice Brennan took the trouble to list several categories of permissible accommodation in his *Schempp* opinion,[29] and several cases have

27. Corwin, *The Supreme Court as National School Board,* 14 LAW & CONTEMP. PROB. 3, 9-16 (1949); Calhoun, *School Prayer in Short Perspective,* 38 CONN. B.J. 643, 647-51 (1964); Abington School Dist. v. Schempp, 374 U.S. 203, 313 (Justice Stewart dissenting).

28. 374 U.S. at 225.

29. *Id.* at 294-304 (Justice Brennan concurring). For a list of all the references in *Engel* and *Schempp,* see 117 Cong. Rec. H10491 (daily ed. Nov. 4, 1971).

found various accommodations permissible under the First Amendment.[30]

In spite of these permissible accommodations, critics insist that the Court has established a "religion of secularism." The "religion of secularism" argument goes basically as follows: While the free exercise clause was meant to include all sects and religious interests, thereby providing freedom for all, the establishment clause was not meant to be all-inclusive. A proper reading of the establishment clause includes only the recognized theistic sects, or "religions," and really only prohibits government sponsorship of one particular sect in preference to others. Therefore, government aid to all recognized sects, or religions in general, is allowable. However, since the Court has included all religious interests[31] in the establishment clause's definition of religion as well as in the free exercise clause, government may not establish even a program of aid to religions in general. Therefore, by including non-theistic interests (atheism, agnosticism, etc.) in the prohibitions against government establishment, the Court forces government to abstain from aiding those truly religious interests, and establishes a "religion of secularism."

The most obvious flaw in this "religion of secularism" argument is that the Constitution simply does not say what this argument insists it says. The First Amendment reads, "Congress shall make no law respecting an establishment of religion . . . ." To prohibit government establishment of an official sect, the framers could have easily written the necessary language. Instead, after 60 days of committee hearings and 11 days of floor debate, they adopted the amendment as it reads today. Of course, we were asked to "clarify" this language on November 8th, 1971, in the space of one hour.[32]

The Court's critics continue, however, that the legislative history and documents preserved from the drafting of the

30. Swallow v. United States, 325 F.2d 97 (10th Cir. 1963), *cert. denied* 377 U.S. 951 (1964); Murray v. Comptroller of the Treasury, 241 Md. 383, 216 A.2d 897, *cert. denied* 385 U.S. 816 (1966).

31. "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." Torcaso v. Watkins, 367 U.S. 488, 495 n. 11 (1961).

32. *See* 117 Cong. Rec. H10647 (daily ed. Nov. 8, 1971) (remarks of Congressman Mikva).

First Amendment show that despite the language, the framers actually intended that the First Amendment mean "an establishment of an officially preferred sect" rather than "an establishment of religion." This argument is also sadly misconceived. History has provided some clues as to the intent of the authors in drafting all types of legislation, but few jurists would be so foolish as to regard it as conclusive. In the first place, if we are to study legislative records for definitive statements of intent, the first problem we will confront is "whose intent?" Debates preceding passage of legislation include widely divergent views, and to pick any one or even several legislators' statements as representative of the entire legislative body would be a fruitless undertaking. Also, even if we can trace the statements made by the sponsors or authors of a proposal, how can we say that their intent deserves more attention than any other group in the legislature? Why should the intent of any individual or group carry extra weight when the entire body participates in the debate, and a majority is needed to approve and pass the legislation?

Secondly, the legislative history of the First Amendment is especially inconsistent.[33] Justice Brennan accurately observed:

> A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.[34]

In fact, the historical evidence as to the framers' intent is considered by several writers to support the inclusive definition of the establishment clause which the Court developed and which the Court's critics attack.[35]

The Court itself dismissed the point unceremoniously in its first significant church-state case[36] and again expressly repudiated the "intent" argument the next year.[37]

33. Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1402 (1966).

34. Abington School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Justice Brennan concurring).

35. Sky, *supra* note 33, at 1403, 1416-21. *See also* Cahn, *On Government and Prayer*, 37 N.Y.U. L. REV. 981 (1962); Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U. L. REV. 1274 (1961).

36. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

37. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948).

Finally, the Constitution is meaningful only as a living document. It must be interpreted in order to offer meaningful guidance in new and modern situations. If it needs no legal interpretation today, the Supreme Court should not be doing so, and we should select a group of historians to simply search the documents and explain the framers' intent, which we should then follow absolutely. The absurdity of supposing that the framers' intent should override our Court's interpretation can be fully realized when we consider the fact that the framers could not possibly have even imagined the problems of prayer in the public schools. There were no public schools as we know them when the framers lived; education was carried on almost completely in church-related schools where religious exercises were accepted without question.[38]

As well as being correct as a matter of logical interpretation and more than able to withstand attacks from a historical perspective, the school prayer cases were decided in the best way with regard to policy. The right to pray is presently quite safe. Students, or anyone, may pray voluntarily. Religion has *not* been banned from the schools; rather, the government establishment, however subtle, has been prohibited. Religion is a subtle issue, and the Court has treated it with the proper sensitivity. In fact, the Court's decisions allow the State to accommodate student prayers as long as the government stays neutral.

Also, the study of the Bible or courses in comparative religion were expressly allowed, and even encouraged, by the Court in *Schempp,* where it was stated:

> In addition, 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 consistently with the First Amendment.[39]

The Court's decisions not only allow accommodations of religion by the schools, but also encourage religious studies. In fact, the neutrality principle has even been used to protect religion from attacks by the state. In a city college of New

38. Sky, *supra* note 33, at 1403-04.
39. 374 U.S. at 225.

York, derogatory attacks upon religion were published in student newspapers, and the Court ruled that the state's facilities could not be used to attack religion, but were required to maintain neutrality.[40]

In spite of this seemingly logical and ultimately reasonable development of the First Amendment principles by the Court, my fellow Representatives felt that religion has been wronged and proposed an amendment to the Constitution in order to overturn the recent decisions.

The working language of the amendment, in its original form, read as follows:

> 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.

Understandably, the consideration of this amendment brought to light several disturbing problems which apparently had not been discernible to its authors in the short time before they introduced it. An analysis introduced by Representative Edwards of California on the day of the vote underscored the amendment's shortsightedness. This analysis came from a letter by Professor Charles L. Black, Jr., of the Yale Law School, which appeared in the Washington Post on November 3, 1971:[41]

> The astounding thing about this text is that it addresses itself only by indirection, if at all, to the problem which actually interests its sponsors, and which actually concerned the Supreme Court in the cases it is designed to overrule or weaken—the problem of official prayer in the public schools. The question in the school prayer cases was not whether people might sometimes lawfully pray in buildings supported in whole or in part by public funds. The question was whether children not so much 'lawfully assembled' in public buildings as *coerced* into assembling in public buildings by the truancy laws, could lawfully be forced either to pray, or to stand silent during a prayer conducted in their coerced presence, or to be sent into the hall or in some other way marked as deviants, with all that means to a child . . . .

Specifically, then, the amendment was supposed to correct an action that the Court never took. Secondly, the amendment, if placed in the Constitution, would not do what the sponsors claimed for it. It would authorize for the first time the govern-

40. Panarella v. Birnbaum, 60 Misc. 2d 95 (Sup. Ct. 1969).
41. 117 Cong. Rec. H10626-27 (daily ed. Nov. 8, 1971).

ment's intrusion into the field of religion; and it contains several open-ended terms that require definition, obviously by those governmental bodies who seek to enforce school prayer.

Though written to allow rather than to limit prayer in the schools, this language would go far beyond the specific result its sponsors sought. Any controlling body would of necessity follow the guidelines set out in the language of the amendment, and would be saddled with the task of limiting government prayers to those authorized in the amendment. How would this controlling body know where to stop? Which groups are lawfully assembled? Visitors at a hospital? Demonstrators? And what buildings are "public buildings supported in whole or in part through the expenditure of public funds"? Would this include hospitals? Many church-sponsored hospitals are supported by public funds. In fact, churches are indirectly supported by the government through tax exemptions. Where would the line be drawn?

Finally, someone would have to decide upon the content of a "nondenominational prayer." Justice Black's remarks in the *Torcaso v. Watkins* decision[42] suggested some of the confusion that "nondenominational prayer" must produce. Nearly all the major religious denominations, over 38 of them, opposed H.J. Res. 191.[43]

Who would write and define such a prayer? For a detached observer, attempting to be objective, this must be an impossible task. Of course, the term "nondenominational" would actually be defined by the very school board or other school authority who wants to write and sponsor the prayer. Mr. Wylie himself admitted that the "local school authorities" would compose or select a prayer and also determine whether it was nondenominational, subject to judicial review in case of abuse.[44]

This is a classic case of making the goat the keeper of the cabbage patch, except that the "cabbage patch" here happens to be the spiritual attitudes and understanding of our nation's children. Who can possibly believe that the very people who write and sponsor a prayer would be willing to

42. *See* note 31 *supra.*

43. 117 Cong. Rec. H10590 (daily ed. Nov. 8, 1971) (remarks of Congressman Celler).

44. 117 Cong. Rec. H10248 (daily ed. Nov. 8, 1971).

objectively criticize that prayer against the standard of nondenominationalism? The danger is not reduced by the fact that the authorities' decisions are subject to judicial review. Each and every objectionable prayer must be attacked in the courts. Private citizens should not be forced to spend unlimited amounts of time and money in protecting the spiritual well-being of their children. No private citizen has the money or the time to outlast the local government in court battles. Even if the private citizen could muster the resources to take his case to court, he would be forced to ask one branch of the government to overturn prayers sponsored by another branch. This is hardly a picture of freedom of religion and conscience that the First Amendment envisions.

The amendment assumed a natural right to participate in nondenominational prayer. It mentioned no right to refrain from such participation. This language had uncertain and definitely unsettling implications on the Constitution's second religious safeguard, the "free exercise" clause, which prohibits government incursions on the people's free exercise of religion. By its silence, it left unanswered the question of whether participation was to be voluntary.

Certainly, the amendment would forbid truly voluntary prayer, for truly voluntary prayer would reflect the influence of each child's individual sect, and would not pass the test of nondenominationalism. Hopefully, the First Amendment would remain sufficiently intact, even after the distortion the Wylie Amendment would cause, so that the free exercise clause would protect dissenters from being forced to participate in nondenominational prayer. However, we have already seen that free exercise would be stretched thin by the necessary limiting of school prayers to nondenominational prayers, and no one could be sure where the disintegration of the free exercise clause would stop. If religious freedom must be limited to nondenominational prayer and voluntary prayer may be forbidden, one further limit of freedom might be easy. The right to refrain from participation could easily be next to fall.

Even if provision were made for nonparticipation, children would be forced into a situation even worse than those the Court found unhealthy in the school prayer cases. Children would be faced with a choice of mechanically repeating an officially-composed, teacher-directed, and ultimately con-

fusing "nondenominational prayer," or leaving the room to stand in the hall, or sitting in silence, a mute minority in the midst of their classmates. Even for children who resign themselves to conformity, the picture is unpleasant. They are taught a set of very specific and individual beliefs in the church, where they voluntarily attend and learn, usually one day each week. Then, for five days each week, they are required to attend school, where they are told by their teacher, whom they are expected to believe and respect, that uttering a confusing and nebulous nondenominational prayer is a proper religious exercise. The effect of all this would certainly be to establish in each child's mind a hostility between church and state. He may ask his teacher, "Why can't we pray the Lord's Prayer?" The teacher's answer must be, "Because that's not nondenominational." Thus, those very legislators who criticize the Court for establishing a "religion of secularism" would simply replace it with a religion of "nondenominationalism."

Finally, the amendment itself cannot enact official prayers. Rather, it would require enabling legislation, presumably by the states. This would produce another array of problems to which the amendment's sponsors have apparently not addressed themselves. Several states are precluded from sponsoring official prayer by the safeguards in their own constitutions,[45] and the resulting conflict between the United States and state constitutions would then have to be resolved. Either the Wylie Amendment would make the safeguards of the state constitutions unconstitutional (probably not, since it probably is not applied to the states by the Fourteenth Amendment) or those states would not allow official prayer while all other states would. What a travesty this would be when our "rights" enumerated in the Constitution would vary from state to state! The Court has repeatedly warned against a situation where one's fundamental rights may be submitted to a vote or made to depend on the outcome of an election.[46]

The Wylie Amendment was changed during the one-hour debate on November 8th by striking the word "nondenominational," replacing it with "voluntary," and adding the words "or meditation" to the end of the sentence. Thus, as amended, the proposal read: ". . . to participate in voluntary prayer

45. *See* 117 Cong. Rec. H10649 (daily ed. Nov. 8, 1971) (remarks of Congressman Meeds).

46. *See, e.g.*, Lucas v. Colorado General Assembly, 377 U.S. 713 (1964).

or meditation."[47] Understandably, this change solved few of the problems associated with the original amendment, and created others that would have led to even greater outrages.

The most glaring flaw in the amendment as changed is that it would allow denominational prayer. This, of course, is a return to the situation which the Court found unsupportable in the original "school prayer" cases. The amendment in its final form would have, however, not only reverted to the original situation with its attendant evils, but it would have made things substantially worse. Though the amendment might be interpreted as its sponsors intended, we are now aware of the foolishness of supposing that the legislator's intent (which legislator?) can offer any real guide to the courts for interpreting legislation. The language itself is far from clear, and could lend itself to at least two different, unanticipated, and unsavory interpretations.

In the first place, if the courts interpret the amendment to protect only prayer which is truly voluntary, they must necessarily strike down prayers which are composed by school authorities and directed by teachers. The Court stressed the coercive nature of such prayers in several of the original school prayer cases, and there is no reason to believe that the courts will ignore this coercion in the future.

In the *Engel* decision, Justice Black explained that, "[w]hen 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."[48] Justice Black continued, citing the warning of James Madison: "It is proper to take alarm at the first experiment of our liberties . . . ."[49]

The Court found such psychological pressures particularly oppressive to children, and in the *McCollum* case stated: "The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."[50]

47. 117 Cong. Rec. H10644, 10657 (daily ed. Nov. 8, 1971).
48. 370 U.S. at 431.
49. *Id.* at 436.
50. 333 U.S. at 227.

The trouble with calling school-directed prayers voluntary, as ably pointed out by Representative Gallagher during the debate on November 8, is that it requires a positive act of abstention by any dissenting child.[51] How can we call a practice voluntary which requires a greater effort to abstain than to participate?

Also, an amendment authorizing the government to enact measures for voluntary meditation is almost laughable in its absurdity. If a child wants to meditate, who on earth can control his thoughts and restrain him? Meditation cannot be anything but voluntary, and an amendment empowering the government to influence meditation seems hardly to envision truly voluntary meditation, but rather government control over the religious thoughts of our children. In the final analysis, the Wylie Amendment does not say what its sponsors intended, for their intent simply was not to authorize truly voluntary prayer.

What the sponsors obviously intended, however, was to write an amendment which would allow school authorities to control and sponsor prayer. If the proposed amendment were interpreted to allow this result, the situation of religion in the public schools would be returned to what it was in the *Engel* and *Schempp* cases, with one major difference. With the addition of the Wylie Amendment to the Constitution, the courts would be powerless to control any infringement of minority rights, as long as the prayer could be said to be voluntary. The local school authorities, under H.R.J. Res. 191, would be free to establish any denominational prayer which would be written by government, recited under government supervision, and directed by the government. Nothing in this broad authorization would put any control whatever over the type of prayer selected, and any school board could, completely beyond the reach of the courts, offer the majority's favorite prayers exclusively. Children of different persuasions could be forced daily to go through the embarrassing procedure of excusing themselves from the room or sitting mute while the majority of their classmates join the teacher or other authority in "voluntary" prayer. The Wylie Amendment would thus reverse the 180-year-old tradition in this country of protecting the rights of the minority against infringement by the

51. 117 Cong. Rec. H10648 (daily ed. Nov. 8, 1971).

majority. It would make the right to true freedom of religion subject to a majority vote. We should all thank Heaven that the amendment was defeated.[52]

While I have followed the history of religion in this country for several years, and believe I have considered the issues from several points of view before coming to any conclusions, it may be felt by some that I have been guilty of doing that for which I criticize the sponsors of H.R.J. Res. 191. It may be said that I am simply reacting, and have decided which conclusion I favor and only later considered the arguments in order to support my view.

To this argument I have two responses. First, by supporting the Supreme Court's decisions, I have not reacted against the Wylie Amendment, but have defended the continuous and thoroughly considered growth of principles designed to sustain religious freedom. Secondly, in this defense of the Supreme Court's decisions, I believe I have fully considered the alternatives before, and not after, I reached my conclusion. My conclusion is, of course, that the Wylie Amendment was a disaster and was rightly defeated. While criticizing the Wylie Amendment (criticism is always easy), I have taken pains to offer a better alternative (not always such an easy task), and offer it now. It reads as follows:

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

52. 117 Cong. Rec. H10657 (daily ed. Nov. 8, 1971).