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The Threat to the American Idea of Religious Liberty

by Robert S. Peck*

With the Supreme Court unlikely to overturn its public school prayer decisions,¹ those who seek a greater religious presence in education have launched two complementary strategies intended to expand existing guarantees of school-related worship rights.

The first strategy is a renewed effort to pass a school prayer constitutional amendment utilizing the political muscle that conservative religious interests demonstrated in the 1994 elections and which resulted in the first Republican controlled Congress in forty years. The amendment movement dangerously attempts to authorize the use of government offices for purposes of religious indoctrination. Though previous efforts at authorizing public school prayer through a constitutional amendment have failed,² the new political landscape forces those concerned with constitutional freedoms to take today's effort seriously.

The second approach being pursued is a litigation strategy that seeks to avoid traditional Establishment Clause³ concerns by emphasizing the

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1. *Engel v. Vitale*, 370 U.S. 421 (1962); *School District v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

2. In each decade since the Court's first school prayer decisions, there has been an effort to enact a constitutional amendment to reverse the effect of the Court's determinations. The last effort, in 1984, fell 11 votes short of the necessary two-thirds for approval in the Senate. R. ALLEY, *SCHOOL PRAYER* 205 (1994) (providing a useful history of previous attempts to amend the Constitution on this issue).

3. U.S. CONST. amend. I provides in pertinent part, "Congress shall make no law respecting an establishment of religion . . ." The First Amendment also protects "the free exercise" of religion.

ostensible private status of the religious speaker in the public setting, minimizing the actual involvement of public authority, and framing the issue as one implicating only freedom of speech. This is a more sophisticated philosophical and legal effort than the constitutional amendment drive and is not without its appeal to civil liberties advocates. Yet, it too is flawed because it has the potential to reduce religious exercise to the status of mere expression, to convert the Establishment Clause into a largely meaningless exhortation, and to transform our public schools into arenas of religious rivalry. None of these results would be beneficial to the purportedly explicit goal of guaranteeing religious liberty proffered by the policy's advocates.

There is a strong likelihood that these efforts, started as separate enterprises, will converge, reconfiguring the constitutional amendment movement into one about freedom of religious expression. The arguments against the two strategies will also then converge.

This article will examine the folly of attempting to amend the Constitution to establish some greater right to engage in prayer in school than currently exists, as well as the stalking horse nature of attempting to denominate the issue as one of free expression. It will survey the development of the American idea of religious liberty as one that sees government and religion operating in largely autonomous spheres and how today's proposals amount to a rejection of that heritage. Furthermore, it will examine the insufficiency of declaring all student speech private speech in order to bring it under the rubric of the First Amendment's free expression protections.⁴ This article will demonstrate that although the First Amendment does afford religious expression some status as constitutionally protected free speech, the Establishment Clause uniquely operates as a limitation on certain types of religious expression in the classroom, an impediment that is not present when the speech falls within other subject areas.

I. FILLING THE VOID IN CHURCH-STATE LAW

The opening that has given shape to both the constitutional amendment and litigation strategies to change church-state law is the Court's own confused Establishment Clause jurisprudence. It can easily be read as an invitation to formulate a new approach to issues of church and state that would lend clarity to the crazy quilt of existing precedents, which careen inexplicably from strict separationism to loose accommoda-

4. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

tionism and sometimes beyond. The Court's difficulty in this area has not escaped the attention of commentators. Former Solicitor General Rex Lee once observed that "a decent argument can be made that the net contribution of the Court's [Establishment Clause] precedents toward a cohesive body of law . . . has been zero. Indeed, some would say less than zero."⁵ Historian Leonard Levy has added that "a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices."⁶

One reason for the Court's incomprehensibility in this area of law is its treatment of the basic test enunciated in *Lemon v. Kurtzman*.⁷ The Court announced in *Lemon* that a challenged governmental action would be upheld against Establishment Clause attack only if it (1) had "a secular . . . purpose," (2) had a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) did "not foster 'an excessive government entanglement with religion.'"⁸ The *Lemon* test was a synthesis of the Court's earlier church-state pronouncements in *Everson v. Board of Education of Ewing Township*,⁹ *School District of Abington Township v. Schempp*,¹⁰ and *Walz v. Tax Commission*.¹¹ Despite this seemingly solid grounding, the Court has never been entirely comfortable with the *Lemon* test. In 1973, just two years after announcing *Lemon*, the Court conflictingly described the test's three prongs as both "well-defined"¹² and "no more than helpful signposts."¹³ The Court has declined to use *Lemon* in a small number of cases,¹⁴ and

5. Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 338.

6. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 163 (1986).

7. 403 U.S. 602 (1971).

8. *Id.* at 612, 612-13 (citations omitted).

9. 330 U.S. 1, 16 (1947).

10. 374 U.S. at 222.

11. 397 U.S. 664, 674-75 (1970).

12. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973).

13. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

14. *See, e.g., Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994) (invalidating a school district created to serve a homogeneous religious community, rather than follow general criteria for the establishment of new school districts); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the practice of appointing a legislative chaplain); and *Larson v. Valente*, 456 U.S. 228 (1982) (invalidating a religious exemption from a charitable registration and reporting law because it established a denominational preference). Some commentators might also include among this number *Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141 (1993) (holding that a public school that makes its building available to community groups outside of school hours, for social, civic, and recreational uses, could not, consistent with the Free Speech Clause, deny use to a church planning a film series on family issues) and *Lee, supra* note 1 (invalidating a public

some justices have expressed their desire to overturn it.¹⁵ The result is that advocates before the Court in church-state cases are forced to argue their position both under *Lemon* as well as under alternative theories.¹⁶

The Court's confused treatment of *Lemon*¹⁷ does not, however, mean that the Constitution ought to be amended. The quest for a single doctrinal gauge in so complex an area, where relations between the secular and sectarian are forever changing and pervasive, is probably an impossible dream.¹⁸ Any conceivable version of a school prayer or religious expression amendment would not help the Court find a more coherent or workable rule, a pursuit to which the Court has devoted considerable time and energy. Moreover, reformulating organized prayer as free speech would not assist the Court in rendering more principled

school's practice of holding an invocation and benediction as part of its graduation ceremony). Yet, in both instances, the avoidance of *Lemon* was not a product of pursuing a result-oriented jurisprudence as much as a decision that *Lemon* provided no further insight into the issues before the Court. In *Lamb's Chapel*, the Court was satisfied that the issue was truly one of freedom of speech without implicating the Establishment Clause. In *Lee*, the Court decided that the degree of coercion was sufficient to render further analysis unnecessary.

15. Then-Justice William Rehnquist, for example, has opined that *Lemon* rests on "historically faulty doctrine" that "causes this Court to fracture in unworkable plurality opinions . . . [that produce difficulty in] yield[ing] principled results." *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

16. The Court has explored a number of alternative theories for church-state issues, but has declined to engage in wholesale substitution of these approaches for *Lemon*. In her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring), Justice O'Connor suggested an endorsement test that would find an Establishment Clause violation when the government makes adherence to religion relevant to a person's standing in the political community. *Id.* at 687-89. The Court seems to have incorporated the idea of endorsement into the *Lemon* test. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). The Court has repeatedly rejected suggestions that a coercion test be employed. *See, e.g.*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part).

17. Justice Scalia has long been an opponent of the *Lemon* test. He indicated, more colorfully than accurately, his frustration with the Court's sometimes-it-is-the-rule-and-sometimes-it-is-not philosophy in an opinion in *Lamb's Chapel*, comparing *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, . . . frightening the little children and school attorneys . . ." 113 S. Ct. at 2149 (Scalia, J., concurring). Yet, *Lemon* will apparently survive until the Court can devise a workable alternative, something that has proven as elusive in this area of law as consistency in results has been.

18. Even the author of the *Lemon* test, Chief Justice Warren Burger, warned against any "naive pre-occupation with an easy, bright-line approach for addressing constitutional issues." *Wallace*, 472 U.S. at 89 (Burger, C.J., dissenting). In Establishment Clause cases, he suggested that "the inquiry calls for line drawing; no fixed, per se rule can be framed." *Id.* (quoting *Lynch*, 465 U.S. at 678).

decisions, but ultimately would undermine the concept of religious liberty by establishing an intrusive governmental role.

II. THE AMERICAN CONCEPT OF RELIGIOUS LIBERTY

In proposing a school prayer amendment, Speaker of the House Newt Gingrich was tapping into the frustrations of many devout Americans who have been fed a steady diet of the myth that the Supreme Court had overstepped its bounds and had "made God unconstitutional."¹⁹ He pledged to bring the measure to the floor of the House of Representatives for a vote by July 4.²⁰ Gingrich demonstrated his own constitutional ignorance on the subject when he defended his proposal on a television talk show. Mistakenly claiming that a St. Louis youth had recently been disciplined for saying grace over lunch, Gingrich declared, "Most people don't realize that it's illegal to pray' in public schools."²¹ Of course, in reality: "Nothing in the United States Constitution as interpreted by this Court . . . prohibits public school students from voluntarily praying at any time before, during, or after the school day."²²

Gingrich initially endorsed language proposed at the end of the 103rd Congress by Representative Ernest J. Istook Jr. (R-OK), who was given responsibility for heading the school-prayer amendment task force. The Istook amendment, H.J. Res. 424, read:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools.²³

Though crafted with an obvious eye to eschewing coercive conduct and preventing government officials from creating a prayer like the Regents Prayer that was invalidated in *Engel v. Vitale*, the amendment would

19. L. PFEFFER, *GOD, CAESAR AND THE CONSTITUTION* 201 (1975) (quoting Senator Sam Ervin's (D-NC) initial reaction to *Engel*). Ervin later changed his mind and became a vociferous supporter of the Court's school prayer decisions. See SAM J. ERWIN, JR., *PROTECTING THE CONSTITUTION: THE AUTOBIOGRAPHY OF SENATOR SAM ERVIN* 237-48 (1984).

20. Laurie Goodstein, *Clinton would support 'Moment of Silence' Religious Leaders Gather Against School Prayer Amendments as President Clinton Clarifies His Stance*, WASH. POST, Nov. 23, 1994, at A3.

21. Rochelle L. Stanfield, *The Amen Amendment* 27 NAT'L J. 22, 26 (Jan. 7, 1995) (quoting Gingrich on NBC's "Meet the Press"). The school district indicated that the boy had been sent to detention for disciplinary reasons unrelated to his prayer over lunch. *Id.*

22. *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring).

23. H.J. Res. 424, 103d Cong., 2d Sess. (Oct. 7, 1994).

have still permitted a public school teacher to choose any existing prayer and lead the students in its recitation, only conceding that objecting students could elect to sit quietly in the room. Nothing in its language would have prevented the courts, consistent with the ruling in *Engel*, from finding that any organized voluntary classroom or school assembly prayer still violated the amendment's own "required participation" prohibition because of the coercive environment of the classroom. *Engel* found that religious ceremonies taking place under the auspices of public school authorities were inherently coercive.²⁴ Subsequent decisions have indicated no retreat from this principle.²⁵ Thus, the Istook proposal, if enacted, may well have been ineffective in accomplishing its obvious purpose.

Even the most likely allies of a school prayer amendment objected to the Istook formulation. At a conference shortly after Gingrich's intentions on school prayer had been announced, Jay Sekulow, chief counsel to the Pat Robertson-led American Center for Law and Justice, indicated his clear opposition to the Istook language, largely due to the authority it placed in school officials.²⁶ Beverly LaHaye, founder of the conservative Concerned Women for America, said some of her constituents would only support school prayer that was made explicitly in the name of Jesus Christ, "which we know is not going to go through."²⁷ The difficulties posed by Istook's language made LaHaye wonder "what magician is going to write this language Prayer is not supposed to divide people, but to bring them together. So if prayer is going to be the big battleground, maybe we should sit back and take a long look at it."²⁸

Although congressional supporters of a constitutional amendment returned to the drafting table after this experience and denigrated their own proposal as merely something to get the discussion started,²⁹ the idea of an amendment is inconsistent with well established American principles of religious liberty.

Fundamental to the American concept of religious liberty is the idea that church and state operate in autonomous spheres. The idea has Biblical roots: "Render to Caesar the things that are Caesar's, and to

24. 370 U.S. at 430-31. See also *School Dist.*, 374 U.S. at 224-25.

25. See, e.g., *Lee*, 112 S. Ct. 2649.

26. Remarks of Jay Sekulow, Annual Conference of Americans United for Separation of Church and State (Nov. 6, 1994).

27. Catherine S. Manegold, *Some on Right See Tactical Misstep on School Prayer*, N.Y. TIMES, Nov. 19, 1994, at 1, 8, col. 1.

28. *Id.*

29. Letter from Rep. Ernest J. Istook to James Dunn, Executive Director, Baptist Joint Committee (Nov. 30, 1994) (letter on file with author).

God the things that are God's."³⁰ The Framers of the Constitution and Bill of Rights were products of the age of enlightenment. They knew, as John Locke had taught, that "[n]obody . . . [has] any just title to invade the civil rights and worldly goods of [another], upon pretence of religion."³¹ Locke had enormous influence on those who created our constitutional structure. His commitment to the idea of separation was nearly absolute. He wrote: "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other."³²

Locke resoundingly rejected the notion that the "care of souls"³³ was within the competence and authority of the civil magistrate. Even the "consent of the people" was insufficient to vest such a power in civil government, Locke wrote.³⁴ These views found ready support among the Framers of the Constitution and Bill of Rights. They knew that the legacy of English rule, where church and state were one, was a constant state of religious strife, prejudice and intolerance.

This Lockean concept of how religion and government should relate found expression in the idea of a "wall of separation" between church and state, a metaphor that predated Locke's writings. In 1644, Roger Williams, the great Baptist leader who founded Rhode Island as a colony of tolerance after he was banished from Massachusetts for "new and dangerous opinions"³⁵ on religion, found support in both the Old and New Testaments for the proposition that the kingdom of God cannot be found on earth and could only be corrupted by the intermingling of church and state. Thus, he concluded that there must be a "hedge or wall of separation between the garden of the church and the wilderness

30. *St. Mark's Gospel* 13:17. James Madison stated that it was an "aberration from the sacred principle of religious liberty [to] giv[e] to Caesar what belongs to God, or join[] together what God has put asunder . . ." JAMES MADISON ON RELIGIOUS LIBERTY 90 (R. Alley ed. 1985) [hereinafter MADISON].

31. JOHN LOCKE, *A Letter Concerning Toleration* 20, in 6 WORKS OF LOCKE (London 1823 & 1963 photo. reprint) (quoted in Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1432 (1990)) [hereinafter LOCKE].

32. LOCKE, *supra* note 31, at 9, cited in Schempp, 374 U.S. at 231 (Brennan, J., concurring). Locke further elaborated on this point when he noted that "civil government . . . is confined to the care of the things of this world, and hath nothing to do with the world to come," LOCKE, *supra* note 31, at 12-13, while also asserting that "churches have [no] jurisdiction in worldly matters." *Id.* at 19.

33. JOHN LOCKE, *A Letter Concerning Toleration* (1689), in 5 THE FOUNDERS CONSTITUTION 52 (Philip Kurland & Ralph Lerner 1987).

34. *Id.*

35. 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 195 (1950).

of the world."³⁶ He wrote that "All Civill States with their Officers of justice in their respective constitutions and administrations are proved essentially Civill, and therefore not Judges, Governours or Defendours of the Spirituall or Christian state and Worship."³⁷

The idea of separation took strong root in the new United States. In every other country, church and state, kings and clergy, had formed an alliance that had tended to corrupt each other by discovering an identity of interests that were often more selfish than principled. Governments and public officials would invoke religious authority to justify public policy choices, and in the process, reinterpret the people's religious obligations to serve their personal political objectives. Churchmen, finding it in their own interest and having become part of the community of rulers rather than of the people, would use Scripture to support these civil edicts. In return, the power of the state would be brought to bear on dissenting ministers who would face "fist fights and jail sentences in vain efforts to halt their preaching to the people."³⁸ In England, this trend manifested itself, *inter alia*, in new rulers, lobbied by competing religious factions, rewriting the Anglican Book of Common Prayers to further their own factional agendas, rather than advance spiritual concerns.³⁹ Surely, this was a support of religion at the expense of others that was antithetical to the idea of religious freedom.

Even where toleration of other faiths was practiced, those who did not share the established faith were subjected to discrimination and a range of penalties, both small and large. In fleeing this kind of religious persecution, many, like Williams, adopted the notion that separation of church and state would be good for the church and for the state.

In November 1776, Thomas Jefferson addressed these issues in a speech to the Virginia House of Delegates. He asked, "Has the state a right to adopt an opinion in matters of religion?" He answered his own

36. Roger Williams, *A Letter of Mr. John Cottons* (1643), quoted in LEVY, *supra* note 6, at 184.

37. ROGER WILLIAMS, *The Bloody Tenet* (1644), in 1 GREAT ISSUES IN AMERICAN HISTORY: FROM SETTLEMENT TO REVOLUTION, 1584-1776 201, 202 (Clarence L. Ver Steeg & Richard Hofstadter, eds., 1969).

38. ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 84 (1955). For example, William Penn and one of his parishioners were arrested for holding services on London's Gracechurch Street after their meeting hall had been padlocked. Only the stout action of a brave jury under enormous pressure for a conviction from the presiding lord mayor prevented Penn's conviction and imprisonment. Trial of William Penn and William Mead, 22 Charles II, 6 Howell's State Trials 951 (1670).

39. *Engel*, 370 U.S. at 425-27.

question with an emphatic no.⁴⁰ Freedom from government intermeddling in matters of religion was a part of America's revolutionary spirit, even if its import and practice was not realized immediately.⁴¹

The battle to secure religious liberty in the United States was pivotally fought in Virginia, when two giants of the new republic proposed opposing pieces of legislation. Patrick Henry offered "A Bill Establishing a Provision for Teachers of the Christian Religion," a successor to an earlier proposal that would have imposed on all citizens a "moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination or communion of Christians, or for some form of Christian worship."⁴² Under the new bill, all Christian faiths would have been treated equally. The measure appeared to have a better chance of success than the alternative that Jefferson had authored, "A Bill to Establish Religion Freedom."⁴³ If the Henry measure had passed, Virginia would have created a multiple establishment of religion, allowing it to prefer all of Christianity to the other faiths it might still tolerate.

Final passage was fortuitously put off until the following legislative session, when Henry ascended to the governorship and, by virtue of that office, lost sway with the legislature. Jefferson, ensconced in Paris as the American minister, had to rely on James Madison to plot legislative strategy for his religious liberty bill.

Madison drafted an argument that was widely and anonymously circulated as a petition against the proposed general assessment bill. He asserted that Henry's proposal would enact "a dangerous abuse of power."⁴⁴ He then stated a simple but unassailable principle: that religious conscience, free from the dictates of others, is "an unalienable right."⁴⁵ Thus, religious faith and practice was entirely beyond the state's authority, "and that Religion is wholly exempt from its cognizance."⁴⁶ Conceding even the smallest measure of this sort of power to the state would enable it to "establish Christianity, in exclusion of all

40. Merrill D. Peterson, *Jefferson and Religious Freedom*, ATLANTIC MONTHLY 113, 116 (Dec. 1994).

41. Even in 1791, the year the Bill of Rights was ratified, six states maintained official churches or established religions. This practice ended in 1833. ROBERT S. PECK, *THE BILL OF RIGHTS AND THE POLITICS OF INTERPRETATION* 93 (1992).

42. Levy, *supra* note 6, at 54.

43. *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 6 (Marvin Meyers ed., 1981). [hereinafter *MIND*].

44. JAMES MADISON, *A MEMORIAL AND REMONSTRANCE*, reprinted in *MIND*, *supra* note 43, at 7.

45. *Id.*

46. *Id.*

other Religions, [and] may establish with the same ease any particular sect of Christians, in exclusion of all other Sects[.]”⁴⁷

Governmental favoritism for those religions that are recognized, Madison observed, “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”⁴⁸ Instead, he wrote that a separation of religion and government was necessary to assure religious freedom, in part, because “[r]ulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries” in their efforts to use spiritual authority to uphold “political tyranny.”⁴⁹

Madison’s reasoning struck a responsive cord in Virginia, as it should in today’s United States. Lawmakers were swamped with “petitions and remonstrances from all parts against the interposition of the Legislature in matters of Religion.”⁵⁰ The effort was successful in forging a new legislative majority willing to enact the Jefferson bill in 1786. After its passage, Madison wrote, “I flatter myself [to think that the provisions of this bill] have in this country extinguished forever the ambitious hope of making laws for the human mind.”⁵¹ Justice Wiley Rutledge later wrote that Madison’s Memorial and Remonstrance was “at once the most concise and the most accurate statement of the views of the First Amendment’s author concerning what is ‘an establishment of religion.’”⁵²

The enacted religious freedom statute, an important forerunner of the First Amendment’s religion clauses because of the involvement of Madison and Jefferson,⁵³ began by acknowledging that religious beliefs must proceed from a mind free to reject the interferences of authority. In line with this notion, the Act rejects any government involvement in assuring financial support for religion, because state financing for even “this or that teacher of [a taxpayer’s] own religious persuasion, is depriving [those so taxed] of the comfortable liberty of giving his

47. *Id.* at 8.

48. *Id.* at 10-11.

49. *Id.* at 10.

50. WILLIAM LEE MILLER, *THE FIRST LIBERTY* 39 (1985) (quoting James Madison).

51. *Id.* at 43.

52. *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting).

53. Madison later wrote, probably in 1826, that the passage of the Statute for Religious Liberty “was always held by Mr. Jefferson to be one of his best efforts in the Cause of Liberty to which he was devoted. And it is certainly the strongest legal barrier that could be erected against the connection of church and State so fatal to the liberty of both.” *Quoted in* ADRIANNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 31 (1950) (1980).

contributions to the particular pastor [personally favored].⁵⁴ The statute further prefaced its operative section by proclaiming that

[O]ur civil rights have no dependence on our religious opinions, [any]more than our opinions in physics or geometry; that "therefore" the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity . . . , unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right⁵⁵

It then declares that as a matter of law "all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."⁵⁶

That Madison, the principal architect of the Bill of Rights, would rely upon the same arguments a few years later to fashion what became the First Amendment is hardly surprising. As Felix Frankfurter observed, to those who sought to secure religious liberty in the new constitution, "[t]he battle in Virginia, hardly four years won, . . . was a vital and compelling memory in 1789."⁵⁷

The principle established through this landmark legislative debate, stated so many times by Jefferson and Madison, was put well by Benjamin Franklin:

When a religion is good, I conceive that it will support itself; and, when it cannot support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one⁵⁸

Thus, religion as a whole, as with individual denominations, rises or falls on the basis of its appeal to the populace.⁵⁹ Government subsidies or endorsements are neither necessary nor desirable interventions in this realm. In fact, the only outcomes that flow from government involve-

54. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 206 (Torchbook ed. 1964) (1861).

55. *Id.* at 207.

56. *Id.* at 207-08.

57. *McGowan v. Maryland*, 366 U.S. 420, 464-65 (1961).

58. Letter from Ben Franklin to Dr. Richard Price (Oct. 9, 1780), quoted in 1 STOKES, *supra* note 35, at 298.

59. Summarizing paragraphs seven and eight of Madison's Memorial and Remonstrance, Justice Douglas put it this way: "The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting." *Engel*, 370 U.S. at 444 (Douglas, J., concurring).

ment are adverse ones, either bending the spiritual to selfish majoritarian ends or sustaining a faith that reason no longer supports. The latter result may prolong a religion's sway, while blocking the rise of better and truer forms of devotion, whether these take place as a reformist movement within the church or the establishment of a new and perhaps competing denomination.

In a 1787 letter to Jefferson, Madison also expressed concern for the persecution of minority faiths if government took on a supportive role toward religion. He worried that if members of "the same sect form a majority and have the power, other sects will be sure to be depressed" for "a majority when united by a common interest or passion can not be restrained from oppressing the minority."⁶⁰

The First Amendment fully recognizes these dangers and was added to the Constitution with two clauses designed in combination to establish religious liberty. The Establishment and Free Exercise clauses, although creating occasional internal tension, generally work together to assure autonomy between religion and government. During the congressional debate over the amendment, its primary author, Madison, explained that the Establishment Clause was intended, in part, to quiet public fears that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."⁶¹ He later wrote that the Constitution "[s]trongly guarded . . . the separation between Religion and Government . . ."⁶²

One of the most celebrated explanations of the amendment came from Jefferson, who though not a participant in the debate was instrumental in assuring that a bill of rights was appended to the Constitution. In an 1802 letter to the Danbury Baptist Association, and prepared with the approval and scrutiny of his attorney general, Levi Lincoln, Jefferson reiterated his longstanding position that religion was a matter "solely between man and his God" and that the people had approved the Establishment Clause as a recognition of this principle, "thus building a wall of separation between church and state."⁶³ Jefferson's explication of the Establishment Clause, the Supreme Court found in 1879, should be "accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."⁶⁴

60. Letter of James Madison to Thomas Jefferson (Oct. 24, 1787), *quoted in* ALLEY, *supra* note 2, at 36.

61. 1 *Annals of Cong.* 758 (Aug. 15, 1789).

62. MADISON, *supra* note 30, at 90.

63. *Quoted in* LEVY, *supra* note 6, at 182.

64. *Reynolds v. United States*, 98 U.S. 145, 164 (1879). *See also* *Everson*, 330 U.S. at 16 (citation omitted) ("In the words of Jefferson, the clause against establishment of

Despite Virginia's venture in disestablishment and the adoption of the First Amendment as a restriction on the federal government, several states continued to support religion. These, too, were slowly undone, as the idea that separation was an essential element of religious freedom gained wider acceptance. In 1833, by a ten-to-one vote, Massachusetts became the last state to end state support for religion.⁶⁵ Thus, Professor Michael McConnell has written: "By 1834, no state in the Union would have an established church, and the tradition of separation of church and state would seem an ingrained part of our constitutional system."⁶⁶

Nineteenth-century lawyer David Dudley Field observed:

The greatest achievement ever made in the cause of human progress is the total and final separation of church and state. If we had nothing else to boast of, we could lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his Maker were a private concern, into which other men have no right to intrude. To measure the stride thus made for the Emancipation of the race, we have only to look back over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion that have filled the world.⁶⁷

The invention of church-state separation as a means of assuring the fullest degree of religious liberty has paid rich dividends. In 1787, the year the Constitution was written, reliable estimates put church membership at less than fifteen percent of the American population.⁶⁸ Today, according to the Census of Religious Bodies, membership tops sixty-two percent.⁶⁹ In addition, more than ninety percent of Americans describe themselves as members of one faith or another.⁷⁰ Comparisons with attitudes in other Western nations, many of whom have state-supported churches, conducted by the Gallup Organization, consistently find that the United States, adhering to the principle of church-state separation, scores higher in affirming religion's personal significance to its citizenry and in adherence in religious beliefs.⁷¹

religion by law was intended to erect 'a wall of separation between church and state.').
Id.

65. PECK, *supra* note 41, at 93.

66. McConnell, *supra* note 31, at 1437.

67. Quoted in 1 STOKES, *supra* note 35, at 37.

68. PFEFFER, *supra* note 19, at 5.

69. BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 6 (1993) [hereinafter KOSMIN-LACHMAN].

70. *Id.* at 15-17.

71. *Id.* at 8.

Rather than inhibit religious faith, as some have contended, separation has allowed religion to prosper.

Even that most trenchant of observers of the American political scene, Alexis de Tocqueville, marveled at the relationship of separation to the preservation and strength of religious faith in the United States. "I questioned the members of all the different sects," he wrote in his seminal work, *Democracy in America*, ". . . they mainly attributed the peaceful dominion of religion in their country to the separation of Church and State . . . during my stay in America I did not meet with a single individual, of the clergy or of the laity, who was not of the same opinion upon this point."⁷²

Felix Frankfurter similarly believed the principle to be ingrained in the American polity: "long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people."⁷³

In fact, the principle was so well established that, despite the many other changes made, the secessionist Confederate States wrote a constitution that included the precise wording of the First Amendment, thereby adopting the prevailing interpretation of the Establishment Clause as acknowledging separation of church and state as an integral component of religious liberty.⁷⁴

III. THE SCHOOL PRAYER CONSTITUTIONAL AMENDMENT

Most proponents of a constitutional amendment that would permit public school officials to conduct a morning prayer for students are either ignorant of the premises of the American canon on religious liberty or reject it outright. Unable to see past their own fundamentally Protestant perspective which can seem to those not in the minority perfectly ecumenical, there is a notion that the reestablishment of public school prayer can overcome contemporary ills and promote what is euphemistically called the "Judeo-Christian ethic."⁷⁵ They ignore both the nature

72. ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 313-14 (Colonial Press 1900) (1831).

73. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 215 (1948) (Frankfurter, J., concurring).

74. Confederate Const. art. I, sec. 9, reprinted in 4 WOODROW WILSON, *HISTORY OF THE AMERICAN PEOPLE* 325 (1902). This provision was unchanged, even though the framers of the Confederate Constitution felt obliged to change the preamble to "invok[e] the favor and guidance of Almighty God." *Id.* preamble, WILSON, at 313.

75. The phrase "Judeo-Christian ethic" appears to be nothing more than a politically acceptable name for what was previously called the Protestant ethic. Judaism is quite distinct from Christianity. Though there may be some shared moral values, these are

of prayer as something more than the rote repetition that is likely to occur in schools and the substantial evidence that the absence of organized prayer is not the cause of modern predicaments.

Madison anticipated this claim when he wrote that when religious devotion is not part of a person's spirit, "the official services of their Teachers are not likely to produce it. It is more likely to flow from the labours of a spontaneous zeal."⁷⁶ On the other hand, where religious spirit has been instilled in young people, there is no need for intervention from educational authorities. Indeed, that intervention can only be counterproductive, as it will turn an act of devotion into either a tiresome chore or meaningless pap.

The argument that prayer would combat the decline in social values is based on the idea that the index of societal ills, such as the violence and divorce rates, increased after the 1962 decision in *Engel*. Yet, many states did not permit organized public school prayer prior to the School Prayer Cases.⁷⁷ New York City, for example, did.⁷⁸ Yet, few would argue that New York City had fewer social problems than did South Dakota, Nebraska or Wisconsin, all of which did not. Moreover, studies have concluded that there is no discernible difference between public and

values common to virtually all faiths as well as to many good people who do not believe in God. At best, it is a misnomer having little to do with religious outlook. At worst, it is a form of meaningless God-talk, intended to have a visceral appeal. Talmudic scholar Jacob Neusner has said "theologically and historically, there is no such thing as the Judeo-Christian tradition. It's a secular myth favored by people who are not really believers themselves." Kenneth L. Woodward, *Losing Our Moral Umbrella*, NEWSWEEK, Dec. 7, 1992, at 60.

In that respect, it is reminiscent of the Yugoslav Constitution of 1921, Article 3 of which declared the official national language to be Serbo-Croat-Slovenian as part of an effort to create the impression of unity and equality among very different and antagonistic peoples. F. HONDIUS, *THE YUGOSLAV COMMUNITY OF NATIONS* 100 (1968). What made the effort entirely laughable was that this fictional language consisted of two similarly spoken languages with entirely different alphabets, Serbian and Croatian, and an entirely different third language, Slovenian. Despite this legal fiction, official Yugoslav histories indicate that this Constitution was a flagrant attempt by Serbs to consolidate their own power. JOZO TOMASEVICH, *PEASANTS, POLITICS AND ECONOMIC CHANGE IN YUGOSLAVIA* 236 (1955). The break-up of Yugoslavia in 1991 and the continuing warfare there can be traced to the same raging ethnic rivalries that the 1921 Constitution attempted to paper over. The lesson is that hyphenated attempts to find unity where there is none do not serve as some magical incantation to deny the hegemony of majoritarian forces.

76. MADISON, *supra* note 30, at 92.

77. *See, e.g., Schempp*, 374 U.S. at 276 n.51 (Brennan, J., concurring) (indicating that courts in Illinois, Louisiana, Wisconsin, South Dakota, Washington, and Nebraska had found religious exercises in the public schools to violate their state constitutions as early as 1890). *Id.* Other states simply did not adopt the practice.

78. *Engel*, 370 U.S. at 424 n.2.

parochial schools in terms of levels of violence⁷⁹ or, for that matter, aptitude scores.⁸⁰ Instead, the argument that blames the School Prayer Cases for societal changes is a perfect example of sophistry.

Even so, school prayer proponents still adhere to the long rejected notion that denying a governmental role in religious worship amounts to hostility to religion,⁸¹ missing the point entirely that government involvement in religion tends to be a corrupting and stifling influence. Yet, as Tocqueville found when those he surveyed credited church-state separation for the vitality of religion in the United States,⁸² modern pollsters find that Americans consistently score higher in adherence to religious belief than citizens of any other democratic nation, despite our laws giving public schools no role with respect to religious devotion.⁸³ A 1989 international Gallup poll found 18-to-24 year-old Americans, those presumably most "harmed" by the ban on public school-sponsored prayer, leading the world with 90 percent of them acknowledging religion's personal significance to them.⁸⁴

As the prayer decisions well recognize, the deleterious effect of government involvement in religion was not an invention of the recent past. To use yet another example, in explaining the Constitution's prohibition on religious tests during the ratification debates, Oliver Ellsworth, a signer of the Constitution, as well as a future Supreme Court justice, wrote that "[i]n our country every man has a right to worship God in that way which is most agreeable to his own conscience."⁸⁵ This construction leaves no role for governmental entities.

Any other approach, permitting the State to support religion, would be a prescription for a civic religion dictated by prevailing political winds. The court in *Engel* noted that the Church of England's Book of

79. *Catholic Educator Surprises by Data on Student Values*, EDUCATION WEEK, Apr. 29, 1987, at 1, col. 1.

80. See *Jean Merl, Are Private Schools Any Better?*, L.A. TIMES, Mar. 29, 1992, at A1.

81. In the first of its school prayer decisions, the Court answered the hostility charge by noting that "[n]othing, of course, could be more wrong." *Engel*, 370 U.S. at 434. Instead, the Court asserted that the First Amendment "was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. 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." *Id.* at 435 (footnote omitted).

82. See *supra* note 72 and accompanying text.

83. KOSMIN-LACHMAN, *supra* note 69, at 8.

84. *Id.*

85. Quoted in *McConnell*, *supra* note 31, at 1474.

Common Prayer "set out in minute detail the accepted form and content of prayer and other religious ceremonies" and was approved by parliamentary acts in 1548 and 1549.⁸⁶ As new rulers came to power, the Book was revised to reflect the views of the new political powers.

Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs.⁸⁷

The revolutionaries who founded the United States rejected the idea that government had such a role or that theology ought to be subject to revision through the offices of the State.

The danger of repeating the errors that the Founders rejected is evident in the public schools, where impressionable young children are placed in the hands of authority figures for so much of their time.⁸⁸ The promotion of religion there, even as a generalized idea, can only give way to transforming our educational institutions into arenas of religious rivalries, where adherents will vie with each other to commandeer "the machinery of the State to practice [their] beliefs."⁸⁹

The dangers of sectarian indoctrination through the offices and instruments of government are not just abstract concerns. Catholic schools were originally established to preserve the religious identity of children of that faith against the lure of the Protestant mainstream that was being inculcated through the public schools. In a number of cities during the 19th century, Catholics who continued to attend public schools were persecuted for refusing to read from the King James Bible or to participate in Protestant prayers. When an enlightened Philadelphia school board in 1843 authorized Catholic children to use their own Bible or forego Bible readings, violent and fatal riots broke out in the city. Catholic churches were even burned.⁹⁰ In Ellsworth, Maine, a Catholic priest was tarred and feathered for suggesting that a member

86. 370 U.S. at 426.

87. *Id.* at 426-27 (footnote omitted).

88. The Court has made much of dangers that arise from the convergence of school's "great authority and coercive power through mandatory attendance requirements, . . . the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (footnote omitted).

89. *Schempp*, 374 U.S. at 226.

90. *PFEFFER*, *supra* note 19, at 175.

of his congregation challenge the Bible reading requirement in court.⁹¹ Another court in Maine upheld the expulsion of a Catholic child who refused to read from the King James Bible,⁹² while a Massachusetts court found it permissible for a teacher to administer a beating to a recalcitrant student.⁹³

No one should think that these events from the last century are unrepresentative of what might be contemporary America's reaction to those who are of a different faith and who, on that basis, refuse to participate in school-sponsored religious activities. When Jehovah's Witnesses lost their first attempt to validate their children's refusal to participate in classroom flag-salute ceremonies⁹⁴ because, in their view, it amounted to worshipping a graven image, the Justice Department reported "hundreds of attacks on Witnesses" within a two-week period, during which Witnesses were seized and brutally beaten, and their property destroyed.⁹⁵ Later, the Department revealed that "in the two years following the decision, the files of the Department of Justice reflect an uninterrupted record of violence and persecution of the Witnesses. Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts."⁹⁶

More recently, after two Oklahoma families successfully challenged a school's practice of teacher-supervised morning prayer meetings, they were constantly threatened and harassed, the children were persecuted

91. *Id.* The case was unsuccessful as the court equated Bible reading to the study of Greek and Roman mythology and not a matter of any different order. *Id.* at 175-76. Courts have long gone to these sorts of extremes in robbing challenged practices of religious character to justify upholding the government's involvement. A recent example of this was the Court's determination that because Christmas was already acknowledged as a secular holiday, Chanukah had to be treated the same, otherwise it "would be a form of discrimination against Jews" not to treat "Chanukah as a contemporaneous cultural tradition." *County of Allegheny*, 492 U.S. at 615 (footnote omitted). What these convenient legal fictions ignore is that the Court has taken manifestly religious holidays and trivialized them as something merely cultural and essentially secular. No rationale can be offered that can transform Christmas from a religious celebration of the birth of Christ into something else. Similarly, it is important to acknowledge that Jews do not celebrate Chanukah as a "cultural tradition" or "secular holiday," and that no one else celebrates it at all. Thus, by attempting to secure a legitimate basis for government involvement in Chanukah, and similarly justify its treatment of Christmas, the Court has done religious liberty a serious disservice by draining all devotional significance and meaning from what are undeniably religious celebrations.

92. *Donahue v. Richards*, 38 Maine 379 (1854).

93. *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Mass. Police Ct. 1850).

94. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

95. Robert S. Peck, *A Wrenching Reversal*, 5 CONSTITUTION 51, 55 (Winter 1993).

96. *Id.*

by school officials and called "devil-worshippers" by other children, one family's home was firebombed,⁹⁷ and the other family was driven from their home, which was subsequently vandalized.⁹⁸

In a now-pending case in which the Fifth Circuit approved of a preliminary injunction to end school-sponsored religious ceremonies, a student-player challenged the practice of the coach leading the women's basketball team in prayer. For refusing to join the others in prayer, she was separated on the basketball court from the others as they prayed for all to see, called "a little atheist" by a teacher in class, and taunted by classmates and spectators.⁹⁹

These incidents, just a small sampling of numerous similar occurrences, demonstrate that it remains wise constitutional policy to hold that "[b]y reason of the First Amendment government is commanded 'to have no interest in theology or ritual.'"¹⁰⁰ Justice Robert Jackson's observation continues to ring true: "We start down a rough road when we begin to mix compulsory public education with compulsory godliness."¹⁰¹ This statement should not be mistakenly read to refer solely to coercion of the overt variety. The court in *Engel* was assuredly correct to find that coercion was present in a facially voluntary system of state-sponsored religious exercises.¹⁰² "When the power, prestige and financial support of government is placed behind a particular religious belief," the Court held, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."¹⁰³

Another point worth making about prayer is that no form of prayer is universally satisfactory to all. For some, a prayer not uttered in the

97. *Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1396-97 (1985) disapproved by *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 304 n.5 (1986).

98. *America's Constitutional Heritage* (ACLU documentary 1994) (transcript on file with author).

99. *Doe v. Duncanville Ind. Sch. Dist.*, 994 F.2d 160, 162-63 (5th Cir. 1993).

100. *Engel*, 370 U.S. at 443 (Douglas, J., concurring) (quoting *McGowan*, 366 U.S. at 564 (Douglas, J., dissenting)).

101. *Zorach v. Clauson*, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting).

102. The religious observance at issue did "not require all pupils to recite the prayer but permit[ted] those who wish to do so to remain silent or be excused from the room" 370 U.S. at 430.

103. 370 U.S. at 431. See also *Lee*, 112 S. Ct. at 2657 ("The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position."). *Id.*

name of Jesus Christ is no prayer at all.¹⁰⁴ For non-Christians, such a prayer would obviously be sacrilegious.

The manner of the devotion is also an issue. As Justice William Brennan has noted, "[m]any deeply devout persons have always regarded prayer as a necessarily private experience."¹⁰⁵ For these people, as it is for many others, prayer is not to be practiced publicly, and it may not be legislated.¹⁰⁶ Moreover, different faiths pray in substantially different manners. While some might be satisfied to pray silently, Buddhists, for example, chant aloud. Even among Christian faiths there are differences: "Pentecostals stand to pray. Catholics and Episcopalians kneel. Presbyterians bow their heads."¹⁰⁷

It remains best for government to stay out of the business of religious devotion, whatever secular benefits some might assert. Religious activity under government aegis can only favor particular denominations or substitute a generic civic religion for genuine forms of worship. The operative principle remains: "what should be rendered to God does not need to be decided and collected by Caesar."¹⁰⁸

IV. TREATING PRAYER AS MERE EXPRESSION

If the frontal assault of a constitutional amendment designed to overturn the School Prayer Cases fails, some advocates of a different approach to church-state issues have taken refuge behind the Free Speech Clause. Speculation in Washington is rampant that the language of the school prayer amendment to be considered will be framed in terms of student religious expression.

The idea behind this approach is that if the speaker is a student, rather than school authorities, all Establishment Clause problems are

104. Those who take this position are often evangelicals, a category that has been estimated to include slightly more than one-quarter (25.9 percent) of the American population. Richard N. Ostling, *In So Many Gods We Trust*, TIME, Jan. 30, 1995, at 72. They cite the Bible, at *John* 16:23, 24, as requiring prayers be in the name of Christ.

105. *Schempp*, 374 U.S. at 284 (Brennan, J., concurring). Some of these are Christians who cite the Biblical injunction that "[w]hen you pray, you must not be like the hypocrites, for they love to stand and pray in the synagogue and at the street corners that they may be seen by men When you pray, go into your room and shut the door and pray to your Father who is in secret" *Matthew* 6:5,6.

106. For an insightful discussion of the impossibility of interposing religion on the civic structure, see Justice Joseph Bradley's letter detailing his opposition to a constitutional amendment that would have acknowledged the Nation's dependence on God, as well as, the Biblical foundation of our laws and institutions. *Schempp*, 374 U.S. at 258 n.23 (Brennan, J., concurring).

107. Eleanor Ivory, *Release Time*, TORCH (April 1994).

108. *Zorach*, 343 U.S. at 324-25 (Jackson, J., dissenting).

solved. This, of course, is not true, but is an immense oversimplification of the constitutional issue. Advocates of this approach take considerable comfort from a problematic graduation prayer decision of the Fifth Circuit, *Jones v. Clear Creek Independent School District*,¹⁰⁹ which was decided subsequent to the Supreme Court's graduation prayer case, *Lee v. Weisman*.

Jones upheld the practice of student prayer at public school graduations because both the purpose and the primary effect of the graduation prayer was to solemnize a public occasion, rather than to transform the ceremony into a religious event.¹¹⁰ In so ruling, the court ignored that the lessons "of both *Torcaso*¹¹¹ and the Sunday Law Cases¹¹² is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice."¹¹³

Even if solemnizing did provide a secular rationale to permit the graduation prayer practice, the Fifth Circuit found more was required, namely the presence of several conditions in the procedure being evaluated. First, the prayer had to reflect a majority decision of the student body.¹¹⁴ Second, the prayer had to be non-sectarian and non-proselytizing, otherwise the court concluded that it would impermissibly advance religion.¹¹⁵ Finally, it had to be delivered by a student, which the Court concluded removed any notion of state control.¹¹⁶

The decision in *Jones* and these conditions are clearly inconsistent with the Court's holding in *Lee*.¹¹⁷ Like the graduation prayer held

109. 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

110. 977 F.2d at 966-67.

111. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that the State may not require a belief in God to qualify for public employment).

112. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961).

113. *Schempp*, 374 U.S. at 265 (Brennan, J., concurring) (footnotes added, footnote omitted). *Accord Lee*, 112 S. Ct. 2649.

114. 977 F.2d at 968-69.

115. *Id.* at 971.

116. *Id.* at 970-71.

117. No opinion should be ascribed to the Court for failing to reconsider *Jones*. The Supreme Court does not act as a court of error, correcting every mistaken ruling of the lower federal courts. Justice Frankfurter once explained the meaning of a certiorari denial this way:

The Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, "imports no expression of opinion upon the merits of the case . . ." A denial . . . carries with it no support of the decision in that case, nor of any of the views in the opinion supporting it.

Agoston v. Pennsylvania, 340 U.S. 844, 844-45 (1950) (Frankfurter, J., concurring in denial of *cert.*) (citations omitted) (footnotes omitted).

unconstitutional in *Lee*, the electoral procedure approved by the *Jones* court has as its object "a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend."¹¹⁸ It thus puts "school-age children who object in an untenable position" and is inconsistent with the Court's oft-stated "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."¹¹⁹ The *Lee* Court noted that "peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction . . . though subtle and indirect, can be as real as any overt compulsion."¹²⁰ Thus, the Court concluded that the student who objects "has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow."¹²¹ Thus, the First Amendment violation is palpable. Neither the intervention of a student election nor recitation of the prayer by a fellow student changes the peer pressures involved or the message of exclusion conveyed to the student whose rights of conscience are violated.

That message of exclusion says to students who cannot in good faith participate in the chosen prayer that they have a lesser standing in the civil community than those of the majority religion. The practice renders them servile to the religious majority before the public institution that forms the most important and largest aspect of their lives. It is constitutionally unacceptable to put students in this precarious position at a public school. As Justice O'Connor has written, a violation of the Establishment Clause occurs when "government makes adherence to religion relevant to a person's standing in the political community."¹²²

Moreover, the electoral procedure that the *Jones* court found to be a saving grace was emphatically rejected by the Supreme Court in *Lee*: "While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects [it]. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."¹²³

118. *Lee*, 112 S. Ct. at 2656.

119. *Id.* at 2658.

120. *Id.*

121. *Id.*

122. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

123. *Lee*, 112 S. Ct. at 2660. As the Supreme Court noted in one of the most important religious liberty decisions ever, our fundamental rights "may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638 (permitting Jehovah's Witnesses to refuse to salute the American flag in public classroom Pledge of Allegiance

Majority decision-making has never been thought to abrogate the state role.¹²⁴ The delegation of authority to a student vote or a student body remains the exercise of state power, subject to the Constitution's commands. The Court has long recognized that government may not sponsor "a religious exercise even with the consent of the majority of those affected" and "has never meant that a majority could use the machinery of the State to practice its beliefs."¹²⁵

Madison, as he was wont to do, anticipated the concern. During Virginia's ratification convention, he discussed liberty of conscience in terms that recognized that religious "freedom arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of anyone sect to oppress and persecute the rest."¹²⁶ If Madison thought the United States was pluralistic then, he would be both amazed and even more adamant about the need for government to be uninvolved in religious worship today with the dazzling array of faiths that are represented among our citizenry.¹²⁷

The nonsectarian nature of the prayers also does not change the constitutional analysis; the use of prayers remains nothing less than a

ceremonies without penalty).

124. Justice Joseph Story wrote:

The prescriptions in favour of liberty ought to be levelled against that quarter, where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in the executive or legislative department of government; but in the body of the people, operating by the majority against the minority.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 982, at 697 (1833; 1987 reprint).

125. *Schempp*, 374 U.S. at 225-26.

126. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Jonathan Elliott ed. 1836) (June 12, 1788). These sentiments were a frequent theme for Madison. In his *Memorial and Remonstrance*, he expressed concern about sects combining to exercise civil power to their own advantage. See text accompanying notes 44-49. In *Federalist* No. 51, he wrote that "security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." *The Federalist* No. 51, at 324 (J. Madison) (C. Rossiter ed. 1961).

127. In 1963, Justice Brennan wrote that:

[O]ur 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 minorities 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.

Schempp, 374 U.S. 240-41 (Brennan, J., concurring) (footnotes omitted).

religious exercise.¹²⁸ The requirement that such prayers be nonsectarian and nonproselytizing raises additional constitutional concerns. Contrary to the Fifth Circuit's holding that this form of prayer "minimizes any such advancement of religion"¹²⁹ and involves no excessive government entanglement with religion,¹³⁰ the required generic format of the prayer, in fact, maximizes State intrusion into religious affairs. Since only prayers that are nondenominational and not calculated to increase religious devotion could be uttered under the standard adopted by the Fifth Circuit, public school authorities must approve or reject the students' proposed prayers. Yet, nothing could be more foreign to religious liberty, and the Court's First Amendment jurisprudence, than the requirement of a government stamp of approval on particular prayers.¹³¹

The decision in *Jones* also ignored the oddity of a "nonsectarian" prayer. No prayer is so universal that all can say it consistently with their faith. It is either no prayer at all because it is generic and so watered-down that religious worship becomes something representing the lowest common denominator of devotion, insulting both to non-believers and those who are devout, or it is a prayer consistent with certain faiths that expresses a governmental preference for those religions over others. In any event, permitting any government role establishes a form of government-sanctioned religious worship, which is what the plain words of the First Amendment forbid.¹³² The religious clauses guarantee that public officials cannot "control, support or influence the kinds of prayer the American people can say."¹³³ This constitutional injunction should not be changed.

The final problem with the procedure approved by the Fifth Circuit is that the school district continues to sponsor the graduation ceremony and all elements of it that are offered as a part of the ceremony's official program.¹³⁴ Thus, when school officials carve out a period for prayer,

128. *Lee*, 112 S. Ct. at 2658; see also *id.* at 2671 (Souter, J., concurring).

129. 977 F.2d at 967.

130. *Id.*

131. See *Engel*, 370 U.S. at 429 (The Framers knew that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."). *Id.*

132. See, e.g., *Board of Educ. v. Mergens*, 496 U.S. 226, 236 (1990) ("a State may not influence the form of any religious activity"). *Id.*

133. 370 U.S. at 429.

134. *Compare Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school-sponsored publications and activities are not public forums open to indiscriminate use by students, and that because such publications carry the school's imprimatur they

even at student request, the religious expression that occurs must be imputed to school officials. Here, as in other cases where the Court has invalidated the practice, educational administrators have authorized "public school buildings [to be] used for the dissemination of religious doctrines"¹³⁵ to the students the law has placed within the officials' charge. By knowingly turning its ceremony over to those who have religious purposes, the school "affords . . . an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery."¹³⁶ Because no public forum is established for all possible varieties of student expression,¹³⁷ a graduating student still has the "reasonable perception that she is being forced by the State to pray."¹³⁸

Testifying before the House Judiciary Committee in 1980, Yale law professor Thomas Emerson said that having students perform the religious service "does not eliminate the pressure to conform and so an organization [of the service] by children is inconceivable In any event the sermon still takes place in the school under auspices of school officials and in the context of a public institution."¹³⁹

For all of these reasons, a number of federal courts have rejected the *Jones* analysis.¹⁴⁰ Most recently, the Ninth Circuit held that "[g]lving

may be subject to official editorial control over the style and content of the students' speech contained therein).

135. *McCullum*, 333 U.S. at 212.

136. *Id.*

137. On the other hand, consider the situation of the valedictorian of the graduating class. Assume that this student speaker was chosen in the usual manner (e.g., on the basis of the highest grade-point average), the school has established a limited public forum. Thus, they would have no right to censor the student's speech whether the student criticizes the school's administration or offers a prayer for the graduating class's future. Like the proverbial soapbox, this is free speech, understood as that, with no governmental purpose to advance religion.

138. *Lee*, 112 S. Ct. at 2658.

139. *Prayer in Public Schools and Buildings—Federal Court Jurisdiction Before the Subcomm. on Courts of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 335 (1980) (statement of Thomas Emerson, professor, Yale Law School on behalf of the American Civil Liberties Union).

140. See, e.g., *ACLU v. Blackhorse Pike Reg. Bd. of Educ.*, (Dkt. No. 93-5368 (3d Cir. Jun. 25, 1993); *Gearon v. Loudon County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993). Only one federal court has chosen to follow *Jones*. See *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994). Prior to *Jones*, several courts had addressed similar issues and reached different conclusions to those proffered by the court in *Jones*. See *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989) (holding that prayers at public high school football games violated the First Amendment, even though student clubs designated the prayer givers); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (holding that the Establishment Clause

majorities the power of the state without constitutional restrictions undermines the limitations on majority oppression the Constitution establishes.¹⁴¹ Any other view, the court contended "would allow school boards in religious communities generally to avoid Establishment Clause concerns in the public schools. The school board could allow students to vote daily prayers and the Ten Commandments back into their classrooms."¹⁴²

The Fifth Circuit may also have impaired its own ruling. In *Doe v. Duncanville Independent School District*,¹⁴³ the court whose majority included the author of *Jones* upheld a preliminary injunction against the practice of prayers before high school basketball games, whether coached or student-led.¹⁴⁴ Since attendance at sports events is far more voluntary than school assemblies or graduations, the logic of *Jones* collapses entirely under this subsequent decision by the Fifth Circuit. A federal court in Mississippi recently held that the *Jones* formulation was limited to graduation and could not be extended to other school events.¹⁴⁵ Thus, in no jurisdiction, has student-initiated, student-led classroom prayer, even when denominated as speech, withstood constitutional scrutiny.

V. RELIGIOUS EXPRESSION PROTECTIONS ARE NOT COTERMINOUS WITH THE GUARANTEES AFFORDED OTHER SPEECH

There can be no doubt that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment."¹⁴⁶ Still, even though there has long been a relationship between religion and speech, one that fully justifies their appearance within the same constitutional amendment, there are substantial differences as well. The First Amendment protects both "free exercise" and "freedom of speech." These protections would be consonant, except for the further limitation on "establishment of religion."¹⁴⁷ No corresponding limitation on

prohibited student volunteers from leading fellow classmates in prayer, even though students could be excused from participating); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (holding unconstitutional student-initiated, student-led prayer and Bible readings at school assemblies).

141. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 455 (9th Cir. 1994), *cert. pending*.

142. *Id.*

143. 994 F.2d at 160.

144. *Id.* at 168.

145. *Ingebretsen v. Jackson Pub. School Dist.*, 864 F. Supp. 1473 (S.D. Miss. 1994), *appeal pending*.

146. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

147. *Cf. Schempp*, 374 U.S. at 218-19 (quoting with approval *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting)).

government "establishment of speech" exists. Recently, the Supreme Court discussed this proposition and its importance in distinguishing between religion and expression:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.¹⁴⁸

The religious and expressive elements of the First Amendment have different historical bases and were designed to address different evils.¹⁴⁹ The State is obligated to draw distinctions between these two forms of expression. Thus, government has had a constitutionally authorized role in providing financial assistance to further the exercise of free speech (e.g., art, educational broadcasting, even public education). At the same time, it is constitutionally prohibited from providing financial assistance to the exercise of religion.

Moreover, the Constitution does not require that the State be "ideologically neutral."¹⁵⁰ It does require that the State be religiously neutral.¹⁵¹ Even though political majorities may use their power to advance their ideologies, those engaged in religious exercise cannot

Our constitutional policy . . . does deny that the state can undertake or sustain [religious training, teaching or observance] in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function.

Id.

148. *Lee*, 112 S. Ct. at 2657-58 (citations omitted). *See also* *Lathrop v. Donohue*, 367 U.S. 820, 852 (1961) (Harlan, J., concurring) (there is a "clear distinction in the wording of the First Amendment between the protections of speech and religion, only the latter providing a protection against 'establishment.'"). *Id.*

149. *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam). *See also* *Flast v. Cohen*, 392 U.S. 83, 125 (1968) (Harlan, J., dissenting) ("the historical purposes of . . . the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged."). *Id.*

150. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

151. *See, e.g., Schemp*, 374 U.S. at 222.

foster their beliefs through the offices of the state.¹⁵² Changing the claim to freedom of speech from freedom of religion does not change the equation; it "has never meant that a majority could use the machinery of the State to practice its beliefs."¹⁵³

Even advocates of a lower wall of separation between church and state believe coerced attendance at religious worship violates the Constitution's religious liberty guarantee. Yet, no one would say such a constitutional violation occurs when students are compelled to attend an assembly where a speaker propagates one-sided political views. By the same token, a teacher is not constitutionally prohibited from advocating or criticizing, for example, political liberalism. But that same teacher may not engage in the similar advocacy or criticism of Christianity, Buddhism or atheism. Justice Thurgood Marshall once put it this way: "although a school may permissibly encourage its students to become well rounded as student-athletes, student-musicians, and student-tutors, the Constitution forbids schools to encourage students to become well rounded as student-worshippers."¹⁵⁴ It is precisely for this reason, the Equal Access Act does not permit teacher participation in student Bible Clubs,¹⁵⁵ even though school personnel may participate in other non-curricular student clubs.

The Ninth Circuit has twice rejected the argument that there is a "meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises."¹⁵⁶ It is indisputable that a delegation of governmental authority has occurred when time is set aside that may be used by students solely for purposes of prayer. This cannot satisfy the requirements of the First Amendment, for it is axiomatic that government may not accomplish indirectly what it is forbidden from doing by the Constitution directly.¹⁵⁷ Obviously, if a true public forum were

152. *Id.* at 226.

153. *Id.*

154. *Mergens*, 496 U.S. at 265-66 (Marshall, J., concurring).

155. 20 U.S.C. § 4071(c)(1), (2), (4) & (5) (1984).

156. *Harris*, 41 F.3d at 452 (quoting with approval *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981)). The Ninth Circuit went on to quote *Collins* about the lack of voluntariness in student-initiated, student-led prayer at school assemblies:

The . . . students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs.

Id. (quoting *Collins*, 644 F.2d at 762).

157. *Compare Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 487 (1986) (noting that government aid to parents or students used at religious schools may

created, it would not depend on majority rule, and it would open the classroom and other school activities to other student speech, speech that might be racy or critical of school authorities and that officials would be loath to encourage. Still, there is a constitutionally cognizable difference between a school permitting an announcement over the intercom that the Bible Club will meet at three o'clock and permitting the offering of a prayer to induce attendance.

Those who advance the idea of prayer as free speech find solace in Justice Lewis Powell's observation that "[t]here is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech', despite their religious subject matter—and become unprotected 'worship.'"¹⁵⁸ Powell, on behalf of the *Widmar* majority, even wondered if a judicially manageable line could be drawn to separate protected free speech from impermissible religious worship.¹⁵⁹

These are remarkable statements, for read alone they indicate an abdication of judicial responsibility.¹⁶⁰ Even though there is no role for the judiciary in making theological judgments,¹⁶¹ almost all judicial decisionmaking is a matter of line-drawing. This is especially true of church-state cases.¹⁶² In the church-state arena, the courts have quite properly taken on the task of separating religious worship from protected religious expression. Justice Arthur Goldberg's description in *Schempp* of how schools ought to relate to religion has become the standard: the Constitution allows "teaching about religion, as distinguished from the teaching of religion, in the public schools."¹⁶³

still have an unconstitutional effect even if the government involvement is indirect) *Id.*; *Evans v. Newton*, 382 U.S. 296, 299 (1966) (stating that private conduct may become ascribable to the state when government involvement is high). *Id.*

158. *Widmar*, 454 U.S. at 269 n.6.

159. *Id.*

160. In fact, the *Widmar* majority later admits

the Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary effect of which is to support an establishment of religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary effect of which is not to support an establishment of religion. This distinction is required by the plain text of the Constitution.

Id. at 272 n.9. Those who plaintively contend that all student religious speech is immune from the Establishment Clause's requirements read too much into *Widmar's* footnote 6.

161. See, e.g., *United States v. Ballard*, 322 U.S. 78, 87-88 (1944) (holding that courts may not inquire into the truth, validity or reasonableness of a person's religious beliefs).

162. *Lee*, 112 S. Ct. at 2661 (Establishment Clause "jurisprudence . . . is of necessity one of line-drawing . . ."). *Id.*

163. 374 U.S. at 306 (Goldberg, J., concurring) (emphasis added).

In evaluating compliance with this constitutional distinction, courts necessarily determine whether religion is being practiced as opposed to being studied as an academic pursuit. It is not an easy task. Previous courts have realized both the unavailability as well as the delicacy of the inquiry. Determining "[w]hen instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."¹⁶⁴ The difficulty of the inquiry does not, however, immunize it from judicial scrutiny, for nothing less than the vindication of the American idea of religious liberty is at stake.¹⁶⁵

How might courts distinguish between protected religious expression and the sort of religious worship that they are obliged to prevent? Obviously, context is everything. Has a public forum, limited or open, been established, and are students free to express themselves on any topic under the sun? If so, whatever is expressed is more easily attributable to the student-speaker than to the State. Thus, a student in biology class may answer a question about the theory of evolution with a statement about how he believes in the Biblical story of creation, because of the kind of forum that has been established and because the student meets the requirements of germaneness that teachers may impose on the class. Thus, also, a graduation valedictorian, chosen in the usual manner and not because she was likely to utter a prayer, may speak of her faith and say a prayer, notwithstanding the Court's decision in *Lee*. Still, under no circumstances, may school officials carve out of the school day or school activities a time that is set aside for prayer.

For those who insist there is no legal difference between religious advocacy, which is usually protected speech,¹⁶⁶ and religious worship, one measure of what side of the constitutional ledger the expression falls on is to view prayer as the Court in *Engel* did: as "a solemn avowal of

164. *McCullum*, 333 U.S. at 236 (Jackson, J., concurring).

165. James Madison implicitly recognized as much when he said on the floor of the House of Representatives in 1789 that:

I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others.

ALLEY, *supra* note 2, at 67.

166. Obviously, such speech is subject to time, place or manner restrictions. Repeated proselytizing in the face of a requests to stop will at some point become punishable harassment. See, e.g., *Turic v. Holland Hospitality, Inc.*, 842 F. Supp. 971 (W.D. Mich. 1994).

divine faith and supplication for the blessings of the Almighty.¹⁶⁷ As the Eleventh Circuit has stated, prayer is the "quintessential religious practice."¹⁶⁸ The First Amendment forbids State sponsorship, endorsement or encouragement of those practices.¹⁶⁹

The decision in *Mergens* does not change this calculus. Attendance at the Bible Club meetings was entirely voluntary, as it was at any non-curricular club meeting. Such meetings were also scheduled at times that would not interfere with the curricular program of the school. Most importantly, the religious meetings were not sponsored or encouraged by the school, nor did school officials participate, except on a custodial basis.¹⁷⁰ No case has yet recognized, and could not consistent with constitutional principles, a right on the part of schools to create recognized periods for prayer.

Treating religious exercises as free speech does substantial disservice to the importance of prayer. This deeply personal communication with higher authority is imbued with theological content. Yet, every time the courts have justified state involvement with something that is palpably religious they have changed its nature, turning it into something secular and cultural. The Court did this with a wave of the judicial gavel, without so much as an incantation, to Christmas and Chanukah, which became "contemporaneous cultural tradition[s]."¹⁷¹

Similarly, a challenge to the inscription, "In God We Trust," on our coins and currency was repulsed by a court that found the phrase to be "of a patriotic or ceremonial character," not to amount to "governmental sponsorship of a religious exercise," and to be without "theological or ritualistic impact."¹⁷² The significance of this decision lies in its apparent ability to separate God from religion in a manner that denigrates and diminishes religious faith by substituting a civic religion of the government's own invention.¹⁷³ Rather than trust in God, as the motto indicates, we are being told to trust in our country and God will come along for the ride. It is this line of reasoning, not that which

167. *Engel*, 370 U.S. at 424.

168. *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

169. *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

170. 496 U.S. at 232-34.

171. *County of Allegheny*, 492 U.S. at 615.

172. *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970). *See also O'Hair v. Blumenthal*, 462 F. Supp. 19 (W.D. Tex. 1978), *aff'd*, 588 F.2d 1144 (5th Cir. 1979), *cert. denied*, 442 U.S. 930 (1979).

173. *See Lee*, 112 S. Ct. at 2657 ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction [of the Religion Clauses of the First Amendment] that cannot be accepted."). *Id.*

upholds separation of church and state, that evidences hostility to religion.

VI. CONCLUSION

Madison warned us that "it is proper to take alarm at the first experiment on our liberties."¹⁷⁴ The current campaign aimed at expanding existing rights to engage in religious exercise in the public schools is at odds with the American idea of religious liberty, one that has seen religion flourish in all its diverse forms.

In its most straightforward form, the constitutional amendment movement would authorize the government to tell school children when, where, with whom, and how they should pray. Yet, "[o]ur Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs."¹⁷⁵

Recasting religious exercise as mere speech does not alter the calculation. The Establishment Clause operates uniquely as a bar to governmentally sponsored religion, even if it takes the form of expression or expressive activities. Moreover, no one may "use secular institutions to force one or some religion on any person [Government] may not thrust any sect on any person."¹⁷⁶

Unlike the facile claims of some, this does not amount to hostility to the religious majority. The opportunities to engage in religious speech and practice are myriad and well-protected by the Constitution. There is even substantial evidence that these existing protections are well-used by the religious majority. Protestant values and speech, reflecting the religion of most Americans, permeate all of society. "The free marketplace of ideas that American society emphasizes naturally benefits the majority Protestant religion and its values," two researchers recently observed.¹⁷⁷ "This was most vividly portrayed in 1992 by the results of a Gallup survey that American Catholics were moving away from their bishops' positions on some issues and closer to the views of a majority of their fellow citizens, who are Protestant."¹⁷⁸ The permeation of this kind of speech throughout society, and the innate desire of

174. MIND, *supra* note 43, at 8.

175. *Id.*

176. *Zorach*, 343 U.S. at 314.

177. KOSMIN-LACHMAN, *supra* note 69, at 10.

178. *Id.* (indicating that a majority of American Catholics now favor the ordination of women as priests, the right of priests to marry, and the use of condoms to prevent AIDS, even though the Church has taken a contrary position). *Id.*

humans to belong, may also explain why “many more Jews observe Chanukah, which coincides with Christmas, and Passover, which coincides with Easter, than observe the equally important holidays of Sukkot (Tabernacles) and Shavuot (Pentecost), which do not coincide with any major Christian holidays.”¹⁷⁹

To be sure, religion evokes passions that cannot be approximated by those who exhibit a zeal for Democratic or Republican politics. No matter how committed one is to health care or a strong military, it does not have the hold or the promise of religious devotion. No political ideology or social philosophy has the same degree of centrality in people’s lives or basic conduct as does their religious faith. Religion necessarily receives different treatment by the Constitution. As Justice Frankfurter noted:

The claims of religion were not minimized by refusing to make the public schools agencies for their assertion The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered.¹⁸⁰

The Framers well knew that the “essence of Government is power.”¹⁸¹ To permit government to exercise any power over religion, even a generally encouraging one, is to permit it to define what is religion and how it may be observed. Instead, our Constitution commits us to the idea that government and religion operate in separate spheres. Government may not even play a suggestive role, for “[a]n advisory Government is a contradiction in terms.”¹⁸² It can only result “in a conformity to the creed of the majority and a single sect, if amounting to a majority.”¹⁸³

No argument to the contrary has been put forth with sufficient force or appeal to change these observations. People of all faiths, as well as those who have none, must be able to “sit down at the common table . . . , without any inquisition into their faith, or mode of worship.”¹⁸⁴ Any

179. *Id.* at 12.

180. *McCullum*, 333 U.S. at 216.

181. Address of James Madison to the Virginia Convention (Dec. 2, 1829), reprinted in *MIND*, *supra* note 43, at 403.

182. *Madison*, *supra* note 30, at 93.

183. *Id.*

184. *STORY*, *supra* note 124, at § 992, at 703.

other view yields to government an "impious presumption" that would permit it to assume "dominion over the faith of others."¹⁸⁵

The wisdom of the First Amendment remains unassailable. Only by refusing to permit government and its instrumentalities from becoming theaters of religious rivalry can the freedom of each and every denomination and of all nonbelievers remain secure. In this manner, "[t]he spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government."¹⁸⁶

185. JEFFERSON, *supra* note 54, at 206.

186. *Zorach*, 343 U.S. at 319-20 (Black, J., dissenting).