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REPORT
105–543

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RESTORING RELIGIOUS FREEDOM

MAY 19, 1998.—Referred to the House Calendar and ordered to be printed

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Mr. CANADY of Florida, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.J. Res. 78]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 78) proposing an amendment to the Constitution of the United States restoring religious freedom, having considered the same, reports favorably thereon with an amendment and recommends that the joint resolution as amended do pass.

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The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"To secure the people's right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed. Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."

PURPOSE AND SUMMARY

H.J. Res. 78 proposes to amend the Constitution of the United States to secure the people's right to acknowledge God according to the dictates of conscience.[1] The purpose of the Religious Freedom Amendment (RFA) is to restore the right of religious persons to acknowledge their beliefs, heritage, and traditions on public property, to engage in voluntary school prayer, and to have an equal opportunity to participate in government programs, activities, or benefits. The RFA would prohibit Federal and state governments from establishing any religion, prescribing any particular prayer, forcing anyone to join in prayer, discriminating against religion, or denying equal access to a benefit because of religious affiliation.[2] If adopted, the RFA would not repeal but would coexist in the Constitution with the religion clauses of the First Amendment, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." Nevertheless, the RFA clearly is intended to alter a number of judicial interpretations of those clauses, particularly of the establishment clause.

H.J. Res. 78, introduced by Congressman Ernest J. Istook, of Oklahoma, would respond to the public's concern that the Supreme Court and lower courts have misinterpreted the Constitution by issuing rulings that severely restrict religious expression when other forms of free speech are not so restricted, and which result in discrimination against a religious viewpoint in public affairs. The RFA would rectify acts of discrimination toward religious expression in everyday life. For example, the RFA would permit public schools to give students a moment of silence for prayer and the ability to pray

[1] More than forty-five states mention God in their constitutions or preambles to their constitutions and reference to a divinity occurs three times in the Declaration of Independence ("God," "Creator," and "divine Providence").

[2] During the Subcommittee on the Constitution markup on October 28, 1997, H.J. Res 78 was amended to make clear that "government" meant both the United States and state governments. The clear intention of the RFA is that it apply to the federal government and the states. The Supreme Court in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), held that the establishment clause applies to the federal government and to the states.

on a voluntary basis in their classrooms. The RFA would permit prayer at high school graduation ceremonies as long as the government did not mandate that the prayer be part of the ceremonies or prescribe the text of the prayer, and would give religious groups and clubs the same degree of consideration as other secular groups receive when the use of school meeting rooms is requested. The RFA would allow the posting and display of symbols of differing faiths on public property and on government seals and insignia. The RFA would permit religious groups that provide social services programs the ability to be eligible to receive grants and contracts for these services to the same extent other private secular social services group are eligible.

The goal of the RFA is not to change the First Amendment but rather to restore to the law a balanced and even-handed treatment of religious expression and affiliation.[3] The RFA has broad-based support from a diverse group of religious organizations.

BACKGROUND AND NEED FOR THE LEGISLATION

Over the past four years, the Subcommittee on the Constitution held a number of hearings on the issue of "Religious Liberty and the Bill of Rights." The hearings revealed that religious speech, whether in school or on other public property, is often not afforded the same protection as non-religious speech. In addition to individuals encountering a hostility toward the exercise of free speech when the topic is religious in nature, qualified faith-based institutions are prevented from participating in programs to provide social services, drug prevention education, and drug treatment because of their religious character.

The Subcommittee hearings included testimony from legal experts on the state of legal protection for religious freedom and testimony from individuals from around the country who related stories of adverse treatment because of their religion. Testimony from the regional hearings showed widespread discriminatory treatment based both on ignorance of the law and on outright animosity toward people with a religious viewpoint. For example:

> In Harrisonburg, Virginia, Jason Nauman testified that while he was Student Council President his classmates voted to have him deliver the keynote commencement address, but he was told by the principal and the school board attorney that anyone submitting a speech which included a prayer or reference to God would be removed from the graduation program. Also in Harrisonburg, Mrs. Ellen Pearson told the Subcommittee that she took her daughter Audrey, who attended special education classes, out of a Prince William County public school after the principal said that Audrey could not read her Bible on the school bus because it was a violation of the separation of church and state.

[3] The only previous vote in the House on a constitutional amendment concerning church and state in recent decades occurred in 1971, when the House voted in favor of H.J.Res. 191, a school prayer proposal by Rep. Wylie (R.–Oh.) by a margin of 240–162; but that was twenty-eight votes short of the necessary two-thirds majority. That measure came to the House floor not by means of a Committee recommendations but through a discharge petition. The Senate conducted votes in 1966, 1970, and 1984.

In Tampa, Florida, students testified that they were told they could not carry Bibles to school, could not mention God or prayer in their commencement addresses, and could not invite classmates to a church-sponsored harvestfest celebration that was being held as an alternative to Halloween "trick-or-treating."

In Oklahoma City, Lyn Whittington testified that she filed suit in Federal court when, as a public employee, she was forbidden by the government from attending Bible studies during non-work hours.

In the District of Columbia, Mrs. Anna Doyle, from Rhode Island, told the Subcommittee on the Constitution how public school officials confiscated rosaries that her daughter Kathryn had made for her friends. Mrs. Doyle reported that a teacher told her daughter that her favorite book "Jesus My Love" could not be read during "sharing time" in school because it was "against the law."

More problematic than ignorance of the law, however, is the effect of misinterpretation of constitutional guarantees by the courts. Specifically, the phrase "separation of church and state" has been used frequently not to promote official neutrality toward public religious expression, but to promote hostility. Essentially, it suggests that whenever government is present, religion must be removed. Because government is today found almost everywhere, this growth of government has dictated a shrinking of religion under this faulty theory. "Separation" has become a euphemism for "crowding out" religion.[4] That phrase is not found in the Constitution; yet it is commonly erroneously treated as the standard measuring stick for religious freedom issues. A proper analysis of the right to religious freedom should center on the actual text of the Constitution.

Our courts are blazing a wayward trail because they use a broken compass, a fact noted by several dissenting justices on the Supreme Court. After reviewing at great length both the extra-constitutional origin of the phrase, and the history of the development of the First Amendment itself, Chief Justice Rehnquist in his dissent in *Wallace* v. *Jaffree,* 472 U.S. 38 (1985), condemned the reliance on the phrase "separation of church and state:" "The evil to be aimed at, so far as those who spoke were concerned [in the Congress which approved the First Amendment], appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another . . ." 472 U.S. at 99. Rehnquist also examined the meaning of establishment: "It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations." *Id.* at 106. Justice Rehnquist pointed to

[4] The severity of the problem was noted by Pope John Paul II, on greeting the new American ambassador to the Vatican in December, 1997, when he stated, "It would truly be a sad thing if the religious and moral convictions upon which the American experiment was founded could now somehow be considered a danger to free society, such that those who would bring these convictions to bear upon your nation's public life would be denied a voice in debating and resolving issues of public policy. The original separation of Church and State in the United States was certainly not an effort to ban all religious conviction from the public sphere, a kind of banishment of God from civil society."

the patch-work precedents which have attempted to clarify the rule as evidence of its inappropriateness:

> Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.' *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971); *Tilton* v. *Richardson,* 403 U.S. 672, 677–678 (1971); *Wolman* v. *Walter,* 433 U.S. 229, 236 (1977); *Lynch* v. *Donnelly,* 465 U.S. 668, 673 (1984).

Id. at 107. Rehnquist perceived the real trouble of the rule as follows: "But the greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . [it] is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned." *Id.*

The RFA reflects the dissenting opinions of many Justices during this period, many of which were 5–4 decisions. As noted in numerous examples, the RFA reflects the opinions expressed by many Supreme Court justices prior to the Court's detours in recent years.

The deficiencies in current law and the effect of the RFA are discussed in three sections: School Prayer, Religious Expression on Public Property, and Equal Access to Government Benefits.

I. School Prayer

A. CLASSROOM PRAYER

The Supreme Court has construed the establishment clause to prohibit government sponsorship or promotion of devotional activities such as prayer or Bible reading. *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963); *Chamberlin* v. *Dade County Board of Instruction,* 377 U.S. 402 (1964). In addition, moment-of-silence statutes for the purpose of prayer are regarded as unconstitutional. *Wallace* v. *Jaffree,* 472 U.S. 38 (1985).

Current law does not allow school-sponsored invocations and benedictions by clergy at commencement ceremonies. *Lee* v. *Weisman,* 505 U.S. 577 (1992). As for student-initiated and student-delivered prayer, the Supreme Court has yet to rule, and the federal circuit courts of appeal are split. *See, e.g., Jones* v. *Clear Creek Independent School District,* 977 F.2d 963 (5th Cir. 1992) (student prayer does not violate establishment clause) and *ACLU of New Jersey* v. *Black Horse Pike Regional Board of Education,* 84 F.3d 1471 (3d Cir. 1996) (school board policy allowing vote of senior class to determine if prayer will be included in high school graduation is unconstitutional).

The RFA states: "[T]he people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed." In addition, it states that there are certain activities in which the government cannot engage: "Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion . . ."

The RFA is intended to follow the standard which the U.S. Supreme Court has applied to the Pledge of Allegiance. "The RFA effectively endorses and follows the standard applied by the Supreme Court in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). There the Court correctly ruled that no child could or should be compelled to say the Pledge of Allegiance. However, the Court did not create a right for an objecting student to prohibit their [sic] classmates from saying the Pledge of Allegiance." [5]

That portion of *Engel* v. *Vitale* which held that the government may not compose any official prayer or compel joining in prayer would not be overturned by the RFA, [6] but RFA would overturn the portion of *Engel* which precludes students from engaging in group classroom prayer even on a voluntary basis. The prohibition on government-composed prayer or imposition of prayer found in *Abington School District* v. *Schempp* would not be disturbed.

But to the extent that *Abington* broadly permits the Establishment Clause to supersede the Free Exercise Clause, it would yield to the standard enunciated in Justice Stewart's dissent:

> It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.

374 U.S. at 309.

In fact, Justice Stewart regarded permitting school prayer as a necessary element of diversity:

> [T]he duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the

[5] Written Statement of Rep. Ernest Istook before the Subcommittee on the Constitution. July 22, 1997, p. 14.

[6] During the Subcommittee markup of H.J. Res 78, the text was amended so that the words "initiate or designate" were replaced with the word "prescribe." The purpose of this change was to make clear that the government may not prescribe prayer either in the sense that it direct that prayers occur (the initiative would need to come from the students) nor may it "prescribe" prayer by mandating its content. In a letter to supporters of H.J. Res. 78 dated July 14, 1997, Mr. Istook explained the need for the amendment as follows: "The concern was that any role by a school teacher or principal or other agent to accommodate student-sponsored prayer might be used to ban prayer . . . and to argue that certain Supreme Court rulings were not in fact reversed by the RFA. Some courts might then pursue detailed inquiry into whether some conduct of a teacher (such as asking a class president whether prayer was desired at graduation) 'suggested' or 'tainted' matters, even though it did not 'compel' prayer. We do not wish to ban government accommodation, under a claim that such would be 'initiating,' but we want to be clear that government should not prescribe prayer for students, nor the text of a prayer."

> fact that there exist in our pluralistic society differences of religious belief.

Id. at 316–317.

In addition, *Wallace* v. *Jaffree* would be overturned so that silent prayer would be permitted "so long as there was no government dictate either to compel that it occur, or to compel any student to participate."[7] As Chief Justice Burger stated in his dissent in *Wallace* v. *Jaffree*:

> It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence." . . . To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion.

472 U.S. at 85. Burger denounced the majority's conclusion that the Alabama statute violated the principle of anti-establishment:

> The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes.

Id. at 89.

The RFA would prohibit a school from preventing a student from engaging in religious expression on the same terms as non-religious expression is allowed. Public school students would have the right to pray on school grounds during the school day, but students who did not wish to pray would be protected by the language which prevents government from compelling participation in prayer.

According to Justice Potter Stewart in his dissent in *Abington School District* v. *Schempp:*

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

374 U.S. at 313.

B. GRADUATION PRAYER

With regard to graduation prayer, Justice Kennedy in the 5–4 *Lee* v. *Weisman* decision concluded that the requirement that stu-

[7] Written Statement of Rep. Ernest Istook before the Subcommittee on the Constitution. July 22, 1997, p. 9.

dents maintain respectful silence during a rabbi's prayer was coercive because it created "pressure, though subtle and indirect . . . as real as any overt compulsion." 505 U.S. at 593. The standard articulated by *Lee* v. *Weisman*'s slim majority has been dangerous because it rests upon the proposition that simple exposure to religious speech is so damaging that people must be protected from it. Indeed, Justice Kennedy in the majority opinion wrote: "Assuming, as we must, that the prayers were offensive . . ." *Id.* at 594.[8] *Lee* v. *Weisman*'s subjective standard permits a lone "offended" individual to silence all others in a public place, thereby censoring their religious expression.

The graduation prayers outlawed by *Lee* v. *Weisman* would be permitted under the RFA as long as the government did not require that prayer occur or seek to set forth the text of the prayer. The RFA takes issue with Justice Kennedy's view, and instead embodies the views of the four dissenting Justices, who concluded that "hearing" is not "participating" and "hearing" is not "joining" in prayer, and thus there was no coercion to pray. The RFA would employ a common sense standard that no person can be compelled "to join in prayer."[9] The RFA applies a neutral standard—that respect for religious speech should be no less than the respect that is expected for nonreligious speech. In dissenting to *Lee* v. *Weisman*'s 5–4 ruling, Justice Scalia called the new "psychological coercion" standard "boundless, and boundlessly manipulable." He noted that prayer at school graduations had been standard since the first known graduation from a public high school, in Connecticut in July 1868. Just as the RFA now does, Justice Scalia and the other three dissenting justices distinguished between being present and actually joining in a prayer:

> According to the [majority opinion of the] Court, students at graduation who want "to avoid the fact or appearance of participation," . . . in the invocation and benediction are psychologically obligated by "public pressure, as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence" during those prayers. This assertion—*the very linchpin of the Court's opinion*—is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Durer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. . . . It claims only that students are psychologically coerced "to stand . . . *or,* at least, maintain respectful silence" (emphasis added) . . . The Court's notion that a student who simply sits in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous.

[8] Even pornography is granted a chance to be measured against prevailing community standards; but prayer is assumed automatically to be offensive.

[9] Current law allows the government to hire a chaplain to offer prayers at the opening of legislative sessions based on the practice's "unique history" and the lack of any evidence tending to show that "the prayer opportunity [was] exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh* v. *Chambers,* 463 U.S. 783, 794–95 (1983). The RFA, which states that "neither the United States nor any state shall . . . prescribe school prayers," is intended to leave the holding in *Marsh* untouched because the prohibition on the prescription of prayer only applies to prayer in schools.

505 U.S. at 636.

C. EQUAL ACCESS FOR RELIGIOUS GROUPS

Current law permits students to meet to engage in religious speech on school grounds, subject to reasonable time, place, and manner restrictions. *Hedges* v. *Wauconda Community School District,* 9 F.3d 1295 (1993). In 1984, Congress enacted the "Equal Access Act" (P.L. 98–377, 20 U.S.C. §§ 4071 *et seq.*) which was intended to address widespread discrimination against religious speech in public schools. The Equal Access Act requires that public secondary schools receiving federal funds allow student groups to meet for religious speech, prayer, and Bible study on the same basis as other student groups are allowed to meet. In *Board of Education of Westside Community Schools* v. *Mergens,* 496 U.S. 226 (1990), the Supreme Court held that the Equal Access Act did not violate the establishment clause and upheld the act as constitutional. Application of the Act, however, has been intensely disputed. *See Ceniceros* v. *San Diego Unified School District,* 106 F.3d 878 (9th Cir. 1997) (involving challenge to use of room during lunch time); *Hsu* v. *Roslyn Union Free School District,* 85 F. 3d 839 (2nd Cir. 1996), *cert. denied,* 117 S.Ct. 608 (1996) (involving challenge to club with Christian-only officers policy); *Garnett* v. *Renton School District,* 987 F.2d 641, (9th Cir. 1993) *cert. denied,* 114 S.Ct. 72 (1993) (involving dispute over school as open forum).

Current law, however, does not require that elementary schools allow religious clubs to meet on the same terms as nonreligious clubs (*Bell* v. *Little Axe Independent School District,* 766 F.2d 1391 (10th Cir. 1985)) or that schools allow private groups to conduct after-school religious instruction or services. *The Bronx Household of Faith* v. *Community School District No. 10,* 127 F.3d 207 (2nd Cir. 1997), *cert. denied,* 66 U.S.L.W. 3687 (1998); *Full Gospel Tabernacle* v. *Community School District No. 27,* 979 F. Supp. 214 (S.D.N.Y. 1997).

The RFA would effectively bar discrimination against religious clubs and organizations, and require that public meeting places, including elementary school facilities, be made available to them on the same basis as they are made available to other groups.

II. Religious Expression on Public Property

A. PUBLIC DISPLAYS

The Court has construed the establishment clause to prohibit government from displaying religious symbols by themselves on public property. Current law, however, does allow privately-sponsored religious displays on public property as long as the government does not foster or encourage the belief that government is endorsing religion. *Lynch* v. *Donnelly,* 465 U.S. 668 (1984); *Allegheny County* v. *American Civil Liberties Union,* 492 U.S. 573 (1989).

In *Lynch* v. *Donnelly,* the Supreme Court in a 5–4 decision upheld a city's inclusion of a creche in a Christmas display in a downtown park. Chief Justice Burger, writing for the majority, stated that, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789" and that there are "countless

other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." 465 U.S. at 674 and 677.[10]

In *Allegheny County* v. *American Civil Liberties Union,* however, the Supreme Court in another 5–4 decision restricted the display of a private creche on public property, citing a need for better visual "balance" with secular emblems. Justice Kennedy, concurring in part and dissenting in part, reiterated the appropriateness of the acknowledgments listed by Justice Burger, noting that "government policies of accommodation, acknowledgment and support for religion are an accepted part of our political and cultural heritage" 492 U.S. at 657. (Chief Justice Rehnquist, and Justices White and Scalia joined in this opinion.) Further, Justice Kennedy stated:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch* v. *Donnelly,* supra at 678; *Walz* v. *Tax Comm'n of New York City,* supra, at 669. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute 'wall of separation,' sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

492 U.S. at 657–58. Justice Kennedy concluded:

> In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.

Id. at 679.

Most recently in *Capitol Square Review Board* v. *Pinette,* 115 S.Ct. 2440 (1995), Justice Scalia, held that a Ku Klux Klan-sponsored display of a cross in an open public forum in the square in front of the Ohio Capitol during the 1993 Christmas season was not an impermissible establishment of religion. The plurality opinion, however, did not pronounce a coherent standard for such a display's constitutionality. Justices O'Connor, Ginsburg, Souter, Stevens, and Breyer supported the view that religious displays on public property are permissible only if the reasonable observer would not perceive the display as a government endorsement of religion. But Chief Justice Rehnquist and Justices Kennedy and Thomas joined the portion of Justice Scalia's decision which stated that, if

[10] *See also,* "Legal Analysis of H.J.Res. 78, the 'Religious Freedom Amendment,'' by David Ackerman, Congressional Research Service, June 11, 1997, footnote 43.

the government applied an equal access policy to privately-sponsored public displays, it would not matter what the reasonable observer thought.

While public displays of religion are, under current law, acceptable where they appear in an open forum, such as a square, and are limited in duration, more permanent displays have not been upheld, regardless of attempts to discourage the impression or perception of government endorsement.[11] Public schools, for example, may not post the Ten Commandments. In *Stone* v. *Graham,* the Supreme Court concluded that a law requiring the posting of the Ten Commandments in public schools was an unconstitutional establishment of religion. The Court expressed concern that posting the Ten Commandments would “induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.” 449 U.S. at 39 (1980). In addition, the Ninth Circuit has upheld a permanent injunction forbidding the permanent presence of 3 crosses on public property in San Francisco. *Ellis* v. *City of La Mesa,* 990 F.2d 1518 (9th Cir. 1993). Public displays of religious symbols have been prohibited as violating the establishment clause, including a cross on the seal of the City of Edmond, Oklahoma and the removal of a cross in San Francisco which had been in a public park for 65 years.

The RFA states, in part, that, “the people’s right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed.” To the extent that this provision is read to apply only to private religious expression, it is largely consonant with, and not to alter, existing constitutional law. According to its principal sponsor Representative Istook, however, the RFA also seeks to reinstate the principle that:

> “the people’s right” is a right held both by individuals and as a collective group. The RFA does not, however, create a mechanism for government officials to begin ordering inclusion of religious symbols for constant or incessant display on public property, because they would remain bound by the First Amendment’s prohibition on establishing a religion via government. I stress that the Religious Freedom Amendment is not intended to override the First Amendment’s prohibition on establishing any religion as a state religion, or creating official status for any set of beliefs. Nor would the RFA do so.[12]

In testimony before the Subcommittee on the Constitution, Representative Istook explained that the expected implementation of this provision would require an approach that allows all faiths, minority as well as majority, to be included, so long as the inclusion does not mean advocating or promoting any particular faith.[13]

The RFA would overturn *Allegheny County* v. *ACLU* to the extent that the display of a private creche on public property requires secular symbols for better visual “balance.” The so-called “plastic reindeer” test for holiday symbols on public property would no longer be decisive. Instead, *Allegheny County* would be brought

[11] *See* discussion at Government Seals and Insignia, *infra.*

[12] Written Statement of Rep. Ernest Istook before the Subcommittee on the Constitution. July 22, 1997, p. 11.

[13] Written Statement of Rep. Ernest Istook before the Subcommittee on the Constitution. July 22, 1997, p. 13.

back in line with *Lynch* v. *Donnelly,* which permitted display of a government-owned Nativity scene.

The RFA would also overturn *Stone* v. *Graham* and allow, but not require, the posting of the Ten Commandments on public property as an expression of the religious beliefs, heritage, or traditions of the people.

The key inquiry for public displays under the RFA would be "whether symbols of differing faiths were afforded similar opportunity for display during their special seasons" and "whether government sought to establish an official religion."[14] The intent of RFA is to establish true neutrality by affording religious expression the same protection as other expression.

B. GOVERNMENT SEALS AND INSIGNIA

The federal courts of appeal are split on whether religious symbols on government seals and insignia are unconstitutional. *See, e.g., Wayne Robinson* v. *City of Edmond,* 68 F.3d 1226 (10th Cir. 1995), *cert. denied,* 517 U.S. 1201 (1996) (holding seal with cross unconstitutional); *Harris* v. *City of Zion and Kuhn* v. *City of Rolling Meadows,* 927 F.2d 1401 (7th Cir. 1991), *cert. denied,* 112 S.Ct. 3054 (1992) (holding that depiction of cross on seal creates impression that local government tacitly endorses Christianity in violation of the establishment clause); and *Robinson* v. *City of Edmond,* 68 F.3d 1226 (10th Cir. 1995) (concluding that religious symbols on government seals and insignia are in violation of the establishment clause). *But see Murray* v. *City of Austin,* 947 F.2d 147 (5th Cir. 1991) (ruling that religious symbols on government seals and insignia are not in violation of the establishment clause). The standard is whether an average observer would perceive the government's use of religious symbols on its seals and insignia to be an endorsement, but courts often disagree about the perception of the average observer.

The RFA, on the other hand, would allow local governmental seals to reflect the people's religious beliefs, heritage, and traditions. The key inquiry for public displays under the RFA would be "whether government sought to establish an official religion, rather than outlawing traditions from a public forum."[15] As stated above, the intent of RFA is to establish neutrality in government's treatment of religion by affording religious expression the same protection as other expression.

III. Equal Access to Government Benefits

Aid that does not flow directly to religious institutions but initially to individuals has been upheld so long as the initial recipients have had a genuinely free choice about where to use the aid. *Mueller* v. *Allen,* 463 U.S. 388 (1983); *Witters* v. *Washington Department of Services for the Blind,* 474 U.S. 481 (1986); *Zobrest* v. *Catalina Foothills School District,* 509 U.S. 1 (1993).

In *Rosenberger* v. *Rector and Visitors of the University of Virginia,* 515 U.S. 819, 844 (1995), aid in the form of payments to out-

[14] Written Statement of Rep. Ernest Istook before the Subcommittee on the Constitution. July 22, 1997, p. 12.

[15] Written Statement of Rep. Ernest Istook before the Subcommittee on the Constitution. July 22, 1997, p. 12.

side contractors on behalf of a religious student publication was upheld because the funding program was neutral toward religion, the payments were not made to the publication, and the publication was not a religious institution "in the usual sense of that term as used in our case law."

Finally, in *Agostini* v. *Felton,* 117 S. Ct. 1997 (1997), the Supreme Court held that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the establishment clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards. Because the program "does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement," the program was found not to violate the establishment clause. *Id.* at 2016.

In contrast with the reasoning found in *Agostini, Rosenberger, Zobrest* and *Witters,* there is also a body of Supreme Court precedent which prohibits the use of public funds for "specifically religious activities" or by "pervasively religious" organizations. *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Hunt* v. *McNair,* 413 U.S. 734 (1973). This line of cases has been criticized recently, however, by Justice O'Connor who stated in her concurrence in *Bd. of Education of Kiryas Joel* v. *Grumet,* 512 U.S. 687, 717 (1994), that, "the Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion."

The RFA states, in part: "Neither the United States nor any State shall . . . discriminate against religion, or deny equal access to a benefit on account of religion." The principle underlying this portion of the RFA was explained by Professor Carl Esbeck in his testimony before the Subcommittee on the Constitution:

> When government provides benefits to enable activities that serve the public good, such as education, health care, or social welfare, there should be no discrimination in eligibility based on religion. Nor should religious schools and charities be required to engage in self-censorship or otherwise have to water down their religious character as a condition of program participation. The religious-equality model allows individuals and religious groups to participate fully and equally with their fellow citizens in American's public life, without being forced to either shed or disguise their religious character or convictions. Importantly, the theory is not a call for preferential treatment for religion in the administration of publicly funded programs. Rather, when it comes to participation in programs of aid, religious equality merely lays claim to the same access to benefits, without regard to religion, enjoyed by others.[16]

Some opponents of the Amendment have argued that it would require the government to fund private religious institutions on the same basis as it supports public programs. Because the government funds public schools, for example, it would also be required to support private religious schools. This argument misreads the purpose and effect of the amendment. As explained by David Ackerman in

[16] Written Testimony of Professor Carl Esbeck, Professor of Law, University of Missouri, before the Subcommittee on the Constitution, July 23, 1996, p. 3.

the Congressional Research Service, "Legal Analysis of H.J.Res. 78, the 'Religious Freedom Amendment:' "

> The proposal does not, it should be noted, appear to mandate the extension of benefits to religious institutions where the benefits are otherwise restricted to public institutions. The subsidy of public schools, for instance, would not seem to trigger a requirement of comparable funding of private sectarian schools. Only where other private entities are eligible participants or recipients would religious entities have to be included and comparably treated.[17]

Some people object to the idea of allowing religious individuals and institutions to participate in publicly-funded programs. Participation by religious people, they argue, will allow taxpayer dollars to support religious ideas and values with which they do not agree in violation of their religious freedom. This objection is valid only when funding is provided to a religious activity or for a religious purpose on a preferential basis. In contrast, the RFA says that when government funds private groups to perform a valid secular purpose, it cannot prevent religious groups from participating on an equal basis. The principle of equality underlying this aspect of the amendment was explained by Professor Michael McConnell in his testimony before the Constitution Subcommittee in June of 1995:

> [I]t is argued that it would violate the religious freedom of taxpayers to compel them to support schools or other activities propagating ideas in which the taxpayer does not believe. But this is a valid objection only when funding is provided to a religious activity on a preferential basis, because it is a religious activity. That is what the battle over disestablishment among our founders was about. The principle has no application when the government funds a wide variety of private groups, for a secular purpose, and religious groups are included on a neutral basis. No one suggests that churches or synagogues should be denied the valuable benefits of police, fire protection, roads, sewers, or tax benefits, on an equal basis with other property and other nonprofit institutions. There is no principled reason to deny a similar equality to citizens who choose religious schools or the services of other religious institutions. Justice Brennen stated the principal well in his plurality opinion in *Texas Monthly, Inc.* v. *Bullock,* 'Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause.' The underlying requirement is one of neutrality.[18]

In sum, the provisions of the RFA would apply where a state enacts a program of aid that funds all private and public schools, for example, but explicitly disqualifies participation by religious pro-

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[17] "Legal Analysis of H.J.Res. 78, the 'Religious Freedom Amendment,'" by David Ackerman, Congressional Research Service, June 11, 1997, p. 8.

[18] Written testimony of Professor Michael McConnell, William B. Graham Professor of Law, University of Chicago Law School, before the Subcommittee on the Constitution, June 8, 1995, pp. 16–17.

viders. Should a state decide to provide support only to government-operated schools, however, such a decision would not violate the RFA.

The RFA is in keeping with the principles underlying *Agostini, Rosenberger, Zobrest* and *Witters*. Under the RFA, government aid or a government program would still need to serve a secular purpose such as education or drug treatment. As long as sectarian institutions are considered on an equal basis with non-sectarian institutions and with other sectarian institutions they will be eligible to receive government funding, even funding made directly to the institutions.

HEARINGS

The Subcommittee on the Constitution held five days of hearings on "Religious Liberty and the Bill of Rights" on June 8, 10, and 23, and July 10 and 14, 1995; a hearing on "Legislation to Further Protect Religious Freedom" on July 23, 1996; and a hearing on H.J. Res. 78: "Proposing an Amendment to the Constitution of the United States Restoring Religious Freedom" on July 22, 1997.

On June 8, 1995, testimony was received from the following witnesses: Representative Ernest J. Istook, Jr., U.S. House of Representatives, 5th District, Oklahoma; Michael Stokes Paulsen, Professor, University of Minnesota Law School; Norman Redlich, Attorney, Watchell, Lipton, Rosen & Katz; Michael McConnell, William B. Graham Professor of Law, University of Chicago Law School; Dr. Derek H. Davis, Director, J.M. Dawson Institute of Church-State Studies, Baylor University; William Ball, Counsel, Ball, Skelly, Muffen & Connell.

On June 10, 1995, at a field hearing held in Harrisonburg, Virginia, testimony was received from the following witnesses: Colby May, Attorney, American Center for Law and Justice; C. Dow Chamberlain, Interfaith Center for Public Policy; Reverend William Wilson, Pastor, First Baptist Church of Waynesboro; Dr. Charles G. Fuller, Pastor, First Baptist Church of Roanoke; Ron Rosenberger, Former student, University of Virginia; Professor Robert Alley, Professor of Humanities, University of Richmond; Jason Nauman, Former Student Council President, Spotswood High School; Audrey Pearson, Student, accompanied by her mother, Mrs. Ellen Pearson; Craig L. Parshall, Attorney; Ray Gingerich, Professor of Bible and Church History, Eastern Mennonite College; Kelly Shackelford, Adjunct Professor, University of Texas School of Law.

On June 23, 1995, at a field hearing held in Tampa, Florida, testimony was received from the following witnesses: Matthew D. Staver, Attorney, Stavers & Associates; Reverend Henry Green, Pastor, Heritage Community Church; Amber Johnston-Leohner, Student, accompanied by her mother, Marian Johnston-Loehner; Jennifer Greene, Student; Reverend Marcia Free, President, Hillsborough Clergy Association; Dr. Charles W. Spong, Director for Distance Education, Southeastern College of the Assemblies of God; Rebecca Fiore, Student, accompanied by her mother April Fiore; Delano S. Stewart, Attorney, Stewart, Joyner, Jordan-Holmes, Holmes; Joshua Burton, Student, accompanied by his father Mark Burton; Robert Rosenthal, President, American Jewish

Committee, Sarasota Chapter; A. Eric Johnston, Attorney, Trippe & Brown.

On July 10, 1995, testimony was received from the following witnesses: His Eminence, John Cardinal O'Connor; Reverend Dr. James Forbes, Jr., Senior Minister, The Riverside Church; Father Richard John Neuhaus, President, Institute on Religion and Public Life; Rabbi Arthur Hertzberg, Rabbi Emiritus, Temple Emmanuel; Rabbi Mayer Schiller, Author and Lecturer; Mrs. Lisa Herdahl, Ecru, Mississippi; Mr. Joseph P. Infranco, Attorney, Migliore and Infranco, P.C.

On July 14, 1995, at a field hearing held in Oklahoma City, Oklahoma, testimony was received from the following witnesses: Representative Ernest J. Istook, Jr., U.S. House of Representatives, 5th District, Oklahoma; William J. Murray, Author and Editor, Al Edwards, Texas House of Representatives, District No. 146; Scott Armey, Commissioner, Denton County, Texas; Shannon Welch, High School Valedictorian; Ron Barber, Attorney, Barber & Bartz; Lyn Whittingham, Private citizen; Greg Schwab, father of student, Audrey Schwab; Dr. Lavonn D. Brown, Pastor, First Baptist Church in Norman, Oklahoma; Miss Shanda Bontempi, Oklahoma City School Student; Richard L. Christensen, Assistant Professor of Church History, Phillips Theological Seminary; Dr. Sandra Rana, mother of a student in Tulsa Public School.

On July 23, 1996, testimony was received from the following witnesses: Representative Ernest J. Istook, Jr., U.S. House of Representatives, 5th District, Oklahoma; Anna Doyle, mother of six, accompanied by daughters Katie and Rebecca, Rhode Island; Brother Bob Smith, Principal, Messmer High School, Milwaukee, Wisconsin; Reverend Elenora Giddings Ivory, Director, Washington, D.C. Office, Presbyterian Church, U.S.A.; Dr. William A. Donahue, President, Catholic League for Religious and Civil Rights; Dr. Anne L. Bryant, Executive Director, National School Boards Association; Jay Alan Sekulow, Chief Counsel, American Center for Law and Justice; Forest Montgomery, Counsel, Office for Governmental Affairs, National Association of Evangelicals; Reverend Oliver S. Thomas, Special Counsel, National Council of Churches; Dr. Richard Land, President, Christian Life Commission, Southern Baptist Convention; Rabbi A. James Rudin, Director of Interreligious Affairs, American Jewish Committee; Carl H. Esbeck, Isabell Wade & Paul C. Lydia Professor of Law, University of Missouri; Reverend Lou Sheldon, Chairman, Traditional Values Coalition; Carole Shields, President, People for the American Way; Craig Parshall, Attorney, Concerned Women for America; Reverend Barry W. Lynn, Executive Director, Americans United for Separation of Church and State; Gregory Baylor, Assistant Director, Center for Law and Religious Freedom, Christian Legal Society.

On July 22, 1997, testimony was received from the following witnesses: Representative Ernest J. Istook, Jr., U.S. House of Representatives, 5th District, Oklahoma; Representative Chet Edwards, U.S. House of Representatives, 11th District, Texas; Representative Tom Campbell, U.S. House of Representatives, 15th District, California; Representative Walter Capps, U.S. House of Representatives, 22nd District, California; Representative Sanford Bishop, U.S. House of Representatives, 2nd District, Georgia; Craig

Parshall, Special Legal Counsel, Concerned Women for America; Reverend Barry W. Lynn, Executive Director, Americans United for Separation of Church and State; Jim Henderson, Senior Counsel, American Center for Law and Justice; Dr. Derek H. Davis, Director, J.M. Dawson Institute of Church-State Studies; Mark Scarberry, Professor of Law, Pepperdine University School of Law; William Murray, Americans for School Prayer; Reverend Timothy McDonald, Iconium Baptist Church; Rabbi Aryeh Spero, Congregational Rabbi.

Committee Consideration

On October 27, 1997, the Subcommittee on the Constitution met in open session and ordered favorably reported the resolution H.J. Res. 78, as amended by an amendment in the nature of a substitute offered by Mr. Hutchinson, by a vote of 8 to 4, a reporting quorum being present.

On March 4, 1998, the Committee met in open session and ordered reported favorably the resolution H.J. Res. 78, as amended by an amendment in the nature of a substitute ordered reported by the Subcommittee, by a recorded vote of 16 to 11, a reporting quorum being present.

Votes of the Committee

The Committee considered the following amendments.

ROLLCALL VOTE NO. 1

An amendment by Mr. Scott to delete that portion of the Resolution that would permit religious organizations to have equal access to the same benefits made available to private non-religious groups. The amendment was defeated by a 9–14 rollcall vote.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Canady
Ms. Jackson-Lee	Mr. Inglis
Mr. Meehan	Mr. Buyer
Mr. Wexler	Mr. Bryant (TN)
Mr. Rothman	Mr. Chabot
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease
	Mr. Rogan
	Mr. Graham (SC)

ROLLCALL VOTE NO. 2

An amendment by Ms. Jackson-Lee to delete the reference in the Resolution to the people's right to "acknowledge God" and replace it with the people's right to "freedom of religion." The purpose of

the amendment was to delete a reference to "God" in the Resolution. The amendment was defeated by a 7–18 rollcall vote.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mr. Nadler	Mr. Sensenbrenner
Mr. Scott	Mr. McCollum
Ms. Jackson-Lee	Mr. Coble
Ms. Waters	Mr. Smith (TX)
Mr. Meehan	Mr. Gallegly
Mr. Delahunt	Mr. Canady
	Mr. Inglis
	Mr. Buyer
	Mr. Bryant (TN)
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease
	Mr. Rogan
	Mr. Watt
	Ms. Lofgren
	Mr. Wexler
	Mr. Rothman

PRESENT

Mr. Graham (SC)

ROLLCALL VOTE NO. 3

Final Passage. Mr. Hyde moved to report H.J. Res. 78 favorably, as amended by an amendment in the nature of a substitute ordered reported by the Subcommittee, by a recorded vote of 16 to 11.*

YEAS	NAYS
Mr. Hyde	Mr. Conyers
Mr. Sensenbrenner	Mr. Frank
Mr. McCollum	Mr. Nadler
Mr. Coble	Mr. Scott
Mr. Smith (TX)	Mr. Watt
Mr. Gallegly	Ms. Jackson-Lee
Mr. Canady	Ms. Waters
Mr. Inglis	Mr. Meehan
Mr. Goodlatte	Mr. Delahunt
Mr. Buyer	Mr. Wexler
Mr. Bryant (TN)	Mr. Rothman
Mr. Jenkins	
Mr. Hutchinson	
Mr. Pease	
Mr. Rogan	
Mr. Graham (SC)	

*Ms. Lofgren, who was absent on official business, indicated, had she been present, she would have voted NAY.

Committee Oversight Findings

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings

and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the resolution, H.J.Res. 78, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 9, 1998.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 78, a joint resolution proposing an amendment to the Constitution of the United States restoring religious freedom.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman (for the federal costs), who can be reached at 226–2860, and Leo Lex (for the state and local impact), who can be reached at 225–3220.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

cc: Hon. John Conyers, Jr.,
Ranking Minority Member.

H.J. Res. 78—A joint resolution proposing an amendment to the Constitution of the United States restoring religious freedom

H.J. Res. 78 would propose amending the Constitution to secure people's rights to religious freedom. The legislatures of three-fourths of the states would be required to ratify the proposed amendment within seven years for the amendment to become effective.

CBO estimates that adopting this amendment would result in no significant cost to the federal government. Because enactment of

H.J. Res. 78 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

CBO is uncertain whether section 4 of the Unfunded Mandates Reform Act of 1995 (UMRA), which excludes from consideration under that act any bill or joint resolution that enforces constitutional rights of individuals, applies to H.J. Res. 78. If the joint resolution is not excluded from consideration under UMRA, uncertainties about how it would be interpreted and implemented make it impossible to determine whether it would impose any intergovernmental mandates and what the costs of any such mandates might be. The joint resolution would impose no private-sector mandates.

The CBO staff contacts for this estimate are Susanne S. Mehlman (for the federal costs), who can be reached at 226–2860, and Leo Lex (for the state and local impact), who can be reached at 225–3220. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article V of the Constitution.

Article V of the United States Constitution provides that the Congress has the authority to propose amendments to the Constitution. Such proposed amendments must be approved by two-thirds vote of both Houses. Congress must also specify whether the ratification process is to be done through State legislatures or by State conventions. In either case, a proposed amendment must be ratified by three-fourths of the State legislatures or State conventions. H.J. Res. 78 calls for ratification by State legislatures.

LEGISLATIVE ANALYSIS

H.J.Res. 78 proposes to reinforce the people's right to acknowledge God according to the dictates of conscience, to protect the people's right to religious expression on public property, and to prohibit the government from denying religious people or organizations the ability to participate in government programs, activities, or benefits.

The RFA is proposed to clarify that the supreme law of the land protects the religious freedom rights against infringement by state as well as federal governmental actions. The RFA is proposed to correct adverse court decisions that have resulted in the weakening of constitutional protection for the freedom of religion, as previously discussed in the *Background and Need for the Legislation* section.

The RFA allows voluntary prayer (and other religious activity) in public schools and religious expression on public property, but forbids any mandatory participation or prescribed prayers. The RFA does not create an absolute right to protection of religious expression, such as a right to disrupt class by spontaneously offering a prayer, just as the First Amendment does not protect the right to disrupt class by expressing speech of a different content. Neither the federal government nor the state government could, however, prescribe prayer or direct or dictate the content of the prayer under

the RFA. Religious symbols and religious expression would no longer be suspect when they occur on public property under the RFA.

The "benefits" language in the RFA does not guarantee any benefit to any person or group. Rather, it provides that government may not deny to a religious person or organization the ability to apply for a benefit to the same extent that the benefit is made available to other private people or organizations. The portion of the Amendment requiring "equal access to a benefit on account of religion" will ensure that government programs be administered without discrimination on the basis of religion.

DISSENTING VIEWS TO H.J. RES. 78

INTRODUCTION

H.J. Res. 78 [1]—the sixth constitutional amendment scheduled for a floor vote so far this Congress—represents a continuation of an unprecedented assault on our Constitution and our civil liberties.

Though short, this Amendment effectively destroys the First Amendment while doing nothing to protect against government discrimination against religion that the Constitution does not already do. The First Amendment Free Exercise Clause and the Establishment Clause,[2] as well as the Fourteenth Amendment Equal Protection Clause [3] already clearly and effectively prohibit the government from discriminating against religion.

The most likely effect of H.J. Res. 78 is to allow coercive religious activities by government in general and public schools in particular, and to mandate that the government fund religion in the same manner it funds secular activities, paving the way for public support of parochial schools and other religious causes. The result will be the defunding, if not the elimination of public education in this country.

While many proponents of H.J. Res. 78 claim it is "pro-religion," their argument is undercut by the significant number of religious organizations that oppose this Constitutional Amendment.[4] It is, in

[1] H.J. Res. 78 provides, "[t]o secure the people's right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed. Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."

[2] The First Amendment to the Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The former the "Free Exercise Clause," and the latter is the "Establishment Clause." U.S. CONST. amend. I, cl.1.

[3] The Equal Protection Clause of the Fourteenth Amendment provides "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

[4] Religiously affiliated organizations opposing this Amendment include: American Baptist Churches, U.S.A., American Jewish Committee, American Jewish Congress, Americans for Religious Liberty, Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee on Public Affairs, B Nai Brith, Central Conference of American Rabbis, Church of the Brethren Washington Office, Church State Council of Seventh-day Adventists, the Episcopal Church, Friends Committee on National Legislation, General Board of Church & Society, United Methodist Church, General Conference of Seventh-day Adventists, Hadassah, the Interfaith Alliance, Interfaith Religious Liberty Association, Jewish Council for Public Affairs, Jewish Labor Committee, the Jewish Reconstructionist Federation, Jewish Women International, Lutheran Office for Governmental Affairs of the Evangelical Lutheran Church in America, Mainstream Loudoun, Mennonite Central Committee Washington Office, Muslim Public Affairs Council, National Council of Churches of Christ in the U.S.A., National Council of Jewish Women, National Council on Islamic Affairs, National Jewish Democratic Council, Pres-

Continued

fact, because we are so concerned about the need to protect religious liberty that we vigorously oppose H.J. Res. 78 and dissent from its adoption.

I. The First Amendment Has Fostered Widespread Religious Liberty and Diversity

Religion is alive and well in America today. According to the annual Pew survey on the state of religion in America, 71% of those polled "never doubted" the existence of God; 61% believe that miracles come "from the power of God;" and 53% believe in daily prayer.[5] Notably, all of these figures have risen by double digits since 1987.[6] Moreover, a recent study conducted by the University of Michigan shows that weekly worship in the United States exceeds that in any other industrialized nation. We worship more than twice as often as the French and nearly twice as much as the British.[7]

More specifically, a 1994 Gallup poll shows that 96% of all Americans believe in God; 69% of Americans are members of a church or synagogue, 42% attended a church or synagogue within the past 7 days, 58% say that religion is "very important "in their life, and 62% believe that religion "can answer all or most of today's problems."[8]

II. The First Amendment Was Never Intended to Permit Government Entanglement with Religion

Supporters of H.J. Res. 78 contend that the courts have consistently misinterpreted the framers' intentions in creating the First Amendment in the Bill of Rights, resulting in the suppression of religion. The majority argues that the framers intended only that no one single religion be preferred over others, but that the framers had no intention of prohibiting government aid to all religions or to religion on a nonpreferential basis. In truth, convinced that government meddling with religion produces intolerance, persecution and bloodshed, the Founders outlined a process of checks and balances to protect life, liberty and property, not to save souls or make men moral and good.[9] An analysis of the history of the Establishment Clause demonstrates this intent.

In Europe, an establishment of religion meant a state church: one church exclusively enjoying the benefits of a formal, legal union with the state.[10] It was the church of the state and attendance at its services was often compulsory and all subjects, even dissenters

byterian Church Washington Office, Rabbinical Assembly, Reconstructionist Rabbi Association, Soka Gakki International U.S.A., Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Office for Church in Society, the United Synagogue of Conservative Judaism, Unitarian Universalist Association, Women of Reform Judaism the Federation of Temple Sisterhoods, Women's American ORT, and the Women's League for Conservative Judaism.

[5] Frank Rich, *Let Them Not Pray,* N. Y. Times, Jan. 7, 1998, at A21.

[6] *Id.*

[7] *Id.*

[8] George Gallup, Jr., *Religion in America; Religion in America, Will the Vitality of Churches be the Surprise of the Next Century?,* 6 The Public Perspective, No. 6, October/November 1995.

[9] Isaac Kramnick and R. Laurence Moore, *In Godless We Trust; Why the Founding Fathers Created a Religion-Free Political Order, and Why We Shouldn't Change It,* W. Post, Jan. 14, 1996, at C1.

[10] Leonard W. Levy, *The Establishment Clause,* How Does the Constitution Protect Religious Freedom?, 69 (Robert A. Goldwin and Art Kaufman eds. 1987).

paid for its support.[11] In this country, the political debate at the time the First Amendment was adopted was not between those who wanted to support religion and those who did not. At the Constitutional Convention, it had already been decided not to give the federal government any power to deal with religion.[12] The issue faced by the first Congress was how to define a prohibition so that no future Congress would assume an authority that had not been provided in the Constitution.[13] For this reason, the language did not say "Congress shall make no law establishing religion," but instead reads: "Congress shall make no law respecting an establishment of religion." This clear language cannot be construed as authorizing Congress to support religious institutions.[14] It defies logic to suppose that an amendment expressly designed to prohibit a power never given to Congress in the Constitution should be construed as creating the authority to enact laws benefitting religion financially.[15]

Some argue that the word *establishment* really means preferment, and that the First Amendment is therefore against preferential aid to churches, but not against aid itself. Yet when considering the Amendment, the Senate rejected the idea that establishment is preferment by voting against all attempts to limit the meaning of establishment to the concept of preference.[16] It did not thereby imply that nonpreferential aid is acceptable.

In the House, when a prohibition on a single national establishment of religion was proposed, it was rejected in Committee and repudiated on the floor. The author of the proposal withdrew it and the House then adopted a motion that "Congress shall make no laws touching religion. . . ."[17] No consideration was ever given to preferential aid to religion because the First Amendment does not *empower* Congress. Rather, it *denies* Congress *any power* to vote laws respecting an establishment of religion.[18]

In essence, the unamended Constitution vests no power over religion and the First Amendment vests no power at all. The framers believed that no limitations on the government's power over religion was necessary because the government possessed only delegated authority plus the authority necessary to execute the delegated powers, leaving the government entirely without authority over religion.[19] Therefore, even in the absence of the First Amendment, the government is powerless to enact laws benefitting religion, with or without preference.[20]

The history of the Constitution clearly refutes those who argue that the Constitution was designed to perpetuate a Christian order and that the separation of church and state is a myth created by the heretical left. Those concerned with the absence of a reference to a deity in the Constitution knew it then. The anti-Federalist op-

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[11] *Id.*
[12] John M. Swomley, Religious Liberty and the Secular State: The Constitutional Context, 44–45 (1987).
[13] *Id.* at 45.
[14] *Id.* at 49.
[15] *Id.*
[16] *Id.* at 51.
[17] *Id.* at 52.
[18] *Id.* at 51.
[19] Levy, *supra* note 10, at 84.
[20] *Id.*

ponents of the Constitution attacked it and its infidel sponsors. One of the most damning criticisms of the Constitution during the ratification debates was "its cold indifference towards religion." [21]

III. Congress Has Wisely Rejected Altering the First Amendment in the Past

Congress has taken a number of statutory actions to protect religion, but has wisely rejected efforts to amend the Constitution. Over time Congress has contemplated many measures to address the school prayer issue including constitutional amendments; [22] limitations on federal court jurisdiction; [23] equal access proposals; [24] appropriations riders; [25] the cutoff of funds; [26] and Sense-of-the-Congress resolutions.[27] In addition, Congress modified two Senate-passed funds cutoff proposals to the "Goals 2000: Educate America Act" in 1994 to bar funds under the Act from being used by state or local educational agencies "to adopt policies that prevent voluntary prayer and meditation in public schools." [28]

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[21] Kramnick and Moore, *supra* note 9.

[22] These proposals have taken a variety of forms and have been the subject of numerous hearings. The Senate has voted four times on such measures (in 1966, 1970, and twice in 1984) and the House once (in 1971). But only the in Senate vote in 1970 did a constitutional amendment garner the two-thirds majority necessary for adoption, and that vote was perceived less as a vote on school prayer than as a vote to kill the measure to which the school prayer amendment was attached—the Equal Rights Amendment.

[23] In every Congress from the 93rd through the 103rd, proposals were introduced to strip the federal courts of all jurisdiction over cases involving the school prayer issue. Several hearings were held on the proposals, and the Senate voted in favor of such a measure in 1979. Subsequently, however, the Senate rejected such proposals by increasingly wide margins in 1982, 1985, and 1988.

[24] The Supreme Court's 1981 decision in *Widmar* v. *Vincent,* gave impetus to Congressional proposals to ensure the student-initiated religious groups at the high school level the same extracurricular rights and privileges as non-religious student groups. 454 U.S. 263 (1981). Several hearings were held on the subject, and in 1984 Congress enacted into law the "Equal Access Act." Pub. L. 98–377, Title VIII (AUG. 11, 1984); 98 Stat. 1302–04; 20 U.S.C. § 4071–74 (1997).

[25] Beginning in 1980 efforts were made to attach riders to the appropriations acts for the Department of Education barring the use of funds to prevent the implementation of programs of voluntary prayer and meditation in the public schools. Neither the House nor the Senate has ever taken a recorded vote on the matter, but the rider (known as the Walker amendment) has been included in all of the measures funding the Department of Education since fiscal 1981.

[26] Since 1984 both the House and Senate have voted on amendments to cut off federal education funds from any state or local educational agency that prevents individuals from participating in voluntary prayer. Such proposals have been approved twice in both the House (in 1989 and 1994) and the Senate (both in 1994), and rejected once in each body (in 1984 in the house, in 1994 in the Senate.) A limited version of the proposal—the Kassebaum amendment—was enacted into law in 1994 as part of the "Improving America's Schools Act of 1994." Pub. L. 103–382, Title XIV, § 14510 (Oct. 20, 1994); 108 Stat. 3518; 20 U.S.C. § 8900.

[27] A number of resolutions have been introduced since Engel, that would express Congress' view on what devotional activities in the public schools remain permissible under the Court's decisions. The resolutions have sometimes been perceived as an alternative to a constitutional amendment, but they have not won extensive support. The Senate rejected two such proposals in 1966 while adopting one in 1994, but the latter proposal was deleted in conference.

[28] P.L. 103–227, Title X, § 1011 (March 31, 1994); 108 Stat. 265; 20 U.S.C. § 6061.

Although able to avoid a constitutional amendment or the elimination of federal court jurisdiction over the issue of school prayer, Congress has not been able to avoid any legislation on this issue. Congress has enacted (1) a requirement that public secondary schools which receive federal financial assistance afford student-initiated religious, philosophical, and political groups the same opportunity to meet during the school day as is afforded other student-initiated extracurricular groups (the Equal Access Act, 20 U.S.C. § 4071–74); (2) a prophylactic rider to the appropriations acts for the Department of Education, added since fiscal 1981, providing that none of the funds may be used to prevent the implementation of programs of voluntary prayer and meditation in the public schools; (3) an amendment to the "Goals 2000: Educate America Act" barring state and local educational agencies from using funds under the Act to adopt policies that prevent voluntary prayer and meditation in public schools; and (4) an amendment to the "Improving America's Schools Act of 1994" cutting off federal education funds to any state or local education agency that refuses to abide by a court decision holding it in violation of the constitutional right of a student with respect to prayer in the public schools.

The Senate has voted only four times on constitutional amendments concerning school prayer: in 1966,[29] 1970[30] and twice in 1984.[31] Only the 1970 constitutional amendment garnered the two-thirds majority necessary for adoption and that vote was considered less as a vote on school prayer than as a vote to kill the measure to which the amendment was attached—the Equal Rights Amendment.[32]

Last Congress, the Constitution Subcommittee held 6 separate hearings on religious liberty and the bill of rights. These hearings concerned the general question of religious liberty with the last of those hearings, on July 26, 1996, focusing on a constitutional amendment proposed by Congressman Armey. Congressmen Hyde and Istook also introduced Constitutional Amendments related to religious rights. None of these proposals were ever marked up in Committee and, in fact, the only House floor vote related to school prayer was over 25 years ago in 1971.[33]

IV. Current Law Allows Wide Toleration of Religious Practices

Present jurisprudence with respect to the Establishment Clause and Free Exercise Clause already include a carefully balanced set of rules to try to settle the tension between a religious (or nonreligious) people's need to express their religion, and at the same time be free from a Government which seeks to compel religion, either religion generally or a particular religion. Supporters of the Congressman Istook's approach to amending the Constitution have repeatedly told stories of ordinary citizens who have been victimized by a state authority: bibles taken, religious expression squelched, songs altered, pamphlets torn up and the like. The supporters have used these examples as indicative of the need for an amendment to the Constitution that will stop such alleged violations.

To the extent problems may exist in the implementation of what is admittedly complex jurisprudence, the answer to the supporters stated concerns is not another amendment to the Constitution, which guarantees more litigation, but rather more education about what the existing rules permit. Careful reflection upon existing rules reveals that significant religious activity is already permitted in this nation, both in and out of schools.

In an effort to make clear what is and what is not permitted in the public schools, numerous religious groups worked together to craft *Religion in the Public Schools: A Joint Statement of Current Law.*[34] The pamphlet explains what student prayers and what

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[29] In the 89th Congress (1965–1966), the Senate was forced to vote on a constitutional amendment to reverse the Supreme Court's holding in *Engle* v. *Vitale,* 370 U.S. 421 (1962), banning school sponsored prayer. 112 Cong. Rec. 23556 (Sept. 21, 1966).

[30] 116 Cong. Rec. 36478–36505 (Oct. 13, 1970).

[31] 130 Cong. Rec. 5733 (March 15, 1984); 130 Cong. Rec. 5619 (March 20, 1984).

[32] See supra note 30.

[33] 117 Cong. Rec. 39886–39958 (April 5, 1979).

[34] This pamphlet was drafted by the American Jewish Congress, American Civil Liberties Union, American Jewish Committee, American Muslim Council, Anti-Defamation League, Baptist Joint Committee, Christian Legal Society, General Conference of Seventh-day Adventists, National Association of Evangelicals, National Council of Churches, People for the American Way, and the union of Hebrew Congregations. In addition, the following organizations have endorsed the pamphlet: American Ethical Union, American Humanist Association, Americans for Religious Liberty, Americans United for Separation of Church and State, B Nai Brith International, Christian Science Church, Church of the Brethren Washington Office, Church of Scientology International, Evangelical Lutheran Church in America, Federation of Reconstructionist

Continued

graduation prayers are permissible. It also explains that teachers may not engage in religious activities with their students, and explains that students may be taught about religion without being taught religion itself. The pamphlet also covers homework and religion, the distribution of religious literature, religious persuasion versus religious harassment, religious holidays, the excusal of students from religiously objectionable lessons, religious attire, moral values and the Equal Access Act.

Based on this pamphlet, on August 10, 1995, United States Department of Education Secretary Richard W. Riley sent out a "statement of principles" to the nation's school superintendents. This statement provides school officials with guidance, describing the extent to which religious expression and activities are permitted in public schools. The statement goes into depth explaining that schools may not forbid students who act on their own from expressing personal religious views or beliefs solely because they are of a religious nature, and that schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activities.[35]

A. RELIGION/PRAYER IN SCHOOL

The Supreme Court has addressed the issue of school prayer numerous times, effectively holding that the Establishment Clause[36] prohibits government from using the public schools directly or indirectly to inculcate religious beliefs. At the same time the Court has been careful to permit free religious expression and protect religious freedom. Starting with *Engel* v. *Vitale*[37] in 1962 the Court struck a New York School Board's requirement that students join in prayer composed by the Regents. The Court stated that "[g]overnment must maintain strict neutrality, neither aiding nor opposing religion" and "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."[38]

Neither may the government sponsor or promote devotional exercises, teach or inculcate the precepts or prohibitions of any particular sect or dogma, or permit outside parties to give religious instruction to students during the school day on the public school premises. In *Abingdon School District* v. *Schemp,*[39] the Court specifically disallowed State sponsorship of daily devotions, which involve oral readings from the Bible and the unison recital of the Lord's Prayer, notwithstanding that students who objected could be

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Congregations and Havurot, Friends Committee on National Legislation, Guru Gobind Singh Foundation, Hadassah, Interfaith Alliance, Interfaith Impact for Justice and Peace, National Council of Jewish Women, National Jewish Community Relations Advisory Council, National Ministries—American Baptist Churches U.S.A., National Sikh Center, North American Council for Muslim Women, Presbyterian Church (USA), Reorganized Church of Jesus Christ of Latter Day Saints, Unitarian Universalist Association of Congregations, United Church of Christ.

[35] Memorandum from Richard W. Riley, Secretary, U.S. Dept. Of Education, *Religion in Public Schools* (August 10, 1995) (on file with Committee).

[36] Relying mostly on the Lemon test: to pass muster under the establishment clause, government action involving religious must be shown to have a primarily secular purpose, to have a primary effect other than the advancement of religion, and not to lead to excessive entanglement between government and religion. *Lemon* v. *Kurtzman,* 403 U.S. 202 (1971).

[37] 370 U.S. 421 (1962).

[38] 370 U.S. at 425.

[39] 374 U.S. 203 (1963).

excused from participating and that the practices were claimed not to promote religion but to inculcate morality.[40]

Wallace v. *Jaffree*[41] held the government may give objective instruction about religion in the public schools and provide for religiously neutral moments of silence, permit students to engage in private non-disruptive prayer during the school day, and pose no barrier to organized student-initiated religious clubs under the Equal Access Act.[42]

In addition, the Court has declined certiorari in *Jones* v. *Clear Creek Independent School District,*[43] in which the 5th Circuit upheld as constitutional a school policy that permitted the graduating senior class to choose volunteers from among themselves to give "nonsectarian, nonproselytizing invocations at their graduation ceremonies." The 5th Circuit said the purpose and primary effect of the policy was "to solemnize graduation ceremonies", not to advance religion.[44] The policy did not endorse prayer, the court said, but merely passively permitted it.[45]

In sum the case law indicates that the right of students to pray is protected. The majority would have us focus on a few isolated cases in an effort to demonstrate the need for a Constitutional Amendment allowing school prayer. A review of those cases is instructive.

Often cited is the case of Kelley DeNooyer. In December 1990, DeNooyer's parents sued officials at McKinley Elementary School in Livonia, Michigan after DeNooyer's teacher refused to allow the second grader to show a tape of herself singing a religious song, as part of a verbal presentation about herself. The teacher rejected the tape because she felt the tape would undermine the point of the

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[40] 374 U.S. at 223.

[41] The Court struck an Alabama statute providing for a moment of silence at the beginning of each school day for purposes of "meditation or voluntary prayer." The Court did not strike moments of silence *en toto.* Alabama had another law permitting a moment of silence for "meditation," so this law, to the Court, was "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day." "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schooldays. The 1978 statute already protected that right. . . ." 472 U.S. 28, 49 (1985).

[42] *Widmar* v. *Vincent,* 454 U.S. 263 (1981) (The Court has permitted student initiated and student led groups to use school facilities for religious purposes (students at public university have free speech right to use campus facilities for religious meetings on same basis as other students).); *Board of Education of Westide Community Schools* v. *Mergens,* 496 U.S. 226 (1990) (extension of Widmar principle to federally assisted secondary schools in the Equal Access Act is constitutional. "There is a crucial difference between government speech endorsing religion and private speech endorsing religion. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis," *Id.* at 242).

[43] 977 F.2d 963 (5th Cir. 1992), cert. den., 61 U.S.L.W. 3819 (1993). However, the Court has held unconstitutional the inclusion of a clergy-led invocation and benediction in a public school's graduation ceremony, *Lee* v. *Weisman,* 505 U.S. 577 (1992), finding that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, the prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student." *Id.* at 587.

[44] 977 F.2d at 967.

[45] The Ninth Circuit had a contrary result in *Harris* v. *Joint School District No. 241,* 41 F.3d 447 (9th Cir. 1994), in which the court struck down a school policy that permitted the graduating class to determine whether or not to have an invocation and benediction and to choose who would deliver them, stating, "when the senior class is given plenary power over a state-sponsored, state controlled event such as high school graduation, it is just as constrained by the Constitution as the state would be." *Id.* at 455. Harris was dismissed on technical grounds by the Supreme Court, and remanded to the Ninth Circuit with directions to dismiss as moot. *Joint School District No. 241* v. *Harris,* 515 U.S. 1154 (1995).

exercise, which was to make to students feel comfortable giving speeches. She also said that the school has a policy requiring that all tapes be reviewed before being used in class. Finally, she felt the tape's religious content was inappropriate. The Sixth Circuit Court of Appeals ruled that public school teachers and administrators, not students, are the proper agents to determine classroom content and assignments.[46] Thus, the case was more about teacher control of the classroom than religious freedom.

Another case to which the majority has sometimes referred is that of Brittney Settle Gossett. In 1991, Settle (now Gossett) sued the Dickson County Tennessee School Board after she was given a failing grade on a report she had written about Jesus Christ. The teacher had assigned each student in the ninth grade class to write a research paper on an unfamiliar topic, using four outside sources. Settle initially told the teacher she would do her paper on drama, but later asked to switch to the life of Christ. The teacher rejected the new topic saying Settle knew too much about it. Settle wrote the paper anyway and received a zero for ignoring the teacher's instructions. Both the federal district court and the Sixth Circuit Court of Appeals examined the facts and ruled in favor of the school, noting that Settle had no constitutional right to "do something other than [the teacher's] assignment and receive credit for it." The Supreme Court denied certiorari.[47]

Brad Hicks, a former police officer in Newton, North Carolina was fired in April 1996 after he disobeyed the police chief's order to stop handing out gospel tracts while on duty. The police chief first learned of the problem when a woman whom Hicks had pulled over for speeding complained. Before being terminated, Hicks was placed on suspension and told he could keep his job if he stopped proselytizing while on duty; he refused.[48]

Perhaps the only case to which the majority might even reasonably point as a case in which someone's rights were initially violated is a1989 incident in which Audrey Pearson's mother contacted the conservative legal group, the Rutherford Institute, after her daughter was told to stop reading a Bible on a public school bus in Prince William County, Virginia. The principal had not understood that students are permitted to bring religious material to school for their personal use and the decision was reversed when the Institute contacted the school. The matter never went to court. Thus, this matter was easily resolved by a simple phone call. A Constitutional Amendment appears to be overkill when a simple phone call can suffice to remedy a problem.

B. BENEFITS

Generally, governments may not provide financial assistance to religious institutions. However, there are many exceptions to this rule, most of which follow the *Lemon* test that any statute that has the incidental effect of aiding religion must: (a) have a secular purpose; (b) have a principle or primary effect that does not advance

[46] *DeNooyer* v. *Merinelli,* 1993 U.S. App. LEXIS 30084, *reh'g en banc denied,* 1993 U.S. App. LEXIS 36723 (6th Cir. 1993), *cert. denied,* 511 U.S. 1031 (1994).

[47] *Settle* v. *Dickson County School Board,* 53 F.3d 152 (6th Cir. 1995), *cert. denied,* 516 U.S. 989 (1995).

[48] *Officer Who Gave Gospel Tracts to Speeders Fired,* Kingston Free Press, April 12, 1996.

or inhibit religion; and (c) not give rise to an excessive entanglement between government and religion.[49] For example:

Public funds *may be* used to: (1) transport children to religious schools;[50] (2) buy textbooks for kids in sectarian schools, if the books are purely secular and approved by public school authorities;[51] (3) pay for psychological and speech diagnostic services by state personnel in private schools (a "public health service" that has "little or no educational content"), and therapeutic and remedial education services by state employees off the site of the religious school;[52] (4) pay for a signing interpreter to work with an eligible hearing impaired student at a sectarian school under the Education of All Handicapped Children Act, although it was important to the Court that the interpreter did nothing more than report what was said by others;[53] and (5) construct buildings and other facilities at church related colleges, if it is clear that the construction is for facilities that will not be used for sectarian instruction or for religious worship.[54]

Public funds *may not* be used to (1) subsidize the teaching of secular subjects in religious schools (as opposed to the sign interpreting, for example),[55] or (2) provide unrestricted maintenance and repair grants to religious elementary and secondary schools.[56]

The Court at one time had also prohibited the remedial instruction of special needs students (with Title I funds) in religious schools.[57] This precedent, however, was overruled this past term by *Agostini* v. *Felton,*[58] which held that federally paid public school teachers may offer remedial education inside parochial schools. *Agostini* declared Title I Services permissible in private religious schools because the instruction offered is secular in nature and is oversee by public school personnel.

V. H.J. Res. 78 Would Unsettle the Law and Unbalance the First Amendment

Contrary to majority's view that H.J. Res. 78 will clarify and protect religious freedom, it seems far more likely to unsettle the law, cause confusion and result in greater numbers of violations of religious rights.

A major problem with the Amendment is that it is so poorly drafted that no one is certain as to what it actually does. Even conservative Christian organizations and professors have voiced concerns over the language of this Amendment. In a letter to Chairmen Canady and Hyde, a well-known and highly respected conservative law professor from the University of Utah, Michael McConnell, recommended against adopting this Amendment, pointing out that it is "questionable that a constitutional amendment is needed in order to achieve the legitimate objectives of the proposed Amendment." Professor McConnell also pointed out that "there are

[49] *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971).
[50] *Everson* v. *Board of Education,* 330 U.S. 1 (1947).
[51] *Board of Education* v. *Allen,* 392 U.S. 236 (1968).
[52] *Wolman* v. *Walter,* 433 U.S. 229 (1977).
[53] *Zobrest* v. *Catalina Foothills School District,* 113 S. Ct. 2462 (1993).
[54] *Tilton* v. *Richardson,* 403 U.S. 672 (1971).
[55] *Lemon* v. *Kurtzman,* 403 U.S. 602.
[56] *Pearl* v. *Nyquist,* 413 U.S. 756 (1973).
[57] *Aguilar* v. *Felton,* 473 U.S. 402 (1973).
[58] 1997 U.S. LEXIS 4000 (June 23, 1997).

serious problems with the drafting of this particular proposal" referring to the proposal's "confusion and ambiguity."[59] The main question is whether or not the Amendment actually does anything.[60]

One possible interpretation of H.J. Res. 78 is that the language which states that the right to pray shall not be infringed upon may simply mean that no student may be prohibited from praying during lunch. In this case, the amendment is harmless (and meaningless) and merely "codifies" Supreme Court cases to the same effect. If the Amendment does anything, however, and we must assume it is intended to change the law in some way, its effects are clearly deleterious.

A. EFFECT ON PRAYER

Because H.J. Res. 78 authorizes prayers in captive audience situations, it will interfere with the rights of parents to raise their children according to their own religious faith. Congressman Istook has claimed that if parents do not want their children to listen to prayers over the intercom, they are incorrectly assuming that the prayer is harmful. But that depends on the religion of the child and the content of the prayer. All prayers are not acceptable to all parents. Yet this Amendment would require all children, regardless of faith to recite a particular prayer.

Moreover, the language of the proposed Amendment does not specify the time or place of the prayer. This could mean schools will be required to allow prayers whenever and wherever a student so desires. This may mean that if a student decides, on his or her own initiative, during the middle of history class, to begin praying aloud and asks others to join him or her, the teacher is prohibited from stopping this. In addition, students could be permitted to read sectarian prayers over the intercom system and teachers might proselytize during class time.

Further, since H.J. Res. 78 is not limited to schools but applies to all public property, anyone would conceivably have a right to interrupt proceedings in connection with government activities such as a debate on the floor of the House of Representatives, an ongoing court case, or a police training class by praying audibly.

The greatest problem, however, will be one of coercion. The Amendment clearly authorizes coercive practices. If a public school teacher can lead her class in a prayer before a test or a football player feels pressured to join in a team prayer before a game, that is coercion. Yet these activities are authorized by the Amendment.

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[59] Letter from Michael McConnell, Professor, University of Utah School of Law to Henry J. Hyde, Chairman of the Comm. on the Judiciary, U.S. House of Rep., and Charles T. Canady, Chairman of Subcomm. on Constitution, U.S. House of Rep. (July 21, 1997) (on file with the Committee).

[60] Professor McConnell points out three major problems with the Amendment: (1) it is unclear to what *"the people's right to pray"* refers—whether this means the people collectively or as individuals or private groups—if the latter it is irrelevant and if the former there is a question as to what limits, if any, will be placed on the government's right to "recognize" religion; (2) it appears that the proposed protection is intended to create a right for religious speech that is superior to any free speech right people already have on public property, which would result in discrimination in favor of religious speech over all other speech; and (3) the relevance of the proposed amendment to prayer in public school is unclear—either the Amendment simply recognizes the same free speech rights that already exist for all speech or the Amendment will replicate all of the problems of governmental power over the content of prayer and at the same time allow significant classroom disruption. *Id.*

If H.J. Res. 78 becomes the law of the land, we can expect to see more of egregious cases like these:

(1) Fellow students called a Salt Lake City sophomore a "Dirty Jew" and "Jew Bitch" when she objected to having to sing Christian songs in her public high school choir class and at the school's graduation ceremony.[61]

(2) A mother in Pontotoc County, Mississippi objected to her five children being subjected to school prayer over the intercom and in classroom and Bible classes in their public school. When her eleven year old left his classroom prior to religious Bible class, his teacher stated aloud words to the effect that "David doesn't believe in God. People who believe in God go to Bible class—those who don't, don't go to Bible class." Another son's teacher made him wear headphones during the school's organized prayers. His classmates called him "football head" and "baseball head."[62]

(3) An eleven year old Jewish student was reprimanded by a teacher for not praying during a moment of silence. The teacher told the student he "should be praying all the time," and if he did so, he might "go to heaven with all the Christians" instead of "going [to Hell] with all the other Jews" if he didn't pray. Other students told the boy his religion was "stupid" and another asked why they were even talking to the boy since "the Jews weren't worth saving because they had killed Christ."[63]

(4) Two Oklahoma students who did not attend religious meetings on school campus were labeled "nonbelievers" by some of their classmates. After a lawsuit, their family received threatening letters and the children were called "devil worshipers." The family's house was also destroyed by a fire of suspicious origins.[64]

(5) A thirteen year-old Jewish girl said she was "threatened and jostled by classmates" after she complained about Christmas decorations and religious caroling at her school in Concord, New Hampshire. One classmate told her "Christmas is about peace and love" before shoving her into a locker.[65]

(6) A Native American member of a high school marching band objected to the practice of pre-game invocations delivered at home football games. The band director proceeded to lecture him on Christianity.[66]

It appears that the demise of public education and the creation of a "Christian nation" are exactly what the religious right has in mind when advocating this Constitutional Amendment. Pat Robertson has spoken in favor of ending public education. He has stated "[f]or all we've been getting for our tax dollars out of the public schools, they should have disappeared years ago." So long as we have standards that ensure that our goals of quality education are

[61] *Bauchman* v. *Wes High School,* Civil Action No. 95–4084 (1995).

[62] *Herdahl* v. *Pontotoc County School Dist.,* Civil Action No. 3:94CV188–B–A (1994) (intercom and classroom prayers enjoined April 18, 1995).

[63] *Walter* v. *West Virginia Bd. Of Educ.,* 610 F. Spp. 1169, 1172 (D. W.VA. 1985).

[64] *Bell* v. *Little Axe Independent School District No. 70,* 766 F.2d 1391, 1396–97 (10th Cir. 1985).

[65] Jewish Student Reports Threats After Complaint over Christmas, N.Y. Times, December 25, 1993, at A3.

[66] *Jager* v. *Douglas County School District,* 862 F.2d 824, 826 (11th Cir. 1989).

achieved, then the very idea of maintaining an antiquated and ineffective public education system is absurd.[67] In fact Mr. Robertson has gone on to declare that because the public schools "take your tax money and insist on forcing your children to learn a philosophy that is contrary to what you believe very deeply . . . then the public schools are illegal nationwide . . ."[68]

Others on the religious right agree. Reverend Jerry Falwell said: "I hope to see the day when, as in the early days of our country, we won't have any public schools. The churches will have taken them over again and Christians will be running them."[69] Randall Terry has claimed that he is "in full support of Christian teachers being missionaries in public schools, living and testifying to Christ. However, we should keep our children out and ultimately seek to sink the current public education fiasco and replace it with voucher, parent choice education."[70]

B. EFFECT ON BENEFITS

Another problem with H.J. Res. 78 is that the language prohibiting the government from "deny[ing] equal access to a benefit on account of religion" undercuts the Establishment clause entirely and would allow the government to fund programs, even programs with a non-secular bent, sponsored by religious organizations. In other words, so long as the government is funding an organization or activity, religious organizations or individuals would be entitled to receive the same benefits. This means that if a public school received taxpayer funds, so too would religious schools be entitled to public funds. Similarly, if a secular social service agency contracted with the government to perform certain counseling services, then a house of worship that runs a religiously-based counseling service would also be entitled to receive a government contract.

In a March 24, 1997 press release, Congressman Istook cites examples of the kinds of court decisions his Amendment would reverse. Most are cases where governments (not private citizens or churches) were endorsing one religion over another, such as placing a city-owned cross in a park. Even religious conservatives have expressed concerns that this amendment would allow the government to slide from neutral acknowledgment to religious favoritism.[71] Under the pretext of acknowledgment, not only could a city place a nativity scene in a courthouse, it could also post photos of the Dalai Lama in every classroom or require New Age philosophy to be taught at all grade levels. It would also follow, therefore, that in California, if members of the Wiccan religion, which practices witchcraft, proposed to open a pre-school, they too would be eligible to receive taxpayer money to run their school. In fact, in 1993, before the unsuccessful voter referendum on school tuition vouchers,

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[67] Pat Robertson, The Turning Tide 239 (1993).
[68] Pat Robertson, *The 700 Club,* (The Family Channel television broadcast, Nov. 23, 1982).
[69] Rev. Jerry Falwell, America Can be Saved 52–53 (1979).
[70] Randall Terry, Why Does a Nice Guy Like Me Keep Getting Thrown in Jail? 169 (1993).
[71] McConnell letter, *supra* note 59; Memorandum from Steven T. McFarland, Director, Center for Law and Religious Freedom (June 27, 1997) (on file with Committee).

one such group had already announced its intention to seek such support.[72]

Similarly, two years ago, the Department of Housing and Urban Development used federal funds to hire Nation of Islam Security, Inc. to patrol public housing projects. At the time, several members of Congress expressed concern that federal tax dollars were being used to subsidize religious proselytizing by the Nation of Islam guards.[73] H.J. Res. 78, however, actually requires the government to contract with the Nation of Islam if HUD grants are available to other groups.

In addition, religious organizations are sometimes exempted from laws that apply to others. For example, religious institutions can make discriminatory decisions about whom to hire on the basis of religion; other businesses may not.[74] While restaurants and hotels have to comply with the Americans with Disabilities Act, churches do not.[75] If all access is to be equal, then the special dispensations we allow religious organizations may be called into question, even nullified.

Finally, once government starts funding religion, people will reasonably want public accountability as to how the funds are spent. With government funding of a school or welfare program run by a religious institution will come government entanglement and scrutiny that religious organizations are unlikely to welcome. Furthermore, religions will be competing against one another for scarce government resources. Governments will be forced to fund more than 2,000 religious denominations that exist in this country or pick and choose among religions, creating competition and animosity between religious groups.

VI. Relevance of Religious Freedom Restoration Act

Although not directly relevant, this past term the Supreme Court also decided the case of *Boerne* v. *Flores,*[76] which held the Religious Freedom Restoration Act ("RFRA") unconstitutional. In *Boerne,* the Court held that Congress exceeded the scope of its enforcement power under section 5 of the Fourteenth Amendment when it created RFRA in response to a previous Supreme Court case,[77] to prevent neutral laws from burdening religion without compelling justification. Congressman Istook has claimed that his amendment would remedy the Court's *Boerne* decision.

There are at least two responses to this argument. First, the *Boerne* decision is best remedied by statute. If Congress had demonstrated the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"[78] RFRA might not have been held unconstitutional. A new statute

[72] *Hearing on H.J. Res. 78: "Religious Freedom Amendment" Before the Constitution Subcommittee,* 105th Congress (July 22, 1997) (statement of Rev. W. Barry Lynn, Executive Director of Americans United for Separation of Church and State).

[73] Republican Congressmen Peter King and Rick Lazio as well as then-Senate majority leader Senator Bob Dole all attacked the Clinton Administration for allowing Nation of Islam affiliated groups to contract with the Department of Housing and Urban Development. *Charles* v. *Zehren, Farrakhan Units Probed by HUD,* Newsday, January 19, 1995 at A8.

[74] 42 U.S.C. 2000e–1(a).

[75] 42 U.S.C. 12113(c) (exempting religious corporations from 42 U.S.C. 12182-the public accommodations portion of the American with Disabilities Act).

[76] ____ U.S. ____,117 S.Ct. 2157 (1997).

[77] *Employment Div. Dept. Of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990).*

[78] ____ U.S. at ____, 117 S.Ct. at 2157.

might also rely on Congress' spending, commerce or treaty power. Moreover, Congressmen Hyde and Canady are currently working on a statutory solution to the *Boerne* decision and they have previously stated that they believe a Constitutional amendment is premature.[79]

Second, *Boerne* does not involve the Establishment Clause (it relied on the Free Exercise Clause), which is the section that would be most affected by the Istook amendment. The solution to solving the Court's "attack" on the Free Exercise Clause in *Boerne* can hardly be to undermine the protections afforded to religious liberty in the Establishment Clause as the Istook language clearly does.

CONCLUSION

H.J. Res. 78 is poor policy and poorly conceived. We would expect that when undertaking something as serious and consequential as amending the Constitution of the United States, at the very least the drafters would understand the effects of that proposed Amendment and would ensure that the Amendment was clear and unambiguous. We are dismayed that the Committee could adopt a Constitutional Amendment that the majority's own experts deride as "unacceptable"[80] in light of the Amendment's glaring ambiguities and inconsistencies.

Moreover, we are deeply troubled over the notion of amending the First Amendment, which has stood as a bulwark of our democratic system of government. The freedom of religion established by the First Amendment is one of the fundamentals on which our country was founded. Religious freedom separates our country from all others and has worked to protect our citizens' freedom for over 200 years. Now is not the time to alter the constitutional structure which underlies this freedom.

JOHN CONYERS, Jr.
CHARLES E. SCHUMER.
ROBERT C. SCOTT.
MAXINE WATERS.
WILLIAM D. DELAHUNT.
STEVEN R. ROTHMAN.
BARNEY FRANK.
HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTIN T. MEEHAN.
ROBERT WEXLER.

ADDITIONAL DISSENTING VIEWS OF CONGRESSWOMAN ZOE LOFGREN

For over 200 years, the First Amendment has guaranteed Americans the freedom to practice their various religious beliefs, free from both government establishment of religion and government

[79] *Hearing on Protecting Religious Freedom after Boerne* v. *Flores* Before the Subcomm. on Constitution of the House Comm. On Judiciary, 105th Cong. 42, 61 (1997) (statements of Subcommittee Chairman Canady and Committee Chairman Hyde).

[80] McConnell Letter, *supra* note 59.

interference in its free exercise. The current proposal tampers with those freedoms, with unpredictable consequences.

Our current system has given us a country that leads the world in religious freedom. The First Amendment originated as part of the great American experiment in democracy. It has been successful beyond the dreams of the founders. Far from needing modification, the First Amendment deserves our continuing support.

The First Amendment to the United States Constitution ranks with the Magna Carta, the Declaration of Independence, and other major documents through which mankind has attempted to govern itself. It is remarkable that some apparently believe that we can better the works of the founding fathers of this country and the tested wisdom of 200 years of freedom, and craft a better First Amendment that the one that currently graces our Constitution and our nation.

I pray that the United States Congress will have the good sense not to interfere with our successful scheme of religious freedom under law.

ZOE LOFGREN.

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