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The Religious Freedom Amendment: H.J.Res. 78, As Reported by the House Judiciary Committee

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ABSTRACT

H.J.Res. 78, the "Religious Freedom Amendment," would amend the Constitution in a manner that would overturn many judicial interpretations of the religion clauses of the First Amendment that have been based on a separationist perspective. This report details the legislative, political, and constitutional context of the proposal and analyzes its legal effect if ratified as part of the Constitution. It will be updated if H.J.Res. 78 passes the House.

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Summary

On May 19, 1998, the House Judiciary Committee reported the Religious Freedom Amendment (RFA), H.J.Res. 78, to the House, where floor action is expected soon. The proposal would add the following language to the Constitution:

> 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.

The Committee report states that the proposal "would coexist in the Constitution with the religion clauses of the First Amendment ... [but] is intended to alter a number of judicial interpretations of those clauses, particularly of the establishment clause."

H.J.Res. 78 is the latest, and the most ambitious, in a long line of constitutional amendments that have been introduced in Congress since the Supreme Court's school prayer decisions of *Engel v. Vitale* and *Abington School District v. Schempp* in 1962 and 1963. But this is the first time since then that a constitutional amendment concerning church and state has been reported by a House committee. The one previous occasion when the House voted on a school prayer amendment occurred in 1971, when H.J.Res. 191 was brought to the floor by means of a discharge petition. But the vote on that measure — 240-162 — fell 28 votes short of the necessary two-thirds majority. (The Senate has voted four times on such constitutional amendments — in 1966, 1970, and twice in 1984.)

The RFA combines and builds on proposals that were introduced in the 104th Congress and is considerably broader than the school prayer issue that has been the focus of most previous proposals. Its legal effect is not certain in every instance, but it seems clear that it seeks to undo separationist interpretations of the religion clauses of the First Amendment and to foster a closer relationship between government and religion than current constitutional interpretations allow. If ratified as part of the Constitution, the consequences of H.J.Res. 78 would seem to include the addition of a reference to "God" for the first time to the Constitution, a substantial easing of constitutional restrictions on public aid to pervasively religious entities, an expansion of government's role in fostering or accommodating religious expression in the public schools and elsewhere, and a nullification of state constitutional provisions on church and state that are more restrictive than the RFA.

This report details the legislative, political, and legal contexts of H.J.Res. 78 and analyzes its legal effect.

Contents

Introduction 1
Legislative Context 2
Political Context 4
Constitutional Context 6
Legal Effect of H.J.Res. 78 If Ratified 8
(1) References to God in the Constitution 9
(2) No official religion 10
(3) Public aid to sectarian institutions 10
(4) Religious expression on public property 14
Additional Reading 21

The Religious Freedom Amendment: H.J.Res. 78, As Reported by the House Judiciary Committee

Introduction

On May 19, 1998, the House Judiciary Committee reported a modified version of the "Religious Freedom Amendment" (RFA), H.J.Res. 78, to the House.[1] If adopted by two-thirds of the House and the Senate and ratified by three-fourths of the states, the proposal would add the following language to the Constitution:

> 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.

H.J.Res. 78 reflects more than three years of informal debate and discussion (primarily among House Republicans) on what form a constitutional amendment on church and state ought to take, several decades of controversy over specific judicial interpretations of the religion clauses of the First Amendment, and centuries of argument and conflict about the proper relationship of government and religion.

The initiative is the latest, and the most ambitious, of the constitutional amendments that have been proposed since the Supreme Court handed down its school prayer decisions of *Engel v. Vitale*[2] and *Abington School District v. Schempp*[3] in 1962 and 1963. The proposal addresses a broader range of church-state issues than the school prayer issue that was generally the focus of its predecessors and would sanction a closer relationship between government and religion than is currently permitted by judicial interpretations of the religion clauses of the First Amendment.

This report gives an overview of the legislative, political, and constitutional contexts of H.J.Res. 78 and analyzes its legal effect were it to be ratified as part of the Constitution.

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[1] The Committee had ordered the measure reported on a party-line vote of 16-11 on March 4, 1998.

[2] 370 U.S. 421 (1962).

[3] 374 U.S. 203 (1963).

Legislative Context

H.J.Res. 78 was originally introduced on May 8, 1997, by Rep. Ernest J. Istook (R.-Okla.) and currently has 153 cosponsors. The Subcommittee on the Constitution of the House Judiciary Committee held a hearing on the proposal on July 22, 1997,[4] and on a party-line vote of 8-4 on October 28, 1997, reported a modified version of the proposal to the full Committee. On March 4, 1998, the full Committee, on a party-line vote of 16-11, ordered the proposal reported to the House, without further modification.

The measure as reported by the Judiciary Committee differs in three respects from the proposal as it was originally introduced: (1) The sentence "Neither the United States nor any State shall establish any official religion" has been added; (2) the phrase "Neither the United States nor any State" has been substituted for "The Government" at the beginning of the last sentence; and (3) the phrase "prescribe school prayers" in the last sentence originally read "initiate or designate school prayers." As noted, the changes were all made by the Subcommittee on the Constitution in a substitute proposed during mark-up by Rep. Hutchinson (R.-Ar.).

Democratic Members offered a number of amendments to the proposal in both the Subcommittee and full Committee but all were defeated, largely on party-line votes. Proposed amendments in the full Committee markup were as follows:

> (1) a proposal by Rep. Scott (D.-Va.) to strike the last phrase "or deny equal access to a benefit on account of religion" (rejected 9-14);
> (2) an amendment by Rep. Nadler (D.-N.Y.) to strike as well the part concerning the recognition of "religious beliefs, heritage, or traditions on public property" (rejected on a voice vote);
> (3) an amendment by Rep. Scott (D.-Va.) to deny public funding to any religious institution that discriminates on racial grounds (rejected on voice vote);
> (4) another proposal by Rep. Scott (D.-Va.) to add the word "unreasonably" before "infringed" and to change the words "prescribe school prayers" to "prescribe religious activity" (rejected on voice vote);
> (5) an amendment by Rep. Jackson-Lee (D.-Tx.) to change "acknowledge God" to "freedom of religion" (rejected 7-18);
> (6) a proposal by Rep. Conyers (D.-Mich.) to bar public schools from authorizing prayer over a public address system (rejected on voice vote); and
> (7) a proposal by Rep. Watt (D.-N.C.) to strike the text and replace it with the language of the religion clauses of the First Amendment (rejected on voice vote).

The legislative lineage of H.J.Res. 78 dates at least to 1962, when the Supreme Court handed down its first school prayer decision in *Engel v. Vitale, supra*. That

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[4]*Hearing on Proposing an Amendment to the Constitution of the United States Restoring Religious Freedom Before the Subcommittee on the Constitution of the House Judiciary Committee*, 105th Cong., 1st Sess. (July 22, 1997) (unpublished). The subcommittee had also held two related sets of hearings during the 104th Congress — *Hearings on Religious Liberty and the Bill of Rights* (1995) and *Hearing on Legislation to Further Protect Religious Freedom* (1996).

decision and its companion decision a year later, *Abington School District v. Schempp, supra,* precipitated an avalanche of proposals to amend the Constitution to restore government-sponsored prayer to the public schools, and such proposals have continued to be introduced in every subsequent Congress.[5] But H.J.Res. 78 addresses a broader range of church-state issues than most of its predecessors and, more specifically, builds on competing constitutional proposals that emerged during the 104th Congress.

Soon after the elections of 1994, when control of both the House and the Senate shifted to the Republicans, Speaker-to-be Gingrich promised that the House would vote on a constitutional amendment to restore prayer in the public schools no later than July 4, 1995; and he designated Rep. Istook to lead the effort. But a number of proponents of amending the Constitution on church-state concerns wanted to address matters other than, or in addition to, school prayer. Arduous negotiations about the form a proposal should take failed to develop a consensus; and as a result, late in the first session of that Congress Rep. Hyde (R.-Ill.) and Rep. Istook (R.-Ok.) introduced separate and competing proposals to amend the Constitution with respect to matters of church and state — H.J.Res. 121 (also introduced in the Senate by Sen. Hatch as S.J.Res. 45) and H.J.Res. 127, respectively.[6] Late in the second session of the 104th Congress Rep. Armey (R.-Tex.) introduced a modified proposal in an effort to unify

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[5]For a detailed review of Congressional action on constitutional and statutory measures in this area of the law since 1962, *see* CRS, *Prayer and Religion in the Public Schools: What Is, and Is Not, Permitted* (Oct. 7, 1996) (Report No. 93-680A).

[6]The "Religious Liberties Amendment" (H.J.Res. 127) proposed by Rep. Istook provided as follows:

> To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.

The "Religious Equality Amendment" proposed by Rep. Hyde (H.J.Res. 121) and by Sen. Hatch (S.J.Res. 45) provided as follows:

> Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.

proponents of changing the Constitution in this area of the law — H.J.Res. 184.[7] But that effort also proved unavailing.

Thus, no proposal to amend the Constitution with respect to the law of church and state either emerged from committee or came to a vote in the House or the Senate during the 104th Congress. But that formal inaction masked what was in fact a vigorous examination of church-state concerns. Moreover, the proposals that were introduced marked a significant broadening of the debate about a constitutional amendment, as they addressed not only the long-standing issue of prayer and other religious practices in the public schools but also such concerns as public aid to religious institutions and the display of religious symbols on public property.

In the 105th Congress proponents of amending the Constitution on church-state concerns have generally united behind a single proposal — H.J.Res. 78. The measure, with some modifications, incorporates the salient aspects of both H.J.Res. 121 and H.J.Res. 127 from the 104th Congress and has become the primary constitutional initiative on church and state in the 105th Congress.

Political Context

A number of significant events have occurred outside the Congress in recent years which have helped shape the current political context of the debate on H.J.Res. 78. On May 18, 1995, for instance, the Christian Coalition proposed its "Contract with the American Family," a 10-point legislative agenda that gave priority to a "Religious Equality Amendment." The Coalition did not propose any particular language for the amendment but said it would be designed to overcome "the hostility of public institutions toward religious expression" and to "allow voluntary, student and citizen-initiated free speech in non-compulsory settings such as courthouse lawns, high school graduation ceremonies, and sports events." The issue has remained a high priority for the Coalition, which is supporting H.J.Res. 78.

A month earlier on April 14, 1995, a diverse coalition of about three dozen groups — including the American Jewish Congress, the National Association of Evangelicals, People for the American Way, and the Christian Legal Society — joined with Education Secretary Riley in a declaration on *Religion in the Public Schools: A Joint Statement of Current Law*. The statement described various ways in which students can practice their religion in the public schools consistent with the present interpretation of the Constitution, stating: "Some say that the Supreme Court has declared the public schools 'religion-free zones' or that the law is so murky that school

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[7] Also called the "Religious Freedom Amendment," H.J.Res. 184, proposed by Rep. Armey, provided as follows:

> In order to secure the right of the people to acknowledge and serve God according to the dictates of conscience, neither the United States nor any State shall deny any person equal access to a benefit, or otherwise discriminate against any person, on account of religious belief, expression, or exercise. This amendment does not authorize government to coerce or inhibit religious belief, expression, or exercise.

officials cannot know what is legally permissible. The former claim is simply wrong. And as to the latter, while there are some difficult issues, much has been resolved."

That document contributed substantially to a major initiative by President Clinton on the issue of religious expression. In a speech on July 12, 1995, President Clinton defended the Supreme Court's interpretation of the religion clauses of the First Amendment, saying "it protects freedom of religion by allowing students to pray, and it protects freedom of religion by preventing schools from telling them how and when and what to pray." But he also said he understood that many believe there is "a positive antireligious bias in the cumulative impact of [the courts'] decisions ...." As a consequence, he announced that he was directing the Secretary of Education, in consultation with the Attorney General, to provide every school district in America with a statement addressing the extent to which religious expression and activity are permitted in its public schools. On August 10, 1995, Secretary Riley did so, sending every school superintendent in the country a guide entitled *Religion Expression in Public Schools*.[8] Drawing heavily from the coalition document described above, the guide describes the legal standards governing such matters as student prayer and discussion, graduation prayer and baccalaureates, teaching about religion, the distribution of religious literature, and meetings of student religious groups.

Finally, on August 14, 1997, the Administration also issued a document to govern religious exercise and religious expression by federal employees. Entitled *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace,*[9] the document attempts to establish rules to govern the treatment of religion on the job. Under the guidelines, for example, agencies are barred from regulating employees' religious expression in the workplace because of its content or viewpoint and employees are allowed to engage in private religious expression to the same extent as they may engage in private nonreligious expression. The government, moreover, is barred from discriminating against any employee on the basis of the employee's religious beliefs and practices or lack thereof. The document also addresses the difficult issue of religious harassment and sets forth a number of examples of what might constitute such harassment. The *Guidelines* have been subject to both strong praise and criticism, but they are further evidence of this Administration's willingness to address religious issues.

A number of organizations have taken positions publicly supporting H.J.Res. 78. These organizations include: American Conference of Jews and Blacks, American Muslim Council, America's Prayer Network, the Catholic Alliance, Christian Action Network, Christian Coalition, Concerned Women for America, Family Research Council, Focus on the Family, National Association of Evangelicals, National Baptist Convention USA, Salvation Army, Southern Baptist Convention, and the Traditional Values Coalition.[10]

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[8]The text is available from the White House internet site: <http://library.whitehouse.gov>.

[9]The text of these guidelines is also available on the White House internet site.

[10]This listing is taken from a fact sheet on H.J.Res. 78 released by the office of Rep. (continued...)

By the same token a number of organizations publicly oppose the RFA. These organizations include: American Civil Liberties Union, American Jewish Committee, American Jewish Congress, Americans for Religious Liberty, Americans United for Separation of Church and State, Anti-Defamation League, Church State Council of Seventh-day Adventists, the Episcopal Church, Friends Committee on National Legislation, Joint Baptist Committee on Public Affairs, Mennonite Central Committee Washington Office, Muslim Public Affairs Council, National Council of Churches of Christ in the U.S.A., and People for the American Way.[11]

No publicly available polls have been found assessing the sentiment of the American people on H.J.Res. 78. So far as the First Amendment is concerned, a poll conducted in July, 1997, and released on December 22nd indicated that 81% of Americans consider the freedom to choose in matters of faith to be an essential right and another 18% consider that choice an important right. That same poll, sponsored by the Freedom Forum and undertaken by the Center for Survey Research and Analysis, also found that 71 percent of Americans believe that the amount of religious freedom in the United States is "about right"; 21% of Americans believe they have too little religious freedom; and 6% say America has too much. As for teacher-led prayer in school, a majority favored it, but less than a majority said they wanted to amend the Constitution to get it. As a general matter, some polls about the religious attitudes and beliefs of Americans have been criticized for being inaccurate because of how the polling questions were phrased, though no such criticism appears to have been raised so far about the Freedom Forum poll.

Constitutional Context

The constitutional context addressed by H.J.Res. 78 is formed primarily by 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 ...,"[12] and by court decisions applying these clauses in particular situations. It also includes at times the free speech and free press clauses of the First Amendment,[13] particular statutory enactments such as the Equal Access Act,[14] and related judicial decisions.

The report of the House Judiciary Committee states that the RFA would "coexist in the Constitution with the religion clauses of the First Amendment" but also "is intended to alter a number of judicial interpretations of those clauses, particularly of

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[10](...continued)
Istook on March 2, 1998, at the markup by the Subcommittee on the Constitution.

[11]This listing is taken largely from a footnote in the "Dissenting Views" section of H.Rept. 105-543, *supra*, n. 4, p. 21.

[12]The religion clauses are applicable to the states as well as the federal government. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause held applicable) and *Everson v. Board of Education*, 330 U.S. 1 (1947) (establishment clause held applicable).

[13]"Congress shall make no law ... abridging the freedom of speech, or of the press ...."

[14]20 U.S.C.A. 4071 *et seq.*

the establishment clause."[15] The Supreme Court and lower courts," the report asserts, "have misinterpreted the Constitution ..."[16] and "promote[d] hostility" toward religion.[17] Thus, it, says, "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."[18] In contrast, the dissenting views of fourteen Democrats on the Committee contend that the religion clauses of the First Amendment have ensured both that "[r]eligion is alive and well in America today"[19] and that the American people can freely"express their religion" while being free "from a Government which seeks to compel religion, either religion generally or a particular religion."[20]

These views reflect a long-standing debate about the meaning and interpretation of the religion clauses of the First Amendment. On the one hand, it has been contended that the religion clauses were a response to the "turmoil, civil strife, and persecutions" that had been endemic in Europe in the centuries preceding and contemporaneous with the colonization of America as various faiths allied themselves with government to establish their supremacy. Similar struggles in the colonies themselves, it is said, gradually created a "feeling of abhorrence" about such unions of church and state and fostered a movement to eliminate existing establishments. As a consequence, it is argued, the religion clauses were drafted with the intent of having a broad scope and of creating a "wall of separation between church and state."[21] In a classic statement of the separationist understanding, Justice Black stated for the Court in 1947:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs,

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[15]H.Rept. 105-543, 105th Cong., 2d Sess. (May 19, 1998), at 2.

[16]*Id.*

[17]*Id.*, at 4.

[18]*Id.*, at 3.

[19]*Id.*, at 22 (Dissenting Views).

[20]*Id.*, at 25.

[21]The metaphor derives from a letter Thomas Jefferson wrote while President to a group of Baptists in Danbury, Connecticut, who had inquired about his views on the religion clauses of the First Amendment. He stated as follows:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions -- I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

> for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion ... In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[22]

On the other hand, critics of some of the judicial interpretations of the religion clauses (including the report of the House Judiciary Committee on H.J.Res. 78) have noted that the phrase "wall of separation" is "nowhere to be found in the Constitution" and have termed the phrase "misleading," "useless," "a mischievous metaphor," and a "metaphor based on bad history."[23] Critics of the separationist view have contended that there has been "an unbroken history of official acknowledgments by all three branches of government of the role of religion in American life from at least 1789"[24] and that the Constitution does not require "complete separation of church and state ... [but] affirmatively mandates accommodation ... of all religions, and forbids hostility toward any."[25] Prior to the courts' modern constructions of the establishment clause, it has been said, the clause had a

> well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations .... [It] did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.[26]

Both views of the religion clauses have been evident in judicial decisions about church and state, particularly those involving the establishment clause. The separationist view, for instance, has been most prominent in the decisions holding unconstitutional government sponsorship of devotional activities in the public schools, various forms of public aid to religious schools, and government sponsorship of quintessential religious symbols. In other instances a principle of benevolent neutrality or equality has governed the judicial application of the establishment clause. That principle has been most prominent in decisions which have afforded broad protection to private religious expression in the public schools and elsewhere, whether oral or written or symbolic.

H.J.Res. 78, it seems clear, takes issue with the separationist perspective and would overturn judicial decisions based on the separationist principle.

Legal Effect of H.J.Res. 78 If Ratified

Not all of the legal implications of H.J.Res. 78 are necessarily self-evident from its language, and much of its legislative history still remains to be developed. Moreover, the scope and meaning of constitutional amendments sometimes change

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[22]*Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

[23]*Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

[24]*Lynch v. Donnelly*, 465 U.S. 668, 674 (1987).

[25]*Id.*, at 673.

[26]*Wallace v. Jaffree, supra*, at 106 (Rehnquist, J., dissenting).

over time.[27] Nonetheless, it seems clear that the general effect of the proposal would be to introduce a reference to God into the Constitution for the first time, substantially lower existing constitutional restrictions on public aid to religious institutions, allow the government a greater role in fostering or accommodating the expression of religious beliefs and traditions in the public schools and on other public property, and override more restrictive state constitutional provisions on church and state.

(1) References to God in the Constitution. H.J.Res. 78 prefaces its substantive provisions with the words "[t]o secure the people's right to acknowledge God according to the dictates of conscience ...." If added to the Constitution, this prefatory language would for the first time add a reference to God to the Constitution. Unlike the Declaration of Independence[28] (but like the Articles of Confederation[29]), the Constitution as presently written makes no mention of a deity. Article VI forbids a "religious test" for public office, and the First Amendment bars government from making "any law respecting an establishment of religion, or prohibiting the free

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[27] *Compare, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966) *with City of Boerne, Texas v. Flores*, 117 S.Ct. 2157 (1997).

[28] References to a divinity occur four times in the Declaration. The opening paragraph states:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's **God** entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

The second paragraph, in turn, opens with these words:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their **Creator** with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

And the concluding paragraph declaims:

> WE, THEREFORE, the Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the **Supreme Judge** of the world for the rectitude of our intentions, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States .... And for the support of this Declaration, with a firm reliance on the Protection of **Divine Providence**, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

[29] The substantive text of the Articles made no reference to a divinity, but the resolution by which it was adopted by representatives of the States included the following words:

> And whereas it has pleased the **Great Governor of the world** to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union ....

exercise thereof ...." But the Constitution is otherwise silent on the subject of religion. The introductory phrase of H.J.Res. 78 would alter that and, for the first time, insert a specific reference to God.

Whether the term "God" as used in this introductory phrase is intended to have a specific or generic meaning is, in the present state of the proposal's evolution, uncertain. "God" is the term typically used in Western religious discourse about a deity, but other religious faiths use other terms -- Vishnu, Shiva, and Brahma (Hinduism); Kami (Shintoism) -- or are not centered about a deity (Taoism, *e.g.*). The rest of the amendment uses the more obviously inclusive term "religion" or "religious." During markup the Judiciary Committee rejected a proposal to replace the phrase "acknowledge God" with the phrase "freedom of religion" by a vote of 7-18.[30]

In any event, this language does not appear to confer or prohibit any particular right or power. But like the Preamble to the Constitution, it could conceivably be used to evidence the scope and purpose of the amendment. Joseph Story said of the Preamble that "its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them."[31] Thus, if any of the substantive provisions of H.J.Res. 78 were subject to conflicting or ambiguous constructions, this language might be used as evidence of the intent of the provision.

(2) No official religion. The initial substantive provision of H.J.Res. 78 provides that "neither the United States nor any State shall establish any official religion." This provision was added to the proposal by the Subcommittee on the Constitution and appears to reflect one side of the ongoing debate about the original intent of the religion clauses of the First Amendment described above. As noted, separationists have construed the clauses broadly as creating, in Jefferson's words, a "wall of separation between church and state" and as barring any preference not only for one religion over another but also for religion generally over irreligion. Critics of that view, on the other hand, have contended that the religion clauses were intended to do no more than bar the establishment of an official religion by the government, *i.e.*, articles of faith, a preferred church, special privileges for one faith or church. The clauses were not intended, it is argued, to bar nondiscriminatory assistance to religion and preferential treatment for religion over irreligion. This provision of H.J.Res. 78 appears to resolve this debate in favor of the latter view, *i.e.*, that the Constitution ought to bar only the official designation of a church or faith as favored by the government and not bar nondiscriminatory assistance to religion.

(3) Public aid to sectarian institutions. This construction of H.J.Res. 78 appears to be born out by its concluding words: "Neither the United States nor any State shall ... discriminate against religion, or deny equal access to a benefit on account of religion." This language appears to have its most dramatic effect on the constitutional law governing the direct provision of public aid to sectarian institutions, because that area of the law now requires discrimination and denial of benefits on the

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[30]*See* H.Rept. 105-543, *supra*, at 17-18.

[31]Story, Joseph, *Commentaries on the Constitution of the United States* (1833), § 462.

basis of religion. H.J.Res. 78 would require that pervasively religious entities be eligible for direct (and indirect) government assistance on the same basis as nonreligious private entities.

Existing interpretations of the establishment of religion clause have made clear that it "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[32] As a consequence of this separationist principle, the Supreme Court has held the clause to impose substantial, although not absolute, constraints on public aid to religious institutions.

Public aid that flows directly to such institutions in the form of grants or contracts, the Supreme Court has said, must be used only for "secular, neutral, and nonideological purposes."[33] Thus, under the establishment clause direct support can be provided to the secular programs and services sponsored or provided by religious organizations but not to their religious activities or to any religious proselytizing. Thus, if an organization's religious and secular functions are separable, direct aid can be provided to its secular functions.[34] But if they are not separable, *i.e.,* if an institution is "pervasively sectarian," then direct aid is generally prohibited (although benefits that are no more than "incidental" may be allowed).[35] In other words, in direct aid programs the establishment clause has been construed to **require** government to deny benefits to religious activities and to entities with a pervasively religious character.

Indirect aid to religious institutions has not been held to be constrained to the same extent by the establishment clause. Tuition grant, tax benefit, and other programs in which the public aid does not flow directly to the religious institution but

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[32]*Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985).

[33]*Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973).

[34]*See, e.g., Bradfield v. Roberts*, 175 U.S. 291 (1899) (public grant to religiously affiliated hospital to care for the health needs of the poor in the District of Columbia upheld); *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal construction grants for academic buildings at institutions of higher education, including several sectarian colleges, upheld); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976) (state program of general purpose grants to colleges in the state, limited only by a bar against sectarian use, upheld); *Bowen v. Kendrick*, 487 U.S. 589 (1988)(program of federal grants to institutions, including religious ones, to provide pregnancy prevention and care services upheld facially but remanded for an examination of whether funding went to pervasively religious entities); and *Agostini v. Felton,* 117 S.Ct. 1997 (1997) (provision of Title I remedial educational services to children attending sectarian schools by public school teachers on the premises of the sectarian schools held to be constitutional).

[35]This has been particularly true with respect to sectarian elementary and secondary schools. The Court has found such schools to be so permeated with a religious purpose and character that their secular functions and religious functions are "inextricably intertwined." *See, e.g., Committee for Public Education v. Nyquist*, *supra* (program of maintenance and repair grants struck down); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (program of grants for the support of teachers of secular subjects struck down); and *Wolman v. Walter*, 433 U.S. 229 (1977) (programs providing bus transportation for field trips and instructional materials other than textbooks struck down).

initially to individuals have been upheld by the Court so long as the initial recipients have had a genuinely free choice about where to use the aid.[36] Aid received by religious institutions through such programs need not be confined to secular use, the Court has said, because the initial recipient and not the government chooses where the aid ultimately goes. As a consequence, the government is deemed to be religiously neutral and not to be the agent of any religious use. However, if the government has designed an indirect aid program in such a way that the initial recipient's choice is constrained or channeled to pervasively sectarian institutions or programs, the program will not pass muster under the establishment clause.[37] In that case the government is not deemed to be religiously neutral, because the design of the program inevitably channels most of the benefits to religion-pervasive institutions.[38]

H.J.Res. 78 would substantially alter this constitutional framework for both direct and, to a more limited extent, indirect aid programs. Under the proposal's nondiscrimination and equal access mandate, religious entities could not be excluded from participation in public aid programs for which they would be eligible but for their pervasively religious character. Religiously affiliated or sponsored entities that received government funds in the form of grants or contracts would no longer be constitutionally restricted to using the funds exclusively for "secular, neutral, and nonideological purposes." Similarly, pervasively religious institutions would seem no longer to be deemed ineligible for direct assistance simply because religion permeates their activities and programs. In addition, indirect assistance programs that otherwise included comparable private institutions as potential beneficiaries seemingly could not, as now, exclude religious institutions.

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[36]*See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (tax benefit program allowing educational expenses incurred by the parents of both public and private schoolchildren to be deducted from gross income for state income tax purposes upheld); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (vocational education grant to student who wished to use it for training for a religious ministry upheld); and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (provision of sign language interpreter to deaf student attending a sectarian secondary school upheld).

[37]*See, e.g., Committee for Public Education v. Nyquist*, *supra* (tuition grant and tax relief programs limited to the parents of private schoolchildren struck down) and *Sloan v. Lemon*, 413 U.S. 388 (1973) (program of tuition grants limited to private schoolchildren struck down).

[38]It should be noted that one decision by the Supreme Court does not fit easily into either of the foregoing categories. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) the Court held a public university subsidy of the printing costs of an openly religious student publication not to violate the establishment clause. In that case the University, in order to promote vigorous debate on the campus, used student activity fees to subsidize the printing costs of a variety of student publications. But it denied the subsidy to student religious publications. The Court, however, said that a denial of funding to the religious publication when the subsidy was available to all other student publications constituted viewpoint discrimination violative of the free speech clause of the First Amendment. It further held that the subsidy did not violate the establishment clause, because the subsidy program was available to all student publications and, thus, was neutral with respect to religion.

The report of the House Judiciary Committee confirms this understanding. It states:

> [T]he 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 .... 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.[39]

For example, if H.J.Res. 78 were added to the Constitution, a religious institution that operated a government-funded social services program would no longer be constitutionally precluded from engaging in religious activities or religious proselytizing in the funded program. Sectarian elementary or secondary schools -- now generally precluded from receiving direct government assistance because they are deemed pervasively sectarian -- would be fully eligible for direct government funding on the same basis as other private schools. An educational voucher program that permitted students to use the vouchers at public or private nonsectarian schools would have to permit the vouchers to be used at sectarian private schools as well, and provisions of state constitutions that are more strict than the religion clauses of the First Amendment with respect to such public funding of pervasively religious entities (such as those in the Milwaukee voucher case[40]) would be overridden. In short, constructions of the establishment clause and of pertinent provisions in state constitutions that have imposed restrictions on the participation of religious entities, including pervasively religious institutions, in public subsidy programs would be overridden.

Moreover, as is true in existing law as well, the nondiscrimination mandated by H.J.Res. 78 would appear to be all-inclusive. That is, if private entities were eligible participants or recipients in any publicly funded program, government could not exclude any particular religious group from participating. So long as an entity met the test of being religious, it could not be excluded from participating in an otherwise applicable program.

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

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[39]H. Rept. 105-543, *supra*, at 14-15.

[40]In *Jackson v. Benson*, 1997 Wisc. LEXIS 973 (Ct. App. Wisc., decided August 22, 1997), an intermediate state appellate court in Wisconsin held the part of Milwaukee's Parental Choice Program allowing sectarian elementary and secondary schools to participate to violate a provision of the state constitution barring any money from being drawn from the treasury "for the benefit of religious societies, or religious or theological seminaries" (Art. I, § 18). Similarly, a state court in Maine has held that state's constitution to bar the inclusion of sectarian schools in a state voucher program for parents in rural areas without public schools. *See Bagley v. Town of Raymond, Me.*, No. ___ (Maine Superior Court, decided April 29, 1998).

private entities are eligible participants or recipients would religious entities have to be included and comparably treated.[41]

Nor does the proposal appear to alter the present constitutional limitation on indirect aid programs that give preference to religious institutions. As noted above, tax benefit, tuition voucher, and other similar programs are at present constitutionally invalid if religion is given preferential treatment.[42] H.J.Res. 78 would require only nondiscrimination in such programs and does not appear to alter that limitation.

In sum, then, the effect of H.J.Res. 78 on the present constitutional framework governing the provision of public aid to religious institutions, particularly with respect to direct assistance, appears to be substantial. The secular use limitation that now attaches to direct public aid to religious institutions would seemingly be eliminated, and direct aid could be provided even to pervasively religious institutions. In indirect assistance programs religious entities would have to be included in any program that also included comparable nonreligious institutions, notwithstanding state constitutional provisions that might prohibit such assistance.

(4) Religious expression on public property. The rest of H.J.Res. 78 concerns religious expression on public property. Its second sentence affirmatively provides that "[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." The first part of the last sentence is worded in the negative as a limitation on what government can do with respect to religious expression -- "Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers ...."

According to the report of the House Judiciary Committee, this language would have a number of consequences. It would

- allow public schools "to give students a moment of silence for prayer and the ability to pray on a voluntary basis in their classrooms"[43];

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[41]The report of the House Judiciary Committee states:

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

H. Rept. 105-543, *supra*, at 14-15.

[42]*Committee for Public Education v. Nyquist, supra; Sloan v. Lemon, supra*; *Texas v. Bullock*, 489 U.S. 1 (1989) (exemption of religious periodicals that promoted the teachings of a religious faith from a state's sales and use taxes held unconstitutional).

[43]H. Rept. 105-543, *supra*, at 2-3.

- allow prayer at high school graduation ceremonies, so long as "the government did not mandate that the prayer be part of the ceremonies or prescribe the text of the prayer"[44];
- give "religious groups and clubs the same degree of consideration as other secular groups receive when the use of school meeting rooms is requested"[45];
- extend the principle of the Equal Access Act,[46] which allows student-initiated religious groups in federally assisted secondary schools to meet in school facilities during noncurricular time on the same basis as nonreligious student groups, to the elementary school level[47];
- require that outside groups be allowed to use school facilities for after-school religious instruction and worship services[48];
- allow the posting of the Ten Commandments and other religious texts and symbols on public property without any need for accompanying secular texts or symbols[49]; and
- allow the inclusion of religious symbols on government seals and insignia.[50]

The intent, the report states, "is to establish neutrality in government's treatment of religion by affording religious expression the same protection as other expression."[51]

This part of the RFA implicates at least two aspects of the courts' church-state jurisprudence -- the decisions concerning religious activities in the public schools and those involving religious expression in public places other than the schools. Both aspects have a public and a private speech component.

With respect to religious activities in public schools, judicial applications of the establishment, free exercise, and free speech clauses of the First Amendment have generally prohibited government from sponsoring or promoting religious activities or doctrines in the public schools. The Supreme Court, for instance, has struck down government sponsorship of regular devotional activities such as prayer and Bible reading,[52] moment of silence statutes where prayer has been given preference by the state,[53] school-sponsored invocations and benedictions by clergy at commencement

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[44]*Id.,* at 3.

[45]*Id.*.

[46]20 U.S.C.A. 4071 *et seq.*

[47]H. Rept. 105-543, *supra*, at 9.

[48]*Id.*.

[49]*Id.*, at 11-12.

[50]*Id.*, at 12.

[51]*Id.*, at 12.

[52]*Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); and *Chamberlin v. Dade County Board of Instruction*, 377 U.S. 402 (1964).

[53]*Wallace v. Jaffree*, 472 U.S. 38 (1985).

ceremonies,[54] public school accommodation of privately sponsored religious instruction on the public school premises during the school day,[55] the posting of the Ten Commandments on schoolroom walls,[56] and state prohibitions and constraints on the teaching of evolution.[57]

But the Court has emphasized that "there is a crucial difference between *government* speech endorsing religion and *private* speech endorsing religion."[58] Thus, it has upheld the constitutionality of released time programs in which students leave the school premises during the school day to receive religious instruction from private teachers at nearby religious centers.[59] It has held as well that students in a public university must be given the same right to use campus facilities for religious purposes as is afforded nonreligious student uses.[60] It has upheld as well the constitutionality of the Equal Access Act,[61] which requires secondary schools that receive federal financial assistance to permit student-initiated religious groups to meet in school facilities on the same basis as other noncurricular student groups.[62] It has implicitly affirmed the constitutionality of a properly drafted statute allowing a moment of silent meditation in the schools.[63] It has held that religious groups cannot be barred from using school facilities outside of school hours where the facilities are generally made available for community use.[64] Finally, the Court has affirmed that in some instances a student has a constitutional right to be excused from ceremonies or curricular requirements that conflict with his or her religious beliefs.[65] Although the Court has

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[54]*Lee v. Weisman*, 505 U.S. 577 (1992).

[55]*McCollum v. Board of Education*, 333 U.S. 203 (1948).

[56]*Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam).*

[57]*Epperson v. Arkansas*, 393 U.S. 97 (1968) and *Edwards v. Aguillard*, 482 U.S. 478 (1987).

[58]*Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (O'Connor, J., concurring).

[59]*Zorach v. Clauson*, 343 U.S. 306 (1952).

[60]*Widmar v. Vincent*, 454 U.S. 263 (1981).

[61]20 U.S.C. 4071 *et seq.*

[62]*Board of Education of Westside Community Schools v. Mergens, supra.*

[63]*Wallace v. Jaffree, supra*. In *dicta* the Court observed that "[t]he 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 schoolday."

[64]*Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

[65]*See, e.g., West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (right not to participate in flag salute and Pledge of Allegiance) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (right of the Amish not to comply with final two years of state's compulsory education requirement).

not addressed every aspect of private religious expression in the public school context, its decisions have generally afforded broad protection.[66]

The public/private distinction also has been made, although with less clarity, with respect to religious expression on public property other than the public schools. The Supreme Court has made clear that religious speech encompasses a variety of expressive activities, including worship, the singing of hymns, reading scripture, teaching religious principles, discussing religious issues, proselytizing through literature and the spoken word, and displaying religious symbols.[67] And in a number of decisions the Court has held that the free speech and free exercise of religion clauses provide broad protection to private religious speech in public places.[68] As with other forms of speech, government can impose reasonable time, place, and manner restrictions.[69] But it is constitutionally barred from imposing restrictions on private speech, whether religious or nonreligious, because of its content. As the Court stated in a recent decision,

> [P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 767 (1995).

Thus, the Court has held that private religious speech in public parks cannot be subject to the unfettered discretion of local officials[70]; that the private distribution of religious literature cannot be prohibited[71]; that public facilities that are generally open for community use cannot exclude religious use or religious topics[72]; and that persons with a religious identity cannot be barred from participating in political affairs.[73] Most recently, the Court made clear that this broad protection for private religious speech in the public square extends as well to the display of religious symbols in public fora. In *Capitol Square Review & Advisory Board v. Pinette, supra*, the Court held that government could not preclude a private group from displaying a cross during the Christmas season in a public square traditionally used for expressive purposes, so long

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[66]For a more thorough treatment of what forms of religious expression are, and are not, permitted in the public schools, *see* CRS, *Prayer and Religion in the Public Schools: What Is, and Is Not, Permitted* (1996) (Report No. 93-680A).

[67]*See, e.g., Widmar v. Vincent*, 454 U.S. 263, 269 (1981) and *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

[68]*See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Heffron v. International Society for Krishna Consciousness, supra*; *International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992).

[69]*Heffron v. International Society for Krishna Consciousness, Inc., supra*, at 647.

[70]*Cantwell v. Connecticut, supra; Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951).

[71]*Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

[72]*Lamb's Chapel v. Center Moriches School District*, *supra*.

[73]*McDaniel v. Paty*, 435 U.S. 618 (1978).

as a reasonable observer would not perceive the display as a governmental endorsement of the faith represented by the symbol. In short, private religious speech — oral, written, and symbolic — is broadly protected by existing Constitutional law.

Judicial decisions on the constitutionality of religious expression by government in contexts other than the public schools have been less clear cut. In two cases the Supreme Court has held the establishment clause to bar government from displaying a quintessential religious symbol by itself in a public space but to permit the government to display such symbols together with secular symbols.[74] In another case, on the basis of a unique historical circumstance, the Court has held it to be constitutionally permissible for government to hire a chaplain to offer prayers at the opening of legislative session.[75] Lower federal and state courts have in several instances held the inclusion of religious symbols on government seals and insignia to be unconstitutional[76] and have reached various results with respect to the display of religious symbols in public places.[77]

As is the case with respect to public aid to religious institutions, this part of H.J.Res. 78 basically is directed at judicial decisions concerning religious expression on public property based on a separationist perspective. As noted above, existing

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[74]*Lynch v. Donnelly*, 465 U.S. 668 (1984) (government Christmas display including a creche and numerous secular symbols of Christmas such as a Santa Clause and reindeer, a small village, candy-striped poles, hundreds of colored lights, and a large banner reading "Season's Greetings" held not to violate the establishment clause) and *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (government display of a creche by itself in a county courthouse held unconstitutional but display of a menorah, Christmas tree, and a sign designating the display as a "Salute to Liberty" in front of a municipal building held constitutional).

[75]*Marsh v. Chambers*, 463 U.S. 783 (1983). The Court found that Congress had authorized the hiring of a chaplain within three days of recommending the Bill of Rights to the states and concluded, therefore, that it could not have intended the establishment clause to bar such a legislative chaplaincy.

[76]*See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), *cert. den.*, 517 U.S. 1201 (1996) (Latin cross on one quadrant of a city seal held unconstitutional); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. den.*, 495 U.S. 1120 (1990) (depiction of local Mormon temple on city seal held unconstitutional); and *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. den.*, 505 U.S. 1218 (1992) (a Latin cross, a dove carrying a branch, a crown and sword, and the name "Zion" on a city's seal, emblem, and logo held unconstitutional). *But see Murray v. City of Austin,* 947 F.2d 147 (5th Cir. 1991) (upholding the inclusion of a religious symbol on a city seal as constitutional).

[77]*See Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (permanent display of three crosses in city park held unconstitutional); *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir.), *cert. den.*, 66 U.S.L.W. 3474 (1998) (display of a creche by a city in a downtown park held not to violate the establishment clause); *Carpenter v. City and County of San Francisco*, 93 F.3d 627 (9th Cir. 1996), *cert. den.*, 117 S.Ct. 1250 (1997) (city's display of large Latin cross in a public park held to violate state constitution); *Americans United for the Separation of Church and State*, 980 F.2d 1538 (6th Cir. 1992) (private display of a menorah in a public park that was used a traditional public forum held constitutional); and *Harvey v. Cobb*, 811 F.Supp. 669 (M.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir.), *cert. den.*, 511 U.S. 1129 (1994) (display of Ten Commandments on courthouse wall held unconstitutional).

judicial interpretations of the First Amendment provide substantial protection for private religious expression, whether in the public schools or elsewhere; and H.J.Res. 78 does not appear to alter that. The constitutional infirmity identified by the courts under the establishment clause has been government's involvement with religious expression as sponsor, prescriber, or endorser; and it is these decisions that H.J.Res. 78 appears to overrule, at least to some extent.

It seems clear that H.J.Res. 78 would do more than legitimate student-initiated and student-led devotional exercises in the public schools. That is an avenue that has gained considerable currency in some circles following the decision of the U.S. Court of Appeals for the Fifth Circuit in *Jones v. Clear Creek Independent School District*.[78] After the Supreme Court in *Lee v. Weisman, supra*, held the establishment clause to be violated by prayers given by a clergyman at the principal's invitation at a public secondary school's graduation exercise, the Fifth Circuit held the clause **not** to be violated by nonsectarian, nonproselytizing commencement prayer initiated by members of the graduating class. As a result, some states adopted statutes authorizing student-initiated, nonsectarian, nonproselytizing prayer at school events. Those statutes have to date been struck down as unconstitutional in Mississippi[79] and Alabama,[80] and those results likely would be overturned by H.J.Res. 78. But H.J.Res. 78 also appears to legitimate an affirmative role for government in sponsoring or encouraging devotional exercises and other forms of religious expression..

The report of the House Judiciary Committee on the RFA repeatedly describes an affirmative governmental role under H.J.Res. 78 with respect to religious expression, although the scope of government's role is not always clear. The report of the House Judiciary Committee, for instance, states that the holdings of *Engel v. Vitale, supra*, and *Abington School District v. Schempp, supra*, that government "may not compose any official prayer or compel joining in prayer would not be overturned,"[81] but it also says that classroom prayer would be permitted. The operative standard, the report states, is that which the Supreme Court applied to group recitations of the Pledge of Allegiance in *West Virginia Board of Education v. Barnette, supra*, where the Court held that a student with religious objections could not be compelled to participate but that the exercise could proceed. Yet that is precisely the model that the Court held unconstitutional in *Engel* and *Abington* for religious exercises: School authorities prescribed the devotional exercises but allowed individual students to opt out. If *Barnette* is the model, then H.J.Res. 78 would seem to disallow only government composition of prayers to be recited in the classroom and to allow governmental sponsorship of voluntary devotional exercises.

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[78]977 F.2d 963 (5th Cir. 1992), *cert. den.* 508 U.S. 967 (1993).

[79]*Ingebretsen v. Jackson Public School District*, 88 F.3d 274 (5th Cir. 1996).

[80]*Chandler v. James*, 958 F.Supp. 1550 (M.D. Ala. 1997) and 958 F.Supp. 1062 (M.D. Ala. 1997). The case is now on appeal to the U.S. Court of Appeals for the Eleventh Circuit, and the Governor has asked the Supreme Court for a writ of mandamus to stop enforcement of the trial court's injunction.

[81]H. Rept. 105-543, *supra*, at 6.

An affirmative governmental role also seems to be implied by the statement in the Committee report that *"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.'"[82] At issue in *Wallace* was a state moment of silence statute that had been amended to specify that the moment could be used for voluntary prayer. The Supreme Court held that amendment to have an unconstitutional legislative purpose of returning prayer to the public schools. The implication seems to be that under H.J.Res. 78 government can sponsor a moment of silence that openly allows for voluntary silent prayer.

The report further asserts that the RFA would "overturn" *Stone v. Graham*, *supra*, which held unconstitutional a state statute mandating the posting of the Ten Commandments on schoolroom walls. Such a statute would, the report states, be "allow[ed], but not require[d]."[83] The test, it says, would be "whether symbols of differing faiths were afforded similar opportunity for display during their special seasons." Again, the implication is that the RFA would legitimate an affirmative government role with respect to the display of the Ten Commandments and other religious affirmations.

Finally, the report states that the RFA "would allow local governmental seals to reflect the people's religious beliefs, heritage, and traditions." The test, it says, is "whether government sought to establish an official religion, rather than outlawing traditions from a public forum."[84] Again, the connotation is for an affirmative governmental role in sponsoring religious expression.

Moreover, there does not appear to be any restriction in H.J.Res. 78 that would limit the government's affirmative role to the areas discussed in the Committee's report, *i.e.,* classroom prayer, graduation prayer, religious clubs, and the display of religious symbols on public property, including government seals and insignia. So long as government did not coerce anyone into participating in religious activities or, in the school context, prescribe the prayers, it could, apparently, sponsor or sanction religious expression in a multitude of venues where current interpretations of the First Amendment disallow it. Voluntary devotional exercises might be authorized at all public school events, including athletic contests and school assemblies.[85] Religious symbols might be placed on courtroom walls.[86] A judge might open his courtroom sessions with prayer.[87] A public school might have Warner Salman's "Head of Christ"

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[82]*Id.*, at 7 (quoting written statement of Rep. Istook before the Subcommittee on the Constitution on July 22, 1997, at 9).

[83]*Id.,* at 12.

[84]*Id.*, at 12 (quoting written statement of Rep. Istook, *supra*).

[85]*Contra Chandler v. James, supra.*

[86]*Contra Harvey v. Cobb, supra*.

[87]*Contra North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145 (4th Cir. 1991).

on permanent display.[88] It is not certain that H.J.Res. 78 would legitimate all of these forms of religious expression, but it does seem possible.

In sum, the language in H.J.Res. 78 regarding religious expression appears not to change existing constitutional law regarding private religious expression, both within and without the public schools. But it would seem to overturn a number of judicial interpretations of the religion clauses of the First Amendment that have limited government's involvement with religion in the public schools and elsewhere. More specifically, it appears to legitimate an affirmative governmental role with respect to religious expression. Government could not coerce anyone into participating in a religious exercise or, in the public schools, prescribe the prayers. But it could, apparently, sponsor or authorize religious expression in a wide variety of venues.

Additional Reading

CRS Report 98-65A, *The Law of Church and State: Developments in the Supreme Court Since 1980* (January 8, 1998) (77 pages).

CRS Report 98-387A, *The Law of Church and State: The Proposed Religious Freedom Amendment, H.J.Res. 78* (April 20, 1998) (6 pages)

CRS Report 98-163A, *The Law of Church and State: Public Aid to Sectarian Schools* (February 26, 1998) (6 pages).

CRS Report 93-680A, *Prayer and Religion in the Public Schools: What Is, and Is Not, Permitted* (October 7, 1996) (29 pages).

CRS Report 96-846A, *School Prayer: The Congressional Response, 1962-1996* (October 16, 1996) (36 pages).

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[88] *Contra Washegesic v. Bloomingdale Public Schools*, 33 F.3 679 (6th Cir. 1994), *cert. den.*, 514 U.S. 1095 (1995).