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In Opposition to the School Prayer Amendment

Geoffrey R. Stone†

Twenty years ago, in *Engel v. Vitale*,¹ the Supreme Court invalidated the practice of government sponsored prayer in the public schools. In 1951, the New York Board of Regents, "aware of the dire need . . . to pass on America's Moral and Spiritual Heritage to our youth,"² devised a prayer to be recited at the opening of classes each day to "strengthen . . . the belief in a Supreme Being."³ The prayer: "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'"⁴ The Board of Education for the New Hyde Park school district directed that the Regents' prayer be said at the beginning of each school day and that the students be led by the teacher or by a student singled out by the teacher for this purpose.⁵ Students who did not wish to participate were excused from participation or permitted to leave the classroom.⁶

The Court, in a six-to-one decision, held that "by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."⁷ Justice Black, speaking for the Court, explained that "this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave Eng-

† Professor of Law, University of Chicago. This article is adapted from my testimony before the Senate Judiciary Committee on September 16, 1982, concerning the proposed School Prayer Amendment. I should like to thank Philip Kurland, Cass Sunstein, and William Marshall for their helpful comments on earlier drafts of this article.

¹ 370 U.S. 421 (1962).

² Brief of the Board of Regents of the University of the State of New York as Amicus Curiae at 14, *Engel v. Vitale*, 370 U.S. 421 (1962), reprinted in 56 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 959, 974 (P. Kurland & G. Casper eds. 1975) [hereinafter cited as Kurland & Casper].

³ *Id.* at 15, reprinted in Kurland & Casper, *supra* note 2, at 975.

⁴ *Engel v. Vitale*, 370 U.S. at 422 (quoting the New York Regents' prayer).

⁵ *Id.*

⁶ *Id.* at 438 (Douglas, J., concurring).

⁷ *Id.* at 424. Justices Frankfurter and White did not participate in the decision. *Id.* at 436. Justice Stewart dissented. *Id.* at 444.

land and seek religious freedom in America.”⁸ As a result, Black noted, the framers of the first amendment “knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government’s stamp of approval.”⁹ They added the first amendment to the Constitution in part to assure “that the people’s religions [would] not be subjected to the pressures of government for change each time a new political administration is elected to office.”¹⁰ Thus, Black concluded, “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”¹¹

Moreover, Black maintained that “[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause.”¹² On the coercion issue, Black suggested that “laws officially prescribing a particular form of religious worship [may in fact] involve coercion,” for “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”¹³ Ultimately, however, Black found it unnecessary to rule on coercion, for “[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”¹⁴ The establishment clause, Black explained, was premised upon two central assumptions: “that a union of government and religion tends to destroy government and to degrade religion,”¹⁵ and “that governmentally established religions and religious persecutions go hand in hand.”¹⁶ Black concluded that, wholly apart from any coercion, “[t]he New York Laws officially prescribing the Regents’

⁸ *Id.* at 425.

⁹ *Id.* at 429.

¹⁰ *Id.* at 430.

¹¹ *Id.* at 425.

¹² *Id.* at 430.

¹³ *Id.* at 431.

¹⁴ *Id.* at 430.

¹⁵ *Id.* at 431.

¹⁶ *Id.* at 432.

prayer" were "inconsistent" with these assumptions.¹⁷ In answer to the argument that the Regents' prayer "does not amount to a total establishment of one particular religious sect to the exclusion of all others," and that "the Regents' official prayer is so brief and general [that] there can be no danger to religious freedom in its governmental establishment," Black called forth the words of the author of the first amendment, James Madison: "[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other[s]?"¹⁸

One year after *Engel*, in *School District of Abington Township v. Schempp*,¹⁹ the Court considered the constitutionality of a Pennsylvania law requiring all public schools to begin each day with a reading of "[a]t least ten verses from the Holy Bible."²⁰ Pursuant to this statute, the Abington Senior High School broadcast "opening exercises" through an intercommunications system while pupils attended their homerooms or advisory sections. These "exercises" included readings by selected students of the ten verses from the Bible. The school permitted the student reading the verses to select the passages and to read from any version he chose, although the school furnished copies of only the King James version. Following the readings, a student recited the Lord's Prayer, also over the intercommunications system. Students were asked to stand and join in repeating the prayer in unison. Students who wished not to participate could leave the classroom or simply remain silent.²¹

Building upon *Engel*, the Court, in an eight-to-one decision,²² held this practice unconstitutional. Justice Clark, speaking for the Court, recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being."²³ Indeed, Clark noted, our religious background "is evidenced today" in oaths of office and in the prayers with which legislative and judicial sessions tradition-

¹⁷ *Id.* at 433.

¹⁸ *Id.* at 436 (quoting J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 WRITINGS OF MADISON 183, 185-86 (G. Hunt ed. 1900-1910)). Madison's *Memorial and Remonstrance against Religious Assessments* is reprinted in full in *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 app. (1947) (Rutledge, J., dissenting).

¹⁹ 374 U.S. 203 (1963).

²⁰ *Id.* at 205 (quoting 24 PA. STAT. § 15-1516 (Purdon 1960)).

²¹ *Id.* at 206-07.

²² As in *Engel*, Justice Stewart dissented. *Id.* at 308.

²³ *Id.* at 213 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

ally begin.²⁴ Clark emphasized, however, that "religious freedom is . . . likewise . . . strongly embedded in our public and private life."²⁵ Thus, Clark explained, if either the purpose or primary effect of a law "is the advancement or inhibition of religion then the enactment [violates the first amendment]."²⁶ Clark added that this "wholesome 'neutrality'" does not reflect any hostility to religion but, rather, is designed to prevent "a fusion of governmental and religious functions or a concert or dependency of one upon the other."²⁷

Applying this "purpose or primary effect" standard to *Schempp* itself, Clark noted that the "exercises are prescribed as part of the curricular activities of students who are required by law to attend school" and that "such an opening exercise is a religious ceremony and was intended by the State to be so."²⁸ Clark thus concluded that the exercise violated "the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion."²⁹

The decisions in *Engel* and *Schempp* triggered heated debate. Not surprisingly, the reaction divided sharply along denominational lines: Catholics tended to condemn the decisions; Jews were generally supportive; Protestants were divided.³⁰ Since 1962, critics of the decisions have attempted to overturn them by constitutional amendment. More than fifty proposed constitutional amendments were introduced in Congress within three days of the *Engel* decision, and following *Schempp*, by the close of the Eighty-eighth Congress, more than one hundred fifty amendments had been introduced.³¹ Proposed constitutional amendments seeking to overturn these decisions have been introduced in Congress in every year since 1962. The Senate has voted twice on such proposals, the House once. In each instance the measure was defeated.³²

On May 17, 1982, President Ronald Reagan proposed a constitutional amendment to "remove the bar to school prayer estab-

²⁴ *Id.* at 213.

²⁵ *Id.* at 214.

²⁶ *Id.* at 222.

²⁷ *Id.*

²⁸ *Id.* at 223.

²⁹ *Id.* at 225.

³⁰ See Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUP. CT. REV. 1, 2.

³¹ CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, LEGAL ANALYSIS OF PRESIDENT REAGAN'S PROPOSED CONSTITUTIONAL AMENDMENT ON SCHOOL PRAYER 22 n.45 (1982).

³² *Id.* at 22-25.

lished by the Supreme Court and allow prayer back in our schools.”³³ The proposed amendment provides:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.³⁴

This amendment should not be enacted.

I. *Engel* AND *Schempp* EMBODY A REASONABLE INTERPRETATION OF THE FIRST AMENDMENT

Engel and *Schempp* are founded upon a perfectly sensible understanding of the establishment clause. They are in accord with the Court's precedents³⁵ and are consistent with the language, purposes, and history of the first amendment.

The practice of government sponsored prayer in the public schools implicates the most fundamental values underlying the first amendment. Unlike other establishment clause questions, the school prayer issue does not involve the mere *neutral* provision of wholly *secular* government services, such as fire and police protection, to both religious and secular institutions.³⁶ Nor does it involve the mere *neutral* and essentially *passive* acquiescence of government in the conduct of both religious and secular activities on government property, such as the distribution of leaflets on public streets.³⁷ Rather, government sponsored prayer in the public schools involves *direct* and *active* government involvement in the encouragement and structuring of perhaps the most basic form of religious activity—prayer itself. For government to compose, select, or promote prayers to be recited by children in a setting dedi-

³³ President's Message to the Congress Transmitting Proposed Legislation, 18 WEEKLY COMP. PRES. DOC. 664, 665 (May 17, 1982) (regarding Constitutional Amendment on Prayer in School) [hereinafter cited as President's Message].

³⁴ *Id.* at 666.

³⁵ See Kurland, *supra* note 30, at 25-29.

³⁶ Cf. *Wolman v. Walter*, 433 U.S. 229 (1977) (constitutional for state to provide parochial school pupils with the same textbooks, standardized testing, and diagnostic services it provides public school pupils); *Tilton v. Richardson*, 403 U.S. 672 (1971) (constitutional to provide federal construction grants to church-affiliated universities for buildings and facilities to be used exclusively for secular educational purposes). But cf. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (unconstitutional to reimburse parochial school for expenditures on teacher salaries).

³⁷ Cf. *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Cf. also *Cox v. New Hampshire*, 312 U.S. 569 (1941) (parading on public streets); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (soliciting on public streets).

cated specifically to the inculcation and "preservation of . . . values"³⁸ would clearly seem to undermine the constitutionally compelled separation of church and state.

Three arguments are most commonly offered in opposition to this conclusion. First, it is sometimes said that *Engel* and *Schempp* are predicated upon a misguided notion of "neutrality." Under this view, the establishment clause "command[s] impartiality . . . [only] as among the various sects of theistic religions, that is, religions that profess a belief in God. But as between theistic religions and those nontheistic creeds that do not acknowledge God, the precept of neutrality . . . [does] not obtain."³⁹ Accordingly, so-called "nondenominational" prayers, such as the Regents' prayer invalidated in *Engel*, pose no establishment clause issue.

At the outset, it should be emphasized that the proposed constitutional amendment cannot be defended on this basis, for as its proponents concede, "[t]he proposed amendment . . . does not . . . limit prayer in public schools . . . to 'nondenominational prayer.'"⁴⁰ In any event, this understanding of the clause seems inconsistent with the central premise of religious toleration upon which the first amendment is founded, for under this view the establishment clause would not protect the members of such faiths as "Buddhism, Taoism, Ethical Culture, Secular Humanism and others."⁴¹ A more inclusive and more reasonable interpretation, long embraced by the Court, holds not only that the establishment clause forbids "governmental preference of one religion over another," but also that it takes "every form of propagation of religion out of the realm of things which could directly or indirectly be made public business."⁴² Under this interpretation, government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and [it cannot] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."⁴³

³⁸ *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

³⁹ Rice, *The Prayer Amendment: A Justification*, 24 S.C.L. Rev. 705, 710 (1972).

⁴⁰ The Administration's Proposed Constitutional Amendment Relating to School Prayer 28 (May 17, 1982) (on file with *The University of Chicago Law Review*) [hereinafter cited as Administration Statement].

⁴¹ *Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961). See also Cahn, *On Government and Prayer*, 37 N.Y.U. L. Rev. 981, 993-94 (1962) (listing "types of religious conscience" and denominations that would find "nondenominational prayer" such as the Regents' prayer unacceptable).

⁴² *School Dist. v. Schempp*, 374 U.S. 203, 216 (1963) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting)).

⁴³ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (footnotes omitted).

Moreover, even if the less inclusive interpretation were supportable, the very concept of a "nondenominational prayer" is self-contradictory. There are well over fifty different theistic sects in the United States,⁴⁴ each of which has its own tenets regarding the appropriate nature and manner of prayer. Any effort to compose a truly nondenominational prayer must thus produce, at best, a sterile litany virtually devoid of true religious meaning. Indeed, even the Regents' prayer in *Engel* embodies numerous sectarian presumptions—that it is appropriate to pray orally, in unison with others, and in public; that it is appropriate to invoke divine blessing for one's parents; that the appropriate subject of prayer is a unitary, immanent, and metaphysical "God" who is "almighty"; that the appropriate relationship of human beings to "God" is one of supplication and dependence; and that it is appropriate to "beg."⁴⁵ Finally, even if one could compose a meaningful nondenominational prayer, there is the very real and widely recognized danger that the "official promotion of common-denominator religious practices" could contribute to the development of an "official folk religion" and thus undermine the "vitality . . . of the historic faiths."⁴⁶ This is, of course, one of the evils that the first amendment was designed to prevent, for as the Court observed in *Engel*, one of the assumptions underlying the establishment clause is "that a union of government and religion tends . . . to degrade religion."⁴⁷

A second objection that is occasionally lodged against *Engel* and *Schempp* turns on the notion that the school prayer issue involves a conflict between the establishment clause and the free exercise clause and that the Court did not give sufficient weight to the free exercise interests of those students and parents who desire government sponsored prayer in the public schools.⁴⁸ This argument was first elaborated by Justice Stewart in his dissenting opinion in *Schempp*. He argued that "a compulsory state educational system so structures a child's life" that "parents who want their children exposed to religious influences" might not be able ade-

⁴⁴ See BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1981, at 52-53 (102d ed. 1981).

⁴⁵ Prepared Testimony of William VanAlstyne on S.J. Res. 199 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 7-9 (Sept. 16, 1982) (on file with *The University of Chicago Law Review*). For a similar argument, see Cahn, *supra* note 41, at 993-94.

⁴⁶ Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1065 (1963); see also Kurland, *supra* note 30, at 30-31.

⁴⁷ 370 U.S. at 431.

⁴⁸ See Administration Statement, *supra* note 40, at 21.

quately to "fulfill that wish off school property and outside school time."⁴⁹ Although Stewart conceded that such parents would have a right under the free exercise clause to send their children to private or parochial school,⁵⁰ he maintained that this consideration was "too facile to be determinative" because, as the Court had recognized in *Murdock v. Pennsylvania*,⁵¹ "[f]reedom of speech, freedom of the press, [and] freedom of religion are available to all, not merely to those who can pay their own way."⁵²

This argument proves too much, for it would logically authorize not only school prayer, but "state sponsorship of the full panoply of denominational instruction available in private schools."⁵³ Why, after all, should the line be drawn at one highly ritualistic prayer? Moreover, Justice Stewart's reliance on *Murdock* is fundamentally misplaced, for there is a critical difference for first amendment purposes between the proposition, established in *Murdock*, that government may not unreasonably *tax* religious activity, and the proposition, put forth by Justice Stewart, that government may affirmatively *promote* such activity.⁵⁴ Finally, it should be emphasized that the school prayer issue does not pose a "true" conflict between the establishment clause and the free exercise clause, for as even Justice Stewart appeared to concede, the refusal of government to sponsor prayer in the public schools would not itself violate the free exercise clause.⁵⁵

This is not to say that Justice Stewart's theory is wholly without foundation. To the contrary, as the Court noted in *Schempp*, there may indeed be circumstances in which a practice that would otherwise violate the establishment clause would be upheld because of the nature and strength of competing "free exercise" interests. The Court suggested, for example, that the government's employment of chaplains to serve members of the armed forces might not be unconstitutional, for in such circumstances "the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious ser-

⁴⁹ *Schempp*, 374 U.S., at 313 (Stewart, J., dissenting).

⁵⁰ *Id.* at 312-13 (Stewart, J., dissenting) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

⁵¹ 319 U.S. 105 (1943).

⁵² 374 U.S. at 313 (Stewart, J., dissenting) (quoting *Murdock v. Pennsylvania*, 319 U.S. at 111).

⁵³ See Pollak, *The Supreme Court 1962 Term—Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 75 (1963).

⁵⁴ Cf. *Harris v. McRae*, 448 U.S. 297, 318 (1980) (upholding the Hyde Amendment's limitation on the use of Medicaid funds for abortions).

⁵⁵ See *Schempp*, 374 U.S. at 316 (Stewart, J., dissenting).

vices to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths."⁵⁶ That surely is not the case with respect to students in the public schools. Given the many alternatives available, the prohibition of government sponsored prayer in the public schools hardly seems a significant obstacle to the ability of students to practice their faiths.⁵⁷

The third argument that is occasionally advanced in opposition to *Engel* and *Schempp* is that "the history of the Establishment Clause . . . [does] not support the Supreme Court's conclusion that public prayer in schools is unconstitutional."⁵⁸ In his opinion for the Court in *Engel*, Justice Black suggested that the result was virtually dictated by the intent of the framers. In fact, it seems fair to say that Black's use of history was somewhat "overdrawn,"⁵⁹ for a careful review of the record indicates more ambiguity than Black acknowledges. This is not to say, however, that the claim that *Engel* and *Schempp* are contrary to the intent of the framers is any less "overdrawn." As is often the case, the appeal to the intent of the framers yields mixed and conflicting conclusions. The point, of course, is not that history is no guide. It is, rather, that resort to the intent of the framers is a slippery business that must be approached with caution.⁶⁰

There are essentially three facets to the historical attack on the Court's decisions. At the most specific level, it is argued that "the framers of the first amendment did not intend to forbid pub-

⁵⁶ *Id.* at 226 n.10.

⁵⁷ See *infra* notes 122-46 and accompanying text for a discussion of alternatives that may be available even during school hours or on school grounds. There is, finally, another aspect of Stewart's argument that merits note. Stewart argued in *Schempp* that a refusal to permit religious exercises in the schools may be seen, "not as the regulation of state neutrality, but rather as the establishment of a religion of secularism." 374 U.S. at 313 (Stewart, J., dissenting). But this, too, proves too much. As the Court observed in *Schempp*, although "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion," *id.* at 225, a ban on government sponsored prayer in the public schools hardly violates that precept, *id.*; Kauper, *supra* note 46, at 1054-55. And although the "secularism" of the public schools may be a cause for concern, there are numerous remedies available that are much less intrusive on establishment clause values than the institution of government sponsored prayer. See *infra* notes 122-46 and accompanying text.

⁵⁸ Administration Statement, *supra* note 40, at 20.

⁵⁹ Pollak, *supra* note 53, at 65; see Kauper, *supra* note 46, at 1050-51; Rice, *supra* note 39, at 710-15.

⁶⁰ See Kurland, *supra* note 30, at 22. See generally Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981) (discussing the role of the framers' intent in constitutional interpretation).

lic prayer.”⁶¹ To support this contention, the critics of *Engel* and *Schempp* point out, for example, that the First Congress, which drafted the first amendment, “retained a chaplain to offer public prayers” and, “the day after proposing the First Amendment, called on President Washington to proclaim ‘a day of public thanksgiving and prayer.’”⁶²

Although the framers of the first amendment did not intend to forbid such public prayer, that is not the issue. For as the Court made clear in both *Engel* and *Schempp*, those decisions turned on the very special characteristics of *school prayer*. In *Engel*, for example, Justice Black explained that “nothing in the decision reached here . . . is inconsistent with . . . [the] many manifestations in our public life of belief in God. . . . [Most] patriotic or ceremonial occasions bear no true resemblance to the unquestioned *religious exercise* that the State of New York has sponsored in this instance.”⁶³ Similarly, in *Schempp*, Justice Clark expressly distinguished the clearly “religious” exercises that were “prescribed as part of the curricular activities of students who are required by law to attend school”⁶⁴ from such matters as the inclusion in oaths of office of the final supplication “[so] help me God” and the traditional commencement of legislative and judicial sessions with an opening prayer.⁶⁵

Thus, that “the framers did not intend to forbid public prayer”⁶⁶ generally tells us very little about their intent with respect to the very special problem of government sponsored prayer in the public schools, where the environment is dedicated to the inculcation of values and “where immature and impressionable children are [especially] susceptible to a pressure to conform and to participate in the expression of religious beliefs.”⁶⁷ And, of course, the framers themselves gave no distinct consideration to the particular question of devotional exercises in public schools, for education as the framers knew it was confined almost exclusively to private schools.⁶⁸ Finally, even if the framers had expressed an intent on this question, it is not at all clear that it is sensible for

⁶¹ President's Message, *supra* note 33, at 665.

⁶² Administration Statement, *supra* note 40, at 1 (quoting Rice, *supra* note 39, at 715).

⁶³ 370 U.S. at 435 n.21 (emphasis added).

⁶⁴ 374 U.S. at 223.

⁶⁵ *Id.* at 213.

⁶⁶ President's Message, *supra* note 33, at 665.

⁶⁷ Kauper, *supra* note 46, at 1046. See Schwengel, *The Prayer Amendment: A Rebuttal*, 24 S.C.L. Rev. 723, 730 (1972).

⁶⁸ See *Schempp*, 374 U.S. at 238 (Brennan, J., concurring).

their intent to control our present understanding of the clause. The religious composition of our society and the general structure of American education have changed fundamentally since the enactment of the first amendment. We may well be truer to the intent of the framers if we look not to their specific intent based on their immediate circumstances but to whether, in the light of changed circumstances, a challenged practice tends to promote the type of interdependence of religion and state that the first amendment was designed to prevent.

The second facet of the historical attack focuses on the Court's interpretation of the establishment clause at a more general level. In attempting to come to grips with the ambiguities of the clause, the Court often has sought guidance in the writings of Thomas Jefferson and of James Madison, the original author of the first amendment.⁶⁹ Indeed, to "anyone conversant . . . with Madison's Memorial of 1785" and with the Court's reliance on Madison's views, the decision in *Engel* "ought scarcely to have been surprising."⁷⁰ Critics of the Court's decisions maintain, however, that the Court has paid too much attention to the views of Jefferson and Madison and not enough attention to the views of others who contributed to the framing of the first amendment. These critics argue that a consideration of the other views would lead to an understanding of the clause considerably narrower than that embraced by the Court. The Reagan Administration argues, for example, that a consideration of these other views would demonstrate that "the concern the Congress wished to address by the amendment was the fear that the federal government might establish a national church, use its influence to prefer certain sects over others, or require or compel persons to worship in a manner contrary to their conscience," and that "in addressing that concern, Congress did not want to act in a manner that would be harmful to religion generally or would defer to the small minority who held no religion."⁷¹ This interpretation is not wholly implausible, but neither is the Court's. To the contrary, on any fair reading of the record there is "sufficient historical evidence to justify" the Court's interpretation.⁷² At best, then, the contrary interpretation

⁶⁹ See, e.g., *Engel v. Vitale*, 370 U.S. at 436; *Everson v. Board of Educ.*, 330 U.S. 1, 11-13, 16 (1947).

⁷⁰ Cahn, *supra* note 41, at 986.

⁷¹ Administration Statement, *supra* note 40, at 11-12. This is, of course, merely another version of the "neutrality" argument. See *supra* notes 39-47 and accompanying text.

⁷² Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1463 (1966).

warrants the traditional Scotch verdict: not proven.

The final facet of the historical attack turns not on the intent of the framers, but on the observation that "there has been a long tradition of including some form of prayer in the public schools ever since their inception."⁷³ Although the existence of such a "tradition" may be relevant to constitutional interpretation, it is hardly dispositive. Otherwise, such landmark decisions as *Brown v. Board of Education*⁷⁴ and *New York Times Co. v. Sullivan*⁷⁵ would not stand. In any event, at the time of the *Engel* and *Schempp* decisions, the "tradition" of school prayer was not nearly as firmly entrenched as the proponents of the proposed amendment would like to believe. By 1962, a number of states had outlawed school prayer entirely,⁷⁶ and only twenty-two states had actually sanctioned it by statute or judicial decision.⁷⁷ A 1962 survey revealed that less than half the school systems in the United States conducted Bible readings and only about one third of the systems required prayers at the beginning of the school day.⁷⁸

The central holding of both *Engel* and *Schempp* is that government sponsored prayer in the public schools violates the establishment clause because its purpose and primary effect is to aid religion.⁷⁹ This conclusion is founded upon a reasonable understanding of the first amendment.⁸⁰ Moreover, these decisions have

⁷³ Administration Statement, *supra* note 40, at 5.

⁷⁴ 347 U.S. 483 (1954).

⁷⁵ 376 U.S. 254 (1964).

⁷⁶ See, e.g., *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910); *Herold v. Parish Bd. of School Directors*, 136 La. 1034, 68 So. 116 (1915); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N.W. 846 (1902), *aff'd on rehearing*, 65 Neb. 876, 93 N.W. 169 (1903); *State ex rel. Finger v. Weedman*, 55 S.D. 343, 226 N.W. 348 (1929); *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 P. 35 (1918); *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 44 N.W. 967 (1890). For discussion of these cases, see D. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 108-32 (1965); Harrison, *The Bible, the Constitution and Public Education*, 29 TENN. L. REV. 363, 386-89 (1962); Note, *Bible Reading in Public Schools*, 9 VAND. L. REV. 849 (1956).

⁷⁷ Comment, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 87 (1963).

⁷⁸ See J. LAUBACH, *SCHOOL PRAYERS* 32-33 (1969).

⁷⁹ See *supra* notes 14-18, 26-29 and accompanying text.

⁸⁰ Indeed, long before these decisions, a number of state courts had embraced similar constructions of analogous state constitutional provisions. See cases and authorities cited *supra* note 76. Moreover, of the nine Justices who participated in *Engel* and *Schempp*, only Justice Stewart dissented. The decisions were thus endorsed not only by the so-called Warren Court "liberals," but also by such moderate-to-conservative Justices as Harlan, Clark, and White. And, for what it is worth, the academic commentary has generally been quite favorable. See, e.g., Cahn, *supra* note 41; Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963); Kauper, *supra* note 46; Kurland, *supra* note 30; Pollak, *supra* note 53. But see Griswold, *Absolute is in the Dark—A*

clearly withstood the test of time. Despite dramatic changes in the makeup of the Court, *Engel* and *Schempp* have never been called into question. To the contrary, they remain important and vital components of the Court's contemporary interpretation of the first amendment.⁸¹ Thus, those who support the proposed constitutional amendment must forthrightly recognize that they seek to overturn not just two decisions of the Supreme Court, but an established precept of our first amendment jurisprudence.

II. THE PROPOSED AMENDMENT IS UNSOUND AS A MATTER OF POLICY

Even if *Engel* and *Schempp* were "wrongly" decided, the proposed constitutional amendment still should not be enacted. However well-meaning the amendment's proponents may be, the policies underlying the amendment are fundamentally unsound. This is so not only for the reasons elaborated in *Engel* and *Schempp*, but for at least two additional reasons as well.

First, there is the problem of coercion. Almost everyone would agree that government should not *compel* an individual to recite a prayer or affirm a belief that is contrary to his religious faith. Such a practice could not be squared with the establishment clause, the free exercise clause, or with our traditions as a free society. The framers of the proposed amendment recognize this, for the proposed amendment provides not only that "[n]othing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions," but also that "[n]o person shall be required . . . to participate in prayer."⁸²

Although recognizing the right of the individual not to be coerced "to participate in prayer," the proponents of the proposed amendment explicitly reject "the 'implied coercion' theory of [*Engel*]" and substitute in its stead what they term a "[r]easonable accommodation" of the conflicting interests.⁸³ This accommodation focuses on the interests of school children. The amendment's supporters conclude that "persons who do not wish to participate in prayer should be excused or may remain silent, but that should not

Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 UTAH L. REV. 167 (1963); Rice, *supra* note 39.

⁸¹ For a recent example, see *Stone v. Graham*, 449 U.S. 39 (1980), in which the Court, relying upon *Schempp* and *Engel*, held unconstitutional a Kentucky statute requiring the posting of a copy of the Ten Commandments on the wall of each public school classroom.

⁸² President's Message, *supra* note 33, at 666.

⁸³ Administration Statement, *supra* note 40, at 32.

interfere with or deny the rights of others who do wish to participate.”⁸⁴ There are at least two difficulties with this seemingly straightforward analysis. First, as the Court recognized in *Engel* and *Schempp*, there are important societal, institutional, and constitutional interests at stake here. These interests go beyond those of the children immediately affected; wholly apart from any coercion, the government has no business promoting religion in the public schools.⁸⁵ Second, and more to the point, the “reasonable accommodation” of the amendment’s proponents is too facile—it is premised upon a naive and simplistic conception of “voluntary” participation.

As the Court noted in *Engel*, “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”⁸⁶ The problem is especially acute, of course, when the member of the religious minority is a child and the “indirect coercive pressure” is brought to bear in a school environment. Social psychologists and sociologists have long observed that children place special importance on how they are regarded by their classmates. The urge to conform to their classmates’ attitudes can often induce children to go along with the majority and do or say things that they are convinced are wrong, or that they would not otherwise do or say.⁸⁷ School prayer poses an especially “cruel dilemma,”⁸⁸ for as a number of state courts have long recognized, “[t]he exclusion of a pupil from [religious] exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school.”⁸⁹ Thus, as Justice Frankfurter has explained: “That a child is offered an alternative [to participation] may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside

⁸⁴ *Id.* at 34.

⁸⁵ See *supra* notes 12-17, 26-29, 79-80 and accompanying text.

⁸⁶ *Engel*, 370 U.S. at 431.

⁸⁷ See Choper, *supra* note 80, at 344, and authorities cited therein.

⁸⁸ *Schempp*, 374 U.S. at 290 (Brennan, J., concurring).

⁸⁹ *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 351, 92 N.E. 251, 256 (1910). See also *Herold v. Parish Bd. of School Directors*, 136 La. 1034, 1050, 68 So. 116, 121 (1915) (“[t]he exclusion of a pupil [from religious exercises] puts him in a class by himself; it subjects him to a religious stigma”); *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 200, 44 N.W. 967, 975 (1890) (a pupil excused from religious exercises “loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult”).

the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to [conform]."⁹⁰

Ultimately, of course, the question turns on what we mean by "coercion." The question is not one of semantics. The answer will not be found in a dictionary. It will be found in the definition not of a word, but of a relationship—the relationship of citizen to state in our society. How much pressure is "too much"? The answer depends not only on the amount of pressure, but on other factors as well: Who is the individual? What is he being "pressured" to do? What competing interests are furthered by the government action that generates the "pressure" to conform?

In the school prayer context, the individual is a child. Moreover, the pressure is not to do homework or to be on time for class, but to recite a prayer that may contradict the child's religious faith. He is pressured, in other words, to do an act that runs counter to our most cherished traditions of individual dignity and religious freedom. Further, the pressure to conform in this context, however indirect or unintended, is substantial indeed. The proponents of the amendment argue, however, that the pressure is justified by the government's interest in enabling those who wish to pray in the public schools to do so.⁹¹ I cannot agree. Although recognition of a "dissenter's veto" is always troubling, our historic commitment to religious freedom is founded on protecting the rights of dissenters. Moreover, the government interest said to support the proposed amendment seems attenuated at best. Given the many alternatives available to those who wish to pray,⁹² the inability to participate in government sponsored prayer in the public schools hardly seems a significant obstacle to the practice of their faiths. The proposed amendment is thus *not* a "reasonable accommodation."

Before leaving the coercion issue, there are two subsidiary points I should like to address, if briefly. First, it is sometimes said that the plight of the nonconforming student should not be given

⁹⁰ *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring). The result of this pressure to conform is illustrated in *Schempp*, where the children's father permitted them to participate in religious activities that were contrary to their religious beliefs because he did not want his children to be labeled as "odd balls" or atheists and to "have to stand in the hall outside their 'homeroom'" as if they were being punished "for bad conduct." 374 U.S. at 208 & n.3 (quoting the district court's summary of the father's testimony, 201 F. Supp. 815, 818 (1962)).

⁹¹ See *supra* notes 83-84 and accompanying text.

⁹² See *infra* notes 122-46 and accompanying text.

much weight because "these pressures to conform are part of the normal social pattern[,] and part of the price of being a religious nonconformist is the social stigma which all nonconformists have to bear."⁹³ Indeed, the experience of being "set apart" in this manner arguably may be "educational" and perhaps even "desirable."⁹⁴ This view is misguided. Religious and other minorities have enough trouble without government adding to their burdens. Government should not actively increase the price one pays for being a religious nonconformist.⁹⁵

Second, it is occasionally suggested⁹⁶ that to ban school prayer to protect the rights of dissenters would be inconsistent with *West Virginia State Board of Education v. Barnette*,⁹⁷ in which the Court, without holding that the use of the pledge of allegiance was prohibited entirely, held that a state could not constitutionally compel objecting school children to recite the pledge.⁹⁸ The situations, however, are quite different. In *Barnette*, the government used its schools to foster allegiance to the state. This is a legitimate and well-acknowledged function of government, "provided that [the state] does not infringe the individual's right of intellectual [or religious] nonconformity."⁹⁹ School prayer, however, involves a government effort to foster religion, an end forbidden to it by the first amendment. There is thus no legitimate government interest sufficient to offset the competing interest of dissenters in being free of pressures to conform.¹⁰⁰

My second objection to the policy underlying the proposed amendment arises out of the fact that, if enacted, the amendment would authorize not only so-called "nondenominational" prayer, but expressly sectarian prayer as well. Recognizing the almost insurmountable problems inherent in the formulation and implementation of "nondenominational" prayer and the likelihood that "[a] limitation to 'nondenominational prayer' might well be construed . . . to rule out virtually any prayer except one practically devoid of religious content," the framers of the proposed amendment specifically drafted it so as not to "limit prayer in public

⁹³ Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 495 (1955).

⁹⁴ Griswold, *supra* note 80, at 177.

⁹⁵ See Choper, *supra* note 80, at 347.

⁹⁶ See Administration Statement, *supra* note 40, at 33-34.

⁹⁷ 319 U.S. 624 (1943).

⁹⁸ *Id.* at 641-42.

⁹⁹ Pollak, *supra* note 53, at 73.

¹⁰⁰ See Choper, *supra* note 80, at 348-60; Pollak, *supra* note 53, at 72-73. But see Kauper, *supra* note 46, at 1062-63.

schools . . . to 'nondenominational prayer.'"¹⁰¹

As the Court has observed, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."¹⁰² In *Engel*, for example, Justice Black traced the tumultuous history of *The Book of Common Prayer*, which was created under government direction in England in the sixteenth century and which "set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England."¹⁰³ As Justice Black explained, the controversies over the book "repeatedly threatened to disrupt the peace" as competing groups struggled "to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted."¹⁰⁴ Other groups, "lacking the necessary political power to influence the Government," decided "to leave England" and to "seek freedom in America."¹⁰⁵ The framers of the first amendment thus "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval," and as Black noted the "First Amendment was added to the Constitution" with this evil in mind.¹⁰⁶ The lesson of history is that "competition among religious sects for political and religious supremacy has occasioned considerable civil strife"; part of what is at stake in establishment clause cases, then, is the prevention of "that kind and degree of government involvement in religious life that . . . is apt to lead to strife and . . . strain a political system to the breaking point."¹⁰⁷

By authorizing government sponsored *sectarian* prayer in the public schools, the proposed amendment is likely to produce precisely the conflict and "division along religious lines" the first

¹⁰¹ Administration Statement, *supra* note 40, at 28.

¹⁰² *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). See *Meek v. Pittenger*, 421 U.S. 349, 372 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 795-96 (1973); *Walz v. Tax Comm'n*, 397 U.S. 664, 694-95 (1970) (Harlan, J., concurring); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691-92 (1969). For a critical view of the "political divisiveness test," see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

¹⁰³ *Engel*, 370 U.S. at 426.

¹⁰⁴ *Id.* at 426-27.

¹⁰⁵ *Id.* at 427.

¹⁰⁶ *Id.* at 429.

¹⁰⁷ Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 796 (1973) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring)). See also Cahn, *supra* note 41, at 983.

amendment was designed to prevent. Indeed, the religious strife generated in this context is likely to be especially severe, for here we deal not with mere incidental religious differences over essentially secular issues,¹⁰⁸ nor even with religious differences over secular issues that might differentially affect different religious groups,¹⁰⁹ but with religious differences over what are in the most fundamental sense purely religious issues. Endless and no doubt occasionally bitter disputes would arise over the use of the Old or the New Testament, the version of the New Testament, the choice of texts, the unitarian or trinitarian form of address, and so on. Moreover, the stakes in such disputes are high. The "winners" receive the imprimatur of government for their faith. The "losers" must face the prospect that their children will encounter the "cruel dilemma" of either reciting a prayer that is contrary to their beliefs, conspicuously remaining silent, or leaving the room while their classmates engage in prayer. Like *The Book of Common Prayer*, the practice authorized by the proposed amendment would intensify religious division as competing groups struggle "to impress their particular views upon the Government and obtain [prayers] more suitable to their respective notions of how religious services should be conducted."¹¹⁰ Whether or not such a practice is unconstitutional, it is surely unwise.

There is, moreover, another aspect to this issue. The Court has consistently "adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'"¹¹¹ This is, indeed, the "clearest command" of the first amendment.¹¹² Even Justice Stewart, the lone dissenter in *Engel* and *Schempp*, agreed that the constitutionality of the challenged practices "would be extremely doubtful" if the government designated "a particular religious book" or a "denominational

¹⁰⁸ Cf. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (upholding the Hyde Amendment's limitation on the use of Medicaid funds for abortions) ("[T]hat the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.").

¹⁰⁹ Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (holding unconstitutional state statutes providing state aid to church-related schools) ("Political fragmentation and divisiveness on religious lines are . . . likely to be intensified" when "successive and very likely permanent annual appropriations . . . benefit relatively few religious groups.").

¹¹⁰ *Engel v. Vitale*, 370 U.S. at 426-27.

¹¹¹ *Larson v. Valente*, 102 S. Ct. 1673, 1684 (1982) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)). See *Epperson v. Arkansas*, 393 U.S. 97, 104-07 (1968); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

¹¹² *Larson v. Valente*, 102 S. Ct. 1673, 1683 (1982).

prayer.”¹¹³ And even so staunch an opponent of *Engel* and *Schempp* as Professor Charles Rice agrees that the establishment clause “command[s] impartiality on the part of government as among the various sects of theistic religions.”¹¹⁴

The proposed constitutional amendment, by authorizing government sponsored *sectarian* prayer, directly contravenes this previously unquestioned principle of interfaith neutrality. Let us suppose that the proposed amendment is enacted and that a school board thereafter authorizes the use of a prayer referring specifically to Jesus as “Our Lord.” A Jewish student protests, but the school authorities tell him that if he does not wish to participate he may “sit quietly, occupy [himself] with other matters, or leave the room.”¹¹⁵ The student and his parents file suit, claiming that the prayer violates the “clearest command” of the establishment clause—that government may not “aid one religion” or “prefer one religion over another.” What is the court to do?

There are at least three alternatives. First, the court might construe the amendment as authorizing only “nondenominational” prayer. As already indicated, however, even an amendment so limited would pose substantial problems¹¹⁶ and would involve the courts in the awkward task of determining when a prayer is “nondenominational.” In any event, such a construction would fly in the face of the intent of the framers, who specifically intend not to “limit prayer in public schools . . . to ‘nondenominational prayer.’”¹¹⁷

Second, the court might hold that although the school board may authorize sectarian prayer, it must do so in conformity with the neutrality principle. What, though, does this mean? Must the board follow an “equal time” policy? How is “equal” to be defined? In terms of the religious composition of the community? If the community is five percent Jewish, do Jews get to write the prayer one day out of twenty? What if the Methodists disagree with the Episcopalians who disagree with the Catholics? Should the court insist on a policy of “separate but equal”? The plain fact is that the notion of sectarian prayer is irreconcilable with the principle of neutrality.

Finally, the court might treat the issue as one to be left en-

¹¹³ *Schempp*, 374 U.S. at 315 (Stewart, J., dissenting).

¹¹⁴ Rice, *supra* note 39, at 710.

¹¹⁵ Administration Statement, *supra* note 40, at 32.

¹¹⁶ See *supra* notes 44-47 and accompanying text.

¹¹⁷ Administration Statement, *supra* note 40, at 28.

tirely to the discretion of the local school board. This appears to conform to the intent of the amendment's proponents, who state that the proposed amendment "does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for [judicial intervention] to determine whether or not particular prayers are appropriate for individuals or groups to recite."¹¹⁸ This view, if accepted, would render the neutrality principle nugatory and would leave the members of minority faiths at the mercy of the majority. Such a result is incompatible with this nation's longstanding commitment to religious toleration. It should not be enacted into the Constitution.

III. THE AMENDMENT IS UNNECESSARY

Even if *Engel* and *Schempp* were "wrongly" decided, and even if the policies underlying the proposed constitutional amendment were sound, the proposed amendment still should not be enacted. The Constitution of the United States should not be altered merely to "correct" an "erroneous" or "unpopular" decision of the Supreme Court. Such a practice, once established as precedent, may prove too easy to follow and may lead, ultimately, to political and constitutional instability.¹¹⁹ The Constitution should be amended only with respect to "fundamental matters of constitutional concern" and only when "the necessity and desirability of the amendment . . . [are] clearly demonstrated."¹²⁰ This is especially true with respect to the Bill of Rights, which has never been amended and has served quite well for almost two hundred years.

The proposed amendment does not deal with a fundamental matter of constitutional concern. Although the role of religion in our society is of profound importance, the amendment itself deals with only a marginal issue. It does not attempt to define the relationship of government and religion in any principled manner, but

¹¹⁸ *Id.*

¹¹⁹ The Constitution has been amended only three times to "correct" decisions of the Supreme Court. The eleventh amendment overturned *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that a state was subject to suit by a citizen of another state; the fourteenth amendment overturned *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which held that blacks were not "citizens"; and the sixteenth amendment overturned *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), which held an unapportioned direct tax on income to be unconstitutional.

¹²⁰ *School Prayer: Hearings on S.J. Res. 148 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 605 (1966) (statement of Paul Kauper, Professor of Law, University of Michigan Law School).

tries to resolve a narrow, quite specific dispute.¹²¹

Moreover, the necessity and desirability of the amendment have not been demonstrated. Why should the Constitution be amended to authorize government sponsored prayer in the public schools? What values or interests are threatened by the current state of affairs? Presumably, there is a sense among those who support the amendment that our schools should do more to promote the moral education of the young, that public education should strive to instill a sense of morality and reverence in students, and that if the public schools exclude religion they will contribute to the philosophy of secularism. These are legitimate concerns, but I do not think they are addressed by the proposed amendment.

The brief recitation of a prayer in unison in the classroom is hardly likely to contribute significantly to the moral education of the young. It is at best a deceptively easy way to avoid the problem of moral education in the public schools. Nor is the practice of government sponsored prayer a particularly effective means to neutralize the potentially secularistic tendencies of public education. The value of such prayer is more symbolic than real. Students are apt to regard it as an irrelevant ritual to be dispensed with before beginning the serious business of the day.

Moreover, the decisions in *Engel* and *Schempp* exclude neither religion nor prayer from the public schools, but only *officially sanctioned* religious activity. They prohibit not religion, but government's affirmative promotion of prayer and its direct and active involvement in religious expression. Nothing in any decision of the Supreme Court forbids a student to engage in private, nondisruptive prayer. As both the Supreme Court and the lower federal and state courts have recognized, *Engel* and *Schempp* leave ample room for religion in the school environment.¹²²

¹²¹ See *id.*

¹²² The Reagan Administration has significantly overstated the likely impact of the proposed amendment. For example, in describing court rulings regarding school prayer, the Administration points to a case in which "a school principal's order forbidding kindergarten students from saying grace before meals on their own initiative was upheld," Administration Statement, *supra* note 40, at 16, implying that the proposed amendment would preclude such a decision. Nothing could be farther from the truth. The issue in *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), was *not* whether the school's decision to allow a prayer violated the establishment clause; rather, the court held that the school's decision to *exclude* the prayer did not violate the free exercise clause. The latter issue is not affected in any way by the proposed amendment. Indeed, the Administration's apparent criticism of *Stein* is especially ironic, for the Administration professes that a central purpose of the amendment is "to allow . . . diversity of state and local approaches" and to accord deference to the decisions of "state and local authorities." Administration Statement, *supra* note 40, at 29-30. That, of course, is precisely what *Stein* did. The Administration's criti-

It is generally accepted, for example, that a public school may set aside a minute at the beginning of the school day for "silent meditation or prayer" without running afoul of the establishment clause.¹²³ In *Gaines v. Anderson*,¹²⁴ for example, a federal district court expressly upheld such a practice. As the court explained, this practice "may serve legitimate secular purposes in aid of the educative function," for a "quiet moment at the beginning of the day would tend to 'still the tumult of the playground and start a day of study.'" ¹²⁵ Moreover, such a practice "permits meditation or prayer without mandating the one or the other."¹²⁶ The effect is thus "to accommodate students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters."¹²⁷ Unlike the schemes in *Engel* and *Schempp*, a moment of silence does "not operate to confront any student with the cruel dilemma of either participating in a repugnant religious exercise or requesting to be excused," for if "a student's beliefs preclude prayer in the setting of a minute of silence in a schoolroom, he may turn his mind silently toward a secular topic, or simply remain silent, without . . . facing the scorn or reproach of his classmates."¹²⁸

This practice, which has been authorized in at least twenty-one states,¹²⁹ embodies a more "reasonable accommodation." Given the availability of this alternative, it is difficult to understand the

cism of *Stein* thus suggests that its real goal is not to foster local control, but to promote prayer. The Administration's analysis of several other decisions is similarly ill considered. See, e.g., *id.* at 17 (discussing *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 914 (1982)).

¹²³ See, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 280-81 (1963) (Brennan, J., concurring); *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976); Opinion of the Justices, 113 N.H. 297, 301, 307 A.2d 558, 560 (1973); *State Bd. of Educ. v. Board of Educ.*, 108 N.J. Super. 564, 574-75, 262 A.2d 21, 26-27 (N.J. Super. Ct. Ch. Div.), *aff'd*, 57 N.J. 172, 270 A.2d 412 (1970), *cert. denied*, 401 U.S. 1013 (1971); Choper, *supra* note 80, at 371; Kauper, *supra* note 46, at 1041; Comment, *Accommodating Religion in the Public Schools*, 59 NEB. L. REV. 425, 450-54 (1980); Note, *Religion and the Public Schools*, 20 VAND. L. REV. 1078, 1092-93 (1967). But see *Beck v. McElrath*, 548 F. Supp. 1161, 1163 (M.D. Tenn. 1982) (invalidating a Tennessee statute requiring the observance of a minute of silence at the beginning of the school day because, after reviewing the actual legislative record, the court found that the "overwhelming intent among legislators supporting the bill, including the sponsors, was to establish prayer as a daily fixture in the public schoolrooms of Tennessee").

¹²⁴ 421 F. Supp. 337 (D. Mass. 1976).

¹²⁵ *Id.* at 342 (quoting *Schempp*, 374 U.S. at 281 n.57 (quoting Wash. Post, June 28, 1962, at A22, col. 2)).

¹²⁶ *Id.* at 343.

¹²⁷ *Id.*

¹²⁸ *Id.* at 345.

¹²⁹ See CONGRESSIONAL RESEARCH SERVICE, *supra* note 31, at 9 n.24.

clamor for a constitutional amendment authorizing government sponsored school prayer. No legitimate government interests are furthered by the schemes invalidated in *Engel* and *Schempp* that are not also furthered by setting aside a moment for silent meditation or prayer. Perhaps the proponents of the amendment are concerned that this practice denies government the power to dictate the terms of the prayer, prevents government from making sure students actually pray, or reduces the pressure to conform. But these concerns are hardly of sufficient weight to merit amendment of the Constitution of the United States. Indeed, they are antithetical to the concept of freedom of religion.

The activities of extracurricular student organizations with a religious orientation present a second example of accommodating religion in public schools. Although courts have tended to interpret *Engel* and *Schempp* as prohibiting most forms of student-initiated prayer when the prayer takes place on school property during school hours as a regular and organized part of the school program,¹³⁰ there is at least one form of organized student-initiated prayer that may well be consistent with the first amendment.

In its recent decision in *Widmar v. Vincent*,¹³¹ the Supreme Court held that "a state university, which makes its facilities generally available for the activities of registered student groups," cannot constitutionally "close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion."¹³² In 1977, the University of Missouri at Kansas City, which officially recognizes over one hundred student groups and routinely provides university facilities for the meetings of such groups, refused to permit an organization of evangelical Christian students to meet in university buildings because of a regulation prohibiting the use of university facilities "for purposes of religious worship or religious teaching."¹³³ In an eight-to-one deci-

¹³⁰ See, e.g., *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.) (invalidating prayer at student assemblies sponsored by the Student Council), *cert. denied*, 454 U.S. 863 (1981); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (holding that to permit student religious club to conduct its activities on the school campus during the official school day would violate the establishment clause), *cert. denied*, 434 U.S. 877 (1977). See also *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 914 (1982); *Kent v. Commissioner of Educ.*, 1980 Mass. Adv. Sh. 803, 402 N.E.2d 1340 (1980); *State Bd. of Educ. v. Board of Educ.*, 108 N.J. Super. 564, 262 A.2d 21 (N.J. Super. Ct. Ch. Div.), *aff'd*, 57 N.J. 172, 270 A.2d 412 (1970), *cert. denied*, 401 U.S. 1013 (1971).

¹³¹ 454 U.S. 263 (1981).

¹³² *Id.* at 264-65.

¹³³ *Id.* at 265 (quoting University of Missouri regulation 4.0314.0107).

sion, the Court held that the University's "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral."¹³⁴

In an effort to justify its exclusionary policy, the university maintained that to permit religious meetings in its facilities would violate the establishment clause. Justice Powell, speaking for the Court, rejected the argument that an "equal access" policy would be incompatible with the first amendment. An "open-forum policy," Powell maintained, would have the secular purpose of enabling students to exchange ideas.¹³⁵ Moreover, Powell noted, an "open-forum" policy would involve less government "entanglement with religion" than the exclusionary policy, for it would avoid the need for the university "to determine which words and activities fall within 'religious worship and religious teaching.'"¹³⁶ Finally, Powell held, "the primary effect" of an "open-forum" policy would not be to advance religion. Although conceding that religious groups might benefit from access to university facilities, Powell explained that "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion."¹³⁷ Here, Powell concluded, the benefit was only "incidental," for "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices," and "the forum is available to a broad class of non-religious as well as religious speakers," thus indicating that the primary effect is "secular."¹³⁸

The potential impact of *Widmar* on the permissible role of student-initiated religious organizations in primary and secondary public schools remains uncertain.¹³⁹ On the one hand, the Court may extend *Widmar* with full force, thus according student-initiated religious organizations a right to use school facilities on an

¹³⁴ *Id.* at 277. The Court explained that, "[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups," *id.* at 267; "to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end," *id.* at 269-70.

¹³⁵ *Id.* at 271 n.10.

¹³⁶ *Id.* at 272 & n.11.

¹³⁷ *Id.* at 273-74 (quoting *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771 (1973)).

¹³⁸ *Id.* at 274-75.

¹³⁹ Prior to *Widmar*, the lower federal courts were divided. Compare *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (holding that such organizations can meet on school property) with *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (holding that such organizations cannot meet on school property), *cert. denied*, 454 U.S. 1123 (1981).

equal basis with nonreligious organizations.¹⁴⁰ On the other hand, there may be some reluctance to extend *Widmar*, for public universities do not historically share "the special place of public schools in American life,"¹⁴¹ and, as the Court noted in *Widmar*, "[u]niversity students are . . . less impressionable than younger students and should be [better] able to appreciate that the [school's] policy is one of neutrality toward religion."¹⁴² Thus, the Court may hold *Widmar* wholly inapplicable to primary and secondary schools.¹⁴³ Perhaps most likely, however, the Court may hold *Widmar* applicable only in part and thus adopt an intermediate approach. For example, the Court might hold that local authorities at their discretion may either exclude religious organizations from public schools or permit them to operate on an equal basis with nonreligious organizations. That is, neither the exclusion nor the equal inclusion of such organizations would be unconstitutional. Alternatively, the Court might permit student-initiated religious organizations to operate in the public schools, but only in accord with special regulations governing the nature, timing, and location of their activities to reduce the dangers of "establishment."¹⁴⁴ In short, the law on these questions is currently in flux. This is no time to amend the Constitution.

Finally, it should be emphasized that neither *Engel* nor *Schempp* prohibits the study of religion in the public schools. To the contrary, as the Court observed in *Schempp*, "one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civiliza-

¹⁴⁰ The essence of *Widmar* is "equality." Any grant of *special* benefits to religious organizations would thus pose a very different problem. See *Widmar*, 454 U.S. at 273 n.13.

¹⁴¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-5, at 825 (1978).

¹⁴² 454 U.S. at 274 n.14.

¹⁴³ One year after *Widmar*, the Fifth Circuit invalidated a school board policy authorizing "students to gather at the school with supervision either before or after regular hours on the same basis as other groups . . . to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary." *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1041 (5th Cir. 1982). In reaching its result, the court emphasized the unusual factual background of the case and the fact that the "explicit authorization of religious meetings" arose not out of a general policy concerning student activities, but out of a specific "policy setting forth guidelines on religion in the school." *Id.* at 1048.

¹⁴⁴ Cf. *Reed v. Van Hoven*, 237 F. Supp. 48, 54-57 (W.D. Mich. 1965) (setting forth a series of guidelines governing the permissible activities of religious organizations in public schools). See generally Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3 (1978) (discussing the establishment clause, the free exercise clause, and the free speech clause in context of student religious groups); Comment, *supra* note 123, at 457-62 (discussing whether and under what limitations students should be able to hold religious meetings in public school rooms).

tion," and the "study of the Bible or of religion, when presented objectively as part of a secular program of education," may "be effected consistently with the First Amendment."¹⁴⁵ Thus, with no embarrassment from the establishment clause, public schools may explore the religious and ethical values that illuminate the purposes of our democratic society. It is through this process, and not through the repetitive recitation of a government sponsored prayer, that we will achieve true moral education.¹⁴⁶

CONCLUSION

Whatever legitimate ends the proposed amendment seeks to achieve are already attainable through other more reasonable and more effective means. There is simply no sufficient justification to invoke the solemn processes of constitutional amendment. The proposed amendment is inconsistent with our contemporary constitutional jurisprudence, it is unsound as a matter of policy, and it is unnecessary to achieve its most central objectives. It should not be enacted.

¹⁴⁵ *Schempp*, 374 U.S. at 225.

¹⁴⁶ I have not addressed the question of prayer in "public institutions" other than public schools because the courts have consistently upheld prayers in the other contexts in which the issue has arisen. See, e.g., *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (celebration of mass by Pope on the National Mall in Washington, D.C.); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888 (opening borough council meetings with an invocation or silent meditation), *appeal dismissed*, 454 U.S. 958 (1981). Thus, it is not clear what purpose the proposed amendment might have outside the public school area. Although the Administration cites *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982), as an example of a decision that would be overruled by the proposed amendment, Administration Statement, *supra* note 40, at 19 & n.50, 31 & n.72, that decision did not focus on prayer as such, but rather on the state legislature's funding of only one chaplain of one denomination to offer legislative prayers for sixteen consecutive years, 675 F.2d at 234. The funding issue presumably would not be affected by the proposed amendment. In any event, the Supreme Court reversed, finding no establishment clause violation. 51 U.S.L.W. 5162 (U.S. July 5, 1983).