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Let Us Pray - An Amendment to the Constitution

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LET US PRAY— AN AMENDMENT TO THE CONSTITUTION

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THE CATHOLIC, AND ESPECIALLY the Catholic lawyer, ought to consider the school prayer matter in several aspects. One aspect is the problem of constitutionality. Another is the question of the practical benefit to be derived from the institutionalization of governmentally-sponsored religious observances. And a third is the problem of whether the long-term interest of the Church will be served by an amendment to overrule the United States Supreme Court's decisions. It will be profitable here to discuss the problems of constitutionality and practical benefit before proceeding to an inquiry as to whether the Catholic opponents of an amendment are, perhaps through an overconcentration upon the problem of federal aid to education, sowing the seeds of principles which, in their long-term effect, will rebound to the serious disadvantage of the Church in particular and religion in general.

Constitutionality

The school prayer decisions were wrongly decided as a matter of constitutional law. Their basic fallacy lies in the Court's erroneous construction of the doctrine of neutrality which is implicit in the establishment clause of the first amendment. That clause reads simply, "Congress shall make no law respecting an establishment of religion. . . ." It was undeniably understood by its framers that establishment of religion "meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."[1] The motive for the enactment of the clause was, in the words of James Madison during a debate in the first Congress, that "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."[2] The goal, in a word, was to achieve governmental neutrality among religions. The word "religion," however, for constitutional purposes, presupposed

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[1] COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 224-25 (1898).

[2] 1 ANNALS OF CONG. 731 (1789) [1789-1791].

that a belief in God was the common denominator of all religions. As the Supreme Court stated in 1890, "the term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[3] The establishment clause, therefore, was more precisely designed to ensure governmental neutrality among religious sects professing a belief in God. It was never meant to compel neutrality on the part of government as between those religions that profess a belief in God and those that do not, *i.e.,* between theistic and non-theistic religions. In the words of Mr. Justice Story, who served on the Supreme Court from 1811 to 1845, and who was himself a leading Unitarian:

> Probably at the time of the adoption of the constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[4]

It was in the light of this understanding that the Supreme Court properly affirmed, in 1892, that "this is a Christian nation."[5]

This background, of course, must be considered in conjunction with its complement in the first amendment, the free exercise clause. Together, the two clauses read: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." The free exercise clause has always protected the believer and non-believer alike against any coercion to believe in, or disbelieve, any religion. But the establishment clause, at the same time, sanctioned a governmental hospitality toward, and impartial encouragement of, theistic religions.

All this, however, has now been changed. In the 1961 case of *Torcaso v. Watkins,*[6] the Supreme Court invalidated a provision of the constitution of Maryland requiring a state employee to declare his belief in God. The test, said Mr. Justice Black speaking for the Court, unconstitutionally invaded the employee's "freedom of belief and religion. . . ."[7] The requirement was invalid because "the power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God.' "[8] The Court then emphasized the right of non-theistic beliefs to protection as religions:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and *neither can aid those religions based on a belief in the existence of*

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[3] Davis v. Beason, 133 U.S. 333, 342 (1890).
[4] STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1874, 1877 (1891).
[5] Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892).
[6] 367 U.S. 488 (1961).
[7] *Id.* at 496.
[8] *Id.* at 490.

> *God as against those religions founded on different beliefs.*[9] (Emphasis added.)

Appended to the last quoted clause was a footnote specifying that:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.[10]

In view of this holding, it may now be said that there are two general types of religions entitled to the protections of the first amendment. On the one hand are those which profess a belief in God. For purposes of discussion, let us call them theistic, and for analysis we shall include therein both deistic and theistic beliefs in God with their variant interpretations of the nature of God and his providence. On the other hand are those non-theistic religions described in Mr. Justice Black's footnote in the *Torcaso* case. Of the four he mentioned, the two most important in contemporary terms are Ethical Culture and Secular Humanism, both of which may be called non-theistic religions in that they do not affirm the existence of God. It is reasonable also to include atheism and agnosticism, whether organized or unorganized, within the broad *Torcaso* description of non-theistic religions, since both are compatible with Ethical Culture and Secular Humanism.

It was difficult to tell whether the Court in *Torcaso* rested its decision upon the establishment clause or the free exercise clause, although it is more likely that it was the latter. In either event, today the Supreme Court has removed all doubt that the broad definition of religion applies to the establishment clause. The Court in the 1963 school prayer decision, which was based on the establishment clause, quoted approvingly the principle laid down in the *Torcaso* case, that neither a state nor the federal government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[11] The Court has now ordained, therefore, through its misconstruction of the establishment clause, that the government is required to be neutral as between the two great classes of religions, the theistic and the non-theistic.

When this erroneously imposed neutrality is coupled with the Court's tendency to view the first amendment in rigorously absolute terms, one is drawn to the conclusion that the new interpretation would plainly interdict a governmental affirmation that there is, indeed, as the Declaration of Independence affirms, a "Creator," a "Supreme Judge of the World." Thus it is that Mr. Justice Brennan, in his extensive concurring opinion in the 1963 prayer case, in which opinion he probed the consequences of the Court's ruling, could bring himself to observe that the words "under God" in the pledge of allegiance are not necessarily unconstitutional only because they "may merely recognize the historical fact that our Nation *was believed to have been founded 'under God'* "[12] (emphasis added). Presumably, if the words were construed as a present affirmation of truth, rather than a rote commemoration of an historical fact (or curiosity), they would be unconstitutional.

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[9] *Id.* at 495.

[10] *Id.* at 495 n.11.

[11] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 220 (1963), quoting Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

[12] *Id.* at 304.

Actions or proceedings have been instituted to remove those words from the pledge, to invalidate governmentally-paid chaplaincies in the military services and prisons, to strike down the tax privileges enjoyed by religious organizations, and to eliminate other remaining public evidences that this is a nation which subordinates itself to God. The free-exercise-clause rights of prisoners and military personnel could well be violated unless the government, as the *Schempp* Court noted, "permits voluntary religious services to be conducted *with the use of government facilities*. . . ."[13] (Emphasis added.) It may not be rash to note that the Court's reference only to "government facilities" leaves clouded the constitutional future of chaplains themselves on the government payroll. Similarly, the religious tax privileges in question apply to the purely religious activities of churches as well as to those activities, such as teaching mathematics in parochial schools, which serve a valid secular purpose. The tax privileges are, it is fair to say, in serious jeopardy of at least partial invalidation.

Given the proclivity of the current members of the Supreme Court to adhere tenaciously to their own abstractions (which in religion cases have generally been born in gratuitous and self-generated *obiter dicta* in the Court's own opinions), and given the sweeping character of those reigning abstractions, we may fairly expect the manifestations of our religious heritage in public life to be eliminated, singly but inexorably, by judicial decree. Only a constitutional amendment can be counted upon to check the trend, for the notion of judicial self-restraint seems to have fallen out of favor among the majority of the Court.

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[13] *Id.* at 226 n.10.

The objection is sometimes made that, if prayer is permitted in schools or other public activities, the practices will inevitably deteriorate into a rampant sectarianism in which, for example, a communal rosary in public school would become the order of the day in a district where Roman Catholics predominate. There are ample safeguards against such excess. For one thing, the common sense and good faith of the people involved at the local level can usually be counted upon to prevent the observances from being carried to a sectarian extreme. If, however, the problem actually does arise, and, judging from experience, it will arise infrequently if at all, the state and federal courts should deal with it on a case-by-case basis. But in so doing, the courts ought to afford a greater latitude to the local governments to solve the problem than they are now given. At what point are the courts to intervene? In terms of the establishment clause, such things as the communal rosary ought to be prohibited as overly sectarian. The Lord's Prayer and Scripture reading, however, ought to be allowed, in view of our history and tradition. Also, if the case should ever occur, a mere devotional reading from the Koran, in a public school in which Moslems predominate, should be allowed, in deference to the federal character of our government and the general practical wisdom of local control. Operating under the free exercise clause, the courts should invalidate a local practice only when there is actual coercion upon children to participate. In this context, mere embarrassment ought not to be considered such coercion, so long as scrupulous efforts are made by the authorities to minimize such embarrassment.

In fact, a proper deference by the Supreme Court to the concept of federalism

and a healthy respect by the Court for the fairness and capacity of local governments would serve to restore a proper balance in this area. The Supreme Court of the United States is ill-equipped to rule in a matter such as this by uniform, centralized decree. It is not, as has often been said, a "Supreme School Board." Nor should it be.

Some opponents of an amendment maintain that the inclusion of prayers in a public school necessarily violates the free exercise of religion by children and their parents, who do not believe in God. There are four weaknesses in that argument. First, in none of the cases in question was any child actually coerced to do or say anything, and the right of non-participation was scrupulously preserved. Second, the Supreme Court did not decide the cases on the free exercise basis, but rather under the establishment clause, and it is upon the Court's interpretation of the latter clause that approval or disapproval of the rulings ought to be based. Third, even if we do consider the free exercise question, the dictates of common sense are persuasive. Dean Erwin N. Griswold of Harvard Law School said it this way in a passage that is worth quoting at length:

> Let us consider the Jewish child, or the Catholic child, or the nonbeliever, or the Congregationist, or the Quaker. He, either alone, or with a few or many others of his views, attends a public school, whose School District, by local action, has prescribed the Regents' prayer. When the prayer is recited, if this child or his parents feel that he cannot participate, he may stand or sit, in respectful attention, while the other children take part in the ceremony. Or he may leave the room. It is said that this is bad, because it sets him apart from other children. It is even said that there is an element of compulsion in this—what the Supreme Court has called an 'indirect coercive pressure upon religious minorities to conform.' But is this the way it should be looked at? The child of a nonconforming or minority group is, to be sure, different in his beliefs. That is what it means to be a member of a minority. Is it not desirable, and educational, for him to learn and observe this, in the atmosphere of the school—not so much that he is different, as that other children are different from him? And is it not desirable that, at the same time, he experiences and learns the fact that his difference is tolerated and accepted? No compulsion is put upon him. He need not participate. But he, too, has the opportunity to be tolerant. He allows the majority of the group to follow their own tradition, perhaps coming to understand and to respect what they feel is significant to them.
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> Is this not a useful and valuable and educational and, indeed, a spiritual experience for the children of what I have called the majority group? They experience the values of their own culture; but they also see that there are others who do not accept those values, and that they are wholly tolerated in their nonacceptance. Learning tolerance for other persons, no matter how different, and respect for their beliefs, may be an important part of American education, and wholly consistent with the First Amendment. I hazard the thought that no one would think otherwise were it not for parents who take an absolutist approach to the problem, perhaps encouraged by the absolutist expressions of Justices of the Supreme Court, on and off the bench.[14]

The fourth fallacy in the free exercise objection to an amendment is that the objection overlooks the right of the majority of citizens to the free exercise of their religion. Strict neutrality between theism and nontheism, as broadly defined by the Supreme Court, is not attainable. When public offi-

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[14] Griswold, *Absolute Is In The Dark — A Discussion Of The Approach Of The Supreme Court To Constitutional Questions,* 8 UTAH L. REV. 167, 177 (1963).

cials, including school teachers, are compelled to suspend judgment in the course of their official activities on the question of whether there is a God, the effect is an official adoption to that extent of the agnostic approach. Parents and children who believe in God may properly ask why those children must attend a public school where, over their objection, the basic question of God's existence is treated in an agnostic way which is incompatible with, and offensive to, their beliefs and the basic theistic tenets upon which the Republic was nurtured.

In short, there can be no governmental neutrality between theistic and non-theistic religions in terms of the establishment clause. The perpetual suspension of judgment enjoined by the Court on the part of government as to whether there is a God is in reality a mere replacement of the traditional and proper theistic affirmation by a new, non-theistic orthodoxy of agnosticism—a public agnosticism which will, if embedded in our law, spawn a public policy of affirmative and militant secularism.

Practical Benefit

A brief comment is in order on the practical benefit to be derived from a favorable resolution of the amendment question. The issue is, essentially, "can government constitutionally recognize that there is a God?" Implicit in such recognition is an affirmation that there is a standard of right and wrong higher than the state itself. The child who routinely sees the agents of the government, be they teachers or presidents, affirm the existence and supremacy of God and His law over all is less likely to follow the demagogue who asserts for the state, and for himself as its oracle, the final power to ordain what is right and wrong in a matter of public or private morality. Moreover, an inculcation of mere ethical values without reference to their divine source cannot serve this purpose as well as an assertion of the supremacy of an unchanging lawgiver. For, if ethical precepts arise from some non-divine source such as the Constitution, a consensus or a social contract, then they can be subject to change or disregard by a totalitarian state or by a modern democracy enjoying the assent of a majority of its citizens. If we are to preserve the limited government that is the hallmark of American constitutionalism, we can hardly disregard the lesson of history that a strong assurance against governmental abuse is a citizenry devoted to ultimate values transcending the changing will of the state. It is surprising, and disappointing that some Catholic opponents of a prayer amendment have not addressed themselves to this question of the necessity of a frank acknowledgement by the state of the existence of a divine standard higher than itself. On Thomas Jefferson's Memorial there is inscribed his questioning warning: "God Who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God?"

In recent decades the schools of America have retreated from the unapologetic inculcation of love for God and country. Perhaps coincidentally, the educational philosophy of permissiveness gained supremacy during the same period. Today we are confronted with juvenile disciplinary problems of unprecedented magnitude. It is fair to say that the restoration and advancement of character will be furthered by teaching our children that there is indeed a "law of Nature and of Nature's God," which enjoins upon them a rejection of vagrant self-indulgence in favor of an ordered pursuit of a higher good.

Aid To Parochial Schools

Until 1962 the center stage in the continuing debate on church-state relations was held by the controversy over federal aid to church-related schools. Today, however, the main issue is public prayer. There are some proponents of federal aid to church-related schools who consider that issue of such transcendent importance that it appears to have influenced considerably their attitude toward the different question of the constitutionality of public prayer. Such an effect is understandable, for the constitutional justification of federal aid to parochial schools is rather plain, and the equities of fair treatment are compelling.[15] Nevertheless, a word of caution is in order to those whose preoccupation with the aid question may lead them to an erroneous and potentially dangerous oppostion to a public prayer amendment.

Those who favor fair federal aid ought to consider favorably a prayer amendment. This is so because the outcome of the amendment controversy is likely to determine whether the federal government shall assume a posture of hospitality toward theistic religion or a falsely neutral pose which is likely to lead to antagonism toward theistic religion. Equality of treatment for parochial school children in any general program of federal aid can be attained only as an incidental effect of a general climate of governmental hospitality toward theism. Those who believe that equality of federal aid can be achieved in the teeth of a prevailing official policy which, through a degeneration of the false neutrality of agnosticism, regards theistic religion with hostility, are unrealistic. Nor can it be expected that those vocal groups which oppose both federal aid to parochial schools and the prayer amendment will moderate their opposition to the former merely because some Catholic spokesmen have joined them in opposition to the latter.

But there is a more fundamental consideration involved. The condition of the public schools and the caliber of its graduates are matters of concern to all of us, whether Catholics or not. There is abroad in some quarters the idea that the acknowledgment of God in public schools is not something about which Catholics ought to get very excited, since the primary educational concern of Catholics is the preservation and expansion of the parochial school system. The *School Prayer Decisions* seem to have influenced some Catholics to increase their efforts to secure federal aid for the support and expansion of parochial schools where children, unlike their public school contemporaries, can enjoy a school climate in which a frank acknowledgment of God can still be made. Such an attitude, which would employ the increasing secularization of the public school system as an argument in favor of a public subsidy for the church-related school system, is parochial at best and selfish at worst. Ironically, if the Court should continue its tendency to apply to

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[15] I hasten to add, incidentally, that I offer this judgment, not as an advocate of federal aid, but rather as one who agrees that such federal aid would be constitutional and fair, but who also is convinced that there ought to be no general program of federal aid to education, whether public or private, since the state and local communities are adequately meeting their public educational needs. Moreover, a general federal subsidy of local school would entail an undue risk of burdensome federal administrative controls over private as well as public schools. I believe that there should not be general federal aid to education, but if there is to be such, it should be non-discriminatory as between public and private (including parochial) schools.