10-1-1982

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SCHOOL PRAYER, NEUTRALITY, AND THE OPEN FORUM: WHY WE DON'T NEED A CONSTITUTIONAL AMENDMENT

ARNOLD H. LOEWY†

As the proposed constitutional amendment to permit prayer in public schools captures increasing national attention and debate, Professor Loewy argues that in the context of true state neutrality, school prayer does not violate the establishment clause. Noting that state sponsorship (impermissible) is to be distinguished from state neutrality (permissible), he contends that at least two methods of providing the opportunity to pray in school may be allowed. A policy that grants open accessibility of classroom use to all student groups, religious or otherwise, would be constitutional. A policy that permits individually selected philosophical recitations by students probably would be constitutional. Because these methods fully accommodate any need for prayer, and because we do not need prayer which is any less voluntary than that arising from these methods, Professor Loewy concludes that the proposed school prayer amendment should not be added to the Constitution.

No less an office holder than the President of the United States has determined that this nation needs a constitutional amendment authorizing voluntary school prayer.¹ This article contends that truly voluntary prayer already is permissible in school, and that any prayer which is less voluntary is neither necessary nor desirable.² A state, school board, or teacher³ can allow prayer by establishing an open forum from which a student can say any of several

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1. 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.” Letter from the American Jewish Congress to Arnold H. Loewy (May 21, 1982). President Reagan was quoted as saying: “The Amendment we’ll propose will restore the right to pray . . . Changing the Constitution is a mammoth task. It should never be easy. But in this case I believe we can restore a freedom that our Constitution was always meant to protect.” N.Y. Times, May 7, 1982, at B10, col. 1.

2. The term “voluntary” is of course a sliding-scale term. Very few choices are totally voluntary or totally coerced. Sometimes the Supreme Court is willing to describe a choice as voluntary in one context but involuntary in another. Compare Schneckloth v. Bustamonte, 442 U.S. 218 (1973) (noncustodial search; knowledge of right to withhold consent immaterial), with Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogation; instruction of rights required).

Although the proposed constitutional amendment forbids making public prayer a requirement, see supra note 1, the caveat is, however, a far cry from making the amendment truly voluntary. Consider the following piece of precious overstatement by Art Buchwald:

The pro-prayer people say that the constitutional amendment is voluntary and a child will not have to pray if he doesn't want to. The anti-prayer people maintain that
things, including a prayer. What the state cannot do is favor prayer over other forms of speech.

A prayer either written or sanctioned by the school board or teacher cannot be neutral. Even so innocuous a prayer as the Regent prayer invalidated peer pressure as well as teacher pressure will force a kid to pray whether he has the choice or not.

The latter group sees this kind of scenario:

"All right, children, we will now open with a morning prayer. Those sinners who don't believe in God can either stand in the back of the room with their faces to the wall or hide in the clothes closet."

"Come, you little Bolsheviks, hurry it up so the rest of us can get on with seeking divine guidance. Where are you going, Tony?"

"I'm going to the back of the room. I already prayed at home this morning."

"And you think that's enough?"

"It's enough for me."

"Look at Tony, children. He is a perfect example of a secular humanist. He'd rather stand in the back of the room than pray to God. Does anyone know where Tony is going to wind up with his attitude?"

"In Hell."

"Very good, Charles. And who will he find in Hell?"

"Satan.

"And what will Satan make him do?"

"He'll make him feed the flames of a fiery furnace, and Tony will have to wear a tail, and he'll be screaming all the time and fighting off snakes, but it won't do him any good."

"That's absolutely right, Enid. Who knows what else will happen to him?"

"Blackbirds will peck his eyes out, and he'll have a stomach ache all the time and his toes will drop off."

"Very good, Everett. Well, what do you have to say to that, Tony?"

"I'd still rather stand in the back of the room."

"Are there any other communists in the class who would like to join him? All right, Tony, you seem to be the only one. Go to the back and I don't want to see your ugly face until I tell you to take your seat. Now, class, let us bow our heads and pray for Tony's soul! Heavenly Father, there is always one rotten apple in the barrel . . . ."

Buchwald, The Pupil Without a Prayer, Los Angeles Times, May 13, 1982 § V, at 82, col. 1. Much of the inspiration for Buchwald's satire could have come from the testimony of Edward Schempp, the plaintiff in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), which invalidated school sponsored prayer and Bible reading:

Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be "labeled as 'odd balls'" before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable "to lump all particular religious difference[s] or religious objections [together] as 'atheism'" and that today the word "atheism" is often connected with "atheistic communism," and has "very bad" connotations, such as "un-American" or "anti-Red," with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their "homeroom" and that this carried with it the imputation of punishment for bad conduct.

Id. at 208 n.3 (quoting from trial court decision, 201 F. Supp. 815, 818 (1962)).

3. There can be little doubt that action of a state-employed teacher can constitute state action. Cf. Ambach v. Norwick, 441 U.S. 68, 80 (1979) (because public school teachers perform an important governmental function, a state may deny aliens the opportunity to serve in that capacity); Ingraham v. Wright, 430 U.S. 651, 674 (1977) (school authorities acting under color of state law are governed by the fourteenth amendment).
in *Engel v. Vitale*\(^4\) is not neutral: “Almighty God, we acknowledge our dependence upon thee, and we beg thy blessings upon us, our parents, our teachers and our country.” Anyone who seriously thinks that this prayer is neutral should consider the following equally “neutral” prayer: “We acknowledge the nonexistence of God and its inability to bestow anything upon us, our parents, our teachers and our country.”\(^5\)

Although the dividing line between state-sanctioned prayer and state-permitted prayer is elusive, it can and should be drawn. The key is neutrality.\(^6\) This article will propose two methods of permitting but not sanctioning prayer.

Method I is for the state to make classrooms available before or after school or during recess to any groups of students who want to meet in them. If accessibility is nonideological (*i.e.*, it matters not whether the group consists of Jews, Catholics, Protestants, Atheists, Republicans, Democrats, sports fans, animal lovers, or ceramics enthusiasts), the school should not be required to forbid prayer.

Method II is to allow a different student to begin each class with a philosophical recitation that he or she either composes or chooses. For this Method to be lawful, each student must be given an opportunity to speak or the philosopher of the day must be chosen at random without regard to the content of his or her message. From the school’s perspective a message of Atheism, Satan Worship, or Secular Humanism must be accorded the same dignity as a prayer to God.

Part I of this article will discuss the constitutionality of Method I. Part II will discuss the constitutionality of Method II. Part III will examine unconstitutional attempts to permit prayer in school and explain how they differ from the proposed methods.

I

Unless it can be distinguished from last term’s case of *Widmar v. Vincent*,\(^7\) Method I is constitutional. *Widmar* involved a successful challenge to a regulation promulgated by the University of Missouri Board of Curators which forbade prayer on campus. The challenger was Cornerstone, an organization

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5. I attempted the following “neutral prayer” in my Constitutional Law class: “To whom it may concern: Please aid these students in their efforts to fathom the very nearly unfathomable Supreme Court decisions under the establishment clause.” One student objected to the prayer because “to whom it may concern” implied that it did concern somebody. Perhaps “to whom it may concern, if anybody” would be neutral, but one cannot be certain.
6. The Court generally preaches neutrality in establishment clause cases. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963). This is, however, an area in which the Court exhibits more than its ordinary constitutional schizophrenia. For example, the Court has forbidden religious groups from receiving the state aid available to nonreligious groups. The Court has also mandated that unemployment compensation be paid to those refusing to work on religious grounds even when the secularly motivated nonworker goes uncompensated. *See infra* text accompanying notes 82-85. For the reasons proffered in this article, the author contends that at least with regard to school prayer, “neutrality” is the best policy.
of evangelical Christian students that sought university recognition and the concomitant right to hold its prayer meetings on campus. Part of the University's justification for excluding Cornerstone was its contention that the establishment clause precluded recognition. The Court rejected this argument, and held that the discrimination against Cornerstone was forbidden by the first amendment's freedom of speech clause.

The constitutionality of proposed Method I must be evaluated under the three-part test reiterated in Widmar:

[A] policy will not offend the Establishment Clause if it can pass a three pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive entanglement with religion.'"

Although the Court had no difficulty finding that the open forum sought in Widmar, which did not discriminate either for or against religion, would have a secular purpose, it is arguable that an open forum adopted for the express purpose of allowing prayer would be unconstitutional. The Supreme Court in Widmar distinguished McCollum v. Board of Education, which had invalidated religious instruction in the classroom as part of a released time program, on the ground that McCollum permitted school facilities to be used for instruction by religious groups but not by others. Consequently, when classrooms are opened for use as a forum, it is critical that those announcing their opening emphasize all the uses to which they can be put.

The primary effect test presents a more difficult hurdle. The Court distinguished between "primary effect," which is unconstitutional, and "incidental benefit," which is constitutional. As it said in Widmar:

8. University recognition frequently is a prerequisite to holding meetings on campus. The term "recognition" does not necessarily imply approval of the organization's aims. See Healy v. James, 408 U.S. 169 (1972).
9. The University also argued that the Missouri Constitution requires stricter separation of church and state than the United States Constitution. The Court found it unnecessary to decide that issue. 102 S. Ct. at 277.
10. 102 S. Ct. at 275 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
13. 102 S. Ct. at 275 n.10. McCollum could also be distinguished on the ground that: the instructors were subject to the approval and supervision of the superintendent of schools [and . . . [students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.
102 S. Ct. at 208-09.
We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

We are satisfied that any religious benefits of an open forum at UMKC\textsuperscript{15} would be "incidental" within the meaning of our cases.\textsuperscript{16}

The Court relied on two factors in finding the benefit incidental rather than primary:

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. Such a policy "would no more commit the University... to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.\textsuperscript{17}

To avoid the appearance of an imprimatur, a school wishing to adopt Method I should clearly advertise the general availability of the classrooms. For example, a school newspaper might carry the following advertisement:

\begin{center}
\textbf{CLASSROOMS AVAILABLE FOR GROUP MEETINGS}

Classrooms I, II, III, IV, and V will be available for group meetings from 7:30-8:00 a.m., from 3:00-3:30 p.m., and during recess and lunch. You may discuss school work, politics, religion, sports, hobbies or any other subject. Please reserve the room from Vice Principal Smith before using it.
\end{center}

The second \textit{Widmar} factor may be more difficult for a public school to achieve: "[T]he forum is available to a broad class of non-religious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect."\textsuperscript{18}

To a public school that has traditionally operated an open forum and now simply wishes to include religious groups, the \textit{Widmar} logic should apply, at least so long as several nonreligious groups continue to use the forum. When a forum is created for the first time and is primarily used for prayer, greater

\begin{footnotesize}
\begin{enumerate}
\item[15.] The University of Missouri at Kansas City was the branch of the University involved in this litigation. [footnote added by author].
\item[16.] 102 S. Ct. at 276.
\item[17.] \textit{Id.} (quoting with approval Chess v. \textit{Widmar}, 635 F.2d 1310, 1317 (8th Cir. 1980)).
\item[18.] \textit{Id.} at 277.
\end{enumerate}
\end{footnotesize}
difficulties may ensue, particularly in view of the Court's final observation on the establishment issue in *Widmar*: "At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's primary effect." 19

Even if religious groups do dominate the open forum, the Court might permit the forum to continue if it were clear that the school was not responsible for the domination. Then the Court might say that the primary effect is to allow free expression and that the school is no more responsible for religious domination than a school where sports was the leading topic would be responsible for athletic domination.20 In such a case, however, it may be critical that the school's attorney clearly establish the school's lack of responsibility for the students' interest in religion.

A final potential distinction between *Widmar* and Method I is the age of the students. In a footnote, the *Widmar* Court noted that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."21 The obvious negative pregnant is that younger students are more impressionable and will (might?) not appreciate the policy of neutrality. Certainly impressionability was a factor in the School Prayer Cases 22 and has been used by some courts to disapprove of policies such as Method I.23

The concept of impressionability was eminently sound in the School Prayer Cases. There, however, the problem was accurate, not inaccurate perceptions. Specifically, the "impressionable" students accurately perceived that the State was favoring theism over atheism, which is not permitted by the establishment clause.24

To predicate an invalidation of Method I on impressionability, however, expands that concept beyond all bounds. Yet, the Court of Appeals for the Second Circuit has refused to sanction Method I on that ground:

To an impressionable student even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. An adolescent may perceive

19. *Id.*

20. *Cf.* McGowan v. Maryland, 366 U.S. 420, 442 (1961) (upholding a Sunday closing law with the observation that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions").


24. Bible reading not only favors theism over atheism; it favors some forms of theism over others. *See* Abington School Dist. v. Schempp, 374 U.S. at 281-87 (Brennan, J., concurring).
"voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school. To say the least, this presents a rather unflattering view of our nation's youth. It strains credulity to believe that an adolescent who saw a student leader praying in a classroom reserved by the student would assume that the student was praying because he was expected to pray, rather than because he wanted to pray. The court's derogatory description of students stems in part from its rather Spartan view of the educational process: "Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. As Alexander Pope noted, 'Tis Education forms the common mind;/Just as the twig is bent, the tree's inclin'd.'"

Fortunately, the Supreme Court has adopted a less Spartan view of the educational process: "In our system students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." Perhaps the strongest indication that the Supreme Court would apply Widmar to public schools is Tinker v. Des Moines School District. In Tinker, the Court applied a university level academic freedom case to the right of high school, junior high, and arguably elementary school students to protest the Vietnam War by wearing black armbands in school: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which dis-

26. The term Spartan is accurate. As the Court said in Meyer v. Nebraska:
   In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.
262 U.S. 390, 402 (1923).
27. 635 F.2d at 978. The poem from which the appellate court quotes is Epistle I, To Sir Richard Temple, Lord Viscount Cobhan, from A. Pope's MORAL ESSAY in A. Pope, EPISTLES TO SEVERAL PERSONS (MORAL ESSAYS) (F. Bateson ed. 1969). "Epistle I" has been interpreted as reflecting the view that members of the elite ruling class are stable and predictable, while the common man is unstable and unpredictable, influenced by all that he experiences, including education. See R. Brower, Alexander Pope: The Poetry of Allusion (1959).
31. Petitioner John Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high school in Des Moines, Iowa. Petitioner Mary Beth Tinker was a 13-year-old student attending junior high school. Paul and Hope Tinker, ages 8 and 11, respectively, and brother and sister to petitioners John and Mary Beth, also wore armbands to their schools. 258 F. Supp. 971, 972 n.1 (S.D. Iowa 1966). Paul was in the second grade and Hope in the fifth grade. 393 U.S. at 516 (Black, J., dissenting).
covers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

If a university academic freedom case can be applied to a public school situation, *Widmar* should at least permit a public school to adopt Method I.

The final establishment test, "excessive entanglement," has been the subject of extensive academic commentary which need not be reviewed here. Suffice it to say that the Court's observation in *Widmar* "that the University would risk greater 'entanglement' by attempting to enforce its exclusion of religious worship and religious speech" than it would by allowing such worship and speech applies to Method I. For example, if a rule prohibiting prayer applied to an open forum, the school would have to decide whether a sports club student's uttering "May God protect our quarterback in next week's game" constituted a prayer.

It has been argued that public schools, unlike universities, require club activities to be monitored by teachers or administrative personnel and that the injection of such personnel constitutes "excessive entanglement." This argument is premised on the unconstitutionality of paying public school teachers to aid religion. If the monitoring were deemed to be in aid of access to the open forum and not exercise of religion, however, there would be no constitutional problem.

In *Widmar* the university argued that it could not let Cornerstone meet in a publicly financed building because that would aid a religion in contravention of *Tilton v. Richardson*. The Court rejected this argument, holding that use of the building was not a religious use within the meaning of *Tilton*.

32. 393 U.S. at 512. (quoting 385 U.S. at 603).
33. Many academic freedom cases involve a conflict between the considered judgment of school officials on the one hand and the right to diversity of views on the other. E.g., Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799 (1982). Tinker v. Des Moines School Dist. 393 U.S. 503 (1969). By contrast, Method I could be upheld by simply deferring to the school board's judgment to allow individual students the freedom to be diverse.
35. 102 S. Ct. at 275 n.11 (quoting with approval Chess v. Widmar, 635 F.2d 1310, 1318 (8th Cir. 1980)).
37. *See Brandon v. Board of Educ.*, 635 F.2d at 979; *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d at 14, 137 Cal. Rptr. at 50.
40. 102 S. Ct. at 275 n.12.
that same logic, the monitoring of an open forum that at a particular moment is religious, is not the monitoring of religion.

Thus, *Widmar* appears to support Method I as a constitutional way of allowing voluntary prayer.

II

Method II, which allows each student on an alternating basis to begin the day with a philosophical recitation, is less clearly constitutional than Method I. It involves greater teacher participation, and consequently greater potential for unconstitutional manipulation. In addition, it involves the entire class, not just those who voluntarily choose to participate. Nevertheless, a persuasive case can be made for the constitutionality of the practice.

There is certainly a secular legislative purpose. As noted earlier, the Court in *Keyishian v. Board of Regents* said, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." It is doubtful that any process can fulfill this end better than Method II, particularly if the class were allowed to discuss the meaning and significance of the recitation.

Primary effect is another matter. On the one hand, if in a given classroom, ninety percent of the children say Baptist prayers, it is certainly arguable that the primary effect is to advance the Baptist religion. On the other hand, if the school and teachers are careful both to remain neutral and to make certain that the students understand their neutrality, the Court could find the primary effect to be the interchange of ideas.

*Stone v. Graham* supports the constitutionality of this practice. In the course of invalidating a Kentucky statute requiring the posting of the Ten Commandments in the classroom, the Court said, "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." Although the Court's conception of "appropriate study. . . of comparative religion" is not clear, Method II so nearly approaches the *Tinker* admonition of learning "out of a multitude of tongues rather than through any kind of authoritative selection" that the Court should sustain it.

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41. Even if one could be excused from participation, the exercise is not as voluntary as Method I in which the student chooses to participate. *See supra* note 2.
42. 385 U.S. at 589, quoted in *Tinker*, 393 U.S. at 512.
43. In order to ensure the appearance of state neutrality, it may be necessary to limit the role of the teacher in commenting on philosophical recitations. The extent to which teacher participation must be limited is beyond the scope of this article.
45. *Id.* at 42.
46. That the multitude of tongues may happen to speak with the same voice does not destroy
Because of the need to ensure teacher neutrality, the analysis of "excessive entanglement" is more elaborate for Method II than for Method I. Any religious instruction involves some entanglement. For example, a teacher of comparative religions would not be allowed to teach that Catholicism is the one true faith and all other religions are the works of the devil. Similarly a teacher of evolution cannot teach that evolution is necessarily wrong because the Bible says that Earth was created six thousand years ago in six days. Since Method II requires student rather than teacher selection of the philosophical recitation, it may create less entanglement than the above hypotheticals.

Significantly, the standard is "excessive entanglement," not "mere entanglement." No Supreme Court decision has invalidated a practice on this ground unless the practice could inject the State into controlling some aspect of a church or a church school. Given the total dependence on student choice, it seems unlikely that the Court would make this case the first to apply the "excessive entanglement" doctrine to a public school.

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47. This illustration is purely hypothetical. The author does not suggest that Catholicism in fact teaches any such doctrine.

48. A subject that, if not taught, would raise serious constitutional questions. See Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a law forbidding the teaching of evolution). The Court in Epperson reasoned that the Arkansas law selected "from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group." Id. at 103.

49. This is not to say that a school is forbidden to give balanced treatment to "creationism." The establishment clause forbids placing God above Darwin in a public school; the clause does not forbid discussion of a religious theory, even if a judge believes the theory unscientific. To the extent that McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982), is contrary, it should not be followed.

50. But not necessarily. The relative certainty of what can and cannot be done in the above hypotheticals may preclude excessive entanglement. Indeed, when implementing Method II, some limitation on the role of the teacher may be necessary. See supra note 43.

51. See Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (the first and fourteenth amendments were violated by a state court's invalidating a Bishop's defrockment). For cases decided before the entanglement doctrine was enunciated, see Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (free exercise and the establishment clauses of the first amendment forbid any application of a departure-from-doctrine test by a civil court resolving a dispute over property); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (religious freedom encompasses the power of religious bodies to decide for themselves matters of church government, as well as faith and doctrine).


53. The Court has not really had an opportunity to apply "excessive entanglement" to a public school. The only public school case arising since the doctrine originated in Walz v. Tax Comm'n, 397 U.S. 664 (1970), and became firmly entrenched in Lemon v. Kurtzman, 403 U.S. 602 (1971), was Stone v. Graham, 449 U.S. 39 (1980), which invalidated the posting of the Ten Commandments in public schools because of a forbidden religious purpose.

Since the concept of "excessive entanglement" is designed to keep state and church from regulating each other's affairs, Lemon v. Kurtzman, 403 U.S. at 625, and since the state must regulate its schools and teachers anyway, "excessive entanglement" does not seem to be a likely ground for invalidating a practice that has a primary secular purpose and effect.

Political divisiveness is perhaps an independent form of "excessive entanglement." See Meek v. Pittenger, 421 U.S. at 72 (1975); but see Gaffney, Political Divisiveness Along Religious Lines: the
III

Having examined one clearly (I) and one probably (II) constitutional method of permitting school prayer, it is useful to contrast them to those methods that are not constitutional. In *Engel v. Vitale* 54 the Court invalidated the ritualistic recitation of a prayer written by the New York Board of Regents. 55 *Engel* was clearly concerned with state sponsorship of prayer, not its voluntary recitation.

[The framers] knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance. 56

The Supreme Court in *Abington School District v. Schempp* 57 forbade teacher-led ritualistic Bible reading and recitation of the Lord's Prayer. “In the relationship between man and religion, the State is firmly committed to a position of neutrality.” 58 Obviously, when a teacher or some other state official determines which prayer is said, there can be no neutrality.

Similarly, the Court in *Stone v. Graham* 59 invalidated state sponsorship of the Ten Commandments. There was no doubt that the state statute authorizing the posting of the Commandments constituted sponsorship. 60

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55. “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” *Id.* at 422.
56. *Id.* at 435.
58. *Id.* at 226.
60. The statute provided:

(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”

(3) The copies required by this section shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this section.
issue was whether the Commandments could be deemed secular rather than religious. Contrary to statutory declaration, they were held to be religious.61

Although no other Supreme Court case has dealt directly with prayer,62 such issues have regularly arisen in the lower courts. Two of the more interesting cases are *Karen B. v. Treen*63 and *Collins v. Chandler Unified School District*.64

*Karen B.* involved a Jefferson Parish (Louisiana) School Board resolution permitting a minute of voluntary prayer followed by a minute of silent meditation:65

Under the school board guidelines, each teacher must ask if any student wishes to volunteer a prayer, and, if no student wishes to do so, the teacher may offer a prayer of his own. If the teacher elects not to pray, then the period of silent meditation would be observed immediately. The school board guidelines provide that no prayer may be longer than one minute in duration.

Jefferson Parish has also made elaborate provisions for excusing students who do not want to participate in the prayer portion of the morning exercises. According to a school board letter explaining the program to parents, any student who desires to participate in the minute of prayer must submit the express written permission of his parents and make a verbal request to join in the exercise. Students without this permission may either report to class, where they must remain seated and quiet throughout the morning exercises, or remain outside the classroom under other supervision.66

Several witnesses contended that the statute had a secular legislative purpose not unlike the marketplace of ideas theory ascribed to Method II: “These witnesses stated that the purpose of the school prayer program was to increase religious tolerance by exposing school children to beliefs different from their own and to develop in students a greater esteem for themselves and others by

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61. 449 U.S. at 41.
62. Two Supreme Court cases dealt with “release-time” programs, whereby students who so chose were “released” from their schoolwork to pursue religious studies during a specified time each week. McCollum v. Board of Educ., 333 U.S. 203 (1948), held violative of the establishment clause a plan whereby the religious instruction occurred in the students’ regular classroom, and students who chose not to participate were required to continue their secular study in another part of the school building. *Zorach v. Clauson*, 343 U.S. 306 (1952), upheld a program in which religious classes were held outside the school premises. Because a student could be excused for only religious reasons, one could argue that the *Zorach* scheme was not truly neutral. For this reason, *Zorach’s* viability could be questioned. See Smith v. Smith, 523 F.2d 121, 124 (4th Cir. 1975) (upholding *Zorach* only because Meek v. Pitinger, 421 U.S. 349, 359 (1975) described *Zorach* as viable authority). Were *Zorach* to be overruled, the constitutionality of proposed Methods I and II would not be affected.
63. 653 F.2d 897 (5th Cir. 1981), aff’d mem., 102 S. Ct. 1297 (1982).
64. 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981).
65. No challenge was made to the portion of the statute allowing silent meditation, which to the certain knowledge of any teacher of small, noisy children, clearly has a secular purpose.
66. 653 F.2d at 899.
enhancing their awareness of the spiritual dimensions of human nature."\textsuperscript{67}

The Fifth Circuit Court of Appeals correctly rejected this argument:

[T]he plain language . . . of the Jefferson Parish guidelines makes apparent their predominantly religious purpose. Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people. Indeed, since prayer is a primary religious activity in itself, its observance in public school classrooms has, if anything, a more obviously religious purpose than merely displaying a copy of a religious text in the classroom. Even if the avowed objective of the legislature and school board is not itself strictly religious, it is sought to be achieved through the observance of an intrinsically religious practice. The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests.\textsuperscript{68}

The critical distinction between the Jefferson Parish scheme and Method II is that the Jefferson Parish School Board prescribed prayer whereas Method II prescribes a philosophical recitation. While one might argue that most philosophical recitations will be prayers anyway and in some classes all may be, the distinction is critical. The establishment clause prohibits the state from favoring theistic prayers over other philosophical utterances; it does not prohibit individuals from choosing theistic prayers.

An analogy to equal protection is appropriate. It is beyond doubt that a school could not assign blacks to one side of a lunch room and whites to the other.\textsuperscript{69} Yet the school could adopt a policy of unassigned lunch room seats even if that policy resulted in segregated seating. The difference is that self segregation is permitted whereas state-sponsored segregation is not.\textsuperscript{70} Similarly, state-sponsored prayer is forbidden, but prayer without state encouragement is permitted.

Judge Sharp's dissent accepts this dichotomy but fails to find state sponsorship in the Jefferson Parish program. As he viewed it:

There are only three ways in which a state could possibly treat audible prayer in public schools; require it, allow it, or prohibit it. Requiring it would be an elementary violation of the Establishment Clause. But it seems to me that the state should be allowed to choose between allowing audible prayer and prohibiting it.\textsuperscript{71}

The flaw in Judge Sharp's reasoning is his erroneous assumption that this form of allowing prayer is content neutral. Surely, a rule that permitted students to voluntarily recite "Hail Mary" before class would present a different

\textsuperscript{67} Id. at 900. The witnesses were two state legislators who sponsored the statute and the school board member responsible for the resolution to implement the statute in Jefferson Parish.

\textsuperscript{68} Id. at 901.

\textsuperscript{69} McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

\textsuperscript{70} "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

\textsuperscript{71} 653 F.2d at 904 (Sharp, J., dissenting).
constitutional question than a neutral rule allowing any philosophical recitation. While the Jefferson Parish program does not specify the prayer, it does require that the preclass recitation be a prayer and not some other philosophical utterance.

Judge Sharp and I are not far apart on this issue. We agree that "[v]oluntariness is utterly irrelevant when the challenged legislation establishes the substantive content of a religious activity. Such legislation has the primary effect of advancing not religious freedom, but a state religion."72 He, however, views the Jefferson Parish program as content neutral. Notwithstanding this view, he is rightly troubled that teachers, who "at least from the perspective of students [are] government officials,"73 can offer the prayer. Nevertheless, he concludes that the practice establishes religious freedom rather than religion and is no more an establishment of religion than the free exercise clause.74

Although Judge Sharp's opinion is more thoughtful than many on this subject,75 it is difficult to justify state-sanctioned prayer on free exercise principles when the same free exercise concerns can be accommodated by a truly neutral method such as proposed Method II.

In Collins the Ninth Circuit Court of Appeals correctly invalidated a form of voluntary prayer in a case that was much more complex than the court's disturbingly simple opinion led one to believe:

Chandler High School is a public school in Chandler, Arizona. Periodically during the year the Student Council plans and schedules student assemblies and the school administration adjusts the regular class schedule so that the assembly can be held within the school day. Student Council officers conduct the assemblies and students not wishing to attend may report to a supervised study hall.

During the 1977-78 and 1978-79 school years, the Chandler Student Council requested permission to open assemblies with prayer. The principal approved these requests with the knowledge and concurrence of the superintendent and the Board of Education. In planning an assembly, the Student Council allotted a certain amount of time on the agenda and selected one member of the student body to say the prayer. The selected student was free to choose the manner and words in which the prayer was delivered. On each assembly day, the Council gave the principal an agenda that noted whether the gathering would be opened with prayer.76

In the court's view, the school board could not allow prayer in schools at all. Relying on cases such as Brandon v. Board of Education,77 the court held

72. Id. at 905.
73. Id. at 906. See supra note 3.
74. 653 F.2d at 904.
76. 644 F.2d at 760-61.
77. 635 F.2d 971 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981). See supra text accompany-
that merely permitting student prayer is unconstitutional. Although this philosophy is contrary to that espoused in this article, the court did reach the correct result.\textsuperscript{78}

The procedure invalidated in \textit{Collins} is not Method I, since all of the students participate except those who opt for the captive confines of the study hall.\textsuperscript{79} One could argue that a prayer should not be deemed less voluntary because a high percentage of the student body chooses to participate in it. The difficulty with this reasoning is that the student council is a creature of the school which represents the entire student body, making its action a form of state action,\textsuperscript{80} rather than the action of each of the students as individuals.

The \textit{Collins} scheme cannot be defended under Method II because the student is selected to say a prayer, not a philosophical recitation, and he or she is specifically chosen by the student council rather than selected at random. The failure to select at random precludes application of the "open forum" concept, and creates an unjustifiably high risk that the student will be chosen for the probable content of his prayer. If the Chandler High School assembly were to be opened by a philosophical recitation delivered by a student chosen at random from among those expressing an interest, the issue would have been very different. So long as the entire student body is made aware of this procedure, thereby eliminating the danger of a student prayer being attributed to the State, the procedure should be sustained.

\textbf{Conclusion}

The Supreme Court has regularly, but not uniformly, applied the "wholesome neutrality" principle advocated in this article.\textsuperscript{81} \textit{Lemon v. Kurtzman}\textsuperscript{82} and its progeny\textsuperscript{83} severely restrict permissible state aid to the secular functions of sectarian schools, but impose no similar restrictions on state aid to nonsectarian schools. Thus, eligibility for aid depends on the nonreligious character of the institution. At the other extreme, \textit{Sherbert v. Verner}\textsuperscript{84} and \textit{Thomas v. Review Board}\textsuperscript{85} require the state to pay unemployment compensation to an

\textsuperscript{78} 644 F.2d at 762.

\textsuperscript{79} \textit{Cf.} McCollum v. Board of Educ., 333 U.S. 203 (1948). A difference exists between offering students a "choice" between prayer and study hall, and offering students a free choice in how to spend spare time before or after classes, during recess or during lunch. \textit{See} Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965) (upholding voluntary student prayer before or after school because students who did not wish to participate did not have to be present).

\textsuperscript{80} \textit{See supra} text accompanying note 69. \textit{Cf.} Uzzell v. Friday, 401 F. Supp. 775 (M.D.N.C. 1975) (apparently assuming that the student constitution constituted state action), rev'd and remanded on other grounds, 625 F.2d 1117 (4th Cir. 1980).


\textsuperscript{82} 403 U.S. 602 (1971).


\textsuperscript{84} 374 U.S. 398 (1963).

\textsuperscript{85} 450 U.S. 707 (1981).
employee who loses his job because of a religiously motivated inability to comply with the job's conditions, even though compensation would not have been paid if the inability were not religiously motivated.

Whatever may be the merits of these departures from neutrality, they have no place in formulating the constitutional permissibility or impermissibility of school prayers. The school can neither support nor be hostile towards religion. It cannot be an apostle for either Jerry Falwell\(^6\) or Madelyn O'Hair.\(^7\) Method I and Method II fully accommodate any legitimate need for free exercise of religion while maintaining strict neutrality. In addition, they implement the \textit{Tinker} admonition that schools not be "enclaves of totalitarianism,"\(^8\) but places where "leaders [are] trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"\(^9\)

Because Methods I and II fully accommodate any need for prayer, and because we do not need prayer which is any less voluntary than that arising from these methods, the proposed school prayer amendment should not be added to the Constitution.

\(^6\) A Lynchburg, Virginia Baptist minister who as head of the Moral Majority, a religious organization, has become a spokesman for politically active, evangelical Christians.
\(^7\) A politically active atheist.
\(^8\) 393 U.S. at 511.
\(^9\) \textit{Id.} at 512. (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).