Congressional Research Service

Report 98-387

THE LAW OF CHURCH AND STATE: THE PROPOSED RELIGIOUS FREEDOM AMENDMENT, H.J.RES. 78

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Updated April 20, 1998

Abstract. On March 4, 1998, the House Judiciary Committee voted to report H.J.Res. 78, the "Religious Freedom Amendment," to the House. The proposal is the latest in a long chain of constitutional amendments that have been introduced since the Supreme Court's school prayer decisions of Engel v. Vitale and Abington School District v. Schempp. This report summarizes legislative developments on the proposal and briefly analyzes its likely legal effect if added to the Constitution.

98-387 A
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The Law of Church and State: The Proposed Religious Freedom Amendment, H.J.Res. 78

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Summary

On March 4, 1998, the House Judiciary Committee voted to report H.J.Res. 78, the "Religious Freedom Amendment," to the House. The proposal is the latest in a long chain of constitutional amendments that have been introduced since the Supreme Court's school prayer decisions of *Engel v. Vitale*[1] and *Abington School District v. Schempp*.[2] But this is the first time a constitutional amendment concerning church and state has been ordered reported by a House committee. The scope and effect of H.J.Res. 78 are also considerably broader than the school prayer issue that has been the focus of most previous proposals, and in that respect the measure appears to build on the debate on church-state issues that occurred in the 104th Congress. This report summarizes legislative developments on the proposal and briefly analyzes its likely legal effect if added to the Constitution.

Legislative Background

On March 4, 1998, the House Judiciary Committee ordered a modified version of H.J.Res. 78 reported to the House on a party-line vote of 16-11. The proposal would add the following language to the Constitution:

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

[1] 370 U.S. 421 (1962).

[2] 374 U.S. 203 (1963).

H.J.Res. 78 was originally introduced on May 8, 1997, by Rep. Ernest J. Istook (R.-Okla.) and currently has 153 cosponsors. The Subcommittee on the Constitution of the House Judiciary Committee held a hearing on the proposal on July 22, 1997, and on a party-line vote of 8-4 on October 28, 1997, forwarded it to the full Committee.

The measure as ordered reported by the Judiciary Committee differs in three respects from the proposal as it was originally introduced: (1) The sentence "Neither the United States nor any State shall establish any official religion" has been added; (2) the phrase "Neither the United States nor any State" has been substituted for "The Government" at the beginning of the last sentence; and (3) the phrase "prescribe school prayers" in the last sentence originally read "initiate or designate school prayers." The changes were all made by the Subcommittee on the Constitution in a substitute proposed during mark-up by Rep. Hutchinson (R.-Ar.); the full Committee approved the measure without further change.

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

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

H.J.Res. 78 is the latest in a long succession of constitutional amendments that have been proposed since the Supreme Court handed down its school prayer decisions of *Engel v. Vitale* and *Abington School District v. Schempp* in 1962 and 1963. But the proposal addresses a broader range of church-state issues than its predecessors and appears to build on competing constitutional proposals that emerged during the 104th Congress. Late in the first session of that Congress both Rep. Hyde (R.-Ill.) and Rep. Istook introduced proposals to amend the Constitution with respect to matters of church and state — H.J.Res. 121 (also introduced in the Senate by Sen. Hatch as S.J.Res. 45) and H.J.Res. 127, respectively.[3] But the two proposals addressed different aspects of the Supreme

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

> To secure the people's right to acknowledge God according to the dictates

(continued...)

Court's church-state jurisprudence and competed for support among proponents of amending the Constitution in this area of the law. Late in the second session of the 104th Congress Rep. Armey (R.-Tex.) introduced a modified proposal in an effort to unify proponents of changing the Constitution in this area of the law — H.J.Res. 184.[4] But that effort also proved unavailing.

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

The only previous vote in the House on a constitutional amendment concerning church and state in recent decades occurred in 1971, when the House voted in favor of H.J.Res. 191, a school prayer proposal by Rep. Wylie (R.-Oh.), by a margin of 240-162; but that was twenty-eight votes short of the necessary two-thirds majority. That measure came to the House floor not by means of a Committee recommendation but through a discharge petition.[5]

Constitutional Implications

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[3](...continued)

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

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

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

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

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

[5] For a full recounting of Congressional action on school prayer and related proposals, *see* CRS Report 96-846, *School Prayer: The Congressional Response, 1962-1996* (Oct. 16, 1996) .

H.J.Res. 78, with some modifications, essentially consolidates the Hyde and Istook proposals of the 104th Congress into a single measure. If adopted, it would not repeal but would coexist in the Constitution with the religion clauses of the First Amendment, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." Nevertheless, H.J.Res. 78 clearly is intended to alter a number of judicial interpretations of those clauses, particularly of the establishment clause. Much of the legislative history of the proposal is yet to be written, of course, but at this point in the measure's consideration its likely constitutional effects appear to include the following:

(1) Public aid to sectarian institutions. H.J.Res. 78 appears to loosen considerably the existing constitutional limitations on public aid to sectarian institutions, particularly of direct aid. The proposal's concluding words --"Neither the United States nor any State shall ... discriminate against religion, or deny equal access to a benefit on account of religion"-- likely would require government to include even pervasively religious entities in grant and contract programs. Currently, the establishment clause allows direct public aid to religious entities if their secular functions can be separated from their religious ones and the aid is channeled only to the entities' secular functions. But it bars direct aid if the entity is so pervasively religious that the aid cannot be confined to "secular, neutral, and nonideological purposes."[6] Under H.J.Res. 78 pervasively religious entities could not be excluded from participation in direct public aid programs for which they would otherwise be eligible, and existing Supreme Court constructions of the establishment clause that require such exclusion would be overridden.[7]

The proposal's impact on indirect aid programs such as voucher and tax benefit measures would not be quite as dramatic. Current interpretations of the establishment clause allow such indirect aid to flow even to pervasively sectarian entities so long as the primary recipient of the benefit has a genuinely free choice about where to use it and is not channeled by government toward a religious entity.[8] H.J.Res. 78 would not change that interpretation. But under current law government can include nonreligious private entities in indirect public aid programs and exclude religious ones. H.J.Res. 78 appears to mandate the inclusion of private religious entities, including pervasively religious ones, in any indirect assistance program that also includes nonreligious private entities.

With respect to both direct and indirect aid programs, H.J.Res. 78 would also override state constitutional provisions that bar the funding of religious entities.

(2) Religious activities on public property. Less certain is H.J.Res. 78's effect on the Supreme Court's jurisprudence concerning religious activities in the public schools and the display of religious symbols on public property. The Court has construed the establishment clause to prohibit government from sponsoring or promoting religious

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

[7] *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988).

[8] *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

activities or doctrines in the public schools[9] and from sponsoring or displaying quintessential religious symbols by themselves on public property.[10] But it has, in addition, interpreted the establishment, free exercise, and free speech clauses to provide substantial protection to **private** religious expression. "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression," the Supreme Court has said.[11] Thus, the Court has held the First Amendment to require public universities to allow student religious groups to use campus facilities on the same basis as nonreligious student groups.[12] It has upheld as well the "Equal Access Act"[13] extending the same right to students at the secondary school level; affirmed released time programs of religious instruction[14]; and, implicitly, approved the constitutionality of a properly drafted moment of silence statute.[15] In addition, in a number of decisions it has held the First Amendment to protect private religious expression on public property, including privately sponsored displays of quintessential religious symbols.[16]

To the extent that the sentence in H.J.Res. 78 stating that "the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed" is read to apply only to private religious expression, it appears to be largely consonant with, and not to alter, existing constitutional law. But much of the ferment over the law of church and state has been stimulated by the Court's decisions concerning government sponsorship and endorsement of religious expression, and the legislative history of H.J.Res. 78 to date seems to make clear that it is intended to undo at least some of that jurisprudence. Rep. Istook has testified, for instance, that his proposal would overturn *Engel* and *Abington* to the extent that they disallow group classroom prayer on a voluntary basis, reverse *Lee v. Weisman's* restriction on prayer at graduation ceremonies, annul *Stone v. Graham's* prohibition on the posting of the Ten Commandments on classroom walls, cancel *County of Allegheny's* ban on the display of a creche by itself on public property, negate *Lemon v. Kurtman's* restriction on government acting with a religious purpose, and supersede a number of lower court decisions barring religious symbols on government seals and logos. But he has also said that H.J.Res. 78 would retain the First Amendment's existing bans on government

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[9] *Engel v. Vitale, supra; Abington School District v. Schempp, supra; Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Stone v. Graham*, 449 U.S. 39 (*per curiam*); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[10] *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

[11] *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

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

[13] 20 U.S.C.A. 4071 *et seq.*

[14] *Zorach v. Clauson*, 343 U.S. 306 (1981).

[15] *Wallace v. Jaffree, supra.*

[16] *See, e.g., International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); and *Capitol Square Review and Advisory Board v. Pinette, supra.*

mandating religious activity, prescribing the content of a prayer, and designating an official religion.[17]

H.J.Res. 78, in short, does not appear to be limited to protecting private religious speech but would allow the government to play an affirmative role. But in the present state of the proposal's legislative consideration, the scope of government's role with respect to religious speech does not appear to be entirely clear. Greater clarity may emerge once the Judiciary Committee issues its report on the proposal.

(3) "Acknowledge God". H.J.Res. 78's opening words — "[t]o secure the people's right to acknowledge God according to the dictates of conscience" — would introduce a specifically religious term into the Constitution for the first time. Unlike most state constitutions and unlike the Declaration of Independence, the U.S. Constitution currently makes no reference to God and mentions religion only in the Article VI ban on religious tests for public office and in the first two clauses of the First Amendment.

Additional Reading

CRS Report 98-65, *The Law of Church and State: Developments in the Supreme Court Since 1980*.

CRS Report 98-163, *The Law of Church and State: Public Aid to Sectarian Schools*.

CRS Report 93-680, *Prayer and Religion in the Public Schools: What Is, and Is Not, Permitted*.

CRS Report 96-846, *School Prayer: The Congressional Response, 1962-1996*.

[17] *Hearing Before the Subcommittee on the Constitution of the House Judiciary Committee on H.J.Res 78: Proposing an Amendment to the Constitution of the United States Restoring Religious Freedom*, 105th Cong., 1st Sess. (July 22, 1997) (testimony of Rep. Ernest J. Istook) (unprinted). *See also* Istook, Ernest J., *Legal Review & Analysis of the Religious Freedom Amendment* (undated).