SENATE—*Tuesday, March 13, 1984*

(Legislative day of Monday, March 12, 1984)

The Senate met at 11 a.m., on the expiration of the recess, and was called to order by the President pro tempore (Mr. THURMOND).

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray.

Father in Heaven, in our culture strong people do not admit weakness—but they feel it. They are not allowed to admit vulnerability—but they know they are. Power is the word and powerlessness is unacceptable. So we live as though we are supposed to be infallible—and the pressure of perpetuating such illusion is debilitating and destructive.

Forgive us Lord for such hyprocrisy. Save us from its incipient enslavement, and free us to be ourselves. Help us to accept the exciting possibility that to acknowledge weakness and inadequacy might open the door to divine possibilities beyond our best human reasoning. We pray in the name of the truly authentic human who was himself and never pretended to be anything else. Amen.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. BAKER. I thank the Chair.

SENATE SCHEDULE

Mr. BAKER. Mr. President, after the two leaders are recognized under the standing order, there will be two special orders, to be followed by a period for the transaction of routine morning business until noon, and the Senate will recess at 12 noon until 2 p.m., to accommodate caucuses by Members on both sides of the aisle away from the Chamber.

At 2 p.m., the Senate will resume consideration of Senate Joint Resolution 73, which is the prayer amendment. I do anticipate the strong possibility that we will get votes today, a vote or votes on amendments, and I urge Senators to take account of that.

I will perhaps have a further announcement to make about that shortly after we reconvene at 2 p.m.

Mr. President, there are a few other things that will be coming up this week that the leadership on this side may ask the Senate to turn to, in addition to the prayer amendment. There are two supplemental appropriations bills, for instance, and one or both of those might be done in a fairly brief period of time, and it may be possible to do that.

I understand that there is a wheat bill or an agriculture bill that has been reported and it is the bill contemplated when I made the commitment to Senator BOREN of Oklahoma that in exchange for his changing his amendment to the then-pending measure from an amendment to a sense of the Senate resolution the leadership on this side would attempt, in cooperation with the leadership on the other side, to provide a time of about 3 or 4 hours all inclusive to consider such a measure if it is reported, which it appears now to have been. Some day this week the chances are we will take that up as well.

Since Thursday is the regular late evening and since it is not the desire of the leadership to interfere with the progress we may make on the prayer amendment if we get into a voting pattern, which I anticipate, I wish to preliminarily suggest that we may take up that agriculture bill then on Thursday and run perhaps later than usual in order to try to complete it.

Mr. President, I hope we can finish the prayer amendment this week. If we cannot, we will be on it next week. But in any event we will pursue the matter until the Senate has worked its will.

Mr. President, I will confer at length with the minority leader on these arrangements or variations of them so that we can try to establish an understanding and an agreement on how the Senate will proceed this week, but it appears that we will have a busy week and I urge Senators not to plan to be away.

Mr. President, as I say, I will confer with the minority leader and other Senators about the schedule today, but I have nothing further that I can announce at this moment. I am prepared to yield back my time or I offer it to the minority leader if he has a need for additional time.

Mr. BYRD. Mr. President, I thank the distinguished majority leader. I do not believe I have any need for additional time. I think my own order time will be sufficient.

Mr. BAKER. All right.

Mr. President, I yield back the time remaining under the standing order.

RECOGNITION OF THE MINORITY LEADER

The PRESIDENT pro tempore. The minority leader is recognized.

MORE WASTE AND CORRUPTION IN OUR CENTRAL AMERICAN AID PROGRAMS

Mr. BYRD. Mr. President, when will this administration cease treating the American taxpayer with contempt? Once again, another article has appeared in a respected news publication in the United States detailing corruption and mismanagement in our El Salvador aid program.

According to the March 6, 1984, Christian Science Monitor:

> The Salvadoran Government agency responsible for distributing the bulk of AID food to displaced people is riddled with corruption and suffers from mismanagement.

Reporter Chris Hedges detailed the following charges of abuse in our humanitarian aid programs in El Salvador:

First, the use of donated AID food intended for displaced people has been diverted to feed the Salvadoran Army.

Second, the fabrication of food deliveries to cover the private use of AID foodstuffs has been devised by Salvadoran Government and military officials charged with distribution.

Third, the decision has been made by senior officials to cut off food in San Vicente to displaced people in an effort to force them back into combat zones from which they have fled.

Salvadorans who are displaced by the war are to receive food on a monthly basis. However, when the director of the Roman Catholic Relief organization, Caritas, began checking on complaints from the food recipients, it was discovered that food was delivered in San Vicente only three times in 1983; namely, April 28, August 11, and October 5.

There were also complaints that food rations were well below the amount the displaced persons should have been allotted.

During 1984, AID humanitarian assistance for displaced persons in El Salvador will be increased to $40 million. In light of the serious charges already leveled at the handling of humanitarian aid programs for displaced persons, it is difficult to imagine that the administration would be willing to waste even more of the taxpayers' dollars on this program.

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

I ask unanimous consent to have printed in the RECORD, the article entitled "U.S. Food for Displaced Salvadorans Diverted by Corruption and Bad Management."

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Christian Science Monitor, Mar. 6, 1984]

U.S. FOOD FOR DISPLACED SALVADORANS DIVERTED BY CORRUPTION AND BAD MANAGEMENT

(By Chris Hedges)

SAN VICENTE, EL SALVADOR.—The Salvadoran government agency responsible for distributing the bulk of AID food to displaced people is riddled with corruption and suffers from mismanagement, it is charged here.

Further, the United States Agency for International Development (AID) and the US Embassy are described as having used the Salvadoran agency to pressure residents of camps for displaced people into leaving them.

The charges against the National Committee for Displaced People (Conades), its coordinating office in the department of San Vicente, and US officials are leveled by many sources connected with the program, including Salvadoran military officials. The charges include:

The decision by senior AID officials to cut off food in San Vicente to displaced people in an effort to force them back into the conflictive zones they have fled.

The use of donated AID food intended for displaced people, to feed the Salvadoran Army.

The fabrication of food deliveries to cover the private use of AID foodstuffs by Salvadoran government and military officials charged with the distribution.

AID officials have denied the charges, while conceding that "isolated abuses" have occurred. They claim that the displaced people in San Vicente and Chalatenango who say they have been denied food are not telling the truth.

"I know that AID has claimed that the people in the displaced-persons camp in San Vicente have been given food supplies, while the displaced people say they have not," say David Bonilla, the director of the Roman Catholic relief organization, Caritas, in San Vicente.

"We went to the camp, however, and spent several hours looking at the dates inscribed on the Conades cards needed by displaced people to receive the food. Without calling AID a liar, I'm afraid the cards back up the claims by the displaced people and not what the US and Salvadoran government officials are saying."

María Santos Miranda, sitting inside her cramped mud hut in the displaced-persons camp, says, "We received food supplies three times in 1983, and have received them once in 1984." Conades is meant to provide food deliveries to the displaced population on a monthly basis.

Mrs. Santos holds out her card for inspection. According to her card and dozens of others inspected in the camp, the dates of delivery in 1983 were April 28, Aug. 11, and Oct. 5. The 1984 delivery was, according to these cards, on Feb. 9.

The decision to cut back food delivery to the displaced people in San Vicente was made by senior AID officials, according to one Salvadoran government official involved in the food distribution program and military officials in San Vicente.

The former director of the food distribution program in San Vicente, Lt. Col. Juan Pablo Gálvez, allowed the undelivered food to be sold or used to feed Army troops, according to these sources.

"When Gálvez was ousted in November," says one Salvadoran military official, "the soldiers stopped eating AID food. But before that you could see truck-loads of it headed out to feed troops in the field."

Private and church relief officials have said for some time that AID food was being used to feed the Salvadoran Army.

The quantity of food supplied to each displaced family in San Vicente during 1983 is not specified on the Conades cards, although the cards have a box where the quantity should be recorded. Displaced people say the food rations in 1983 were very small, and well below the amount they should have been allotted.

"I assume they didn't write in the numbers because they didn't give us what we should have gotten," says Emilia Martínez, who lives in the camp.

In Chalatenango, displaced people, who occupy an abandoned granary and sleep in what were formerly pigsties, say Conades officials write down on their ration cards figures that are usually double the amount of food given them.

"They assume that because we are all poor, none of us can read the numbers on our cards to understand how they are cheating us," says one.

"It's true that we haven't been able to hand out the allotted amount of food," says the Conades director for the department of Chalatenango, David Rivera Medranos. "But that is because it is not sent to us from the capital."

Medranos denies that Conades has falsified the quantities of food deliveries.

The displaced people say that rather than deliver the food, as AID regulations specify, the displaced people—mostly small children, women, and elderly men—must walk 1½ miles to the Conades office in Chalatenango to get the food, then carry it back.

Medranos says this has been his policy because "the displaced people got used to walking, and it would be hard to break them of the habit."

He says preparations are being made to begin a delivery system. Medranos also claims that canvas beds or mats are not provided to the displaced people, most of whom sleep together in an abandoned warehouse on a cement floor, "because they're Indians, and Indians are more accustomed to sleeping on the ground."

But the displaced people say the cement floor makes sleep nearly impossible.

AID will expand its aid program to Conades in 1984. About $40 million worth of AID humanitarian assistance funds will be directed toward displaced people. Some $10 million will be given to Conades to begin a displaced-persons relocation program in June or July.

The plan calls for 20 percent of the displaced persons living in the camps, estimated at 100,000, to be relocated. The program, say sources familiar with it, will be modeled on the Israeli relocations in the West Bank.

(Mrs. KASSEBAUM assumed the chair.)

FRANK CHURCH ON CENTRAL AMERICA

Mr. BYRD. Madam President, there is a growing concern in the Congress that the administration may be heading in a direction detrimental to U.S. interests in Central America. The evidence is growing that the United States may be sinking deeper into a quagmire in the region—a quagmire reminiscent of our recent experience in Lebanon.

Therefore, it is incumbent upon the Congress to step back and reflect upon the root causes of the turmoil presently shaking Central America. It is time to reflect upon the views of wiser and calmer people. One such individual is our former colleague and former chairman of the Senate Committee on Foreign Relations—Frank Church. The March 11, 1984, edition of the Washington Post carried an op-ed piece written by Senator Church in which he spelled out very forcefully and reasonably why our present policy toward Central America is doomed to failure.

As Senator Church observed, the United States, for the past 40 years, has had difficulty understanding that Third World revolutions are primarily nationalist, not Communist.

Our former colleague explained:

> You might think that revolutionary nationalism and the desire for self-determination would be relatively easy for Americans—the first successful revolutionaries to win their independence—to understand. But instead we have been dumbfounded when other peoples have tried to pursue the goals of our own revolution two centuries ago.

Citing historian Hannah Arendt, Senator Church pointed out:

> • • • The United States has made a series of desperate attempts to block revolutions in other countries, "with the result that American power and prestige were used and misused to support obsolete and corrupt political regimes that long since had become the objects of hatred and contempt among their own citizens."

Citing U.S. involvement in the overthrow of Jacobo Arbenz in Guatemala during 1954, efforts to rid the hemisphere of Cuba's Fidel Castro, and our covert intervention in Chile which led to the overthrow of a democratically elected President, Salvador Allende, Senator Church raises a very important question when he notes:

> After spending billions of dollars and emptying the CIA's bag of dirty tricks, what do we have to show for our efforts? Obviously the hemisphere has not been swept clean of communism.

The point our former colleague makes should not be lost upon us. We have consistently intervened in the past on behalf of the so-called oligarchies of Central America. Our policies have installed into power right-wing, corrupt, repressive regimes. And yet, the past continues to come back and haunt us as we resort to the same methods to resolve the same problems—covert wars, threatened or actual military intervention, and ever increasing amounts of aid to corrupt

military regimes whose primary concern is that of maintaining the status quo, rather than building broadly based democratic institutions.

In El Salvador, we see the classic example of such a failed policy. In January 1981 when President Reagan took office, the so-called final offensive of the Salvadoran guerrillas had collapsed. The guerrillas, for all intents and purposes, were defeated. Yet, 3 years later, and after pumping more than $1 billion of aid into that tiny Central American country, U.S. policy is collapsing. The guerrillas, whom our experts numbered at 3,000 to 5,000 in 1981, have grown to 9,000, and now to 12,000; they have military momentum, and control at least 20 percent of the countryside. After all the aid dollars we have poured into that country, about 40 percent of the labor force is unemployed. And what about democratic institutions taking root?

Things are going so badly in El Salvador that the administration has requested a supplemental appropriation of $178 million in additional military aid to El Salvador for fiscal year 1984. This is $178 million more than the $64.8 million Congress has already appropriated for military aid in this fiscal year.

If Congress approves all the President is requesting in the fiscal year 1984 supplemental and for fiscal year 1985, the American taxpayer will be called upon to pour $947 million in economic and military aid into El Salvador. In 1981, the United States provided a total of $149.5 million in military and economic aid to El Salvador. In 1981, the administration said the guerrillas were defeated. The direct opposite has been the case. The more we have involved ourselves in El Salvador with advisers, trainers, and increasing amounts of military and economic aid, the worse the situation has become.

The administration continues to call upon the American taxpayers to throw their money, in ever increasing amounts, down a rat hole in El Salvador with no end in sight.

There really is not any secret as to why we are losing in El Savlador. Senator Church provides many of the answers in his op-ed piece.

Madam President, I ask unanimous consent that the article by former Senator Church be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Mar. 11, 1984]

WE MUST LEARN TO LIVE WITH REVOLUTIONS

IF THE UNITED STATES CAN BEFRIEND CHINA, IT CAN ACCEPT NICARAGUA

(By Frank Church)

America's inability to come to terms with revolutionary change in the Third World has been a leitmotif of U.S. diplomacy for nearly 40 years. The failure has created our biggest international problems in the postwar era.

But the root of our problem is not, as many Americans persist in believing, the relentless spread of communism. Rather, it is our own difficulty in understanding that Third World revolutions are primarily nationalist, not communist. Nationalism, not capitalism or communism, is the dominant political force in the modern world.

You might think that revolutionary nationalism and the desire for self-determination would be relatively easy for Americans—the first successful revolutionaries to win their independence—to understand. But instead we have been dumbfounded when other people have tried to pursue the goals of our own revolution two centuries ago.

Yes, the United States generally has supported political independence movements, as in India or later in Africa, against the traditional colonial powers of Europe. Those situations were easy for us—we've never been colonialists. But where a nationalist uprising was combined with a Marxist element of some kind or with violent revolutionary behavior, Americans have come unhinged.

This happened most dramatically in the biggest tragedy of American diplomacy since World War II, Vietnam. But it has happened repeatedly in other countries as well, most recently in Nicaragua and El Salvador.

Given the size and the seriousness of our failures to deal successfully with nationalistic revolutions, you might think we'd be busy trying to figure out why we've done so badly, and how we could do better in the future. But on the contrary, we simply stick to discredited patterns of behavior, repeating the old errors as though they had never happened before.

The latest example is the report of the Kissinger Commission on Latin America, which painted events in Central America in ominously stark colors. The commission said that in principle America can accept revolutionary situations, but in Nicaragua and El Salvador we cannot. Why? Because of Soviet and Cuban involvement.

But the sad fact is that the Soviets will always try to take advantage of revolutionary situations, as will the Cubans, particularly in this hemisphere. To solve our problem we have to learn to adapt to revolutions even when communists are involved in them, or we will continue to repeat the errors of the last four decades.

Revolutionary regimes are not easy to live with—particularly for a country as conservative as the United States has become. As Hannah Arendt—no Marxist herself—noted in her classic work, "On Revolution," the United States has made a series of desperate attempts to block revolutions in other countries, "with the result that American power and prestige were used and misused to support obsolete and corrupt political regimes that long since had become objects of hatred and contempt among their own citizens."

Why does America, the first nation born of revolution in the modern age, find it so difficult to come to terms with revolutionary change in the late 20th century?

One answer involves the nature of our own revolution. It was essentially a revolt against political stupidity and insensitivity. With sparsely populated, easily accessible and abundant lands, the restless and dissatisfied in early America had an outlet for their discontent. The young United States never had to deal with the limitless misery of an impoverished majority.

In the first half of this century, when the country faced sharpened class conflict as a result of the excesses of an unbridled capitalism, we were blessed with patrician leaders, Theodore and Franklin Roosevelt, who had the foresight to introduce needed reforms. An intelligent, conservative property-owning class had the sense to accept them.

But our experience is alien to other countries which do not share our natural wealth. In poor countries a desperate majority often lives on the margin of subsistence. A selfish property-owning minority and, often, an indifferent middle class intransigently protect their privileges. Dissidence is considered subversive. It isn't surprising that those who seek change resort to insurrection.

They take their lead not from the American, but from the French revolutionary tradition where, in Arendt's phrase, the "passion of compassion" led the Robespierres of the time to terrible excesses in the name of justice for the impoverished masses.

The spectacle of violent, sometimes anarchic revolutionary activity combined with an obsessive fear that revolutions will inevitably fall prey to communism has led us to oppose radical change all over the Third World, even where it is abundantly clear that the existing order offers no real hope of improving the lives of the great majority. As a result, those who ought to be our allies—those who are ready to fight for justice for the impoverished majority—find themselves, as revolutionaries, opposed not only to the ruling forces in their own societies, but the United States.

I am not arguing that revolutions are romantic or pleasant. History is full of examples, from France to Iran, of revolutions born in brutality and often accompanied by extended bloodbaths of vengeance and reprisal, and which ultimately produce just another form of authoritarianism to replace the old. But the fact that we may not like the revolutionary process or its results is, alas, not going to prevent revolutions. On the other hand, the fact that revolutions are going to happen need not mean disaster for the United States. Our past failures do suggest a way we can adapt to revolutions without fighting them or sacrificing vital national interests.

Consider the case of Vietnam. Our overriding concern with "monolithic" communism led us grossly to misread the revolution in that country. Ignoring centuries of enmity between the Vietnamese and the Chinese, our leaders interpreted a possible victory for Ho Chi Minh's forces as a victory for international communism. The war against the French and then the war among the Vietnamese in our eyes became a proxy war by China and the Soviet Union even after those two powers had split, destroying the myth of "monolithic" communism. Indochina, in the new American demonology, was seen as the first in a series of falling dominoes.

Vietnam did fall to the communists, but only two dominoes followed—Laos and Cambodia, both of which we had roped into the war. Thailand, Malaysia and Indonesia continue to exist on their own terms. The People's Republic of China, for whom Hanoi was supposed to be a proxy, is not engaged in armed skirmishes against Vietnam.

Meanwhile, the United States, having been compelled to abandon the delusion of containing the giant of Asia behind a flimsy network of pygmy governments stretched thinly around her vast frontiers, has at last shown the good sense to make friends with China. American influence, far from collaps-

ing, has drawn strength from this sensible new policy, and has been rising ever since. As for communism taking over, it is already a waning force. The thriving economies are capitalist: Japan, South Korea, Taiwan, Hong Kong, Singapore. You don't hear Asians describing communism as the wave of the future.

If any lessons were learned from our ordeal in Southeast Asia, they have yet to show up in the Western Hemisphere, where our objective is not simply to contain, but to eradicate communism, regardless of the circumstances in each case. In pursuit of this goal, we took heed of one restraint. The legacy of resentment against us still harbored by our Latin neighbors, stemming from the days of "gunboat diplomacy," made it advisable, wherever feasible, to substitute "cloak and dagger" methods—covert instead of overt means.

Hence the American-sponsored coup to oust a democratically elected government in Guatemala in 1954. The ousted president, Jacobo Arbenz, was by American standards, a New Deal liberal. But our cold warriors of that era decided he was a red threat. As U.S. Ambassador John Peurifoy, arriving in Guatemala on his special mission, put it: "If Arbenz is not a communist, he'll do until the real thing comes along."

In Cuba, the United States spared no effort to get rid of Fidel Castro. We financed and armed an exile expeditionary force in an attempted repeat of the Guatemalan coup, only to see it routed at the Bay of Pigs. Then the CIA tried repeatedly to assassinate Castro, even enlisting the Mafia in the endeavor; and the United States imposed against Cuba the most severe trade embargo inflicted on any country since the end of World War II.

Even where the left gained power in fair and open elections, the United States has been unwilling to accept the results. Hence the Nixon administration's secret intervention in Chile aimed first at preventing the election of and then at ousting President Salvador Allende.

Despite these and other efforts by the United States, another Marxist regime did arise in the hemisphere: Nicaragua. And, true to form, the United States has again financed, armed and promoted an exile army whose objective is its overthrow.

After spending billions of dollars, and emptying the CIA's bag of dirty tricks, what do we have to show for our efforts? Obviously, the hemisphere has not been swept clean of communism. Cuba and Nicaragua have avowedly Marxist regimes; in El Salvador, and insurrection gains momentum against an American-trained and equipped army, despite an American-sponsored agrarian reform program and our hopes for the election of a reformist president and legislature. The result defies our grand design: the army fights indifferently; the agrarian reform is stymied, and the Salvadoran middle class and traditional landed interests remain determined to elect extreme rightists to the important legislative and executive positions.

By our unrelenting hostility to Castro, we have invested him heroic dimensions far greater than would be warranted by Cuba's intrinsic importance in the world. We are in the process of performing a similar service for the commandantes of Nicaragua and, at the same time, discrediting the legitimate domestic opponents of their political excesses. We have left Cuba no alternative to increased reliance upon Russia, and we now seem determined to duplicate the same blunder with Nicaragua.

So by any standard, American policy has failed to achieve its objective: to inoculate the hemisphere against Marxist regimes. But are we fated to cling to the disproven policy of opposing each new revolution because of Marxist involvement, even though the insurgents fight to overthrow an intolerable social and economic order?

By making the outcome of this internal struggle a national security issue for the United States, as the Kissinger Commission does, we virtually guarantee an American military intervention wherever the tide turns in favor of the insurgents. If this happened in El Salvador, it would be difficult to imagine that the present administration would stop before it had gone "to the source," Nicaragua or even Cuba. In the process, of course, we would fulfill Che Guevara's prophecy of two, three, many Vietnams in Latin America.

We should stop exaggerating the threat of Marxist revolution in Third World countries. We know now that there are many variants of Marxist governments and that we can live comfortably with some of them. The domino theory is no more valid in Central America than it was in Southeast Asia. And it is an insult to our neighbor, Mexico, for it assumes that Mexico is too weak and unsophisticated to look out for its own interests.

We repeatedly ignore the explicit signals from Marxists in Central America that they will respect our concerns. For example, we worry that the commandantes in Nicaragua will invite the Soviets or the Cuban to establish bases in their countries. Yet, the Sandinista government in Nicaragua has explicitly committed itself not to offer such bases to the Russians or Cubans. Instead, they have offered to enter into a treaty with the United States and other regional countries not to do so. And the political arm of the insurgents in El Salvador has also committed itself to no foreign bases on its soil.

Why not take them up on these commitments? The United States, with the help of other regional powers who share our interests, including Venezuela, Mexico, Colombia and Panama, has the means to ensure that the revolutionaries keep their word. If Nicaragua violated its treaty obligation to those states, the United States would have legal grounds and regional sanction for taking action.

If the threat of communist bases is real, than a negotiated agreement precluding them would surely be perceived as a "victory" for the United States and a "defeat" for the Russians. And with a Nicaraguan treaty agreement with the United States and the countries of the region, the Salvadoran insurgents, should they prevail, would surely follow suit.

Although the Nicaraguan revolution has followed classic lines, in comparative terms it has been relatively moderate. There has been no widespread terror, and the regime has shown itself sensitive to international pressure. If we cannot come to terms with the Nicaraguan revolution, then we probably are fated to oppose all revolutions in the hemisphere.

The problem is illustrated in human terms by a vignette of the Kissinger Commission in Nicaragua. According to press accounts, the members of the commission were angered by the confrontational tone of the meetings with the Nicaraguans and their obvious reliance on Soviet and Cuban intelligence.

Imagine the setting: The commission arrives in Nicaragua one week after the contras, supported by the United States, blow up a major oil facility. On the one side, a largely conservative commission led by Henry Kissinger, Robert Strauss, William Clements and Lane Kirkland, men in their late 50s or 60s, expecting to be acclaimed for their willingness to listen to the upstart revolutionaries. On the other side, peacock-proud Nicaraguan commandantes in their 30s or early 40s, men and women, who had spent years fighting in the mountains, who had seen their friends and comrades die at their side in opposition to the U.S.-supported Somoza dictatorship, and naturally resentful of U.S. support of the counterrevolution. To them, a commission led by Kissinger, architect of the campaign to destabilize Allende, had to be seen as a facade for the American plan to bring them down. Is it a wonder there was no meeting of minds?

Whoever gains power in Central America must govern. And governing means solving mundane problems: the balance between imports and exports, mobilization of capital, access to technology and know-how. The United States, the Western European countries and the nearby regional powers, Colombia, Mexico and Venezuela, are the primary markets and sources of petroleum, capital and technology. The social democratic movements in Western Europe are important sources of political sustenance for revolutionary movements in Central America.

If we had the wit to work with our friends and allies rather than against them, the potential abuses and exuberance of revolution in Central America can be contained within boundaries acceptable to this country. There is no reason to transform a revolution in any of the countries of Central America, regardless from where it draws its initial external support, into a security crisis for us.

The objective of U.S. policy should be to create the conditions in which the logic of geographic proximity, access to American capital and technology and cultural opportunity can begin to exert their inexorable long-term pull. Russia is distant, despotic and economically primitive. It cannot compete with the West in terms of the tools of modernization and the concept of freedom.

But if we insist on painting the Cubas and Nicaraguas of this world—and there will be others—into a corner, we save the Russians from their own disabilities. If, on the other hand, we were to abandon our failed policy and adopt the alternative I suggest, pessimism might soon give way to optimism. After a while, democracy may begin to take root again. The wicked little oligarchies, no longer assured American protection against the grievances of their own people, may even be forced to make the essential concessions. The United States and Cuba might be trading again, joined in several regional pacts to advance the interests of both. And Marxist governments, far from overtaking the hemisphere, will be lagging behind as successful free enterprise countries set the standard.

We will marvel at the progress in our own neighborhood measured from the day we stopped trying to repress the irrepressible and exchanged our unreasonable fear of communism for a rekindled faith in freedom.

U.S. DEBT AND THE WORLD MARKET

Mr. BYRD. Madam President, on January 30 of this year, I addressed

the Senate on the subject of our country's $69.4 billion merchandise trade deficit for 1983. This is the largest trade shortfall in history. In January of this year, another new record was set as the trade deficit for 1 month exceeded $9 billion for the first time. This goes along with such other recent records as our first trade deficit with Communist countries, which was set last year.

This administration's policies of pursuing high deficits, high interest rates, and an overvalued dollar have created the present crisis in American trade posture. The President's own Council of Economic Advisers warned of these dangers in its report for 1984. The Republican chairman of the Foreign Relations Subcommittee, Senator CHARLES MATHIAS, noted in a recent speech that—

> U.S. domestic and international economic policies are imposing a terrible burden on the world: high interest rates, skyrocketing dollar exchange rates, misleading low U.S. inflation, and exploding U.S. trade deficits.

The administration has elected to mortgage our economic future for the sake of a short-term expediency. But there are ominous signs that the bill might be coming due faster than the President and his political advisers had anticipated. Since late February, the dollar has been falling against other currencies in large drops. This may portend a destabilizing adjustment that could weaken our economy in ways beyond our control. This occurs at a time when the United States is approaching the status of a debtor nation, whereby foreign investors hold more of our debt than we hold in foreign obligations.

Last September, Americans held $834 billion in foreign obligations while foreign investors held $711 billion of our debt. If this trend continues, foreigners will control more American debt than at any time since before World War I.

The President's chief economic adviser, Mr. Feldstein, warned that this will occur sometime in 1985. This means that President Reagan will have succeeded in doing what two World Wars, a global depression, and an oil crisis could not do—reduce the United States to the status of a debtor country.

Madam President, an article by Dan Morgan, which appeared in the Washington Post of Sunday, March 11, provides an excellent insight into the current crisis.

Madam President, I ask unanimous consent that the article titled "The Gnomes Who Hold Reagan's Fate" with a subtitle "Foreign Speculation in the Dollar Is the Key," which appeared in the Washington Post of March 11, 1984, be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

THE GNOMES WHO HOLD REAGAN'S FATE—FOREIGN SPECULATION IN THE DOLLAR IS THE KEY

(By Dan Morgan)

Meet some of the people and institutions that now have the power to set off a new wave of inflation, push interest rates back up to the mid-teens and halt the American economic recovery:

Speculators in the "yen pit" at the Chicago Mercantile Exchange.

The Deutsche Gesellschaft fuer Wertpapiersparen of Frankfurt.

Wozchod Handelsbank, the Soviet foreign trade bank located in Zurich.

Foreign currency traders for British Petroleum, Siemens of West Germany, the Mitsubishi Trading Co. of Japan and thousands of other international firms.

All of them either trade or own lots of dollars—or stocks, bonds and other assets denominated in dollars. If they get nervous enough about the slide in the value of the dollar that began Jan. 24, they could begin dumping these assets, causing an already tense situation to snowball out of control.

They would be joined by Japanese insurance companies, British pension funds, the big "money center" banks in London, Tokyo, Frankfurt and New York, Arab sheiks, German doctors and dentists and other players in the international money markets.

Such a panic, which some say could drive down the value of the dollar in relation to other major international currencies by as much as 40 percent, isn't necessarily in the cards. There are mechanisms built into the system that quite likely would prevent such a dizzying drop. International companies and banks need dollars to do business, so there is always a limit on how many they can sell. Governments can step into the financial markets to dampen the impact of panic and speculation. So economists in Washington and money managers in New York City aren't panicking yet and, in fact, the dollar rallied somewhat at the end of last week.

But most experts agree that the dollar is overvalued, relative to its buying power. So the risk of a dollar collapse, rather than a gentle decline, is real. In this election year, this fact makes the nation's economy vulnerable to outside forces as seldom before.

The dollar's fluctuations are only a symptom of the problem. The underlying malady is economic and fiscal policies that have made foreign capital essential for supporting massive government borrowing and an economic recovery at the same time.

This comes down to simple arithmetic. In 1983, the federal government had to borrow some $190 billion in new funds to cover its budget deficit. Individuals and industry borrowed another $90 billion to build homes, expand inventories, open new factories, and construct office buildings. That made a total of $280 billion in credit needs in this country. But the net savings of American families, businesses and pension funds and the surpluses of state and local governments—the basic pool of funds sitting in U.S. banks and saving institutions and available for borrowing—came to less than $250 billion. So the U.S. economy drew on some of the savings of foreigners to make up the difference.

Foreigners were persuaded to exchange their own currencies for dollars to buy U.S. Treasury bonds, bank certificates of deposit, corporate stocks and bonds, real estate and so on. This switching of other currencies into dollars helped "support" the price of the dollar in the international money markets for most of the last four years.

But this "strong" dollar concealed serious weaknesses. We attracted foreign capital by giving foreigners a high return on their U.S. investments in the form of interest rates that were 4 or 5 percentage points above what they could get at home. We lured funds from abroad—but at the same time imposed a heavy burden on the U.S. economy.

The same strong dollar that was in demand by foreigners also made our exports (priced in dollars) relatively expensive. The strength of the dollar is partly responsible for the largest U.S. trade deficit in history.

There is also a longer term cost, one that many Americans have overlooked. The borrowing is gradually turning the United States into a debtor nation, reversing the creditor status it has enjoyed since the end of World War II. In 1982, for the first time, foreigners invested $8.3 billion more here than American companies, banks and individuals invested or loaned abroad. In 1983, according to preliminary figures of the U.S. Federal Reserve, this grew to $32.3 billion. In 1984, it is expected that this country will take in some $80 billion more in investments and loans than it sends abroad.

Sometime in 1985, according to chairman Martin Feldstein of the Council of Economic Advisers, the U.S. will owe more to foreigners and foreign governments than they owe to us. "No lights will flash when we pass from creditor to debtor status," he said. But from that moment on, some of our national wealth—and some part of our standard of living—will have to be used to pay interest and dividends to our foreign creditors.

This dependence on foreign capital has exposed the U.S. economy as never before to the whims and uncertainties of international financial markets.

A sudden collapse of the dollar, instead of the slow, gradual decline that the Reagan administration would like, would undermine the foundations of the administration's economic policy. If foreigners lost confidence in the dollar and stopped helping us finance our public and private borrowing, several things would happen. Private investment would shrink because fewer funds were available and interest rates were rising, perhaps steeply, to lure back more foreign funds.

At the same time, a plunging dollar would make foreign imports relatively more expensive here, leading to more U.S. inflation.

Whether that scenario materializes will depend largely on the decisions of financial managers whose primary concern is profit, not the well-being of the American economy or the political fate of Ronald Reagan.

As U.S. interest rates rose sharply above European and Japanese rates in 1981, then held that differential through 1982 and 1983 as U.S. inflation was checked, foreign investors scrambled to buy dollar-denominated assets. As the dollar rose in value, people who owned the currency made money. Then in mid-1982, the U.S. stock market began to boom. That gave foreigners another incentive to buy U.S. equities.

Foreign investors made big profits in what was virtually a no-lose situation. A West German who in 1980 traded in 182 D-Marks to buy 100 dollars could take the same 100 dollars at the end of 1983 and collect 272 marks—a capital gain of 50 percent. If in

the interval from 1980 to 1983, the U.S currency had been put into a U.S. certificate of deposit, it would also have drawn interest of from 10 to 15 percent. If the money had been moved into stocks during the 1982 bull market, the German investor could have realized still more gains.

But consider the situation now. For most of the last six weeks, the dollar's value has been sliding. It declined 6½ percent against the D-Mark in February. And in four hectic days of trading beginning Friday, March 2, it weakened 5 percent against the Japanese yen. Such sharp declines can cancel out with brutal suddenness the advantages of higher interest rates of foreign investors.

There are already signs that even these relatively small declines have changed the heady dollar psychology of the previous four years. "In the financial markets it's always a struggle between greed and fear," said an international banker in New York last week. "Fear may be getting the upper hand."

The reason for the changed mood is unclear. Financial experts cite the January U.S. trade deficit of $9.2 billion; the administration's lack of decisive action on the budget deficit, the end of the U.S. bull market, and persistent talk by top U.S. officials, such as Feldstein, that the dollar is overvalued.

Once the psychology of the markets shifts, controlling the outcome becomes tricky, even for a government as powerful as ours.

Take the case of the Deutsche Gesellschaft fuer Wertpapiersparen (DWS), a huge investment fund associated with the Deutschebank, Germany's largest commercial bank. DWS manages nearly $4 billion worth of assets for thousands of small investors. Most of the assets are in U.S. stocks and bonds. One fund, called Interrente, is 70 percent invested in U.S. utility and industrial bonds.

Udo Behrenwaldt, DWS's managing director, is "watching events closely."

"Until the end of 1983 we assumed that rising interest rates would mean a stable if not rising dollar, but we now believe that the psychology in favor of the dollar has been shaken," he said.

So far, Behrenwaldt says, there has been no fundamental change in DWS's investment portfolio. To protect profits perviously made on the dollar by hedging against its possible decline, DWS recently began selling dollars in the forward (future) market. If the decline continues, DWS could reduce its holdings of dollar-denominated U.S. corporate bonds from 70 to 50 percent and switch into German government securities.

Behrenwaldt is keeping a close eye on what the U.S. Federal Reserve does and is not panicking. But, he acknowledges, if there is another slide of 10 percent, the doctors, lawyers and other small investors who invest in DWS in search of larger returns than they can get in a German bank could lose their nerve and start wholesale withdrawals of their funds. If that happened, he said, DWS would have to start selling off its huge holdings of U.S. assets. Inevitably, that would have an impact on the U.S. stock market, and on the dollar itself.

"In 1977 and 1978, the big holders of dollars lost their nerve and the dollar collapsed," recalled Mieczyslaw Karczmar, senior analyst for the European-American Bank in New York City. "We are not at that point yet, but we do see similar signs."

Karczmar and other analysts describe the administration's hope for a slow, gradual decline in the dollar as wishful thinking. "If foreign exchange markets become convinced that the dollar is going down, it won't be an orderly retreat," he says. "You can't be just a 'little' pregnant."

One factor raising anxieties is the proliferation of new methods of mobilizing capital and moving it electronically around the world. British pension funds now have 15 percent of their assets invested outside Britain. These funds can be switched easily from dollar assets into, say, Japanese or Swiss securities.

U.S. mutual funds representing American investors increasingly take advantage of opportunities to move out of dollars and into non-American assets abroad.

"The Swedish stock market went like gangbusters in the last couple of years," said the international currency manager of one large New York investment house. "Anybody would have been crazy just to leave their money in dollars when they could convert into Swedish kroners and double or triple their money."

Although U.S. banks handle other people's money, they also speculate from hour-to-hour for their own accounts, as they buy and sell currencies on a spot basis and also operate a "forward" market in these currencies around the clock.

"The banks have more than a passing involvement in what direction the market is taking, particularly when there is a run. The good old herd psychology takes over," said a New York banking source.

None of this means the dollar will collapse. The world's central banks currently have about 70 percent of all their monetary reserves in dollar-denominated assets. They will defend the dollar against a really massive fall, in their own interest. For example, if DWS's small German investors pulled their money out of the fund, this would have the effect of pulling D-Marks back into the country. To offset that move, the Bundesbank, Germany's central bank, could use its own D-Marks to buy dollars and purchase U.S. Treasury securities—thus recycling the money back to the United States.

The sustained strength of the dollar, many experts contend, is based on fundamental confidence in this country's long-term economic strength and political stability. The dollar remains attractive to foreigners worried about political instability in their homelands. In the last few years people with assests ranging from coffee plantations to Philippine pesos have been moving money into the United States.

According to the Far Eastern Economic Review, recorded capital outflows from the Philippines reached $500 million after the Aug. 21, 1983, murder of opposition leader Benigno S. Aquino Jr., an event that heightened political uncertainties in that country.

Currently, there are said to be more $100 bills circulating in Brazil than the United States—a tribute to the enduring faith in the dollar among Brazilians.

According to Lawrence B. Krause of the Brookings Institution, the dollar won't fall as sharply as it did in the 1970s because current monetary policy won't let it. If the dollar sides further, inflation and a growth of the money supply would result. But that would lead to a rise in interest rates, which, in turn, would correct the dollar's slide.

But the dilemma remains. A rise in interest rates that propped up the dollar and brought foreign capital back to the United States would also mean financial pain for Americans—higher mortgage rates for home buyers and higher loan costs for businesses. Such a sudden runup in interest rates set off the 1982 recession. If something like that happened again this year, political expectations for 1984 would be transformed.

Mr. BYRD. Madam President, does the Senator from Wisconsin need any additional time?

Mr. PROXMIRE. No, I do not.

Mr. BYRD. I thank the Senator. I yield back the balance of my time, Madam President.

RECOGNITION OF SENATOR PROXMIRE

The PRESIDING OFFICER. Under the previous order, the Senator from Wisconsin (Mr. PROXMIRE) is recognized for not to exceed 15 minutes.

HOW POWERFUL IS THE SOVIET UNION TODAY?

Mr. PROXMIRE. Madam President, we know the Soviet Union, like the United States, has the nuclear power to literally blow up the world. What does this kind of power mean? How useful is it? Answer: This power is totally useless—as former Defense Secretary McNamara says—except to deter a nuclear attack. Any use of this power against the United States would finish both countries. So unless the U.S.S.R. wants to commit suicide, its nuclear power means nothing, except that no other country can overtly attack it without facing extermination.

The Soviet Union also has a very great conventional military power. It has far more men under arms than the United States, three or four times as many tanks, far more fighter planes and more warships. Offsetting these Soviet conventional advantages are these factors: Much—perhaps as much as a third—of this Soviet military force is immobilized on its eastern frontier, tied down by the China threat. The use of its military manpower in Europe would, in fact, pit Russia and the Warsaw pact against NATO. In such a confrontation the NATO powers would actually have more manpower, as many fighter planes, more bombers, and almost certainly the United States would have more supportive, united, and determined allies in the United Kingdom, France, West Germany, and Italy than the Russians would have in Poland, East Germany, Hungary, and so forth. The Soviets would have an advantage in the number of tanks, but NATO has a variety of antitank defenses that might prevail and, if necessary, NATO might very possibly to to tactical nuclear weapons rather than accept a defeat from the Warsaw pact.

Under these circumstances, just as the United States matches Russian nuclear power, so NATO provides a match in conventional power for the Soviet Union and its allies. After all,

the Soviet Union has been struggling for 3 years in Afghanistan, a primitive bordering country without success. Why should we assume that its forces would so easily sweep to the Atlantic against what is—compared to Afghanistan—an infinitely better armed combination of land, air and sea power. And in such a Soviet adventure the Soviets would confront France, armed with over 1,000 nuclear weapons and the capability of delivering them on Russian soil, and the United Kindom, with 1,500 nuclear weapons with the same capability. Could the Russians assume that either country would surrender their sovereignty to the Soviet Union rather than use the nuclear capability that it has built up at such expense for precisely this kind of showdown? And could the Soviet Union feel confident that the United States would not use its tactical nuclear capacity and that NATO would not employ the intermediate range missiles now being deployed, rather than accept Russia as its master?

So much for Soviet military power. Yes, indeed, it is great. But it has its obvious limits. Meanwhile as Jonathan Steele pointed out so well on Christmas day in the Washington Post, the Soviet Union is losing on virtually every front, and has been doing so for the past 10 years.

We have already mentioned Afghanistan. In addition, it has lost the support and earned the hostitility of China. Its power in Eastern Europe is weak. In Poland, East Germany, Romania, Hungary, Czechoslovakia, and elsewhere it has the support of governments that are regarded by the people of each of these countries as Russian puppets. These do not make strong or faithful allies.

The Russian economy has made little progress. Its people suffer from inadequate food, and shoddy goods. Russia has just suffered a serious defeat in its effort to dissuade the Western Europeans from accepting intermediate nuclear missiles for NATO. It has tried and failed in Europe, in Africa, in Asia, in South America, and Central America. Almost every time it has gone to bat it has struck out. It is true that both the United States and the Soviet Union are losers in the failure to reach arms control agreements. But the Russian losses on this score may be even more immediately serious than ours.

After all, the burden on the Russian economy, the sacrifices for the Russian people, the slow down in Russian agricultural and industrial progress from the diversion of its economic resources to its gigantic military buildup are even more punishing for the Russian economy than for the American economy. Whatever power the Russians may possess, it is a power that right now is on the wane.

Madam President, I ask unanimous consent that an article from the Washington Post of December 25, 1983, be printed at this point in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Dec. 25, 1983]

WE ALWAYS EXAGGERATE SOVIET POWER

(By Jonathan Steele)

Why are we always so eager to judge the Soviet Union on the basis on prejudice instead of detached analysis?

Consider the Korean airliner episode. Well after the initial expressions of Western outrage, U.S. intelligence officials conceded that Soviet ground and air defense did not know they were downing a civilian airliner. That recolored the episode quite dramatically.

We did see compelling evidence of the Soviet Union's considerable military inefficiency—the plane spent two hours in Soviet airspace and the defenders did not know what it was. But what of the harsh language used earlier by Western statesmen? The tragic fate of Flight 007 triggered off the usual eagerness to seize on any incident to issue wide-ranging condemnations about "brutality," "no respect for human life," "completely different standards" etc.—all of which look false in the light of Soviet ignorance that the plane was carrying unarmed civilians.

But we rarely seem interested in serious analysis when it comes to the Soviet Union. In the last 10 years there has been an astonishing decline in Russian studies and in the availability of professional expertise from Russian-speaking observers of the Soviet scene, whether diplomats, journalists, or academics. In the United States the number of graduate students in Russian studies has dropped to its lowest point since World War II, leading one American expert to estimate that in 1982 the Soviet Union had three times as many specialists on American foreign policy as the United States had on Soviet foreign policy.

Partly because they feel unsure of Soviet intentions, and sometimes because of a deliberate desire to misrepresent the facts, many Western decision-makers insist that the only basis for Western policy toward the Soviet Union should be the nature of Soviet capabilities. By this logic, what matters is not what Moscow is likely to do, but what it can do. This inevitably leads to a "worst case" analysis of Kremlin options in any crisis—an approach that encourages pessimism, if not paranoia. It tends to weigh the discussion in favor of military quantification rather than political judgment. Emphasis on Soviet military capabilities is a reasonable starting point for those who design weapons, but it should not be the primary or sole guide for those who design Western policies.

In fact there is a sufficient body of evidence, based on Soviet practice, to throw light on the Kremlin's thinking and intentions. Careful analysis of the Kremlin's record—where the Soviet Union has intervened and where it has not, what its leaders have said and what they have done, when they have moved quickly and when they have been slow to react—can offer a guide to their motives and the likely patterns of future action.

The recent record suggests that Soviet policy is less adventurous, energetic, and threatening than conventional Western wisdom proclaims. Phrases like "expansionism," "the Soviet threat," "nuclear blackmail," and "appeasement" are bandied about in the West with little effort to examine what they mean or whether they apply to reality.

Of course one should not forget the lasting features of the Soviet system—the centralized bureaucracy, Russian domination of the numerous national minorities, the Communist Party's monopoly of power, the controlled press, intolerance of dissent—but within these confines there have been significant changes in Soviet domestic policy since Stalin's day. The same is true of Soviet foreign policy. The image of remorselessly expanding Soviet Union, which was formed in the 1940s when Joseph Stalin imposed Soviet control over the Baltic states and Eastern Europe, is no longer valid in the 1980s. Virtually all the major political changes in the Third World over the last decade—from the collapse of the Portuguese empire in Africa, the independence of Zimbabwe, the fall of Somoza and the Shah of Iran—took place with little or no Kremlin input. The Kremlin can count less than 10 of the more than 100 members of the nonaligned movement as its friends.

Within the continuing context of a missionary ideology and a publicly proclaimed faith in the eventual triumph of socialism over capitalism, the Kremlin's perceptions of the world have undergone important changes. Soviet foreign policy, far more than Soviet domestic policy, is circumscribed by an external environment that no planner can control. Soviet policy makers have to operate in an international context which is overwhelmingly hostile to, and suspicious of, their intentions. The constraints this imposes on the men in the Kremlin have gradually created a pattern of Soviet activity that differs from what it might be in their ideal world, but is the reality to which they and their successors have become accustomed. Hopes are frustrated. Plans are abandoned. Eagerness becomes caution.

Yuri Andropov is having to adjust to the fundamental paradox of the Brezhnev era. While Soviet military power increased in the 1960s and 1970s, Soviet political influence declined. In almost every region of the world the Kremlin faces major problems. The Soviet Union should be judged not only by the size of its arsenal or its leaders' rhetoric, but by results. In the 1970s they were not impressive.

Nevertheless the prophets of doom began to work overtime in the early 1980s in predicting the grimmest scenarios of likely Soviet actions in the rest of the decade. As interest switched to the Brezhnev succession, a change overcame those who had previously portrayed him as the leader of a brutal, expansionist power. Suddenly, by comparison with the successor generation, Brezhnev became a senile moderate, a rather bumbling, somewhat pathetic creature whose departure might even be regretted in the West. After him would come a new breed of younger, more wicked men.

"It is my nightmare," Henry A. Kissinger confessed, "that his successors, bred in more tranquil times and accustomed to modern technology and military strength, might be freer of self-doubt; with no such inferiority complex they may believe their own boasts and with a military establishment now covering the globe, may prove far more dangerous."

Zbigniew Brzezinski shared Kissinger's vision of a stronger and more dangerous Soviet Union. "The most critical period will be roughly from 1983 to 1987 when the Soviet leadership will probably pass to younger men," he told reporters in July 1982. "This successor generation may see these first years as the optimum period to use military power."

Other spokesmen for the West's security establishment had a similar nightmare, though its origin was different. The horrific factor for them was the Soviet Union's weakness, not its strength. In 1981 John Nott, Britain's defense minister, asked: "Who can tell what problems will come for Brezhnev's successors, with popular discontent inevitable over living standards, with demographic problems—a steep increase in the birth rate of non-Slavic peoples, especially the 50 million Moslems in Central Asia—and all this held together by a repressive bureaucracy and supplied by a heavy over-centralized and inefficient economic system? Can we disregard totally even the possibility in years to come of disintegrating Soviet empire with, as an act of desperation, the dying giant lashing out across the central front?"

Whether the Soviet Union was judged to be strong or weak, the message was the same as it had been for almost 40 years. The West must keep up its guard and spend more on defense. The fact that these assessments of the Soviet threat were so vague and contradictory did not seem to worry the West's hawks.

For a Soviet strategic planner the future offers little encouragement. The dispute with China is deeply entrenched—illustrating the point that the advent of communist governments abroad may create more problems for Moscow than it solves. Although there are signs now of Chinese willingness to show more even-handedness between the superpowers, Moscow probably cannot look forward to anything better than peaceful coexistence with China. The chances of a Sino-Soviet alliance are virtually nil.

In the Middle East Islam has proved to be as unpredictable a problem for the Soviet Union as for the West. Moscow has shown no sign of being able to handle resurgent Islamic nationalism. But the consequences of this are more serious for the Soviet Union because of its closeness to the Middle East, and because almost a fifth of its people have Moslem backgrounds. Moscow is bogged down in Afghanistan. Its relations with Iran are worse under Khomeini than they were under the Shah. Its influence in Libya is much less than suggested by alarmist reports in the Western media. Soviet-Libya ties are a marriage of convenience and cannot be relied upon. Muamar Qadaffi might change his mind tomorrow and expel the Russians, as did Anwar Sadat in Egypt and Mohammed Siad Barre in Somalia.

In Eastern Europe Moscow faces a deep crisis of loyalty. The upsurge of Solidarity showed that 35 years of Soviet-style socialism has failed to win the allegiance of large sections of the Polish working class, even among the young who have had no experience of any other system. The Kremlin has to presume that disaffection might equally break out publicly in Hungary, Czechoslovakia, and East Germany. If the upheavals of 1956 and 1968 might be written off by wishful thinkers in Moscow as the outcome of Stalin's repression and his successors' failure to develop enough consumer goods, this explanation could no longer work for the early 1980s.

At the heart of Soviet foreign policy, its relations with Western Europe and the United States, the view from the Kremlin is hardly more comforting. A new round in the nuclear arms race with the United States is underway, with damaging implications for the Soviet civilian economy. West Germany, France and Britain, the three leading countries in Western Europe, are governed by determined anti-communists.

Soviet ideological influence is at a low ebb. Although the Kremlin is still respected in parts of the Third World as a supplier of diplomatic support and military hardware, the Soviet Union has lost its image as the inspiration for revolution. The concept of socialism, in a general and undefined way, might still be influential as a source of theoretical legitimacy for many authoritarian Third World nations, but the Soviet Union's particular experience is not studied with admiration.

Nor are Soviet citizens respected abroad as ambassadors of an alternative life style. In the Third World they tend to be seen as just another group of arrogant Europeans, aloof, partronizing, and often racist. They usually do not have the informality, self-confidence and individual generosity of their American counterparts, or the sophistication of Western Europeans. Official Soviet atheism has cut them off from close relations with deeply religious cultures in Asia, Latin America, and the Middle East.

But is it true, as Kissinger wrote in July 1981, that "We must recognize the tendency of the Soviets to escape their dilemmas by foreign adventures"? His remark assumes a similar degree of linkage between domestic and foreign affairs as exists in Western countries with their volatile public opinion and regular elections.

In the Soviet Union there is no such pressure on the leadership. Foreign affairs are not an issue for public debate. Moreover, Kissinger's remark is belied by the record. In the 1970s the Kremlin sought to escape its dilemmas of declining growth rates, spiraling defense costs and relatively backward technology by the opposite of foreign adventures. It tried to foster cooperation with the West through detente, hoping thereby to control the arms race and forestall the pressure for internal economic reforms by importing ready-made solutions from abroad.

Under Andropov and whatever leadership may follow his, certain fundamental positions will never be abandoned. The Kremlin will permit no weakening of monolithic party rule in the Soviet Union, no destabilization of Eastern Europe, no return by the United States to nuclear superiority, and no unilateral ideological disarmament—that is, the renunciation of Moscow's self-appointed role as the chief international standard-bearer in the competition with capitalism. If these are the minimum conditions on which any Soviet foreign policy will be built, there are a number of major restraints on Soviet power that provide the framework for and, in a real sense, impose a ceiling on its future growth. One of these, clearly, is American policy, the nature of American power—how and where it is used in the 1980s—will play a crucial role in determining Soviet actions.

But it is important to remember that the two are not linked in direct proportion to each other. There is no simple mathematical formula by which a certain application of U.S. power will deter or repulse an equivalent amount of Soviet power. By injecting an element of superpower competition into a Third World conflict, the United States may attract rather than repel Soviet interest, as it did in the case of the Angolan civil war in 1975. Even if Moscow does not actively intervene, it will never concede that Washington has a right to intervene or that Moscow has no right to intervene.

In spite of the distant clients that Moscow has acquired in the last 20 years, such as Cuba and Vietnam, the Soviet Union still maintains a broadly geographical and territorial notion of security. The United States, by contrast, has an outward-bound, forward-based concept of security related to the need for access to raw materials and markets. Moscow recognizes this essential asymmetry between itself and the United States, but it will not readily tolerate any American effort to give it a military dimension. The Carter administration's declaration of the Persian Gulf as a "vital interest" of the United States that had to be defended by U.S. military power excited a strong Soviet reaction.

Some Western observers mistakenly assume that Western power is the only restraint on Soviet actions. If the West does not have military muscle or political will to resist Moscow, the Russians are bound to advance. But the period of superpower dominance is coming to an end. Even within their own alliance systems each superpower is facing strains. The United States is having to adjust to the relative growth of Western European and Japanese economic power, and to demands from elites in Western Europe for more consultation on alliance policy and from substantial sectors of the public for greater independence.

Beyond their alliances, the superpowers face a world in which regional powers are gaining strength, where historical disputes that were often held in check by colonialism are breaking out again, and where the political boundaries drawn by the western imperial nations are coming under challenge. At the same time there is a growth in local nationalism, and a new vigilance in many Third World countries about foreign access to their raw materials. The example of OPEC is only the most dramatic case of Third World determination to protect their primary products and ensure that they are no longer exploited on the advanced industrial countries' terms.

All these factors suggest that while the Third World will be increasingly turbulent, the chances for either superpower to intervene successfully in local or regional conflicts are likely to diminish. The Iran-Iraq war, which left both superpowers impotent on the sidelines, may be the pattern for the decade.

In the second half of the 1970s Soviet attitudes to the prospects of economic and political development in the Third World underwent a significant shift. The old effort to detach Third World countries from the West was modified. Soviet analysts began to talk of a single interdependent world economy, in which the developing countries should participate by producing raw materials in exchange for technology and industrial goods from the advanced countries, of which the Soviet Union was one.

This was not very difficult from the Western conception, although it went strongly against the Chinese view of local and regional self-reliance for Third World nations. The shift in Soviet thinking clearly militated against a policy aimed at encouraging developing countries to cut the West off from raw materials.

Moscow's heavy involvement in the export of arms to the developing countries is more

a sign of weakness than of strength. Arms are one of the few commodities with which the Soviet Union can compete with the West. By contrast, it has few economic products to offer the Third World. It is the West that controls the terms of world trade, organizes the international capital market, and arranges most of the transfer of technology.

The Soviet Union has failed and will continue to fail to make a deep penetration of the Third World. This lack of depth makes it easy for countries such as Egypt to ask the Russians to leave. In spite of considerable Soviet economic and military aid, Sadat was able to expel the Russians without suffering a major economic dislocation. Allende, on the other hand, found it almost impossible to reorient the Chilean economy away from Western influence.

Even Angola, which has moved much further than Allende's Chile toward political alignment with Moscow, and depends totally on the Soviet Union and Cuba for military help, remains deeply linked to the West through the international economy. Vietnam, one of the closest Soviet allies, joined the International Monetary Fund before it joined Comecon, the economic grouping of socialist states which Moscow leads.

The Kremlin's increasing recognition of the complexity of the Third World is not lost on Andropov. In his first policy speech, he hinted at a kind of isolationism when he argued that the Soviet Union's primary task was to develop its own economy. "We exercise our main influence on the world revolutionary process through our economic policy."

The next generation will have more experience of the Third World and is likely to have even fewer illusions about prospects of rapid change. This goes against those Western politicians who argue that because the emerging Soviet leadership will be younger, more vigorous, and more self-confident than Brezhnev, it is likely to be more aggressive.

The notion of increased Soviet "adventurism" in the future rests on nothing but a hunch. It is just as likely that people who have lived through the relatively good years since the war and have enjoyed a gradual increase in prosperity will be more materialistic and less willing to risk everything that those who went through the 1930s and 1940s.

The views of the growing pool of Soviet foreign policy advisers with direct experience of service abroad suggest a sense of realism and the limitations of Soviet power in a complicated world. They are well aware that instability in the Third World is no automatic signal of imminent revolutionary change. They also know that foreign revolutions may demand more of Moscow than Moscow wants to give or can hope to give later.

Revolutions also complicate Soviet relations with the capitalist world. Stability in the Third World may be better for Moscow, provided it is not founded on a Pax Americana in which the United States enjoys new military facilities from which to threaten the Soviet Union.

What the new generation shares with Brezhnev and Andropov are old Russian attitudes—a desire for docile buffer states or friendly neighbors on their immediate borders, and a fear of encirclement. World revolution is something that they do not expect to see in their lifetime, or would unreservedly welcome, if it seemed to be approaching.

BIAFRA: A FIGHT FOR SURVIVAL

Mr. PROXMIRE. Madam President, almost 20 years ago, the Ibo race fought more than a civil war in Nigeria—it fought for survival.

Ethnically, Nigeria is divided into several different Moslem and Christian sects. Tensions developed between these groups. The Moslems grew hateful of the Christian Ibo, who were better educated and more prosperous. The Ibo comprised Nigeria's professional middle class. In fact, the Nigerian national leader, Gen. Johnson Aguiyi-Ironsi, was an Ibo. On May 29, 1966, Moslem mobs in the northern provinces massacred thousands of innocent Ibo and sent several hundred thousand others fleeing east to predominantly Ibo territory.

On July 26, 1966, Gen. Yakubu Gowen, a northern Moslem, led a military coup which overthrew General Ironsi. The Ibo responded out of fear on May 30, 1967, by declaring independence as the Republic of Biafra.

Biafran independence did not last long. The Federal Government of Nigeria refused to recognize the secession and decided to crush the Ibo once and for all. Garnering military assistance from countries around the world, all interested in strong ties with oil-rich Nigeria, the Federal Government began to kill off the Ibo. Their tactics: military might and starvation.

Nigeria initiated a blockade of Biafra's small humanitarian food shipments which made malnutrition, disease, and starvation enemies of the Ibo. Biafra finally surrendered to Nigerian Government forces on January 13, 1970, but not before almost 2 million Ibo had died, the majority by starvation. Under the Genocide Convention, the United States would have had the right to condemn this heinous act.

As a self-proclaimed pillar of human rights and international justice, the United States has yet to make the greatest commitment for the right of man to live.

The Genocide Convention requests the acknowledgement of one basic principle: That the international crime of genocide is morally wrong and must be punished.

The Ibo, a people who could have contributed much to Africa's society and progress, were genocidally decimated. Let us not forget the tragedy of the Ibo. Let us give our full support for the Genocide Convention.

THE SYNTHETIC FUELS CORPORATION: THE FISCAL TIME BOMB

Mr. PROXMIRE. Madam President, the Synthetic Fuels Corporation (SFC) has proved to be a pitifully poor investment. Instead of throwing good money after bad, it is time to stop and ask ourselves if the SFC is a wise investment of our taxpayers' money

The SFC is a fiscal time bomb. It operates off budget and is, therefore, hidden from the scrutiny most Government programs receive. Yet, when its guaranteed loans turn sour or when its price guarantees have to be met, who will be forced to pick up the tab? The taxpayers, that is who.

Twelve of my colleagues, including the distinguished Presiding Officer, and I have introduced S. 2358, legislation which would prohibit the further commitment of $14.7 billion that the SFC has at its disposal until Congress has had the opportunity to review and approve a comprehensive strategy document submitted to it by the Corporation.

Upon becoming operational in 1980, the SFC received a $14.9 billion bankroll to create a commercial synthetic fuels industry. It is now quite apparent that synthetic fuels technologies are immature and uneconomic, making a commercially viable synfuels industry an unattainable dream for the foreseeable future.

What has the Federal Government's $3 billion-plus investment in the synthetic fuels industry bought us? Next to nothing.

Of the 10 projects that made the final stages of consideration or received Federal support, six have been canceled outright, two are over budget and overdue, and one is threatening collapse without further Government subsidies.

Madam President, let us take a closer look at this fiscal Frankenstein and review its track record. Take, for example, the SFC's support of two projects to extract oil from shale. Originally touted as sure winners, the two oil shale projects—Union Oil and Cathedral Bluffs—are floundering amid equipment failures, environmental uncertainties, questions concerning worker health and safety, and cost overruns. Cathedral Bluffs has mushroomed in cost from $374 million to over $3 billion with critics claiming this is only the beginning.

Meanwhile, despite mounting controversy over the feasibility of Union Oil's extraction technology and plant safety features, the SFC is preparing to hand over an additional $2.7 billion to finance a major expansion of the facility.

Madam President, even with the lure of billions of dollars in Federal assistance, many of the most experienced firms in the synthetic industry have abandoned the commercialization of synthetic fuels as uneconomic enterprises.

Exxon tried to develop oil shale technologies 2 years ago, saw the light, and walked away from almost a $1 billion investment in the Colony oil shale project.

Standard Oil knows a losing proposition when they see one. They have formally withdrawn their support from the Hampshire and Paraho-Ute oil shale projects. One Paraho-Ute oil shale project is still undergoing SFC consideration for generous Federal handouts as the remaining partners continue to ask for $2.5 billion from the SFC.

Westinghouse has put its entire synthetic fuels division up for sale and Mobil Oil has abandoned attempts to form a consortium of companies to construct an oil shale project.

Another SFC-financed mature technology is coal gasification. The Great Plains coal gasification project, already granted over $2 billion in loan guarantees, has returned to the Federal Treasury for yet another handout.

While evidence from SFC documents and a GAO report paints a rosy economic picture for the project, Great Plains executives threaten to go bellyup without another $2 billion Federal infusion.

At first glance, the only SFC supported project that is not a national embarassment is the considerably smaller Coolwater coal gasification project. It has received only $120 million in price guarantees.

Small consolation, however, when closely reviewing the facts. The project's sponsors initially indicated that they would build the Coolwater project without Government subsidies. In fact, the identical technology has already been employed in the private sector by the Tennessee Eastman Co., without any Federal assistance.

Ironically, the Coolwater project was designed as a short-term research and development facility—not a commercial venture at all—and the end product is electricity, not liquid transportation fuels.

The SFC is clearly having difficulty finding qualified projects to fund. Quite simply, synthetic fuels technologies have proven to be far less mature and economic than predicted in 1980. The major investors have all backed out, despite SFC's open pockets, leaving a handful of far-out, second-rate projects to vie for the SFC's attention.

Obviously, the SFC has contributed little to the Nation's energy security. The way to wean America from our dependence on foreign oil is not through the commercialization of uneconomic synthetic fuels technologies.

The way to do this is through the wise application of our resources toward promising energy alternatives. This is what the SFC was intended to, but failed to, accomplish.

Madam President, I urge my colleagues to examine S. 2358, and join our effort to reassess the Synthetic Fuels Corporation.

RECOGNITION OF SENATOR HEFLIN

The PRESIDING OFFICER. Under the previous order, the Senator from Alabama (Mr. HEFLIN) is recognized for not to exceed 15 minutes.

THE BANKRUPTCY COURT SYSTEM

Mr. HEFLIN. Madam President, I rise on this 13th day of March 1984, with great concern for the failure of this Congress to act to guarantee the continued operation of the bankruptcy courts of this Nation. Our forefathers provided in article 1, section 8, clause 4, of the Constitution of the United States for "* * * uniform laws on the subject of bankruptcy throughout the United States."

Unfortunately, due to unique and an unprecedented series of events, we are fast approaching the total inability of our bankruptcy courts to function after the 31st day of March. Therefore, there are only 14 legislative days for this Congress to act or the administration of justice will be in an untenable position.

In 1983, 348,872 cases were filed in the bankruptcy courts throughout the United States. Some 564,568 cases were pending in January of this year. This massive number of cases involves more than 11 million creditors with more than $111.7 billion in debts obligated by debtors and some $83 billion in assets to be administered by the court.

In 1978, the Bankruptcy Reform Act was enacted into law and provided the continued authorization of all existing bankruptcy judges through the 31st of March 1984. The grandfathering of the existing judges was part of a transitional period designated to end April 1, 1984. It was anticipated that in 1983, the Congress would authorize the number of bankruptcy judicial positions in each of the 94 judicial districts to be appointed by the President for 14-year terms with the advice and consent of the Senate. However, the U.S. Supreme Court on June 28, 1982, ruled in Northern Pipeline Construction Co. against Marathon Pipe Line Co., that the jurisdiction provided in the 1978 act to article I judges was inconsistent with the Constitution. Thus, it was incumbent upon the Congress to either modify the jurisdiction of the bankruptcy court or authorize article III status for bankruptcy judges to exercise the jurisdiction provided in the 1978 act, to comply with the constitutional concerns of the Marathon decision.

The Supreme Court stayed the effect of these decisions on two occasions, to enable Congress to take appropriate remedial measures. Unfortunately, the Congress failed to act prior to the conclusion of the 97th Congress, and accordingly, the bankruptcy courts have been operating under an interim court procedure based upon the existing statutes consistent with the Marathon decision. Even though this has been an awkward and uncertain situation to enable the continued operation of the bankruptcy courts, it has, on a temporary basis, provided a workable system.

If Congress does not act, there is no authorization for the appointment, jurisdiction, compensation, or tenure of the more than 200 bankruptcy judges which are serving in the 94 judicial districts thoughout this country. If no action is taken, we shall have a bankruptcy law, a bankruptcy court system, half a million pending cases, 11 million creditors with more than $80 billion of obligations, but unfortunately we shall not have judicial officers other than the already overburdened U.S. district judges to preside, process, adjudicate, confirm plans, discharge obligations, and execute the laws of the United States in regard to bankruptcy.

Many concerned individuals, in response to the Marathon decision, have predicted economic chaos, the end of the world, and every other form of judicial and financial catastrophe known to civilized man. These doomsayers have been inaccurate, or at least premature. Our system has been able to perform its statutory and constitutional responsibility due to the diligent efforts of the district and bankruptcy judges, clerks, court personnel, attorneys, debtors, and creditors, but without the continued authorization of judicial officers, I am afraid this will not be possible.

The Senate, after exhaustive review and consideration by the Judiciary Committee, passed S. 1013 on April 27, 1983. This legislation provided the continued constitutional operation of our bankruptcy court system and authorized the appointment of 232 article I judges by the President with the advice and consent of the Senate, consistent with the Marathon decision.

To date, the House of Representatives has taken no action in this crucial area. The House Judiciary Committee favorably reported Chairman RODINO's legislation, H.R. 3, on February 24, 1983, providing article III status to the bankruptcy judges. But since February 1983, the House has taken no further action on H.R. 3, S. 1013, or H.R. 3257, another article I alternative introduced by Representatives KINDNESS and KASTENMEIER. With only 14 legislative days remaining, I am hopeful the House will act on a legislative solution to this impending crisis, so that the House and Senate can confer to address not only the court structure and administrative problems, but also other areas in bankruptcy reforms needed by the Ameri-

can people to preserve the continued and appropriate operation of our bankruptcy courts in a fair, effective, and an equitable manner.

I am hopeful that a permanent legislative remedy can be achieved. But in the event we are not successful, I believe it is incumbent upon Congress to continue the operation of the bankruptcy courts of the United States by temporarily extending the existing statute and a continued authorization of the current bankruptcy judgeships until permanent legislation can be enacted.

Madam President, I think this is a very crucial problem. We are facing an impending crisis. I urge the House of Representatives to act but, in the meantime, if they fail to act, I think we should take steps on a temporary basis, for 12 months or 18 months, to continue the bankruptcy judges in their position until a permanent remedy can be reached. I think this is of vital importance to the people of this Nation.

ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of routine morning business not to extend beyond the hour of 12, with statements therein limited to 5 minutes each.

THE JOB CLUB

Mr. PERCY. Madam President, as most of my Senate colleagues know, I have a special and longstanding interest in programs that promote job opportunities for older workers. For that reason, I would like to share with my colleagues a fine and unique program which I had the opportunity to learn about firsthand at the Oak Park Senior Employment Service office: the Job Club.

Dr. Nathan H. Azrin of Nova University pioneered the concept of the Job Club, a group method which develops skills enabling individuals to find jobs in relatively brief time periods. Job Club does not find jobs for people, but instead teaches them how to find jobs themselves. The Job Club concept blends job counseling with techniques of behavior modification.

The Job Club method is unique in that it is the only system for jobseekers which provides them with a counselor, group support, and a physical setting with telephones for the benefit of their job search. The organization of the club is structured to bring about the development of successful jobseeking skills.

The primary premise behind the Job Club is that looking for work is a fulltime job in itself, and all members attend regularly. The goal of the club is to obtain a job of the highest feasible quality for each and every participating member. The Job Club method uses behavior modification with positive reinforcement; it emphasizes the effectiveness of standardized procedures, positive statements, a direct manner, and taking a series of small steps one at a time. The training methods are highly structured, and constant encouragement is provided. All efforts are directed at the desired final outcome—obtaining a job. Those who are successful in their search become symbols of group success and added incentive to others.

With Dr. Azrin's advice and assistance, Operation ABLE of Chicago has extended the Job Club technique to groups of older adults who need special assistance to succeed in the marketplace.

So that members recognize that finding a job is a job, Job Club meets on working days during working hours. Program essentials are a comfortable workroom, with ample tables and suitable chairs, and a number of telephones for the club's exclusive use.

When a Job Club is started, the three or four training sessions are held in the afternoon. The sessions are then switched to morning so that the members have the entire day to work at job seeking. If the members spend their mornings on the phones at Job Club, they are free to go on interviews in the afternoons. The counselor starts new groups in the afternoon and merges the old and new groups into one morning group after the initial afternoon training period.

Ideally, Job Club should meet every workday. Its headquarters should be in an easily accessible central location, and some transportation allowance should be built into the budget for those who could not participate without assistance.

Job Club members learn to treat finding a job as a fulltime job itself; use their own friends, relatives, and other personal contacts to locate job leads; learn to use telephone contact to obtain job leads and arrange interviews; receive formats for effective job-seeking phone calls and letters: receive guidance and practice for actual job interviews; use special telephone facilities and other program resources such as resume typing and photocopying; learn to emphasize their personal and social attributes; and, gain support from being part of a group with one common goal.

Between September 1981 and September 1982, Operation ABLE's network Job Clubs served a group of 179 older adults. Their previous training ranged from semiskilled to middle management, including a few professionals as well. Of the 179 persons who started with Job Club, 132 stayed with the program and only 47 dropped out. A total of 108 persons found 121 jobs, with some being placed more than once. These job offers included: 14—professional / managerial / technical, 49—service, 10—sales, 41—clerical, and 7—trades. Several of those who were still actively looking for work have since been employed.

I strongly support the concept of the Job Club, and commend Operation ABLE for their success in expanding employment opportunities for older workers.

OTELIA CHAMPION, PRESIDENT OF NACWC

Mr. PERCY. Madam President, I welcome this opportunity to pay tribute to Mrs. Otelia Champion, a distinguished Illinoisan with an outstanding record of service to this Nation. Mrs. Champion is a devoted and articulate woman who has dedicated her life to humanitarian work as a member of the National Association of Colored Women's Club, Inc. (NACWC) for over four decades and now as president of that organization. NACWC enjoys the distinction of being the Nation's oldest and one of the most prestigious black women's organizations in existence today.

I would like to express my own personal admiration for Mrs. Champion whose humanitarian efforts to improve the status of women will continue to be an inspiration to us all. Booker T. Washington once wrote, "Success is to be measured not so much by the position that one has reached in life as by the obstacles which he has overcome while trying to succeed." Indeed, Mrs. Champion is a success by the very fact that she has become a symbol of determination to accomplish the impossible against insurmountable odds.

As President of NACWC, Mrs. Champion has made her goals clear—to reach out and help others, to develop capacities for leadership, education, vocational guidance and to improve the status of women. In particular, the NACWC has committed itself to promoting the education of women and girls; raising the standard of home; working for moral, economic, social and religious welfare of women an children; protecting the rights of women and children who work; an obtaining for all women the opportunity of reaching the highest standards in all fields of human endeavor. Under the leadership of Mrs. Champion, NACWC has also given assistance to homes for battered women and senior citizens; created educational scholarships to assist young career women and men; helped to implement assault on illiteracy programs; and supported the Sickle Cell Anemia Foundation, as well as programs of Africare with contributions.

Mrs. Champion serves as a role model for other women in her commu-

nity and international service, and outstanding professional achievements. Her awards include: Outstanding achievement awards, NACWC, 1981; Outstanding Central Region Sigma Gamma Rho Soror; Most Outstanding Counsellor, 1978, East Chicago, Ind.; achievement award, NAACP; Mayor Carl E. Officer's Proclamation, East St. Louis, Ill., and VIC (Very Important Citizen, Indiana).

Mrs. Otelia Elizabeth Champion is listed in the International Register of Profiles (World Edition), in the World Who's Who of Woman, Cambridge, England, and in the 1980-81 edition of Who's Who in the Midwest.

Mrs. Champion is not only a reputable public servant, but also a bright, charming woman of many accomplishments. She holds a degree in music from the Chicago Conservatory of Music; a B.A. degree from Northwestern University in business administration and an M.A. degree from Northwestern in counseling and guidance. She is a doctoral student in guidance.

As a faithful member of the Zion Baptist Church, Mrs. Champion serves as minister of music. She also founded the Block Junior High School mother/daughter, father/son banquets which have become a tradition in the school.

Hard work is something Mrs. Champion has never shied away from. She has continually stepped forward to provide strong leadership and this is clearly reflected in her record. She has served as a local club president, State president of Indiana, and now as national president of NACWC.

However, Mrs. Champion has a characteristic that distinguishes her from most people—a sincere desire to assist others and improve the world as a whole. She has translated her feelings into concrete actions which bring help to the needy and inspiration to those who need it most. Her enthusiasm for life and determination to serve others has not diminished over the years. She is indeed an outstanding citizen who has given unstintingly of her time, talent, and concern for the advancement of opportunities for women.

It is indeed appropriate that we reflect on the achievements of this remarkable individual who has contributed much to our Nation, States and local communities. Mrs. Champion, by her dedication and achievements, has earned our respect and admiration. I hope that this brief commendation will serve as a reminder of the tremendous impact one person can have on the world.

FRANKLIN PARK ROTARY CLUB

Mr. PERCY. Madam President, during the November recess I had the pleasure to address the Rotary Club of Franklin Park. It has an outstanding scholarship program which illustrates how the private sector can continue to support higher education in this country.

The Franklin Park Rotary Club in Franklin Park, Ill., was formed in 1957 and has 29 members who live or work in Franklin Park. The club is one of 20,000 rotary clubs worldwide.

The Franklin Park Rotary Club primarily provides service to the community. Several of its achievements over the years include donations and assistance to the Franklin Park Senior Citizens Home, gifts to the Franklin Park Ice Rink, Christmas food baskets to the needy, a Halloween party and gifts for the children of Maryville Academy, and sponsorship of students to the Presidential Classroom in Washington, D.C.

The club's highest priority has been its top 10 percent program, recognizing the top 10 percent academically from the graduating class of the two Leyden township high schools and providing 10 $1,000 scholarships for the Leyden students. In 1983, businessmen and professionals throughout the community contributed $18,000 to sponsor a banquet honoring the top 10 percent and establish additional Rotary scholarships for Leyden students.

The top 10 percent program could be emulated by many other service organizations, as a fine example of what the private sector can do to support higher education in this country. I thought this program would interest my colleagues in Congress and other readers of the CONGRESSIONAL RECORD throughout the United States and the world. I commend the Rotary Club of Franklin Park and congratulate every person who contributes to scholarship assistance programs, enabling recipients to continue their higher education.

EYEWITNESS ANONYMOUS

Mr. PERCY. Madam President, I would like to take this opportunity to bring to your attention an exceptional program designed to battle crime in our Nation. Crime in the United States has expanded to such great proportions that numbers of innocent people have been victims, with little hope of restitution. As the number of crimes continues to grow and so many of these crimes remain unsolved, our Nation's citizens have, in essence, sentenced themselves to living in fear.

To help combat this problem, "Eyewitness Anonymous" was introduced to Chicago by WLS-TV on March 4, 1983. "Eyewitness Anonymous" utilizes the services of We Tip, Inc., a nonprofit organization "dedicated to reducing crime and the fear of crime throughout the Nation" by offering citizens an opportunity to anonymously report crimes. We Tip employs Spanish- and English-speaking operators who take anonymous calls, record information, and then relay that information to appropriate law enforcement officials for investigation.

Founded in 1972, We Tip was originally organized to curtail drug sales in California schools. The program expanded, and in 1982 We Tip set up a toll-free nationwide reporting number—1-800-73-CRIME. In the past 12 years the organization has handled over 53,000 anonymous calls, resulting in more than 5,700 arrests and 2,000 criminal convictions. In addition, We Tip has helped recover more than $3 million in stolen property, seize more than $106 million worth of narcotics, and lead to arrests relating to $11 million in arson. And in the Chicago area alone—largely as a result of WLS-TV's efforts—We Tip has received nearly 3,800 anonymous tips and helped recover over $191,000 in stolen property and seize more than $45 million worth of narcotics.

As a public service, ABC television stations in Los Angeles and Chicago joined with We Tip and the appropriate law enforcement officials to publicize and promote this innovative and needed crime reporting program. Special segments of their "Eyewitness News" broadcasts spotlight unsolved crimes that have been recommended by police for publicity. Viewers with information about these or any other crimes are then urged to telephone the We Tip crime reporting number, which is also broadcast. Once police or other law enforcement officials receive tip information, they investigate through typical channels. If the information leads to arrest, cases are forwarded to the courts for hearing and, if warranted, sentencing.

Madam President, I commend WLS-TV for their sincere efforts in bringing "Eyewitness Anonymous" to the Chicago area. This program is a vital, thriving lifeline for the many victims of crime in this country, and I strongly urge my Senate colleagues to investigate avenues for similar programs throughout the Nation. Nothing can replace the hurt, loss, and violation that crime victims have suffered; however, We Tip and "Eyewitness Anonymous" have proven that through the coordination of efforts by law enforcement officials, the media, and conscientious citizens, we can battle this country's destructive and growing crime problem.

A TRIBUTE TO ALLEN ZIEGLER

Mr. CRANSTON. Madam President, however belatedly, I want to take a moment to pay tribute to an outstanding Californian and American, Allen Ziegler, who was honored with the Heart of Gold Award in October 1983 by the Medallion Group of Cedars-Sinai Medical Center—a tribute to Mr. Ziegler's years of selfless contributions

to community-minded causes ranging from day camps to universities.

A prominent leader in the Los Angeles business community, Mr. Ziegler founded Westco Products while attending the University of Southern California—a family business which grew into the leading manufacturer of bakery supplies in the United States.

Twice honored by Mount Sinai for their generous efforts, Mr. Ziegler's parents set a tradition of philanthropy which he and his wife, Ruth, have honored and enlarged upon. Major contributions they have made include the endowment of the administration building at the University of Judaism and facilities at Sinai Temple, Camp Ramah, and the Jewish Home for the Aging. Mr. Ziegler has not limited his work to financial contributions; he has been active in leadership positions in the community and has given unstintingly of his time, intelligence, and energies to charitable causes too numerus to list.

Twenty-five years ago, Mr. Ziegler received the first Eternal Light Award from the Jewish Theological Seminary for his humanitarian achievements. It was a well deserved tribute then, as is the Heart of Gold Award now. Allen Ziegler is an example to us all of generous service in the public good. I commend him to my colleagues in the Senate.

Mr. HEFLIN. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

The PRESIDING OFFICER (Mrs. KASSEBAUM). The Chair, in her capacity as a Senator from Kansas, asks unanimous consent that the order for the quorum call be rescinded, and without objection, it is ordered.

RECESS UNTIL 2 P.M.

The PRESIDING OFFICER. Under the previous order, the hour of 12 noon having arrived, the Senate will stand in recess until 2 p.m.

Thereupon, the Senate, at 12 noon, recessed until 2 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. LUGAR).

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BAKER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER OF PROCEDURE

Mr. BAKER. Mr. President, under the ordinary procedure I believe the Senate would resume the consideration of the unfinished business; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. BAKER. Mr. President, I ask the Chair if the clerk might report the measure.

VOLUNTARY SCHOOL PRAYER

The PRESIDING OFFICER. The clerk will state the pending business.

The bill clerk read as follows:

A joint resolution (S.J. Res. 73) proposing an amendment to the Constitution of the United States relating to voluntary school prayer.

The Senate resumed consideration of the joint resolution.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. BAKER. Mr. President, each day as this matter is brought down and the Senate returns to it as the pending business, I have had a statement to make.

Mr. President, I think now is the time for the Senate to turn to the question of the formulation of the issue and a final disposition of the matter.

As I indicated on Thursday and then again on yesterday, I hope we can commence voting on amendments. I hope we can finish this matter this week and, if we cannot, we will go over to next week, but at some point this has to be concluded.

Mr. President, as I began this debate, I wish to reiterate today that as far as I am concerned my only ambition is to see that the Government of the United States and the lesser governments of this Republic are absolutely neutral in the question of religious observance, that is, that they do not mandate a religious observance nor do they prohibit it on a voluntary basis.

I have no desire to encroach upon the separation of church and state, to challenge the very sound principle that prohibits the establishment of a state religion. I simply wish the Government to be neutral.

Mr. President, in the course of things, I hope that that is the judgment made by the Senate, that the matter is passed with the requisite two-thirds majority and sent to the other body for their consideration and ultimately for the States of this Union to consider as the Constitution provides in the case of an amendment to the charter document.

Mr. President, I hope Members will forbear to offer amendments, and I am not now offering an amendment, but may I say to Members that I hope that we can arrange a sequence of matters to be dealt with and that that should be decided before very long; so I hope for the time being that no amendments will be offered and that we will have an opportunity to pursue the efforts that are going on to establish routine and sequence for the consideration of measures relevant to this issue.

Mr. President, with that I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire is recognized.

Mr. RUDMAN. Mr. President, let me first say that I think the majority leader has summed up as succinctly as could be summed up that which all of us wish to achieve. The difficulty, of course, has been finding language to achieve that laudable end.

Mr. President, I rise today in opposition to Senate Joint Resolution 73, not because I am opposed to prayer, or even because I am opposed to religious activity in public schools if properly structured. I am opposed to the resolution because rather than embracing the precepts of our political and religious heritages, it rejects them in a simplistic manner that ignores the delicate balance between secular authority and personal freedom which is the cornerstone of our Nation. I can only liken Senate Joint Resolution 73 to an attempt to carve a facet in a precious gem by use of a battering ram: The attempt most surely will fail in its primary objective and may destroy the gem itself in the process.

To begin, I ask the following question: What is it that we are really discussing? We are certainly not talking about the right of children to pray in public school. That right exists today just as it has existed throughout the history of our country. Subject only to the necessity to maintain classroom structure and discipline, children are free to pray during many periods of the school day. Admittedly, many of those periods would dictate silent prayer as the preferred choice, but I know of no religion that maintains that communication with its deity requires vocalization.

Nor are we discussing a proposal which reflects the views of the framers of the Constitution and the first amendment. At that time there were no public schools in this country. More to the point, even had there been public schools, there is every reason to believe that language such as that before us today would have been rejected. In explaining the first amendment provision that "Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof," Thomas Jefferson provided the following insight in an 1802 letter:

Believing • • • that religion is a matter which lies solely between man and his god, that he owes account to none other for his

faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence the act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.

James Madison also gives us insight concerning the collective state of mind which lead to the adoption of the first amendment separation clause. In his 1785 "A Memorial and Remonstrance Against Religious Assessments," a statement in opposition to a bill which would have subsidized the teaching of Christianity in Virginia schools of the time, Madison observed that the bill under consideration implied—

* * * either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of social policy. The first is an arrogant pretention falsified by the contradictory opinions of Rules in all ages, and throughout the world; the second an unhallowed perversion of the means of salvation.

The "wall of separation" defended so eloquently by Madison and Jefferson, born of the religious persecution which was their heritage, was built at a time when the population of the United States was at least 95 percent Protestant. To suggest today, at a time when within our borders can be found 89 distinct religions with 50,000 or more celebrants, that the language of Senate Joint Resolution 73 is what our forefathers "really meant to say," is either the height of arrogance suggested by Madison or a deductive leap unsupported by the evidence.

No; what we are really talking about is whether or not we will mandate a period of spoken *prayer* in our public schools. I italicize the word prayer because I do not know what it means in the context of the resolution. Of the 89 religions that I referred to above, the prayers of only one or two would be meaningful to any one individual. The rest would fall between meaningless at best and offensive at the other end of the spectrum. To require of children a meaningless act is, quite simply, a waste of precious time in an educational system already under fire. To require of children something that is offensive to others threatens the fabric of society.

Do we learn nothing from history? In 1854, a Jesuit priest in Maine advised his parishioners to defy a school committee regulation requiring children to read the King James version of the Bible and, subsequently, as chronicled in "Church, State and Freedom" by Leo Pfeffer: "A mob broke into his house, dragged him out, tore off his clothing, tarred and feathered him, and after two hours of cruel treatment, finally released him." Mr. Pfeffer also chronicles an 1843 event in which a Catholic Bishop petitioned the Philadelphia School Board to allow Catholic children to use the Catholic version of the Bible, a petition that resulted in months of controversy, riots, the destruction of churches, convents, and homes, and the murder of both participants in the controversy and innocent bystanders.

Likewise, the result of a 1949 appeal by two Jewish mothers in Chelsea, Mass., then 45 percent Jewish, to appear before the school committee to present their views against the singing of Christmas carols and the presentation of Christmas pagents led to threatening letters, threatening telephone calls, and threats of boycott against all Jewish merchants. Finally, for those of you who think that we in America are now beyond such action: In 1982, an Oklahoma resident and member of the Church of the Nazarene who initiated the filing of a suit against religious activities in her child's school was assaulted on school grounds and was forced to move to another school district to avoid harrassment. I ask my colleagues: Is this the type of activity that we in Congress wish to encourage by adopting Senate Joint Resolution 73?

Our Supreme Court has long recognized the danger in what we argue here today. In a line of cases dating back to 1947, the Court has held that the promoting of certain religious exercises in public schools is unconstitutional. In Everson against the Board of Education (1947) the Court held that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

That landmark decision formed the basis for the 1962 decision in Engel against Vitale prohibiting the recitation of a prayer composed ', the State, and the 1963 decision in Abington School District against Schempp prohibiting the recitation of religious passages not composed by the State. In both these cases, schoolchildren had been granted permission to remain silent or to excuse themselves from the room. The Engel court correctly observed that:

The * * * argument * * * that the program does not require all pupils to recite the prayer, but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects * * *. When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

The Supreme Court's view has been supported by a number of noted conservatives. Columnist James Kilpatrick has observed:

We are talking about state-sanctioned prayer in public schools where attendance is compulsory. It is pure sham to contend that in such circumstances that "prayer" can be "voluntary."

Likewise, it is interesting that the Moral Majority recognizes the divisiveness of what we would do today. Rev. Jerry Falwell has said: "If we ever opened a Moral Majority meeting with prayer, silent or otherwise, we would disintegrate."

Mr. Cal Thomas, Director of Communications for Moral Majority, amplified on the statement by explaining that meetings were not opened with prayer because, "It is a political organization which includes Jews, Catholics, Mormons, Protestants, and even 'non-religious' members."

Mr. Thomas' rhetorical question was: "What kind of prayer would we use?" I commend Reverend Falwell for his insight in this regard, and can only wonder why it is that he supports Senate Joint Resolution 73. Does not his logic extend to our public school system as well?

Finally, it has been suggested that schools might choose a nondenominational prayer in order to avoid the problems I have cataloged. Although there is nothing in this proposed amendment which would require nondenominational prayer, if that were my only objection, I am sure that I could be brought around by some creative amendment to the resolution. This is not the case. Our distinguished colleague, Senator DANFORTH, an ordained Episcopalian minister, has put his finger on the real problem with nondenominational prayer. As he stated in one of his recent speeches:

Prayer that is so general and so diluted as not to offend those of most faiths is not prayer at all. True prayer is robust prayer. It is bold prayer. It is almost by definition sectarian prayer. Yet such genuine prayer would offend children of other faiths.

Even so neutral a prayer as, "Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country"—the prayer which was the subject of the Engel decision—was found to be blasphemous by leaders of certain Christian churches.

To reiterate, the adoption of such an amendment either would require of children a meaningless act or would create a situation in which divisiveness would be the outcome. We dare not pass such legislation. In this regard, I am struck by the fact that approximately 25 religious organizations have taken a position opposing Senate Joint Resolution 73. These include the following denominations: Presbyterian, Seventh Day Adventist, Episcopal, Church of the Brethren, Church of Christ, Baptist—admittedly, with some dissent—Methodist, Quaker, Hebrew, Unitarian, Congregational, and Lutheran, The Roman Catholic Church is neutral on the issue. With this

united opposition to Senate Joint Resolution 73 among religious leaders, one might properly ask, "Why are we debating it at all?"

Having said that, I also reiterate my original statement that I am not opposed to religious activity in public schools if properly structured. I am proud to be a cosponsor of Senate bill 815, introduced by the senior Senator from Oregon, Mr. HATFIELD. That measure would establish, as a matter of law, the principle that schoolchildren have the same rights to engage in voluntary, extracurricular activity for religious purposes as they do to engage in any other voluntary, extracurricular activity. Although the Supreme Court has never held otherwise, some misguided and poorly conceived lower court rulings have cast doubt on that question.

In addition, I intend to support Senate Joint Resolution 212, a proposed constitutional amendment offered by the junior Senator from Utah, Mr. HATCH. That bill, which may be offered either as a substitute for Senate Joint Resolution 73 or considered as a separate measure, addresses both the right to engage in voluntary, extracurricular religious activity and would permit as well the establishment of required periods for meditation or silent prayer during the school day.

Notwithstanding the above, over the last week, as has been reported in the media, both nationally and in my own State of New Hampshire, there has been considerable discussion regarding the possibility of a compromise constitutional amendment. Those of us who have been involved in this effort wished to see if it were possible to draft language which would permit group vocal prayer during class time, as supported by the proponents of Senate Joint Resolution 73, while removing the stigma many attach to such vocalization. The effort has involved talented constitutional scholars as well as Senators and staff predisposed to both sides of the issue. I have been a part of those discussions, have critiqued the suggestions of others and, in fact, have proposed specific language myself. However, after much reflection, I have concluded that the issue is incapable of compromise.

Compromise involves a balancing of conflicting rights and desires. Senator HATCH's proposal represents the classic compromise, the midpoint between those who advocate vocal prayer and those who would maintain the status quo. At this point, I believe anything further would constitute an impermissible favoring of one legitimate viewpoint at the expense of another legitimate viewpoint. I shall cast my vote accordingly.

Correctly structured, religious activity has a place in our public schools. Periods of silence would allow children to communicate with the God of their choice or to reflect on matters otherwise important to them. I see no harm and much to be gained by such periods of reflection. Much of what is wrong with our society today, from individual actions to the often muddled actions of our Government, can be traced directly to lack of reflection on our priorities and how they might best be achieved.

Yet, the activity must be voluntary, truly voluntary. We dare not risk the consequences of having the State or representatives of the State promoting or sponsoring specific forms of oral religious activity. To do so would be to violate our traditions, ignore the teachings of history, and risk the harmony that we all hope defines our society.

Unfortunately, the debate over the last week and a half has underscored the many religious differences which exist in our society, differences which, to date we have kept out of Government and the realm of public policy. Why we seek to transfer the problem of dealing with these differences to the backs of 7- and 8-year-old children in public school is, quite frankly, beyond me.

Mr. DECONCINI and Mr. PACKWOOD addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. DECONCINI. Mr. President, the value of the State fostering silent prayer is that each child can pray in as intense a manner as he or she desires to whatever religious values are most holy to that person.

They can do so every day, in a manner in which every child is accommodated. Silent prayer allows for the most robust expressions of religious conviction within a structured environment; collective vocal prayer would allow only weak statements of devotion. It is interesting to note that many religions establish silent expressions or prayer as their most intense moments of faith. For example, in the Jewish faith the silent Amidah prayer represents the most passionate expression of the values of the religion.

To those who claim that silent prayer even within a structured, group environment is trivial, the following comments are in order:

First, it is not trivial to reaffirm the proper understanding of the first amendment's establishment clause that there is a proper, supportive role between the State and expressions of religious values.

Second, it is not trivial to reaffirm that a student's education ought properly to consist of the development of spiritual character, and that it is an act of religious hostility for the State to compel the attendence of a child at a public institution for 8 hours a day and forbid the expression of any religious impulse.

Third, it is not trivial to reverse the unmistakable trend of recent decades in which official antagonism by the State toward religion is established as the law of the land, and in which secular humanism is the only transcendental value aggressively encouraged by institutions of public education.

REBUTTAL TO THOSE WHO SAY SILENT PRAYER IS NOW ALLOWED

While they have never expressly outlawed silent prayer, the Supreme Court has effectively outlawed it because, almost without exception, jurisdictions throughout the country—most of which allowed vocal prayer prior to the Court decisions—refuse even to allow silent prayer in the belief that the same principles guiding vocal prayer also guide silent prayer. This is not an unreasonable belief.

Thus, even though the Court has never expressly spoken on silent prayer, they have repeatedly spoken on the meaning of the first amendment. They have done so in a manner that most observers believe precludes any form of Government-sponsored prayer. At the very least, they have chilled all such expressions of prayer.

Are we going to have to wait for the Court finally to explicitly outlaw silent prayer before we act on an amendment? The Court is not obligated to hear this issue. They may choose never to hear this issue. The hard fact, however, is that virtually every community in the country is effectively deterred from allowing silent prayer because they believe that the principles enunciated by the Court are applicable to such prayer. While lawyers may be prepared to make fine distinctions among cases, it is wholly reasonable for jurisdictions to assume that the Supreme Court has decisively spoken on silent prayer. See also *Beck* v. *McAlrath,* 548 F. Supp. 1161 (M.D. Tenn. 1982); *Duffy* v. *Las Cruces,* Civ. No. 81-876-JB (N.D. N. Mex., Feb. 10, 1983); *May* v. *Cooperman,* Civ. No. 83-89 (D. N.J., Jan. 10, 1983); *Jaffree* v. *Mobile County,* —— F. 2d. —— (11th Cir. May 12, 1983.

People are being denied rights today relating to school prayer because of a confluence of governmental actions—Court decision, policies of local school authorities, inaction by Congress and other legislative bodies. It is perfectly proper for the people to respond to this situation by proposing an amendment to the Constitution clearly stating the nature of these rights and extending to them new constitutional protections.

Even if the Supreme Court is deemed not to have spoken on silent prayer, the article V process is appropriate here. Most earlier constitutional amendments have not responded directly to Court decisions.

To assume that Congress is incapacitated from acting until the Supreme

Court decides to address the issue is also imprudent in a purely political sense. Who knows what the political configuration of Congress will be at that time? We know what the present configuration is and believe that it might be receptive to a properly drafted prayer amendment. Even if we are not successful during this Congress, we will have laid a foundation so that Congress, whatever its future configuration, will be more likely to reconsider the proposal in the event that a future Court decision explicitly outlaws silent prayer. The present amendment will serve as a continuing focus in that regard.

Had the policy of waiting to act until a final court decision is handed down been the prevailing idea in 1789, this Nation would never have had the Bill of Rights. Opponents of the bill argued that its inclusion in the Constitution should await the realization of the feared dangers. The principle difference in the present situation is that the feared dangers have already come to pass, and opponents of silent prayer refuse to concede this fact.

The Court is perpetually free to reconsider old decisions and enact new ones. The argument that the Supreme Court has not finally spoken on silent prayer, is perpetually true with respect to all constitutional principles. So long as the Court sits, it cannot be assumed to have finally spoken. Is the ERA unnecessary because the Court may reconsider its Frontiero decision? Is an antiabortion amendment unnecessary because the Court may reconsider its Roe against Wade decision? Is the latest court-stripping proposal unnecessary because the Court may reconsider Marbury against Madison?

Mr. President, I support a constitutional amendment that will restore religion to the honored place it has traditionally held in this country. In our Nation's public schools is one of those places. It is my belief that specific allowance of group or individual silent prayer is the proper method of such restoration.

Silent prayer, either by an individual or in a group setting, provides the means for religious expression without subjecting participants or nonparticipants to undue embarrassment. At the same time, it allows a participant the freedom to pray to whatever deity or values he or she finds holy. It is not necessary for the Senate to authorize vocal prayer, which has such great potential for governmental abuse and infringement on a child's privacy and right to pursue his or her own religious beliefs.

From time to time in its history, the Supreme Court has made decisions so unacceptable to the public that they were overruled by constitutional amendment. The Dred Scott case holding that slavery could not be prohibited in the new territories was set aside by post-Civil War amendments. After the Supreme Court found the Federal income tax unconstitutional in 1893, the 16th amendment was passed to authorize the tax.

Another situation requiring a constitutional amendment as a corrective measure was created when the Supreme Court ruled in 1962 that the reading of prayer in public classrooms was an establishment of religion forbidden by the first amendment.

In decisions such as Engel against Vitale, Abington against Schempp, as well as others not relating directly to school prayer, the Supreme Court has established a theory of the first amendment that I believe is wrong and that is contrary to the intent of the founders, the historical development of the first amendment, and the spirit of our entire Constitution.

The Supreme Court has held school authorities to be constitutionally forbidden from sponsoring devotional exercises such as prayer and Bible-reading in the public schools; forbidden from permitting private teachers of religion to give religious instruction to a student during the school day; forbidden from adapting the school curriculum to reflect beliefs; and forbidden from posting such religious affirmations as the Ten Commandments on classroom walls, regardless of whether the student participation was involuntary or voluntary.

This is the climate that surrounds us on a daily basis. In our coinage, our national anthem, our Pledge of Allegiance, our faith in God expressed through prayer is richly engrained in American history. The purpose of the first amendment establishment clause was not to erect a wall of separation between the state and religious expression. Its purpose was to prevent the establishment of a preferred religion by the state, by the Government. However, in an attempt to conform to the severe restraints of Court-imposed separation, our public schools cannot even acknowledge the existence of a deity. By denying expression of the set of values that holds there to be a higher being, we are awaiting the execution of our youth in a way that certainly does not encourage adherence to high moral principles.

The original intent of the establishment clause that Congress be neutral as between competing religious views has now been transformed into the notion of neutrality between religion and irreligion. Congress must now restore the traditional understanding of the first amendment establishment clause by passing a constitutional amendment adopted through the proper article V route.

Prayers should not be banned from our schools. Such an amendment has the overwhelming support of the American public. A 1983 poll reveals that 81 percent of the American public favor a constitutional amendment to permit voluntary prayer in public schools. The task now before us is to identify the method most appropriate to permit the instruction of religious expressions in our schools.

We should not force prayer in public schools. We must simply remove any constitutional barrier to voluntary prayer. The Supreme Court ruling has been blamed for the deteriorating quality of public education, the breakdown of the American family, the decay of moral principles, and the resorting of Government institutions to secular humanism. I do not side with those who seek prayer in schools as a panacea for these ills. I do, however, firmly believe that we are a religious and moral people and that religious expression has an important place in our lives.

While I believe in the role of prayer in our children's formal education, I am concerned that the manner in which prayer is inserted into the school schedule be done in such a way as to account for the diversity of feelings likely to exist in the school setting.

Any amendment approved by this Congress must insure the voluntary nature of the religious expressions. It must protect against potential embarrassment of pupils who choose not to participate or who do so in a way different from that of the other majority.

I am also concerned about how the content of a group of individuals' prayer might be determined. The state must not be allowed to dictate the prayer.

Finally, I would look to see that the amendment is consistent with cherished constitutional beliefs, tolerance of diverse religious protections, of the rights of minorities, and maintenance of the distinct spheres of church and state.

I believe accommodation of the diverse attitudes toward religious expressions in the public schools can be accomplished and I intend to support a constitutional amendment returning prayer to its honored place in our tradition. Unfortunately, Mr. President, Senate Joint Resolution 73, that is before us today, does not meet those tests I have just set out. I know the intention of the authors of that amendment is not to create a state religion, but I am greatly concerned about the intimidation that, if that amendment were passed, would be wrought in the schools among the pupils and the students. I believe that the amendment of the distinguished Senator from Utah (Mr. HATCH), who has introduced Senate Joint Resolution 212, is the proper place. It can be called a compromise, I suppose, as the Senator from New Hampshire has referred to it. But I think it is a well-thought-out

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approach, one that I believe is fair and does what this Senator believes is important: It restores prayer without any intimidation.

Mr. President, I yield the floor.

Mr. HATCH. Mr. President, just before the distinguished Senator from Oregon takes the floor, I wish to compliment the distinguished Senator from Arizona for his leadership on the Constitution Subcommittee of the Judiciary Committee as its ranking minority member. I believe he has made a series of outstanding contributions to that committee, particularly on the immediate matter.

I personally wish to express my high regard for him and for his testimony here today, and to let him know that we on this side care a great deal for him.

Mr. DECONCINI. Will the Senator yield for 1 minute?

Mr. HATCH. I am delighted to yield.

Mr. DECONCINI. Mr. President, I thank the distinguished chairman of the Constitutional Subcommittee. No one has put in more time struggling with the constitutional question than the Senator from Utah. I say that with the greatest respect and sincerity, because the Senator from Utah has certain strong beliefs, but he is a master at realizing that the legislative process is not getting your way 100 percent. The Senator from Utah has demonstrated time and time again that sticking to your principles can also make the train run and run on time. He has done so in this case. I thank the Senator.

Mr. HATCH. I thank the Senator.

Mr. President, lest we get too caught up in these compliments, I have to read a Western Union telegram I recently received. It seems to be the opposite number from that telegram Senator WEICKER read here last week. it says simply: "To Senator HATCH, Senate Building, Washington, D.C.: Being omnipotent, I do not need your help. Thanks anyway. Signed, God."

I thought that was unique correspondence and deserved to be shared with my colleagues.

I yield to the distinguished Senator from Oregon.

Mr. PACKWOOD. Mr. President, listening to the telegram received by my good friend from Utah reminds me of a telegram I received about a year ago. I cannot remember what the discussion was, but there was a filibuster going on on it. It came from a town in Oregon that has a very, very slight Jewish population. Clearly, something was lost in the translation. As someone telephoned the local telephone operator and the local telephone operator called Western Union, or however this got transcribed; the telegram arrived here saying, "Please support kosher."

I sent back a telegram indicating I always have and would continue to do so.

That story indicates the attitude that can exist unintentionally in an area where you have a lack of some religious elements and a predominance of other religious elements. That is what I fear about school prayer. You can talk about prayer being voluntary or not voluntary, about it being imposed by the school board or the teacher or not being imposed by the school board or the teacher. You can talk about prayer that no school board shall compose or no teacher shall compose. I am not sure what that means. Does it mean: Here is a prayer composed not by me but by Mark or by Matthew and this is what we will say today? That falls perhaps within the parameters of a prayer not composed by the school board or the principal or the teacher or any other unit of government.

There is no way, Mr. President, that you can have any kind of organized prayer that is not eventually going to, probably directly but certainly indirectly, reflect the predominant religious strain in that community. I think it is almost inevitable. To try to determine what our founders would have intended with this kind of amendment is almost impossible. As the Senator from New Hampshire, our good friend (Mr. RUDMAN), indicated, at the time of the founding of this country, there were no public grade schools or public high schools as we know them today.

Almost all of the education in this country was either from tutors if you were of the gentry, or from schools run by churches which any student could attend. You did not have to be a member of a particular faith to attend the church, but the school was very sectarian. Clearly you had prayers in the school. It was a church school. It was not a public school as we understand the term.

Public schools in this country did not really start, and then only in a very minor way, until the late 1810–20 period in Delaware, and blossomed in New York in the 1820's and in the West in the 1830's and 1840's.

But by and large, public schools in the normal sense of the word were unknown to our founders. Therefore, it is hard to fathom what our founders may or may not have intended at the time they wrote the establishment clause. It is very clear, however, what they may have had in mind, about an established church, because our founders were very clear in many of the things that they copied from England. And while we are a very diverse country ethnically, historically, we are, indeed, a melting pot of blacks, and Asians, and Hispanics, and Slavs, and Scandinavians. America has all elements of the world representing all religions. We are, however, in our laws very Anglo-Saxon. When you read some of the documents of English liberty and then you realize how much we copied them in our Constitution. You realize how much we intended in some ways to copy England and by contrast how much we did not specifically intend to copy them. Let me read some of those.

The Magna Carta in the year 1215, article 39:

> No free man shall be seized or imprisoned or stripped of his rights or possessions or outlawed or exiled or deprived of his standing in any other way, nor will we proceed with force against him or send others to do so except by the lawful judgment of his equals or by the law of the land.

Almost 600 years later in our Bill of Rights, we stated it a little more simply and shortly:

> No person shall be deprived of life, liberty, or property without due process of law.

We intended the same thing that England was talking about in their Magna Carta 600 years earlier.

The Magna Carta, article 40:

> To no one will we delay right or justice.

Our Bill of Rights, 1791:

> In criminal proceedings the accused shall enjoy the right to a speedy and public trial.

The Magna Carta, self-incrimination:

> In the future no official shall place a man on trial upon his own unsupported statement.

Self-incrimination in the Bill of Rights:

> No person shall be compelled in any criminal case to be a witness against himself.

I could go on and on, Mr. President, reading other documents of English liberty and comparing them with what we copied into our Constitution. We copied it with deliberation and forethought, and we gave it a higher and protected position in our Constitution compared to Great Britain. All of the documents of British liberty with few exceptions are simply acts of Parliament passed from time to time to limit the king in his effort to abridge the right of the citizenry. It took England roughly from 1215, the year of the Magna Carta, until their bill of rights in 1689, almost 500 years, to complete what we would consider the basic liberties of Anglo-Saxon history.

But all of those liberties simply rest upon acts of Parliament passed by a majority. They could all be repealed at any time by a majority act of Parliament.

Fortunately, England has the tradition and the good sense not to repeal those very, very precious liberties. But our founders realized that people could be swept by passion and prejudice. Therefore, they wanted to give those liberties a higher, privileged protection and they put them in our Constitution. They said that the Constitution could not be changed except by a two-thirds vote of the House and the Senate and the concurrence of three-

quarters of the States. They intended the process of amendment to be tortuous, slow, deliberate, and exact. They did not want those liberties tampered with easily, nor in the heat of passion.

I again extend my thanks and credit to the distinguished Senator from Utah in the procedures he has followed in the effort to overturn the Supreme Court's decision on school prayer. He is offering a constitutional amendment, which is what our founders intended if you wanted to overturn a constitutional decision of the Supreme Court. Only four times in the history of this country have we passed constitutional amendments to overturn a decision of the Supreme Court. He is not going the route of those who earlier in the last Congress wanted to take away from the Court the right to hear cases involving constitutional liberties by the simple expediency of passing a bill saying that the Court could not hear those cases. That is dangerous.

I might read some of those amendments that were offered a year ago as amendments to the Bankruptcy Act.

First, it denies to all Federal courts, including the U.S. Supreme Court, the right to hear cases involving voluntary prayer, Bible reading, or religious meetings in a public school.

Second, evidence otherwise admissible in a Federal criminal proceeding shall not be excluded on the grounds that such evidence was obtained in violation of the 14th amendment to the Constitution of the United States.

Then in case we missed anything, the third amendment denies to all Federal courts, including the U.S. Supreme Court, the right to hear cases involving "the abridgment by a State of any right secured by the first eight amendments to the Constitution of the United States."

Well, that is the Bill of Rights. What the proponents of those amendments were trying to do was to say that if we cannot get a two-thirds vote to amend the Constitution, as our founders intended, then let us see if we just cannot pass a bill. This bill would take away from the Supreme Court the right to hear cases where the Supreme Court has made decisions we do not like.

Now, you can realize what the ramifications of that would be. A year-and-a-half ago the Senator from Connecticut (Mr. WEICKER) and I led about a 6- to 8-week filibuster against an amendment. This was not a constitutional amendment, this was just an amendment on the floor. The bill combined prayer and abortion, and it said the Supreme Court could not hear any cases involving prayer or abortion.

At the start of that debate, the press reports highlighted that it was a debate on abortion or a debate on prayer, depending upon the particular emphasis of the reporter. That was not the point the Senator from Connecticut (Mr. WEICKER) and I were trying to make. The issue in that particular bill involved prayer or abortion, but the substance of that bill was far greater. If we have the constitutional right to pass a bill taking away from the Supreme Court the right to hear cases involving prayer or abortion, then we have the right to pass a bill taking away from the Supreme Court the right to hear cases involving freedom of the press, or freedom of speech, or the right to assemble, or self-incrimination. Or anything else that strikes our fancy because we happen to be swept off our feet by the passion of the moment.

And do not think we cannot be swept off our feet relatively easily, whether we be in Congress or whether we be in the executive branch. All one has to do is look at history, look at the different efforts made by Presidents and by Congress to abuse the liberties of this country to realize how easy it is: the Alien and Sedition Act in the 1790's—which was ironically passed by Congress, peopled principally by those who had been members of the Constitutional Convention—an act that simply said you could be put in prison if you held the Government to ridicule. It seems incomprehensible that the people who wrote our Constitution could pass an act like that, but they did. Fortunately, the act had a sunset provision and the act was terminated before the Supreme Court ever had to rule on it. But this is illustrative of what we can do when passion overcomes reason.

Another example is Andrew Jackson, who is normally regarded in his day as a liberal, as a civil libertarian, to the extent that civil liberties had the meaning that they do now. Jackson tried to prohibit the mailing of abolitionist tracts into the South because these mailings were upsetting the South. He was prohibited from doing so.

A third example is Woodrow Wilson. Wilson's clearly regarded as one of the great civil libertarians of his day. But Wilson allowed his Attorney General, Mr. Palmer, in the famous Palmer Red Raids in 1920, to round up people in their homes that we thought were Communists—whatever we thought Communist was in 1910 and 1920. The revolution had occurred in Russia only 2 years earlier and we were frightened. We were not quite sure what we were frightened of, but we violated many, many constitutional liberties by simply rounding up people in their homes because we thought they might be Communist.

And then, of course, the greatest abuse in my judgment, probably the greatest abuse, in the history of this country of constitutional rights is the placing in concentration camps during World War II of Americans of Japanese ancestry solely because of their Japanese ancestry. And I emphasize Americans of Japanese ancestry; these were not illegal immigrants. These were not naturalized citizens. These were native, American-born citizens whose ancestry happened to be Japanese.

I come from the State of Oregon on the west coast. We are long familiar with Asian immigration. It started on the west coast in the 1860's, 1870's, 1880's. We have many, many second, third, fourth generation Asian families. I can personally remember that circumstance because I was then in the third grade in school and had three Asian friends of Japanese ancestry in school with me. One day they just disappeared, trucked off to concentration camps 400 miles inland because they were regarded as a threat to America and could not be trusted. They could not be trusted because there was a chance the Japanese might somehow manage to land on the west coast of the United States.

It is interesting. The Japanese had bombed Pearl Harbor. Pearl Harbor is a fair distance from the west coast of the United States. We had had the Battle of Midway, which the United States had won and effectively had destroyed Japanese naval armaments in that area. By any rational standard, the likelihood of the Japanese invading the west coast of the United States was someplace between zero and slight.

At the very same time, we had German submarines off the east coast of the United States sinking our tankers and freighters; only 20, 25, 30 miles offshore, within sight of people on shore, watching the ships going down.

You talk about a threat to the country! It was the Germans, not the Japanese.

Yet, interestingly, we never gave any thought to imprisoning Americans of German ancestry, even though the country of their ancestry was an infinitely greater threat to us at that time than the Japanese. No, we imprisoned the Japanese because they did not quite look like us and, to the extent that their religion might have been other than Christian, they did not worship quite like us. They were different. Consequently, we justified in our minds treating them differently.

One of the public officials of that time who argued for the right to imprison the Americans of Japanese ancestry was the district attorney in Alameda County, Calif., the Oakland area. A number of cases had arisen around the United States. Many were consolidated on appeal to the Supreme Court. The district attorney in Alameda County who argued in favor of imprisoning the Japanese of American ancestry was Earl Warren, who, without peer, is probably regarded as the

greatest civil libertarian in this century, maybe in the history of the Supreme Court.

Later, in his autobiography, he pleaded guilty to having been swept off his feet by irrational passion during World War II. But, again, it is an example of what can happen to us.

Joe McCarthy, during the mid-1950's, was an example of Congress running rampant over civil liberties. Watergate, in the mid-1970's—a President doing the same thing.

No—the only guarantee we have that Government, either overtly or covertly, will not attempt to subvert our liberties is to hold very firm to the Constitution.

I quoted earlier some of the constitutional provisions we wrote into the Constitution with the deliberate intent of copying the civil liberties of England. We also wrote in one other amendment, however, that England did not have. And to this day England does not have.

England had an established church, the Anglican Church, the Church of England. Many of our ancestors came to this country for the sole reason of getting away from the dominance of a state church. England was trying to repress freedom of the press in this country and freedom of speech in this country, and England had refused to allow the colonists in this country to peaceably assemble and petition their government for redress of grievances.

So we added to our Constitution the first amendment, which simply says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

One sentence—without question, the most single important instance in the history of human liberty. Every clause in that sentence is important. But if you look at only the portion relating to religion, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," at least based upon our history at that time, you can understand what they meant.

England had an established church. For many years, church attendance was compulsory, prayer was compulsory in England, and we did not want that. We did not want the U.S. Government or any of the States imposing a state religion upon our citizens.

I indicated earlier that one is hard-pressed from a historical standpoint to wonder what our founders could have thought about prayer in public schools because there were no public schools. There were church schools where prayer probably was compulsory half a dozen times a day. This did not bother our founders a bit because anybody could go to any church school they wanted to and pray out loud, or pray silently, or not go to that school at all, or switch and go to some other religious school. That is a totally different situation from prayer in a public school where we compel all of the children in the neighborhood to attend, unless they choose to go to their own private religious school.

At the time of the founding of this country, to the extent that you chose to go to school, you chose to go to school. The Government did not compel you to go to school. The Government now compels you to go to school.

So what is the situation going to be? For example, in the town of Antelope, Oreg., several years ago, there was located near Antelope a religious sect, the Rajneesh, who, by and large, I defend. They have a right to settle where they want, do what they want. Their world headquarters is there. Their leader, the Bhagwan, lives there, and more and more people are coming in. They have taken over the town of Antelope, for all practical purposes. They control its city government. But they are there legally. They are living there legally. They are living there peaceably and they are well educated. These are not very young people that have been swept up into a religion. These are, by and large, people with college degrees, in their late twenties and thirties, some of them with families.

What if they decide to become teachers in the schools of that area and the prayer they are going to offer is the prayer of their religion? Do you think there will be any outcry from those in this country who support this prayer amendment? You bet there will, because they did not intend for a non-Christian prayer to be the prayer to be offered in public schools.

To the extent that they will try to cite, "Well, you cannot compose the prayer yourself," I will come back again to the argument that any teacher can take any prayer composed by somebody else and read it. If the Rajneesh teachers chose to read the Rajneesh prayers, would that be any different from the Baptist teacher choosing to read the Baptist prayer, or the Catholic or Jewish teacher choosing to read the Catholic or Jewish prayer?

I would contend, Mr. President, that it is no different. Perhaps in retrospect, we should realize that the strength of this country is not in some compelled conformity. The strength of this country is in its respect for diversity and difference. This country was founded on diversity. This country has never failed to pull together in unity voluntarily when the security of this country was threatened. I have no doubt that, if this country is threatened again, we will have no difficulty pulling together voluntarily for the sake of our common defense and mutual welfare.

But when we decide that, for the sake of all of us, the prayers of some of us will be imposed on the rest of us who do not like those prayers, then we are then starting down the road to compulsion, conformity and eventual disillusion and failure.

Dictatorships all over this world try to impose conformity. They try to break the spirit of diversity in their countries and make everyone religiously, intellectually, politically hew to one thought and one line. It does not work.

Without exception in history, every country that has tried that has eventually failed. These countries have failed to maintain preeminence as a great country. They failed because of the very basic nature of mankind, which abhors that kind of government compulsion.

And nowhere is that abhorrence more marvelously portrayed than in the sweep of Anglo-Saxon history. The Anglo-Saxon tradition is something that has worked so well for those countries that have followed it. The Anglo-Saxon tradition is the philosophy of the supremacy of the individual over the state, the right to be different, the right not to be dictated to, the right, as we said in our Declaration of Independence, to have inalienable rights that no government can take away. And when the Government tries, it becomes dangerous. And when those of us in political power try, we become doubly dangerous.

God did not speak to any one of us. God did not speak to any one of us and make us perpetually, eternally right. When we think God did and when we are in a position of power already, then we are so dangerous. Because if we assume we are right and if you disagree you must be wrong, then it is just a short step to the "end justifies the means". If the end is so right, and if in order to achieve that end some of your liberties must be abused a bit at first, and perhaps a bit more later on if you did not learn your lesson the first time, so be it. That is the price of being wrong.

In just 3 years we will celebrate the 200th anniversary of the writing of our Constitution. There will be justifiable celebrations in 1987 celebrating those 200 years.

I would hope, however, that we remember we celebrate not just 200 years of American liberty but almost 800 years of Anglo Saxon history in which men and women have fought, been tortured, had their properties forfeited, and have died so that today we have the right to choose and to say what we want. We also have the right to choose to be what we want, the right to choose the religion that we want, and the right to be protected

from having the State impose its idea of religion upon us.

I hope as we celebrate in 1987 we remember those liberties and we remember those ancestors who gave to us the most priceless blessing that one generation can give to another, and that is the blessing of political and religious freedom and liberty.

All I ask, as we debate this issue, is that we remember that history, we cherish it, we protect it, we preserve it, and we pass it on to our daughters and to our sons a bit more secure than we received it from our parents.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I appreciate the statements of all of the Senators who have spoken here today. I understand their respective differing points of view. As chairman of the Constitution Subcommittee I have seen all points of view reflected in the hearings that we have had; I think there is much merit in what has been said on all sides of this issue.

Mr. President, it is difficult any time one wants to amend the Constitution of the United States. There have been more than 10,000 proposed amendments to the Constitution during the history of our country; of these, only 33 have come through the legislative process and of the 33 there are only 26 which have become amendments to the Constitution. Of the remaining seven, there is only one still pending, the D.C. voting representation amendment.

So it is an extremely difficult thing to pass an amendment to the Constitution of the United States; that is as it should be because the Constitution is not a legislative document to be amended at will by a majority vote or in response to passing majority sentiment.

The Founding Fathers placed into the Constitution procedures so that it would not be too readily mutable. Proponents should have to bear a very heavy burden of proof no matter what amendment is being proposed to the Constitution.

Mr. President, a great amount of focus has properly been placed upon the status of minority-religion students under the proposed amendment. It is only because I am convinced that Senate Joint Resolution 73 fully protects the interests of such students that I am comfortable supporting its addition to the Constitution of the United States.

As I have already noted in earlier statements on this matter, I interpret the proposed amendment to place an absolute obligation upon local school authorities to reasonably accommodate those students who desire not to participate in prayer. As the test of this measure reads, "No person shall be required by the United States or by any State to participate in prayer." Any student desiring not to participate in prayer is entitled to reasonable accommodation whatever his or her reason for choosing not to participate. He may choose not to participate because a recited prayer is inconsistent with his own beliefs; because he is simply not a believer in religion or prayer, because he is simply opposed to public expressions of religion or prayer; or because of any other reason. It is no business of the school or other public authorities why any individual student chooses not to participate.

Although decisionmaking responsibilities in this area remain at the full discretion of State and local authorities, I fervently hope that such authorities will be creative in considering the full range of options available to them under the proposed amendment. There is discretion as to the language of prayer, whether such prayer is to be vocal or silent, the regularity and duration of such prayer, whether the teacher or a student lead the prayer, whether the prayer will alternate on some basis, and the classroom structure of prayer.

In short, a principal purpose of the proposed amendment is to substitute the diversity and variety of American federalism in the area of school prayer for the sterile and unnecessary uniformity imposed by the Supreme Court in their Engel and Abington decisions. While no student of the Constitution can fail to appreciate the need for uniform national policies, neither can he fail to understand the need to respect the judgment of local authorities in areas of the law where there is not need for uniformity. There is no need for uniformity, in my view, in establishing public policy on school prayer. There is no need for a single, unvarying policy for each of the many thousand school districts around the country, regardless of local attitude, regardless of local religious mix, regardless of the attitudes of local minority groups, and regardless of the attitudes of local school authorities.

There are some individuals and organizations, particularly here in Washington, who seem to believe that only Federal authorities are adequately sensitive to the constitutional rights and the interests of discrete and insular minorities. I do not believe this to be the case. There is no evidence of which I am aware that the previous experience of our Nation with school prayer has demonstrated any systematic insensitivity by State or local officials, or any uniform lack of concern with the interests of all of the students within a school district. While occasional abuses can always be pointed to, I believe that the history of school prayer in this country demonstrates that state and local authorities are equally protective of the genuine constitutional rights of their citizens as are Federal judges and other Federal officials.

I would hope and anticipate that local authorities—those with decisionmaking discretion under the President's proposed constitutional amendment—will exercise that authority with circumspection, with careful planning aforethought, and with sensitivity to the interests of all of the students within a school district. I would emphasize, however, that while there is a wide ambit of discretion in such authorities concerning the structure of the prayer opportunity in the school, there is no discretion concerning their obligation of fully accommodating students not desiring to participate in prayer.

The experience of public schools across our country demonstrates that such accommodation can be made in a reasonable and responsible manner. We have witnessed school districts throughout the country accommodating those students whose parents desire that they not partake in sex education. As far as I am aware, school districts have allowed these students to exercise their decision with grace and with a minimum of embarrassment. Similarly, we have witnessed school districts accommodating those students who have chosen not to participate in such patriotic exercises as the "Pledge of Allegiance" or the "American's Creed." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). This, too, has been done with an absolute minimum of inconvenience to those students choosing not to participate for religious or other reasons.

I would hope that school districts, however, would not fail to seek out ways by which voluntary participation could be maximized and in which the devotional views of a maximum number of students could be respected without separate accommodation. Perhaps, this could include rotational prayer of one form or another, or at least some opportunity by which the diversity of religious sentiment within a school district could be reflected or represented. Although the principal purpose of Senate Joint Resolution 73 is to afford a sincere and genuine opportunity for religious expression by the student in the classroom, this is, by no means, inconsistent with the idea of the student learning more about the richness and variety of prayer, including prayer of different denominations and churches, as well as of prayer to different gods.

I would hope that the prayer experience under Senate Joint Resolution 73 would permit those students of dominant local religions to learn more about the views of those students who do not share those attitudes, and to

learn to be more tolerant of those views. At the same time, I would hope that it would permit those students of minority religions, or perhaps those of no religion at all, to understand their differences and to learn that, despite their differences, they too are respected members of the local community. School prayer can be, and I hope would be, structured not merely as a reverential opportunity but as an educational opportunity, an opportunity to learn that people are different in their attitudes and an opportunity to learn that they are no less entitled to respect and dignity and tolerance as a result of those different attitudes.

Mr. President, the proposed constitutional amendment has been drafted, and is offered in a spirit consistent with the spirit of our Constitution. On the one hand, it attempts to reassert the fundamental devoutness of our people, and the ultimate spiritual foundations to our freedoms and liberties; on the other hand, it attempts to do this in a manner consistent with the values of religious free exercise, tolerant of all religious points of view. The proposed amendment establishes a fair and appropriate balance between the sometimes competing constitutional strains of the religion clauses of the first amendment.

Despite all of the talk about the proposed amendment creating additional tensions within communities across the country, I believe that an intelligently and compassionately structured opportunity for prayer can serve to achieve the opposite effect. I believe that such a prayer can prove an uplifting and satisfying thing for all students, whatever their religious perspectives. I do not share the obvious lack of confidence in the ability of local authorities to achieve this that is felt by some of my colleagues. I do not believe such individuals to be any less protective of American values and principles than Federal judges here in Washington. The ultimate success of this proposed amendment will rest with those representatives of the American people throughout the country who are closest to the American people. As a result, I am comfortable that Senate Joint Resolution 73 will eventually prove to be a highly unifying, rather than a divisive force.

Mr. President, I genuinely do not know how a period of morning prayer in our schools could hurt anyone. I genuinely believe, on margin, that school prayer will promote greater diversity, pluralism, and respect for the viewpoints and the beliefs of others.

I do not believe that it hurts any of us to attend different churches. I do not believe it hurts any of us to study different religions. I do not believe it hurts any of us to listen to prayer by differing people with differing perspectives and differing spiritual values and differing beliefs.

I do believe, however, that a nation that was built upon Judeo-Christian principles that is unwilling to maintain and transmit to successive generations those principles may be afflicted with many things with which it should not be afflicted.

I sometimes believe that if our young people just have that one contact with the religious perspective, in school or anywhere else, maybe just on a single occasion, it might touch that young person's life and change some of his or her attitudes, particularly when those attitudes are leading them into so many directions that are wrong for them and for society.

I believe we need to do more in this area. deTocqueville who wrote about this Nation and chronicled the development of this great, new, young nation was so important, why it was so great, why we accomplished so much, emphasized more than any other thing the religious values that the people in this country possessed, religious values that opposed the establishment of a national religion, that opposed the establishment of preferential treatment for any religion, that opposed the imposition of any particular religious view upon the people, but that supported the right to believe, the right to think, the right to practice, the right to pray and the right to the full and free exercise of religion.

I believe we ought to be a little more concerned about the possibility that perhaps prayer will prove a sensitive thing to young people, something that might uplift them on occasion during their school tenure when that uplifting influence is needed the most. Prayer just might—it just might—trigger a positive response in our Nation's young people, some of whom have never been exposed to it. Why not just give it a chance?

I can remember as a young Mormon boy in Pittsburgh, Pa., saying the Lord's prayer every day in school, alongside of Jewish children, Jehovah's Witness children, and some who came from families who claimed to be agnostic or atheist. And I can tell you it did not hurt any of us and it did not hurt any of them.

On balance, the good that prayer does may help our society as a whole and may justify the statement deTocqueville made that America is great because America is good and when America ceases to be good, America will cease to be great.

We have come through some trying times in the last 20 years. We have come through rebellions and divisions in this country that almost tore this country apart and, in some ways, did rend the fabric of our country. We may be going through additional such times in the future.

We need every possible resource on our side. We need the values that school prayer can create.

Unlike the distinguished Senator from Oregon, I do not think it is going to hurt anyone to listen to an occasional Moslem prayer or Buddhist prayer. I think we may find they share the same values of the Judeo-Christian culture. We may find there really are not that many substantial differences between us.

Mr. President, in order to place the issues of this body in better historical and constitutional perspective, I ask unanimous consent to have printed in the RECORD at this point several articles on the development of the religion clauses of the first amendment.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Wall Street Journal, July 22, 1982]

DEFENDING THE SCHOOL PRAYER AMENDMENT

(By Grover Rees III)

Recently I attended a state college graduation ceremony that began with an invocation by a rabbi and ended with a benediction by a Catholic priest. On the way home I heard a radio commentator denounce President Reagan's proposed constitutional amendment on school prayer. The amendment, the man said, is a radical assault on one of our oldest and most fundamental constitutional principles, the "wall of separation" between government and religion.

The wall of separation is a myth. The record of the debate in Congress on the First Amendment ban against "establishment of religion" clearly indicates that its framers intended only to prohibit the *federal* government from designating a *particular* church to which all citizens must give their allegiance and their financial support. For 200 years the participants in the American constitutional consensus have understood the difference between establishing a church and saying a prayer.

They have invoked the aid of God in their legislative sessions, on their coins, in their national anthem, in their courts and—from the very beginning—in their public schools.

In 1962 six justices of the Supreme Court reversed the settled understanding of the meaning of the First Amendment, holding that it was unconstitutional for a school district to permit students to join in a brief nondenominational morning prayer. The Reagan amendment would simply reverse that decision and its progeny. The amendment would not require that prayers be said in public schools, but the decision would be made (as the framers of the Constitution intended it to be made) in local communities rather than in federal courts.

WILL CHOICE OFFEND PEOPLE?

The arguments advanced by critics of the amendment are the same arguments that convinced the justices in 1962. They tend to show not that school prayer violates the Constitution, but that it might be a bad idea.

The central problem with saying prayers in school is that somebody must choose the prayer. If the choice is left to local school authorities, they are free to choose prayers that could offend people. Christian prayers may offend Jewish students; Protestant prayers may offend Catholics, indeed, any prayer directed to a "personal" God may offend a student who believes that the Su-

preme Being is a "life-force," or that there is no God.

Alternatively, school boards may take it upon themselves to write their own prayers in an effort to avoid offending anyone. Such bureaucratic productions might be bland affirmations of reliance upon a lowest-common-denominator sort of God, a God with no attributes. To parents who wish their children to grow up loving and respecting a real God who is not at all boring, a meaningless prayer or an ugly prayer might be worse than no prayer at all.

Nor do critics of the amendment believe that school prayer will be truly voluntary. Although the Reagan amendment provides that no student may be forced to participate in any prayer to which he objects for any reason, they fear that students will be subliminally coerced into praying, or that they will be forced to listen to prayers with which they do not agree.

To decide whether there ought to be a constitutional rule against prayer in the schools, however, one should consider not only the worst that might happen if prayer is permitted, but also the possible consequences of its prohibition. I am not sure that it is ever possible for an institution to be neutral about a question of fact or value. When the institution is a school and the question is what attitude students will have toward God, it is not at all clear that neutrality is achieved by never mentioning God except in discussions of speculative philosophy and medieval history.

It is frequently observed that schools neither are nor should be merely places where facts are disseminated. Rather, a good school shapes the whole person; it prepares him for life in the world. Between the ages of six and 18—the years in which most of us develop attitudes about religion that will form the matrix for all future experiences and observations—our lives are built around the schools we attend. These schools treat Julius Caesar, Shakespeare, Nietzsche, Washington, Reagan and Brezhnev as real persons whose ideas and actions matter; only God is hypothetical and contingent. Among the values that are fundamental to our civilization, the public schools attempt more or less successfully to inculate in their students the love of freedom, of equality and of their fellow human beings. The love of God is conspicuous in its absence.

Neutrality toward God, in other words, is another myth. I know because I've tried it. I have doubts about God, and my doubts sometimes rise (or descend) to the level of disbelief. But I know that if God exists He is the most important thing in the universe and in my life. When I try to conduct any part of my life without regard to God I am not standing still but turning away.

God is also too important to be left out of the institution that seeks to prepare my child for life in the world. Like most Americans, I cannot afford private schools. The public schools will present my child with a set of facts and values that either includes or excludes God. I believe neither option to be neutral, so I hope his school day will include prayer, which is the affirmation of the love of God.

School is not, of course, the only influence in the lives of our children. Parents can teach their children how to pray. Parents can also teach their children patriotism and sex education. There is at least as good a chance that a child will be adversely affected by a teacher with idiosyncratic ideas about sex as by one who says the wrong prayer, but even the most fervent opponents of sex education seek only to persuade their school boards to omit it from the curriculum. Nobody thinks that the Supreme Court should declare it unconstitutional.

The observation that the Reagan amendment would not mandate school prayer but merely take power over the decision away from courts and give it back to school boards, goes a long way toward answering the horror stories advanced by opponents of the amendment. Any power is subject to abuse, but the possibility of abuse is seldom a sufficient argument against a power that can also be wielded beneficially.

The American political tradition is one of respect for minority opinions: In the 200 years during which prayers were said in our public schools, they were not typically used as instruments of sectarian oppression, and there is no reason to believe that Americans would use prayer as a way to offend their friends and neighbors after the passage of the amendment.

Some people would be offended. Some people are offended by the Christmas tree across from the White House, and some people were probably offended by the rabbi and the priest at the graduation I attended. Some people take religious objection to the Pledge of Allegiance to the flag, and the Supreme Court has held that their children need not participate in the pledge. The Reagan amendment provides the same guarantee with regard to prayer.

GOVERNMENT IS NOT BEING NEUTRAL

I hope that school boards can find prayers that offend as few people as possible. Though my child is a Catholic, there are many beautiful prayers in the legacy of King David and of King James that would enhance his faith and brighten his days. In some communities it may be more appropriate for children of various faiths to compose their own prayers, or to engage in a minute of silent prayer or meditation. Other communities would almost certainly choose to have no prayer at all. But the communities should decide.

Against the hypothetical abuses of school prayer by local authorities if the Reagan amendment passes should be arrayed the absurd lengths to which the federal courts have carried their constitutional rule against prayer. The courts have banned not only "official" prayers but also Bible reading, posting of the Ten Commandments on classroom walls, prayer meetings voluntarily initiated by students after class at times when other student groups were allowed to meet and school policies that allowed students to engage in a minute of silent meditation. One court even upheld a school principal's order forbidding kindergarten students to say grace before meals.

The continued enforcement of a nationwide rule against school prayer, and the erection by judges of higher and wider walls of separation between school children and God, is no way for the government to be neutral about religion. Ratification of the voluntary school prayer amendment would restore the spirit of the First Amendment, whose framers intended it to guarantee freedom of religion, not to impose a regime of freedom from religion in community life.

RELIGION AND THE CONSTITUTION—A REINTERPRETATION

(By Peter J. Ferrara)

CHAPTER 2: THE ORIGINAL INTENT

Issues of church and state played a central role in the very founding of this country. It was largely to escape from the religious wars and persecution of Europe that the earliest settlers came to America, and this remained an important motivation thereafter. The character and concerns of these early settlers in turn played a key role in the contours of early American culture and government.

HISTORICAL EXPERIENCE

A brief understanding of this history provides a useful perspective on the issues discussed in this book. By the 16th century, Catholicism was interwoven with government throughout Western Europe as the official, established church of virtually every kingdom, sometimes providing more legitimacy and support to the secular government than vice versa. The Protestant Reformation, however, begun in the early 16th century in Germany by Martin Luther challenged the primary religious authority of the Catholic Church and the Pope. This sparked religious strife all across Europe.

In England,[1] this strife combined with the incendiary personality of King Henry VIII. Henry's Spanish Catholic wife, Catherine, had failed to bear him a male heir, and he had fallen in love with Anne Boleyn anyway. He asked the Pope to annul the first marriage so he could marry Anne. But Catherine's powerful friend, King Charles V of Spain, prevailed upon the Pope to refuse the request. Eventually, this led Henry to disestablish Catholicism as the official Church of England, establishing the Anglican Church instead, with Henry as the head. He then annulled his own marriage and married Anne.

The law required payments to the new church, professed allegiance to its doctrines, and attendance at its ceremonies, as it had previously for Catholicism. Those who resisted were often beaten, jailed, hanged or burned at the stake. The Anglican Church followed all the traditional Catholic rites, except recognition of the Pope. This led to the ironic government persecution of Catholics who refused to accept the new church, and of Protestant dissenters who believed it did not go far enough in rejecting Catholic practices. In one reported instance, Henry had three Protestants and three Catholics burned at the stake at the same time.[2]

Henry was succeeded by his son Edward, but because of his frail health, Edward died soon thereafter. This brought the Catholic Mary, daughter of Henry's first wife Catherine, to the throne. Mary soon brought Catholicism back as England's official religion and, after a period of religious tolerance, began persecuting Protestants with a vengeance that earned her the title "Bloody Mary." But Mary was frail as well, and she also died after a short reign.

This brought the Protestant Elizabeth, daughter of Anne Boleyn, to the throne, and she completely turned the tables. Reestablishing the Anglican Church, she banned Catholic worship and arrested and even executed many Catholic priests, as well as Catholic sympathizers. During a reign of 45 years, she also similarly persecuted dissenting Protestant sects such as the Unitarians, Anabaptists, Quakers, Puritans, and others.

Because Elizabeth had no children, Protestant King James of Scotland next became King of England. He basically pursued the persecution policies of Elizabeth, but with some leniency. During his reign, Catholics tried to blow up Parliament with gunpowder stored in the cellar. The plot

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Footnotes at end of article.

failed, but left England with a new holiday—Guy Fawkes Day—named after the ring leader.

James was succeeded by his son, Charles I, nominally a Protestant, but subject to the influence of his French Catholic wife, Henrietta Maria. Her support for Catholics and for the reestablishment of Catholicism helped to undermine public and parliamentary support for the eventually doomed king. The King's appointment of William Laud as Chief Archbishop of the official Anglican Church, who adhered strictly to Catholic doctrine apart from Pope allegiance and especially persecuted Protestant dissenters, was also highly detrimental. It was really a dispute over taxes and the powers of Parliament versus the crown that led to the Great Rebellion of the 1640s. But the fighting actually started when the Scottish Presbyterians revolted against Anglican impositions supported by Charles. Religious disputes between King and Parliament fanned the flames, and when Parliament raised an Army to fight Charles, it was the now powerful Puritans and Presbyterians that swelled the ranks with dedicated warriors who fought their way to victory. In 1649, the defeated King was beheaded.

Absolute authority then rested for a time with Parliament, and then for a while with the rebel army leader, Oliver Cormwell. The Puritans during this time were in control, through Cromwell. They persecuted the Catholics more viciously than ever. They fought, and prevailed, over the rebellious Presbyterian Scots. They persecuted Anglicans, Unitarians, and other Protestants. They banned the theater, exacted the death penalty for adultery, and mandated that Sundays be reserved exclusively for religious observances.

But upon Cromwell's death in 1658, a leaderless and chaotic nation turned to the beheaded King's son, Charles II, to accept the throne. Charles reestablished the Anglican Church, and its ministers and supporters in Parliament took the lead in reestablishing persecution of Catholics and Protestant dissenters, particularly the Puritans and Quakers. But Charles and his heir apparent brother James, raised by their French Catholic mother Henrietta Maria, secretly plotted with the King of France to reestablish Catholicism in England. Public suspicion of such a plot led to a reign of terror against Catholics. Protestant nobles plotted rebellion. Before this could gather steam, however, Charles died, and the far more zealous James became king.

Unsuccessful rebellions broke out against James. When peace was restored, James boldly took steps to replace the established Anglican Church with the Catholic Church. He promised tolerance for all non-Catholics, but the populace did not believe him. The final straw was an apparently innocent event—the King's wife gave birth to a son. But the newborn child, certain to be raised as a Catholic, became heir apparent superceding the claim to the throne by James' Protestant daughter Mary, married to William of Orange, ruler of Protestant Netherlands. The Protestant English nobility invited William to invade England. He obliged, and when King James could find no one to defend him, he fled to France, William and Mary were named King and Queen. The Dutch King, disinterested in domestic English politics, allowed a permanent historic transfer of power from Crown to Parliament.

All this violence and bloodshed was only the story of one country. Even more violent and bloody were the Spanish inquisition, the French persecution of the Huguenots, and religious wars in Germany. Refugees from this European religious turmoil provided a steady flow of new settlers for England's American colonies.

The first permanent English settlement in America,[3] Jamestown, established in 1607, was the result of a monied expedition launched by investors hoping to make a profit from the new colony, with the official blessing of the English government. The fabled Sir Walter Raleigh, veteran of the English victory over the Spanish Armada in 1588, led the expedition. These "upper crust" beginnings resulted in the establishment of England's official Anglican Church in Virginia.

But the storied Pilgrims who landed at Plymouth Rock in 1620 were persecuted Puritans who had fled from England to the Netherlands before sailing to America. Just as the Puritans under Cromwell in England were to establish their own church, and legally mandate adherence once they gained power, the Plymouth Puritans were also not great believers in religion liberty. They saw their settlement in America as an opportunity to establish a new community where their ideals of worship could be put to practice, creating the perfect Puritan society. Observance of the Puritan religion was therefore required by law, and dissenters were not tolerated.

The lure of this religously idealistic community, and the policy of vigorous persecution pursued by King Charles' Archibishop Laud in England, brought thousands more settlers to the new colony over the next two decades. The new Puritan settlers branched out, establishing the colony that became Connecticut in 1636. They spilled over into New Hampshire and Maine, colonies started by Crown favorites who did not follow through to maintain permanent settlements of their own. The Revernd Roger Williams, banished from Plymouth for heresy, led a band of various sects of dissenters from prevailing Puritan orthodoxy to establish Rhode Island. Greater religious liberty prevailed in Williams' colony, though its inhabitants were still generally Puritan and devout.

During the reign of Protestant Charles I, Catholic Lord Baltimore established the colony of Maryland. His son made the colony a refuge for English and Irish Roman Catholics. During the reign of Catholic King James II, Protestant Quaker William Penn led a stream of his fellow believers from all over Europe to establish the colony of Pennsylvania. Due to the pacifism of Penn and his Quakers, this colony became the most religiously tolerant. Though the founding of the Carolinas was secularly motivated, they were initially largely populated by Protestant Huguenot refugees fleeing the persecution of Catholic King Louis XIV of France.

Religion remained a dominant cultural factor in the colonies and by the time of the Revolution, nine of the thirteen colonies still had religious establishments. The Puritan Congregationalist Church, was maintained in Massachusetts, New Hampshire, and Connecticut, and the Anglican Church in New York, Maryland, Virginia, North and South Carolina, and Georgia.[4] But the religious toleration first fostered by Penn in Pennsylvania and Rev. Williams in Rhode Island was gaining acceptance in the colonies, as it was in England itself. During the Revolutionary War and soon thereafter, New York, Georgia, North Carolina, and Virginia removed their religious establishments.[5] Yet, these reforms were probably due as much to anti-England sentiment during the revolution as newfound respect for religious freedom, as the Anglican Church disestablished in these states was the Church of England. Moreover, this still left five states with established religions by the time the First Amendment was drafted. In addition, in five of the other states there were still legal restrictions and burdens on certain beliefs relating to religion.[6]

The history of religious wars and violence associated with religious establishments in Europe is often cited as exhibiting the need for strong constitutional provisions against such establishments. This argument is indeed persuasive. But the practices that the Establishment Clause has been used to strike down in contemporary times seem quite remote from the troublesome religious establishments of reformation Europe, as we shall see in the following chapter. Moreover, such a rationale certainly doesn't justify discriminatorily excluding religious groups and activities from receiving the beneficial effects of government actions, denying them participation in general secular programs open to all others, or banning them from any contact with the public sector altogether.

This history also shows that the prevailing attitude towards church and state issues in the colonies grew out of, and did not involve a radical break with, the prevailing attitudes in Europe. The leading intellectual trends of the seventeenth century, at least in England, favored religious toleration, so it was only natural that the newly established colonies should exhibit greater religious liberty, reflecting the new fashions of the times. Moreover, the elements and the Indians in the New World served as common enemies, binding the settlers together and minimizing their differences. However the early settlers, with notable exceptions, still brought over and adopted the notion of state establishment of particular religions, with state imposed fealty and support. Religious establishment policies were followed with special vigor in New England. Religious toleration and freedom grew in America preceeding the Revolution, as it did in England during the same era, and throughout Europe. But by the time of the Revolution and creation of the Constitution, the notion of state establishment of religion was still accepted as proper by broad segments of the American public.

THE FOUNDING FATHERS

The Constitution was originally drafted and sent to the states without the first ten Amendments, which comprise the Bill of Rights. The state ratifying conventions objected to this lack of specific protections, and though they ratified the proposed Constitution, they demanded that the first Congress pass a set of amendments listing various essential rights. Among these were rights relating to religion.

The state of Virginia asked that the Constitution be amended to provide that:

> . . . All men have an equal, natural and inalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[7]

This identical language was used by the North Carolina ratifying convention,[8] and, with minor changes, by the Rhode Island convention.[9] New York had recommended that the Constitution be amended to pro-

vide that "no religious sect or society ought to be favored or established by law in preference to others."[10]

What these states, and others, were asking for, besides a guarantee of religious liberty, was clearly that the new national government be prohibited from providing preferential aid or treatment for any one religion or group of religions. What they were essentially asking is that the Federal government be prohibited from establishing any one religion or group of religions, for such preferential aid or treatment was the essence of religious establishments.

The Federalists, supporting the Constitution and the creation of the national government, were eager to comply with the demands of the States, to maintain support for the new government. Like James Madison, they generally believed that such amendments were unnecessary, because the Federal government was to have only the powers delegated in the Constitution, and the national government had no delegated authority to infringe upon the rights that the states wanted to protect. But since they did not disagree that these rights should be secure from national government infringement, they were willing to provide the additional protection asked for by the states.[11]

James Madison took the lead in seeking passage of the amendment relating to religion, introducing as a member of the House of Representatives in the first Congress the following proposed language:

The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal right of conscience be in any manner, or on any pretext, infringed.[12] (emphasis added)

The language was later changed several times, but this initial proposal is interesting because it shows the intent of Madison, who is often cited as favoring very strict separation between church and state, and the elimination of all government aid or benefit to religion. If this is what Madison favored, why didn't he propose it in the clear, precise language for which he was famous? All he proposed was a ban on the establishment of religion. The intention of Madison, the Federalist, in proposing this amendment, remember, was not that he thought it was necessary, but to satisfy the states, which had requested a ban on preferential treatment. Madison's proposal basically satisfied the states' requests because that is what a ban on an establishment of religion would have amounted to in the lingo of the time (as noted above and as we shall see in more detail later). Madison understood these requests well, having been a member of the Virginia ratifying convention that proposed the no preference langauge noted earlier. Addressing the convention, Madison accepted the no preference concept, saying "it is sufficient to authorize a conclusion that no one sect will ever be able to outnumber or depress the rest."[13] It is also noteworthy that Madison's proposed amendment did not seek any restriction on state aid or favor for religion, proposing only a ban on the establishment of a national religion, which appears only to restrict Congress.

Madison's proposal was referred for consideration to a special Select Committee, which reported out the following language: No religion shall be established by law, nor shall the equal rights of conscience be infringed.[14]

In the ensuing debate on the amendment, it appears that there was general agreements as to what the substance of the amendment should be—protection for religious freedom, plus a ban on any establishment of religion, meaning preferential aid or treatment for one or more religions, by Congress, leaving the states free to adopt their own policies. The argument was over how to express this agreed intent in clear language.

In the first debate on the amendment, in the House on August 15, 1789, a concern was raised that the amendment's language might be construed as banning more than preferential aid or treatment, and result in harm to religion.[15] Madison, as a member of the committee proposing the language, rose to explain that it was intended merely to provide that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[16] This apparently would not ban more than preferential treatment or aid, and Michael Malbin points our that by stating that Congress could not establish a religion, Madison was emphasizing this point.[17] Madison later expressed again the no preference intent behind the amendment, saying that its motivation was "that the people feared that one sect might obtain a predominance, or two combine together, and establish a religion to which they would compel others to conform."[18] Madison also said that he thought the language of the amendment, with its "establishment" phraseology, expressed the intent behind the amendment as well "as the nature of language would admit."[19]

A more serious issue was next raised by the Anti-Federalists, who were strong believers in states' rights. They were especially concerned that Congress should not have the power to overturn the state establishments of religion, which existed in at least five states at the time, or to modify state policies regarding religion in any way.[20] Indeed, the proposed amendment itself, phrased in the passive voice, could be construed as applying to the states themselves. It was apparently these concerns[21] that led Samuel B. Livermore of Puritan New Hampshire to propose that the amendment's language be changed to: Congress shall make no law touching religion, or infringing the rights of conscience.[22]

This would make it clear that the restriction applied to Congress, and that it could not touch state laws relating to religion, as well as being disabled from passing its own. Anti-Federalist leader Elbridge Gerry of Puritan Massachusetts supported this new language, and the House approved it in place of the Committee version by the end of the day.[23]

However, time for reflection apparently led to the realization that this language made it far less clear that Congress was merely prohibited from granting preferential treatment to religious sects. The House instead finally adopted a version suggested by Fisher Ames, from Puritan Massachusetts: Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[24]

With this language, it was still clear that state policies were not to be affected by the Amendment, because it expressly applied only to "Congress." Yet the highly ambigious word "touching," was eliminated in favor of the much clearer "establishing." At the very least, this also left Congress with no delegated authority to overturn state establishments or religious policies.

The Senate seemed particularly concerned to make the no preference intent as clear as possible. Though the floor debate was kept secret, the Senate Journal reveals that the Senate considered a number of rephrasings of the amendment on the same day, in rapid succession. This suggests that the Senate was trying to develop the proper phraseology to express an agreed intent, rather than debating the intent.

The Senate first defeated and then accepted a proposed substitute for the House version which read: Congress shall make no law establishing one religious sector or society in preference to others, or to infringe on the rights of conscience.[25]

The Senate then considered and rejected two modifications of this language: Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[26]

Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.[27]

But by the end of the day, the Senate returned to the following language, similar to the House version: Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[28]

However, those wanting to make sure that religion would not in any way be harmed apparently prevailed upon the Senate to change the amendment to the following before sending it back to the House: Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.[29]

The House-Senate conference finally agreed on the version ultimately enacted: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Madison, who was a member of the conference committee,[30] apparently convinced all that the word "establishment" was sufficiently widely understood to be used to express the no-preference intent that everyone seemed to agree was the object. It is hard to believe that the Senate, obviously deeply concerned about this issue, would have approved the amendment if it was not so convinced.

There are two key words in this final language which are crucial to a proper understanding of the Establishment Clause. The first of these is "respecting." To the modern reader, the phraseology "respecting an establishment of religion" seems awkward. "Respecting" has often been erroneously assumed to mean "tending toward" or "seeming like." But it was actually a very neat and clear solution to the important Federalism concern noted in the Congressional debates—that Congress be prohibited not only from setting up its own establishment of religion, but that it also be prohibited from interfering with the state establishments as well. If Congress could make no law respecting an establishment of religion, then it clearly could not touch the state establishments, nor set up its own. This was the clear intent of the framers.[31] Realization of this meaning sweeps away any real ambiguity in the Establishment Clause.

The second key word is "establishment" itself. This was a term of art familiar to the framers of the amendment, who lived with establishments in their times, and knew well the history of establishments in Europe that played such a major part in the early experience of the colonies. Professor Joseph Brady has elucidated the meaning of the word 'establishment" as understood by the

framers.[32] He first quotes historian Marcus W. Jernegan, noting:

The general rule in those colonies having an established church was to require dissenters to support it by paying tithes or taxes, and also to attend the official church services under penalty. They were also frequently required to submit to various tests or oaths, and to subscribe to the creeds and catechisms of the established church. Sometimes the right to settle in a colony, or the privilege of naturalization, or citizenship, or the right to vote and hold office, depended on submission to religious tests. Moreover, opposition arose to the building of dissenting churches and to the preaching of doctrines contrary to those of the established church.[33]

As Brady writes, this is what the Founding Fathers "by personal knowledge and experience, understood an estabishment to be; this is what they proposed, by the First Amendment, to prevent the Federal Congress from setting up for the whole nation." [34]

Brady also quotes the meaning of the word establishment as defined by the distinguished American constitutional lawyer. Thomas M. Cooley:

By establishment of religion is 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. . . . It was never intended by the Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects. . . .[35]

The Encyclopedia Brittanica, also quoted by Brady, similarly defines, establishment as follows:

Perhaps the best definition which can be given, and which will cover all cases is that establishment implies the existence of some definite and distinctive relation between the state and a religious society (or conceivably more than one) other than that which is shared in by other societies of the same general character. It denotes any special connection with the state, or privileges and responsibilities before the law, possessed by one religious society to the exclusion of others: in a word establishment is of the nature of a monopoly.[36]

Brady concludes, "Establishment, then, means recognition of one religion by the state, in preference to all others, and the according to that one of special privileges not shared by others."[37]

By using the word "establishment," the Founding Fathers thus clearly meant to prohibit any act of Congress that would provide preferential treatment for any one religion or group of religions. This interpretation is consistent not only with the contemporaneous meaning of the language, but with what the states requested that the amendment provide, and with the Congressional debates on the measure. Under this view, the amendment would, of course, serve to ban the creation of an official national religion, with the mandated financial support, profession of belief, attendance at ceremonies, and observance of tenets, along with the violent persecution of dissenters, that had marked the European establishments, and to a degree, the establishments in the early colonies. But it would not ban most of the actions that the Supreme Court has recently used the amendment to strike down, as we shall see.

Of course, since the final language of the amendment provided that "Congress shall make no law . . .," its restrictions clearly were meant to apply only to the Congress, leaving the states absolutely free to adopt whatever policies relating to religion they might choose.

While the meaning of the Establishment Clause intended by the Founding Fathers should therefore be absolutely clear, there is less certainty as to the intended meaning of the Free Exercise Clause. The Congress did not debate this clause, and no Federal action or debates concerning it arose until almost 100 years later in certain Supreme Court opinions. Nevertheless, because the words of the clause themselves are straightforward, and through some evidence brilliantly highlighted by Michael Malbin [38] (though my interpretation of this evidence sometimes differs from Malbin's), it appears that the original intent behind this clause can be sufficiently determined.

Since the clause protects the free exercise of religion, it is clear that it protects opinions and actions relating to religion. But how far does this protection extend?

In regard to opinion, the Founding Fathers were fond of repeating the quite valid point expressed by John Locke in his Letter Concerning Toleration, which we noted in Chapter One—that the state had no ability to regulate opinion, because the force of arms could not control the inner beliefs of the mind.[39] A provision guaranteeing "the free exercise of religion" in the Virginia state constitution enacted in 1776 was prefaced with these words as explaining the reason for the clause: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, . . ." [40] This clause seemed to suggest that since opinion could not be coerced, it was useless to attempt to regulate it by law, and its absolute freedom was therefore guaranteed.

Thomas Jefferson, as third President of the United States, was making the same point about the practical inability to coerce belief when he wrote, "the legislative powers of government reach actions only, and not opinions." [41] Jefferson similarly wrote:

Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we have never submitted, and could not submit. We are answerable for them to our God.[42]

The Founding Fathers thus appeared to intend that the Free Exercise Clause provide absolute protection for opinions relating to religion—individuals are free to believe whatever they want. The Federal government is prohibited from forcing individuals to profess belief in one doctrine or another, as governments often did in Europe and the early colonies.

In regard to actions motivated by religious belief, including expression of that belief, the Founding Fathers apparently intended the protection to be less than absolute. Here the burden on religious freedom from restricting a religiously motivated act would be weighed against the negative effect allowing such an act would have on society. The intended standard for determining when a restriction on a religious action would be allowed and when not, however, is admittedly uncertain.

This distinction between the protection afforded belief and action can bne seen in Virginia's Bill for Establishing Religious Freedom, enacted just before the writing of the Constitution. The bill had been drafted by Thomas Jefferson, and the battle for its enactment was led by James Madison. Presumably, they would not have gone to such pains to obtain passage of a bill which they thought should be unconstitutional. The bill can therefore be taken as a good indication of what they and others at the time thought was allowable under the Free Exercise Clause.

The bill provided absolute protection for religious opinions, stating that: . . . no man . . . shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument maintain, their opinion in matters of religion, and that the same shall in no way diminish, enlarge, or affect their civil capacities. [43] (emphasis added)

The bill, however, provided no explicit protection for religiously motivated actions, stating only in the preface, "it is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order." [44] This suggested that religious actions could be restricted, and the standard for determining when was whether the act went against "peace and good order."

In the debate over the Free Exercise Clause enacted in the Virginia constitution in 1776, George Mason had suggested that the language of the provsion include the standard that religious actions could be restricted only when "under color of religion any man disturb the peace, happiness, or safety of society . . . ."[45] Under the standard proposed by James Madison, religious actions could be restricted only when "under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered." [46] But the final provision included no explicit standard, stating only that it protected "the free exercise of religion," as quoted above.[47]

John Locke, whose writings generally served as the philosophical foundation for the Founding Fathers, held that a restriction could not be imposed on religious action because of the belief behind it. But a general restriction applying to actions regardless of whether they were religious or secular would always be valid as to the religious actions as well as the others.[48]

EARLY FEDERAL ACTIONS

Actions and statements by Congress, the Presidents, and eminent jurists soon after passage of the First Amendment confirm the description of the original intent of the framers provided above. These actions and statements, moreover, are inconsistent with the currently prevailing interpretations of at least the Establishment Clause, particularly the notion that this clause bans all aid or benefit to religion from government actions or programs, or mandates a complete separation of church and state.

One of the earliest actions which must be mentioned, however, occurred at the state level. Ratification of the First Amendment in Virginia was delayed for more than 2 years by eight state senators who objected to the Establishment Clause because: . . . Although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount for the support of religion or its preachers, . . .[49]

Apparently, these senators gave the same meaning to the notion of establishment, and the clause federally prohibiting it, as described above—no preference for one or more sects or religions. But Congress could still provide aid to religion on a nonpreferential basis.

The Congress that passed the First Amendment apparently had the same view. One of its very first acts was to establish a chaplain system to serve the Congress. A House Committee with Madison as a member first proposed it. Since that time, government funds have been used for the support of ministers serving the Congress.[50]

The First Congress also authorized the President to appoint a chaplain for the military. The Second Congress provided for a separate chaplain system for the Army, with the Third Congress providing one for the Navy.[51] Later, Congress approved regulations for the Military and Naval Academies requiring enrollees to attend services every Sunday at the denomination of their choice, and prayer was required in the mess hall before breakfast each day.[52]

On the very day after the House in the First Congress adopted the final version of the First Amendment proposed by the Conference Committee, it adopted the following resolution:

That a joint committee of both Houses be directed to wait upon the President of the United States, to request that he would recommend to the people of the United States a day of public Thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many signal favors of Almighty God especially by affording them an opportunity to establish a Constitution of government for their safety and happiness.[53]

Washington complied, issuing a proclamation which said in part:

Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . .

. . . Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by people of these states to the service of that great and generous Being who is the beneficient author of all the good that was, that is, or that will be; that we may them all unite in rendering unto Him our sincere and humble thanks for his kind care and protection of the people of this country previous to their becoming a nation; . . .[54]

Washington issued another such proclamation of Thanksgiving, and this early tradition was followed by President John Adams, who issued two such proclamations, and President Madison, intimately involved with the passage of the First Amendment, who issued four.[55] President Jefferson, however, refused to issue such proclamations, believing that they would tend to have a coercive, mandatory effect through the operation of public opinion and besides, as a very strong advocate of Federalism, thought in any event that such matters should be left to the states.[56]

But the most important early Federal action supporting the above described original intent of the framers was the hundred year long policy, begun by the very first President and Congress, of providing funds for religious proselytization and education among the Indians. The development of this policy began on August 7, 1989, a week before the major House debate on the religion clauses, when President Washington sent to Congress a report from his Secretary of War Henry Knox recommending that Congress fund missionaries to be sent to work among the Indians. Later in the month, Knox, under orders from Washington, instructed the Commissioner for Trading with the Indians to open communications with Indian groups for the acceptance of resident missionaries on their homelands, saying:

The object of this establishment would be the happiness of the Indians teaching them the great duties of religion and morality, and to inculcate a friendship and attachment to the United States.[57]

Congress eventually approved Washington's proposal.[58]

In 1795, Washington concluded a treaty with the Oneida, Tuscorora and Stockbridge Indians, which provided for payment by the United States of $1000 for the building of a church on the Indians' homeland.[59]

On October 17, 1803, President Jefferson proposed to the Senate a treaty with the Kaskaskia Indians, under which they ceded, their tribal lands to the United States, in return for, among other considerations, Federal government financing of a Catholic priest for the Indians, and the building of a Catholic Church. The treaty said:

And whereas, the greater part of the said tribe have been baptized and received into the Catholic Church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office, and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of the church.[60]

The Senate approved the treaty, and Congress appropriated the required funds.[61]

Similarly, in 1796 Congress granted 4,000 acres around each of three Indian towns to "the Society of the United Brethren for Propagating the Gospel Among the Heathen" in trust for the Indians, to the extent they developed and used the land to spread religion among the Indians. Congress extended the deadline for development of the land several times over the next decade, until 1805, when the opportunity to gain control over any remaining areas within the original grant ceased.[62]

President James Monroe concluded a treaty with the Wyandot Indians under which the United States agreed to donate 640 nearby acres to the Catholic Church, because of the attachment of the Indians to Catholicism.[63] President John Quincy Adams followed with a treaty with the Osage providing for a missionary establishment on their land.[64] President Andrew Jackson concluded a treaty with the Kickapoo Indians that included funds for the building of a church on the Indians' land.[65] President Martin Van Buren negotiated a treaty with the Oneida Indians providing funds for the building of a church and a parsonage for the tribe.[66]

The practice of providing Federal money to religious groups for the advancement of religion among the Indians continued until 1896, when Congress appropriated $500,000 for this purpose in that year.[67] In 1897, Congress began phasing the program out.[68]

The expressed purpose of Congress in providing these funds was in effect to conquer the Indians by civilization—if the Indians became Christians, they would likely drop violent resistance to the advance westward of the white man. Presumably, such funding was open to any religious sect that sought it for an available group of Indians. This would make the program consistent with the original "no preference" intent behind the Establishment Clause. But this policy is certainly not consistent with a theory that religious groups can receive no aid or benefit from government actions.

The Supreme Court did not have an opportunity to rule on the Establishment Clause during the early years of the republic. But venerated Constitutional historian and Supreme Court Justice Joseph Story, an appointee of James Madison who served on the court from 1811 to 1845, had this to say about the intent behind the Establishment Clause in his highly authoritative Commentaries on the Constitution published in 1833:

Probably at the time of the adoption of the Constitution, and of the Amendment to it now under consideration, 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.[69]

Story also said: The real object of the Amendment was . . . to exclude all rivalry among Christan sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government . . .[70]

Story continued: . . . It is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects.[71]

Another early and eminent constitutional historian was Thomas Cooley, some of whose comments we have already noted. In his highly authoritative Constitutional Limitations, published in 1868, Cooley states:

But while thus careful to establish religious freedom and equality, the American Constitution contains no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, . . . No principle of Constitutional law is violated when Thanksgiving or fast days are appointed; when chaplains are designated for the Army and Navy; and when legislative sessions are opened with prayer or the reading of the Scripture, or when religious teaching is encouraged by exempting houses of religious worship from the taxaton for the support of state government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of any one denomination or sect; but the power to do any of these things will not be unconstitutional, simply because of being suspectable to abuse . . .[72]

Clearly, these towering constitutional authorities did not see the Establishment Clause as banning all aid or benefit to religion from government actions, or as mandating complete separation of church and state. They saw the content as stated above—to ban preferential treatment for any one religious sect, or group of sects (if we take Story's emphasis on Christianity to mean religion in general, there being so relatively few adherents to other religions in the U.S. at that time). The government

could even affirmatively undertake to aid religion, as long as it did so on a nonpreferential basis.

The first Supreme Court case to rule on an Establishment Clause issue did not occur until 1899. In *Bradfied v. Reynolds*[73] Congress had provided money for the construction of an additional ward at Providence Hospital in the District of Columbia. The Court rejected the claim of plaintiff Roberts that this grant of funds violated the Establishment Clause because the hospital was owned and operated by a monastic order of the Roman Catholic Church—the Sisters of Charity. Congress had granted the funds on the same nonpreferential basis that it would to any secular hospital operator. The mere fact that the funds provided aid to a religious organization did not mean that the action violated the Establishment Clause.

MADISON AND JEFFERSON

Despite the overwhelming evidence cited above, certain actions and statements of Madison and Jefferson are often cited as support for the view that the Establishment Clause was intended to ban all government aid or benefit to religion, mandating an absolute separation of church and state.

The most important of these relates to the campaign to disestablish the Anglican Church in Virginia.[74] In 1779, Jefferson introduced a "Bill for Establishing Religious Freedom," which would have ended all preferential treatment for the Anglican Church, and allowed complete religious toleration for all sects. Though the Revolution had brought the established Anglican Church into public disfavor because of its role as the Church of England, there was not enough support to pass Jefferson's bill. Legislative action was taken, however, to weaken the favoritism for the Anglican Church. In 1784, after the Revolutionary War had ended, a "Bill for Establishing Support for Teachers of the Christian Religion" was introduced by Jefferson's opponents, which would have made Christianity the established religion of Virginia, requiring, among other things, that each person pay a certain amount for the support of the Christian sect of his choice.

Madison led the fight against this latter bill, publishing his famed "Memorial and Remonstrance Against Religious Establishments" in opposition to the bill. This led the turn in public opinion in favor of Madison and Jefferson, and the proposed bill was defeated in 1785. Madison then promptly reintroduced Jefferson's bill, which was passed in that same year, taking effect in 1786.

There are many reasons why this experience does not contradict the no-preference original intent behind the Establishment Clause described above in favor of the harsher no-aid doctrine. First, it cannot be assumed that what Jefferson and Madison supported as good law in their state they wanted to make constitutionally binding on the whole country. Jefferson in particular, but also Madison, were strong, uncompromising supporters of states' rights, and believed that these issues should be decided by the states.

Secondly, Jefferson was in France at the time of the adoption of the First Amendment, and Madison was only one actor in that adoption. It is the views of the whole nation at that time, not just Madison's, which determine the original intent behind the Establishment Clause. Madison had to accommodate these views to achieve nationwide acceptance of the clause, including the support of Puritan New England. Madison's public statements and actions as to the meaning of the amendment itself at the time of passage, as cited above, are relevant to its meaning, indicating any such accommodations made, not what happened years earlier in regard to a state legislative struggle.

But, most importantly, the statements and actions of Jefferson and Madison at the time of this Virginia legislative struggle completely support the earlier conclusion that they and everyone else viewed an establishment of religion as providing preferential treatment. Preference is what they objected to in Virginia, and a no-preference policy is what they meant to pass into law in that state, rather than the no-aid doctrine or some absolute separation of church and state.

Thus, the 1784 bill against which Madison led the fight would have established one religion, Christianity, as the official religion of the state, with assorted legal preferences. It was this establishment and preference to which Madison mainly objected in his "Memorial and Remonstrance." In a famous passage, he stated:

. . . Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects. That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment.[75]

This passage does not mean that the government cannot spend three pence redounding to the aid of religion, as it has often been incredibly cited to mean by otherwise literate men. Rather, it means that if the establishment of Christianity is acceptable in principle to the exclusion of all other religions, then there can be no principled objection to the establishment of any one Christian sect, with accompanying unjust preferences.

Jefferson's bill, which was enacted with Madison's support, analytically contained four elements: (1) no man shall be compelled by the government to attend or support any religious worship, place, or ministry whatsoever; (2) nor be punished or interfered with by the government on account of his religious opinions or beliefs; (3) nor be restrained from professing or arguing for his religious opinions or beliefs; (4) nor be legally discriminated against for such activities.[76] The bill therefore does no more than remove all vestiges of establishment and preferential treatment for any religion. It does not ban all aid or benefit to religion from government acts or impose an absolute separation of church and state.

This is made abundantly clear by the fact that the first state action in Virginia to forbid sectarian instruction in the public schools did not take place until 1847, and the first act forbidding the use of public funds in denominational schools was not passed until 1902.[77] When the Supreme Court in the McCollum case in 1948, discussed in the next chapter, struck down a "released time" public school policy in Illinois, citing the Virginia 1786 Religious Freedom bill in interpretation of the Establishment Clause, the exact same policy was still in force in Virginia.[78]

Another misconstrued piece of history is a letter Jefferson sent as President in reply to a letter of congratulations from an association of Baptists in Danbury, Connecticut. Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinion, I contemplate with solemn reverence that act of the whole American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.[79]

The concluding phrase in this sentence has been seized upon by strict no aid theorists as strong authority for the doctrine of complete separation of church and state. But this phrase, standing on its own or in the context of the rest of the letter, espouses a mere metaphor too vague to support any theory of the Establishment Clause. It has no clear meaning distinguishing between no-aid and no-preference theories. It is also not in the Constitution.

Another celebrated item is known as Madison's "Detached Memoranda." In 1946, one hundred years after Madison died, a rough draft apparently authored by him with this title was uncovered in the estate of a William C. Rives. In it, he condemns both the Congressional chaplain system and proclamations of Thanksgiving as unconstitutional violations of the Establishment Clause. But he condemns the chaplain system on the grounds that in practice it has not been nonpreferential between religious sects—only chaplains of the creed preferred by the majority had been hired. Presidential proclamations of Thanksgiving and prayer he found to have coercive qualities, through the pressure of public opinion, rather than being merely advisory.[80] These grounds for condemning these practices are based on a no-preference theory of the Establishment Clause, and therefore provide no support for the strict no-aid theory. Moreover, the views stated in the "Detached Memoranda" are contrary to Madison's statements and actions while he was in public life, and these are far more relevant to the original meaning of the Establishment Clause. Madison, remember, was a member of the Congressional Committee that recommended the chaplain system, and he maintained the system and issued proclamations of days of Thanksgiving and prayer while President. In any event, the uncontroversial pursuit of both these policies in the early years of the republic shows that even if Madison decided they were unconstitutional during his retirement, the great majority of those alive at the time of the adoption of the First Amendment disagreed with him and it is the intent of the country as a whole at the time of adoption that is relevant to the meaning of the amendment.

As President, Madison did veto a bill incorporating an Episcopal Church in Alexandria in the District of Columbia, on the grounds that it violated the Establishment Clause. The next week he vetoed a bill granting U.S. Lands in Mississippi to a Protestant Church on the same grounds, saying that it would provide "a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies."[81] But both these bills can be seen as providing preferential aid to the particular churches involved, if not viewed in the context of a long-term policy providing the same benefits to all on a nonpreferential basis. True, the quoted phrase from the second veto message suggests that Congress cannot appropriate funds for the pur-

pose of supporting religious societies, regardless of whether this is done on a nonpreferential basis. This phrase is the only historical item truly inconsistent with the original intent described above. But even this does not ban nonpreferential aid or benefit to religion resulting from government actions undertaken for secular purposes, and therefore it does not support a strict no-aid theory either. In any event, this stray phrase cannot serve as a foundation for a constitutional doctrine, particularly in contrast to the remarkable amount of contrary evidence cited in this chapter.

Jefferson and Madison knew that "establishment" meant providing preferential treatment for one or more religions, and this is what they thought was prohibited by the Establishment Clause. Throughout their lives, they both consistently used the word establishment to mean precisely this. During the Congressional debates on the First Amendment, as noted above, Madison forcefully and effectively took the position that the word "establishment" would clearly convey the no-preference intent behind the amendment. Jefferson's overriding concern with preferential treatment was indicated when he wrote, "I am for freedom of religion, and against all maneuvers to bring about a legal ascendency of one sect over another." [82] Similarly, Madison wrote that the United States has "the noble merit of first unshackling conscience from persecuting laws, and of establishing among sects a religious equality." [83] The actions of both men in public life, particularly when serving as President, further confirm this view.

Indeed, Jefferson's own conception of the wall of separation between church and state did not prevent him from advocating and implementing government support for religious education in the state of Virginia. After he retired as President, Jefferson wrote a bill for Virginia providing for the creation of public elementary schools, which the state passed in 1817. The bill provided that "no religious reading, instruction or exercise, shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination (emphasis added)." [84] This law still allowed nondenominational religious activities.

Thus, Jefferson did not find religious activities in the public schools to imply an establishment of religion, which his own bill banned in Virginia in 1786, as long as, once again, these activities did not involve any preferential treatment for any sect. The implicit government aid to religion from allowing these activities to take place in publicly financed schools did not invalidate the practice in Jefferson's mind.

In 1814, Jefferson had recommended that the state create a publicly financed professional school of theology to train clergymen.[85] Later, however, when he founded the publicly owned and operated University of Virginia, a department or school of theology was not created because in his own words he could not find a practical way to do so without in effect preferring some sects over others. Jefferson wrote:

In conformity with the principles of our Constitution, which place all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment and surprise . . . we have thought it proper at this point to leave every sect, as they think fittest, the means of further instruction in their own peculiar tenets.[86]

This once again supports the view that it was preferential treatment, rather than aid or benefit to religion, that was the key factor in Jefferson's view of establishment.

To further confirm this, Jefferson later adopted a system of religious education for his public university. Noting again his original concern of "giving countenance or ascendency of one sect over another," Jefferson later wrote:

It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation.[87]

To resolve the equality problem, but provide for the religious education Jefferson thought necessary, he invited all sects that wanted to establish their own schools of religious instruction on the University campus, "so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them. . . ."[88] Jefferson then issued school regulations providing that:

. . . The students of the University will be free and expected to attend religious worship at the establishment of their respected sects, in the morning, and in time to meet their school in the University at the stated hour. The students of such religious school, if they attend school at the University, shall be considered students of the University, subject to the same regulations, and entitled to the same rights and privileges.[89]

Clearly, nonpreferential aid to religion did not involve an establishment in Jefferson's view. In truth, Jefferson, Madison, and the other Founding Fathers, right or wrong, actually thought such aid was necessary to the maintenance of the new nation, and a free society.[90] Distinguished constitutional historian Walter Berns notes that Jefferson argued that a firmly established religious belief among the common people was the only way to maintain their respect for the rights and liberties of other men over the long run.[91] "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" Jefferson asked.[92] He actually wrote this in a discussion of slavery, arguing that its injustice could only be made popularly manifest through the spread of religion. No less a chronicler of early America than Alexis De Tocqueville noted the prevalence of this view of the importance of religion, writing:

I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society.[93]

Washington expressed these views in his Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens . . . and let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[94]

Berns summarized the views of the Founding Fathers:

Wisdom might dictate that it be the policy of the government to promote this conviction, which it can do by supporting religion in the form of a "multiplicity of sects while favoring no particular one of them." Pennsylvania and New York, Jefferson had pointed out . . ., had shown the way for Virginia (and the United States as a whole). They had "long subsisted without any establishments," but religion was well supported there—" of various kinds indeed, but all good enough" from his political point of view, "all sufficient to preserve peace and order [and] morals." Harvey C. Mansfield, Jr. has stated the conclusion to be drawn from this. "For the sake of liberty, government must support religion in general, but no particular religion."[95]

THE 14TH AMENDMENT

Though the religion clauses by their very terms applied only at the Federal level (Congress shall make no law . . .), and this was the clear intent of the framers as described above, the courts today regularly apply them to the states as well, thereby providing the basis for federal judicial interference in local education policies relating to religion. The justification for this application to the states is the Fourteenth Amendment, passed in 1868.

The relevant words of the Fourteenth Amendment state, ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law." The Supreme Court has held that this "Due-Process Clause" makes most of the Bill of Rights applicable against the state governments. Any state law affecting the life, liberty, or property of any person must comply with these constitutional provisions or it is not consistent with due process of law. This is known as the incorporation doctrine.

The Supreme Court began using the Fourteenth Amendment in this way in 1925,[96] progressively incorporating more and more of the Bill of Rights against the states. The Free Exercise Clause was held applicable to the states in 1940 [97] and the Establishment Clause in 1948 [98] (not counting the dicta in the 1947 Everson case). This use of the amendment, and the incorporation doctrine in general, is highly controversial, and rightly so. For much persuasive, scholarly work has shown that the framers of the amendment had no such intention.[99] But there are some special reasons as to why they certainly did not intend to so incorporate the Establishment Clause against the states.

Perhaps the clearest of these is that Congress considered and rejected eleven times between 1870 and 1888 [100] and 25 times between 1870 and 1950 [101] proposed Constitutional amendments that would have applied the Establishment Clause in some form against the states. This clearly shows that Congress, especially the very same people who passed the Fourteenth Amendment, did not believe that that amendment already applied the Establishment Clause to the states. It also clearly shows that the American people do not want such a provision in the Constitution.

The most illustrative example of these proposals and rejections occurred in 1875.[102] James G. Blaine, Former House Speaker and future Republican Presidential candi-

date, introduced the amendment with the active support of President Grant and the Republican Party. The amendment not only included the phrase, "No State shall make any law respecting an establishment of religion," but also provided:

No public property, and no public revenues of . . . the United States, or any State, Territory, District or Municipal Corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught . . .[103]

The inclusion of the Federal government in this proposed amendment indicates clearly that at this time as well no one in Congress thought that the Federal prohibition on establishment banned nonpreferential federal government aid to religious education.

The Congress that considered this amendment included 23 members of the Congress that passed the Fourteenth Amendment, yet:

Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier . . . Senator Stevenson, in opposing the proposed amendment, referred to Thomas Jefferson: "Friend as he was of religious freedom, he would never have contended that the states . . . should be degraded and that the Government of the United States, a government of limited authority, a mere agent of the states with prescribed powers, should undertake to take possession of these schools, and of their religion." Remarks of [other members of Congress] . . . gave confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.[104]

Blaine's amendment did better than any of the other proposals—it passed the House, but failed in the Senate. Interestingly, the motivation for this and similar amendments seemed to be anti-Catholic sentiment, in reaction to the waves of Catholic immigrants at that time and their establishment of a private parochial school system, rather than high-minded church and state philosophy.

The second special reason as to why the Fourteenth Amendment did not incorporate the Establishment Clause relates to the intent behind the original First Amendment. The Founding Fathers didn't apply the Establishment Clause only to the Federal level because they didn't think of the states. They affirmatively wanted to reserve establishment concerns to the states. In fact, the wording of the First Amendment provides a constitutional guarantee to the states that this will be so. As we have seen, by providing that Congress shall make no law "respecting" an establishment, the clause prohibits Congress from interfering with state establishments, as well as from creating its own. With five state establishments of religion existing at the time of the amendment's adoption, this guarantee was probably politically necessary.

This raises an important logical problem as to how the Establishment Clause could be incorporated against the states. The clause guarantees the states that their laws relating to establishments will not be interfered with. How does one incorporate a right of the states against the states? If "the states" is substituted for "Congress" in the language of the Establishment Clause, then one is not merely applying it to the states, but radically changing it to remove a constitutional guarantee originally intended. This cannot be justified on the basis of the Fourteenth Amendment.

The third special argument against incorporating the Establishment Clause against the states is based on the Supreme Court's own theory of incorporation. In order for the due process clause to apply in a case, allowing some Bill of Rights provision to be applied to the states, the state law or action must first deprive one of "life, liberty or property." The Establishment Clause cases the courts have considered since World War II have not involved a deprivation of life or property. The elements the courts have based their decisions on has been deprivation of liberty. But most of the cases have not involved this element either. Allowing high school students to form "Students for Voluntary Prayer" on the same basis as other clubs, allowing them to read the Bible and pray on the lawn before class, tuition tax credit or voucher systems—all involve no coercion or deprivation of liberty.[105]

Under the Supreme Court's own theory, only state establishment laws or policies which involve a deprivation of liberty could be considered covered under the First Amendment through the Due Process Clause. The courts would have to look for the key element of coercion before they could apply the Establishment Clause to the states. But mere aid or benefit to religion resulting from a general secular government program, or merely allowing the religiously motivated to participate on the same basis as everyone else, would generally not involve any such deprivation of liberty. The courts therefore have no business applying the Establishment Clause to the states in such cases, under their own theory of incorporation.

Considering the earlier comments above, however, it appears that the framers of the Fourteenth Amendment never intended that it would in effect apply the First Amendment's Establishment Clause to the states in any form.

CONCLUSION

Based on the historical evidence in this chapter, the following three conclusions can be drawn as to the original intent of the framers concerning the religion clauses:

(1) The Establishment Clause was intended to prohibit Federal laws providing preferential treatment for one or more religious sects. It was also intended to prohibit the Federal government from interfering with state establishments, or state laws providing preferential treatment for one or more sects. It was not intended to provide for an "absolute separation of church and state" or to ban all aid or benefit to religion from government actions. Congress could even undertake to aid aid religion if done on a nonpreferential basis. The restrictions of the Establishment Clause were intended to apply at the Federal level only and not to the states. In fact, the clause provided a constitutional guarantee to the states that they would be free to adopt whatever policies they democratically chose in this area.

(2) The framers of the Fourteenth Amendment did not intend it to apply the Establishment Clause to the states. Indeed, the clause cannot be so applied without obliterating the original First Amendment guarantee to the states that they would be free to adopt their own policies in this area without Federal interference.

(3) The Free Exercise Clause was intended to provide absolute freedom for religious opinions. It was also intended to provide protection for religiously motivated action, but the right to engage in any such acts would be weighed against the harm they might cause to society. Laws restricting such acts would be allowed if the harm they prevented outweighed the interest in religious liberty. Freedom for actions, therefore, as opposed to opinions, was not intended to be absolute.

These conclusions are not unique to this author. The compelling historical evidence concerning the first two was marshalled in *Religion and Education Under the Constitution*, a devastating critique of the Supreme Court by Professor James O'Neill published almost 35 years ago.[106] At about the same time, authoritative constitutional historian and Princeton Professor Edward S. Corwin similarly skewered the Court in a shorter article.[107] Professors Joseph H. Brady [108] and James McClellan [109] followed with works further elaborating these themes. Professors Walter Berns [110] Michael Malbin [111] and Robert L. Cord [112] have most recently and brilliantly demonstrated the original intent behind the Establishment Clause. There have been many others.[113]

But the Supreme Court has been openly scornful of this rising chorus of dissenting scholars. In 1963, in the leading case firmly striking down Bible reading and prayer in the public schools, Justice Clark, speaking for the majority, explained that though the Establishment Clause interpretations of the Court had by then:

. . . Been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.[114]

In the same case, Justice Brennan said, "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . ." [115] In the 1948 McCollum case, Justice Jackson said that there was no law in this area to guide the members of the Court, "but our own prepossessions." [116]

The Justices are, of course, bound by their oaths of office to uphold the Constitution as written by the framers, not to impose their own quixotic public policy values on the rest of us. But this judicial duty is now considered blase by the legal profession, and it appears unlikely that the Court will return to the original intent of the framers as described above in the foreseeable future.

This has been recently illustrated in the case in Alabama, where a remarkably courageous Federal Judge refused to ban prayer in the local Mobile schools. Judge W. B. Hand held on January 14, 1983, that the Supreme Court precedents in this area were contrary to the binding, original intent of the framers, reviewing the historical evidence as discussed above.[117] An outraged Justice Powell reached all the way down from the Supreme Court to ban the local school prayer by a stay pending appeal, saying that the practice was clearly unconstitutional under the precedents of the Supreme Court.[118] On appeal, the Circuit Court did not offer any counterarguments to the historical evidence marshalled by Judge Hand. The court simply stated, "The Supreme Court, however, has carefully considered these arguments and rejected them." [119] The appeals court therefore re-

versed the lower court and permanently banned prayer in the Alabama schools.

This does not mean that the struggle for the judicial readoption of the original intent should be stopped. In our constitutional republic, this is ultimately the only acceptable permanent resolution of these issues, and there are many possible avenues for achieving this goal. But in the meantime, the courts might at least be persuaded to adopt views not hostile to the religious.

CHAPTER AND FOOTNOTE

[1] The European history discussed below is taken primarily from Will and Ariel Durant, *The Story of Civilization* (New York: Simon and Schuster, 1957).

[2] Will Durant, *The Story of Civilization*, Vol. VI, p. 572.

[3] The American history discussed in this section of this chapter is taken primarily from Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965).

[4] Joseph H. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* (South Orange, N.J.: Seton Hall University Press, 1954), pp. 5-6.

[5] Ibid.

[6] James B. McClellan, "The Making and Unmaking of the Establishment Clause," in Patrick B. McGuigan, Randall R. Rader, eds., *A Blueprint for Judicial Reform* (Washington, D.C.: Free Congress Foundation, 1981), pp. 306-308.

[7] Robert L. Cord, *Separation of Church and State, Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), p. 7.

[8] Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute, 1978), pp. 4-5.

[9] J. M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949), p. 113.

[10] Brady, *Confusion Twice Confounded*, p. 12.

[11] Ibid., pp. 14-15; O'Neill, *Religion and Education*, pp. 91-95.

[12] *Annals of Congress*, Vol. I, p. 434.

[13] Brady, *Confusion Twice Confounded*, p. 13.

[14] *Annals of Congress*, Vol. I, p. 729.

[15] The concern was raised in particular by Peter Sylvester of New York and Elbridge Gerry of Massachusetts, *Annals of Congress*, Vol. i, pp. 729-30.

[16] *Annals of Congress*, Vol. I, p. 730.

[17] Malbin, *Religion and Politics*, p. 8.

[18] *Annals of Congress*, Vol. I, p. 731.

[19] Ibid., p. 730.

[20] Benjamin Huntington of Connecticut first raised this concern in a much misunderstood and misquoted passage. He said that he agreed that the amendment meant what Madison said it meant, but he feared that it may be susceptible to distortion by others in a way that would harm the state establishments. As an example, he noted that the established church in Connecticut was maintained by an assessment against its members, and he suggested that these assessments might not be enforcible in the Federal Courts because of the proposed Establishment Clause. See *Annals of Congress*, Vol. I, p. 730. In response, Madison suggested that the word national could be inserted into the amendment in front of religion to show that it was only a federally imposed establishment that was forbidden. Ibid., p. 731.

[21] See e.g., Malbin, *Religion and Politics*, pp. 9-12.

[22] *Annals of Congress*, Vol. I, p. 731.

[23] Malbin, *Religion and Politics*, pp. 10-11.

[24] *Annals of Congress*, Vol. I, p. 766.

[25] *Journals of the First Session of the Senate*, p. 70.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid., p. 77.

[30] Malbin, *Religion and Politics*, pp. 13-14.

[31] This view is supported by the exceptional analysis of Malbin, Ibid., pp. 15-16.

[32] Brady, *Confusion Twice Confounded*, pp. 6-8.

[33] Ibid., pp. 6-7.

[34] Ibid., p. 7.

[35] Ibid., pp. 7-8.

[36] Ibid., p. 8.

[37] Ibid., p. 8.

[38] Malbin, *Religion and Politics*, pp. 19-37.

[39] John Locke, *A Letter Concerning Toleration*, (Indianapolis: Bobbs-Merrill, 1975).

[40] Malbin, *Religion and Politics*, p. 22. Since only opinions concerning the manner of discharging religious duty cannot be directed by force and violence, it appears that the phrase, "and the manner of discharging it," should be taken to refer to opinions in this regard.

[41] Malbin, p. 33.

[42] Ibid., p. 34.

[43] Ibid., p. 27-38.

[44] Ibid., p. 27.

[45] Ibid., p. 21.

[46] Ibid., p. 21-22.

[47] Ibid., p. 22.

[48] Ibid., pp. 30-31.

[49] Brady, *Confusion Twice Confounded*, p. 28.

[50] See Cord, *Separation of Church and State*, pp. 23, 153-154.

[51] Ibid., p. 54; O'Neill, *Religion and Education*, p. 111.

[52] Brady, *Confusion Twice Confounded*, pp. 32-33.

[53] O'Neill, *Religion and Education*, p. 110, Cord, *Separation of Church and State*, p. 27.

[54] Cord, *Separation of Church and State*, pp. 51-52.

[55] Ibid., p. 53.

[56] Ibid., p. 40.

[57] O'Neill, *Religion and Education*, p. 116.

[58] Ibid., pp. 115-116.

[59] Cord, *Separation of Church and State*, p. 58.

[60] Ibid., p. 38.

[61] Ibid., pp. 38-39.

[62] Ibid., pp. 42-45.

[63] Ibid., p. 59.

[64] Ibid.

[65] Ibid.

[66] Ibid., pp. 59-60.

[67] O'Neill, *Religion and Education*, pp. 118-119.

[68] Ibid.

[69] Brady, *Confusion Twice Confounded*, p. 46.

[70] Ibid., p. 45.

[71] Ibid., p. 46.

[72] Thomas M. Cooley, *Constitutional Limitations*, (Boston: Little, Brown & Co., 1868), pp. 470-471.

[73] 175 US 291 (1899).

[74] See Brady, *Confusion Twice Confounded*, pp. 54-59; Malbin, *Religion and Politics*, pp. 22-28.

[75] Saul K. Padover, *The Complete Madison*, (New York: Harper & Brothers, 1953), p. 301.

[76] O'Neill, *Religion and Education*, p. 74.

[77] Ibid., p. 146.

[78] Ibid., p. 147.

[79] Saul K. Padover, *The Complete Jefferson*, (Freeport, N.Y.: Books for Libraries Press, 1943), pp. 518-19.

[80] See Elizabeth Fleet, ed., "Madison's Detached Memoranda," *William and Mary Quarterly*, Vol. III (1946), pp. 535-66.

[81] Brady, *Confusion Twice Confounded*, p. 23.

[82] O'Neill, *Religion and Education*, p. 85.

[83] Ibid., p. 97.

[84] Brady, *Confusion Twice Confounded*, pp. 61-62.

[85] Ibid., p. 61.

[86] Ibid., p. 63.

[87] Ibid., pp. 63-64.

[88] Ibid., p. 65.

[89] Ibid., p. 66.

[90] Walter Berns, *The First Amendment and the Future of American Democracy*, (New York: Basic Books, 1976), Chapter 1.

[91] Ibid., pp. 13-14.

[92] Ibid.

[93] Ibid., p. 12.

[94] Ibid., p. 13.

[95] Ibid., p. 14.

[96] *New York v. Gitlow*, 268 US 652 (1925).

[97] *Cantwell v. Connecticut*, 320 US 296 (1940).

[98] *McCollum v. Board of Education of Champaign, Illinois*, 333 US 203 (1948).

[99] The most famous of these are Charles L. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5 (1949); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*. (Cambridge, Mass.: Harvard University Press, 1977).

[100] O'Neill, *Religion and Education*, p. 123.

[101] Brady, *Confusion Twice Confounded*, p. 35.

[102] See, Ibid., pp. 36-38.

[103] Ibid., p. 37.

[104] McClellan, in *A Blueprint for Judicial Reform*, p. 318.

[105] See cases discussed in Chapter 1, pp. 1-6, and Chapter 3.

[106] O'Neill, Religion and Education.

[107] Edward S. Corwin, "The Supreme Court as National School Board," *Law and Contemporary Problems*, Vol. 14, p. 3 (1949).

[108] Brady, *Confusion Twice Confounded*.

[109] McClellan, *in A Blueprint for Judicial Reform*.

[110] Berns, *The First Amendment*.

[111] Malbin, *Religion in Politics*.

[112] Cord, *Separation of Church and State*.

[113] Other works supporting the view expressed here in regard to the Establishment Clause are Mark DeWolfe Howe, *The Garden and the Wilderness*, (Chicago: University of Chicago Press, 1965); C. J. Antieau, A. T. Downey, and E. G. Roberts, *Freedom From Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964); Charles E. Rice, *The Supreme Court and Public Prayer*, (New York: Fordham, 1964); Francis O'Brien, *Justice Need and the First Amendment*, (Washington, D.C.: Georgetown University Press, 1965). For additional or contrary views see, Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1967) Leo Pfeffer, *God, Caesar and the Constitution* (Boston: Beacon Press, 1976).

[114] *School District of Abington Township Pennsylvania v. Schempp* 374 US 203, 217 (1963).

[115] 374 US at 237.

[116] McCollum, supra, at 237-238.

[117] *Ishmael Jaffree v. Board of School Commissioners of Mobile County*, Civil Action no. 82-0554-H, January 14, 1983 (slip opinion).

[118] *Jaffree v. Board of School Commisioners of Mobile County* 74 c. Ed. 2d 924, 926 (1983).

[119] *Ishmael Jaffree v. Board of School Commissioners of Mobile County*, No. 83-7047, May 12, 1983 (slip opinion).

VOLUNTARY SCHOOL PRAYER: JUDICIAL DILEMMA, PROPOSED SOLUTIONS

(By Teresa L. Donovan, Marcella C. Donovan, and Josepth J. Piccione)

CHAPTER 1—THE FIRST AMENDMENT

The intent of the framers

Many Americans familiar with the U.S. Supreme Court decisions prohibiting voluntary prayer in public schools, but unfamiliar with the wording of the United States Constitution, would probably think the Constitution contained the words "strict separation between church and state" or "there must be a high and impregnable wall between church and state." Given the U.S. Supreme Court's decisions concerning church-state issues over the past 20 years, this would be a good guess. After all, these phrases are repeated and quoted endlessly in any discussion of church-state issues, particularly the cases dealing with voluntary school prayer. If those words were in the Constitution the court's decisions would be more understandable. But those words are not in the Constitution.

The key to analyzing the school prayer cases is to determine whether or not the court has properly interpreted the First Amendment Establishment Clause. Justice Felix Frankfurter said "An amendment to the Constitution should be read in a sense most obvious to the common understanding at the time of its adoption." [1] In other words, when interpreting the Constitution, binding authority is given to the text of the Constitution and to the intention of its authors. One legal scholar listed several reasons for giving the Constitution its original meaning.[2] First, the Constitution is the Supreme Law of the land so that it takes precedence over all subsequent laws if there is an inconsistency. Second, since the document is interpreted consistently over time, judges have less discretion to write what they themselves would have written had they drafted the Constitution. Finally, the document represents the will of the people. The Constitution begins "We, the people of the United States . . ."

To truly understand our religious rights as Americans—in order to protect our rights—it is necessary to analyze and study the original meaning of the First Amendment by examining the actual wording of the

amendment; the intent of the individuals responsible for its adoption and ratification and the relevant historical records and documents. The purpose of this chapter is to come to a better understanding of the meaning of the First Amendment so that we can better defend our religious liberties.

The U.S. Constitution was adopted and ratified in 1789. Many states approved the Constitution contingent on the first Congress passing the Bill of Rights, thereby giving added protection to the states from the federal government. The Federalists argued that the Bill of Rights was redundant and unnecessary since the federal government had no power unless it was expressly given in the Constitution and the Constitution gave the federal government no authority or power over religion. Nevertheless, those in the first Congress kept their word. Only two years later, in 1791, the Bill of Rights guaranteeing civil liberties including freedom of religion, freedom of the press and freedom of speech, protection against illegal search and seizure and self-incrimination was added to the Constitution.

The First Amendment to the Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The first sixteen words of the amendment embody the two religion clauses guaranteeing first, that *Congress* shall enact no law "respecting an establishment of religion," and second, that Congress shall not prohibit "the free exercise" of religion. The Supreme Court has prohibited voluntary school prayer on the finding that it is an "establishment of religion."

What did the words "respecting an establishment of religion" mean to Members of Congress who approved the language of the amendment? Several well respected historians and legal scholars after careful analysis of the proposed drafts of the First Amendment and the congressional debates surrounding adoption of the amendment conclude that the Congressmen understood first, that an "establishment of religion" was the setting up of an official government religion which would receive preferential treatment over all other religions, and second, that the term "respecting" meant that Congress could not enact any law with regard to an established religion—either creating a national religion or interfering with the state established religions.[3]

Justice Joseph Story in his authoritative *Commentaries on the Constitution* made clear in his analysis of the First Amendment that it was adopted to prevent the establishment of a national religion, but the amendment in no way interfered with the power of the individual states over religion. He wrote:

"The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any *National ecclesiastical establishment,* which should give to an hierarchy the exclusive patronage of the national government." [4]

Story also noted:

"Thus, the whole power over *the subject of Religion is left exclusively to the state governments,* to be acted upon according to their own sense of justice; and the state constitutions." [5]

Two leading experts on the First Amendment, Dr. Robert L. Cord and Dr. James McClellan, after studying the words and actions of the framers and all the documentation relating to the First Amendment conclude that there are three objectives to the First Amendment.[6] First, there is no Congressional authority to establish a formal national church or religion or sect which would necessarily give one religion preferential treatment over all other religions. Second, each individual is guaranteed the freedom to believe as he chooses. Finally, each state has the right and power to establish a state religion if it so chooses. The historical data does *not* support the theory that the First Amendment was adopted to ensure an absolute separation between church and state.

A cursory description of the church-state relationships in the early years of the Republic and several examples of government action involving religion taken by the earliest American statesmen will enable us to better understand the original meaning of the First Amendment.

It is well known that the first colonies in America were settled by religious dissenters who fled from Europe and England to escape religious persecution and intolerance. In Sixteenth and Seventeenth Century England, Henry VIII and his daughter Elizabeth I persecuted the Catholics and certain Protestant sects such as the Puritans and the Unitarians, while Queen Mary persecuted the Protestants. At the same time, there was civil war in France between the Catholics and the Huguenots. And in Germany, Hapsburg attempts to restore Catholicism were resisted in twenty-five years of fighting.

The fact that the earliest settlers fled from the Old World to escape religious persecution and strife did not prevent them from establishing official religions in their New World communities and colonies. Established religions were commonplace in colonial America. For example, the pilgrims at Plymouth Rock who set up a puritan community were fleeing persecution in England. By the time of the Revolution in 1775, nine of the thirteen colonies had established religions: Anglicanism was the established religion in Maryland, Virginia, North Carolina, South Carolina and Georgia. Congregationalism was established in Massachusetts, New Hampshire and Connecticut. And in New York, each township was actually obligated to support a Protestant church and minister. Twelve years later, when the Constitutional Convention convened in 1787, only five colonies still had established religions: Georgia, South Carolina, Connecticut, New Hampshire and Massachusetts.[7]

One leading historian [8] examined references to religion in the state constitutions of each of the first states in the nation in the Eighteenth Century. Both Maryland and Georgia authorized taxation for religion. South Carolina established the Christian-Protestant religion as the official state religion. In New Jersey, although each individual had the right to worship as he pleased, only Protestants could hold office in the state legislature. The Vermont constitution "urged every sect or denomination to observe the Sabbath." Several states required government officials to take an oath professing belief in God or divine inspiration of the Bible or belief in a particular religion.

While most states gave preferential treatment to a particular Protestant sect or the Protestant religion in general, Virginia and Rhode Island were the only two states that prohibited the establishment of any religion so there was a complete disestablishment of religion. The disestablishment of religion in Virginia was the exception rather than the rule in church-state relationships in the late Eighteenth Century. Furthermore, disestablishment of the Anglican Church—the Church of England—was not just religiously motivated, but politically motivated. It is not surprising that the men who fought for independence from England would not want the Church of England to be the established religion in their new homeland.

It seems clear from the foregoing that the framers of the First Amendment envisioned that state authority over religion would continue. The adoption of the Bill of Rights did not change state jurisdiction over religion. Listed below are several examples of actions by the drafters of the First Amendment which demonstrate that the adoption of the First Amendment did not mean the federal government was totally powerless to enact laws concerning religion—it simply could not establish a national religion or interfere with the state established religions. These examples show the framers *never* intended an absolute separation of church and state.

First, many of these same statesmen who approved the Declaration of Independence July 4, 1776 also participated in the adoption of the Constitution. The language of the Declaration certainly expresses faith in a Supreme Being. It reads in part:

"When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of Nature and of Nature's God entitles them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation . . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights."

Second, from the very first Congress under the Constitution there has always been a chaplain in the House of Representatives and the Senate to open each session with a prayer. James Madison was a member of the Committee that recommended a chaplain for the House of Representatives. On May 1, 1789, the House elected Rev. William Linn as chaplain and appropriated $500 for his salary. Similarly, the Senate approved a chaplain system April 25, 1789. Only several months later these same Members of Congress reached a final agreement on the language of the Bill of Rights. Recently, Chief Justice Burger agreed that the federal and state chaplain systems do not violate the Establishment Clause of the First Amendment further indicating the framers did not envision or intend absolute separation of church and state. Chief Justice Burger writing for the court in *Marsh* v. *Chambers* said:

"Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and giving prayers as a violation of that amendment for the practice of opening sessions with prayer have continued without interruption ever since that early session of Congress." [9]

Third, the fact that the earliest American statesmen signed treaties with the Indians providing them with missionaries shows that they never intended an absolute separation of church and state. For example, President Thomas Jefferson signed into law three extensions of an Act which among other things provided "for the society of United Brethren for propagating the gospel

among the heathen." [10] In effect, the United States government after adopting the First Amendment approved and financed programs to spread Christianity among the Indians. President Jefferson also asked the Senate to ratify a treaty with the Kaskaskia Indians which provided the Indians with $100 a year for seven years for a Catholic priest and $300 for a Catholic church. As late as 1833, President Andrew Jackson, in a treaty with the Kickapoo Indians, provided $3,700 of government money to build a mill and church for the Indians.

Fourth, the fact that most American Presidents, beginning with President George Washington, signed Thanksgiving Day proclamations shows that the framers never intended an absolute separation of church and state. For example, on October 3, 1789, George Washington signed the first Thanksgiving Day Proclamation which said in part:

"Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore His protection and favor . . ." [11]

It further read:

"Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation." [12]

James Madison, who drafted the First Amendment, also signed Thanksgiving Day proclamations. Much is made of the fact that President Jefferson did not sign Thanksgiving Day proclamations. While President Jefferson was opposed to the President issuing such a proclamation of thanksgiving, he acknowledged the fact that under the Constitution the states had power and authority over religious activities. The sentiment was evidenced in his second Inaugural Address which read in part:

"In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the general government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies." [13]

Finally, the enactment of the *Northwest Ordinance* in 1787 by the last Congress of the Confederation providing that religion and morality should be encouraged in the public schools further demonstrates that the framers never intended "strict separation" between church and state. The *Northwest Ordinance* which provided for the establishment of public schools read in part:

"Art. I. No person, demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

"Art. III. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." [14]

The same men who enacted this ordinance adopted the First Amendment two years later.

It seems apparent that the original objective of the First Amendment was not to mandate strict separation between church and state, but rather to prohibit the establishment or creation of a national religion, to leave the states free to enact laws respecting religion and to guarantee each individual the freedom to believe as he chooses. This was the general understanding of the First Amendment until 1947. As might be expected, many states did enact laws regarding religion. Massachusetts had required Bible reading in the schools since 1826, and between 1913 and 1930, eleven more states enacted similar statutes. [15]

Justice Black's misinterpretation of the first amendment

From 1791 to 1947 there was no doubt about the meaning of the First Amendment. The first modern Supreme Court case dealing with the Establishment Clause was *Everson v. Board of Education.* [16] No prior decision had given full consideration to the meaning of the Establishment Clause. This landmark case involved a New Jersey statute which reimbursed all parents whose children took public transportation to school—either public or private—for the bus transportation costs. This statute was challenged as an unconstitutional violation of the Establishment Clause. It was argued that taxpayers money was being used to support and maintain Catholic schools because parents of children in private schools, most of whom were Catholic, were being reimbursed for school transportation costs. While the Supreme Court decided five to four to uphold the statute, thus permitting parents of private school children to be reimbursed for transportation costs, the court's rationale paved the way for all the modern court decisions mandating a strict separation of church and state.

Justice Hugo Black's decision in the *Everson* case marks the beginning of the misinterpretation of the First Amendment Establishment Clause which has resulted in the unreasonable, unfounded decisions of the last forty years including the Court's prohibition on voluntary school prayer. Justice Black's interpretation of the Establishment Clause is inconsistent with the intent of the framers. First, Justice Black makes the First Amendment applicable to the States when it was intented to apply only to the federal government. Second, Justice Black interprets the Establishment Clause to mean what he would have intended had he—not the framers—adopted the First Amendment. Black justified his interpretation of the First Amendment not by looking at the U.S. congressional debates, but by looking at the disestablishment of the Anglican church in Virginia.

Justice Black's first mistake was assuming the Establishment Clause of the First Amendment applied to the states. To understand how this happened it is necessary to examine the judicially created "doctrine of incorporation." Basically, the "doctrine of incorporation" means that when Congress adopted and the states ratified the Fourteenth Amendment they intended to make the Bill of Rights applicable to the states. In other words, according to this judicial doctrine, the "due process" clause of the Fourteenth Amendment was a shorthand way of making the Bill of Rights applicable to the States. This judicial interpretation of the Fourteenth Amendment has given the federal courts most of their power and business. The relevant section of the Fourteenth Amendment is:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall *abridge the privileges or immunities of* citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

In 1925, in *Gitlow v. New York,* 268 U.S. 652, the Supreme Court began the process of selectively incorporating the Bill of Rights into the Fourteenth Amendment thereby making the prohibitions in the first ten amendments applicable to the states. Slowly but surely, the other provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment and made applicable to the states. [17] This is a primary example of judicial activism—of the judicial branch usurping the legislative law-making function. Despite the fact that the Bill of Rights was intended to *restrict only the federal government* and not the individual state governments, the courts, in applying the doctrine of incorporation for the last sixty years, have forced the state governments to comply with the restrictions embodied in the first ten amendments.

Several historians and legal scholars have studied congressional debates and the debates of the state legislatures when ratifying the amendment to determine the scope and meaning of the Fourteenth Amendment. [18] Nowhere in the history of the Fourteenth Amendment was there any indicaton that Congress intended to make the Bill of Rights applicable to the states. Surely if the states understood that by ratifying the Fourteenth Amendment they were subjecting themselves to the prohibitions in the Bill of Rights they would have said so. Had the Fourteenth Amendment extended the Bill of Rights to the states, many states would have been required to make immediate changes in their criminal laws. One legal scholar, Professor Raoul Berger, points out that the state legislatures never would have ratified the Fourteenth Amendment if they thought it was intended to make the Bill of Rights applicable to them. Raoul Berger notes:

"The freedom that the states traditionally have exercised to develop their own systems of administering justice, repels any thought that the federal provisions on grand jury, criminal jury, civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified it." [19]

Also, Supreme Court decisions both prior to and subsequent to the adoption and ratification of the Fourteenth Amendment in 1868 by the Thirty-ninth Congress indicate there was no intent by the Congress to make the Bill of Rights applicable to the states. For example, before adoption of the Fourteenth Amendment there was no question but that the Bill of Rights applied solely to the federal government. The Supreme Court enunciated this principle in *Barron v. Baltimore:*

"But it is universally understood, it is a part of the history of the day, that the great revolution which establish the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost

every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

"In compliance with a sentiment thus generally expressed, the quiet fears were thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. *These amendments contained no expression indicating an intention to apply them to the state governments.* This court cannot so apply them."[20]

Similarly, after the ratification of the Fourteenth Amendment, the Supreme Court continued to hold that the Bill of Rights was meant to restrict only the federal government and not the individual state governments. For example, in 1875, in *U.S. vs. Cruikshank*, the court noted:

"The First Amendment to the Constitution prohibits Congress from abridging the right of the people to assemble and to petition the government for a redress of grievances. This like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the National government alone."[21]

The court went to say:

"It is now too late to question the corrections of this construction. They left the authority of the states just where they found it, and added nothing to the already existing power of the United States."[22]

Also, just three years before beginning the selective process of incorporation with the *Gitlow* case, the Supreme court noted:

"But as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restriction about "freedom of speech" or the "liberty of silence"; nor, may we add, does it confer any right of privacy upon either persons or corporations." [23]

Even more concrete evidence that the Fourteenth Amendment was never intended to incorporate the Bill of Rights was the *Blaine Amendment* introduced in Congress in 1876. Senator James Blaine from Maine, at the request of President Ulysses S. Grant, introduced the following amendment which would have prohibited the states from making any law with respect to an establishment of religion:

"No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any state. No public property, and no public revenue of, nor any loan of credit by or under the authority of the United States or any state, territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational, or other institution, under the control of any religious or anti-religious sect, organization or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already invested. . . ." [24]

This amendment passed in the House of Representatives but failed in the Senate. Between 1950 and 1970, Congress twenty-five times rejected similar amendments which would have prohibited states from enacting laws with respect to an establishment of religion.[25] At the very least, the Blaine Amendment demonstrates that the framers of the Fourteenth Amendment never intended the incorporation of the First Amendment.

Twenty-three Members of Congress who considered the Blaine Amendment were members of the Thirty-ninth Congress which passed the Fourteenth Amendment. One would think at least one of these twenty-three Congressmen would have said "This has been done. Being present in the Congress at the adoption of the Fourteenth Amendment, I can tell you the Fourteenth Amendment incorporated the Bill of Rights. The Fourteenth Amendment already makes the First Amendment applicable to the states." Of course, no such argument was ever made simply because that is not what the Fourteenth Amendment was intended to do. This should prove conclusively that the courts are wrong when they apply the First Amendment to the states.

In sum, when Justice Black announced that the Establishment Clause of the First Amendment applied to the states, he disregarded the understanding of the state legislatures which ratified the Fourteenth Amendment. He disregarded Supreme Court precedent on the scope of the First and Fourteenth Amendments and the rejected Blaine Amendment. Instead, Black applied his own rule—the Establishment Clause is incorporated into the Fourteenth Amendment and is applicable to the states.

Justice Black's second mistake in the Everson case was misinterpreting the original meaning of the First Amendment. In broad, sweeping language, Black said the Establishment Clause meant at least this:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious belief or disbelief, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion was *intended to erect a "wall of separation between church and State. . . ."* [26]

Some statements in this sweeping definition are accurate: the federal government cannot set up a church or prefer one religion over another. No person can be punished for professing a certain religious belief. But other statements cannot be justified by the original meaning of the Establishment Clause. Black says the Federal Government and the States cannot pass laws which aid all religions. However, as was noted earlier, the state governments were always free to determine their own policy on religion including establishing a religion if they chose and while the federal government cannot establish a religion by preferring one sect over another, it can and has in fact aided religion in general.

The question is how could Justice Black justify such a broad interpretation of the Establishment Clause? Black attempts to explain his broad interpretation using historical data. He quotes from selected writings of Thomas Jefferson and James Madison who lead the disestablishment of religion movement in Virginia. As will be shown, Black's reading of history is incomplete. He relies on the history of disestablishment in Virginia to the exclusion of the more authoritative U.S. congressional debates on the First Amendment and he overemphasizes certain writings of Jefferson and Madison to the exclusion of other documents.

As noted earlier, one of the most quoted phrases in any discussion on church-state issues is that the First Amendment was intended to "build a wall of separation between church and state." Justice Black referred to the "wall of separation" in his Everson decision. Where did this language come from? In 1802, in a letter to a group of Baptists in Danbury, Connecticut, Thomas Jefferson wrote in part:

"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinion, I contemplate with solemn reverence that act of the whole American People which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' *thus building a wall of separation between church and state."* [27]

While this language is often used to defend the principle of absolute separation between church and state it was never intended to support any interpretation of the First Amendment. It was merely a phrase used in a letter to a constituent. Admittedly, Jefferson did believe in the separation of church and state. After all, Madison and he led the fight to disestablish the Anglican church in Virginia. But the question is did he intend an *absolute* separation of church and state?

As mentioned earlier, as President, Jefferson signed several treaties with different Indian tribes which provided for federal government money to the Indians for churches and missionaries. The money was going to aid religions in general, and apparently Jefferson did not see this as a violation of the Establishment Clause.

Additionally, when establishing the University of Virginia, Jefferson suggested that sectarian schools be established on the confines of the University so that those students could take advantage of the courses and instruction at the University. This hardly evidences a Jefferson who believed in *absolute* separation of church and state. Jefferson explained he wanted those pursuing religious studies to be able to take advantage of the University courses:

"It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are most interesting and impor-

tant to every human being, and most incumbent on this study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences . . . *A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science* . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to *establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University*, and to maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy; and could this jealousy be now alarmed, in the opinion of the legislature, by what is here suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express." [28]

Today, the Court would hold that permitting religious schools to establish themselves on the confines of a public university would constitute *aid to religion* and thereby violate the Establishment Clause. Indeed, the court had considered a case where religious instruction was made available on public school property. In *McCollum* v. *Board of Education*,[29] Justice Black again writing for the Court, invalidated an Illinois statute permitting religion teachers to come weekly into the school buildings during regular hours to provide religious instruction. Although the "released time program" was completely voluntary, the Court held that permitting religious instruction on public school property was aiding religion and in violation of the Establishment Clause. Given Jefferson's suggestion about the University of Virginia, it seems he would have decided the *McCollum* case differently.

Justice Black also quoted James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785) [30] which antedates the First Amendment by four years and which was never offered as an interpretation of the First Amendment. In fact, it was Madison's response to a bill before the Virginia Assembly which if enacted would have required all Virginia taxpayers to support teachers of the Christian religion. Madison argues more against the government giving preferential treatment to one religion rather than arguing against any government aid to religion. Madison shows he understands an "establishment of religion" to mean preferential treatment towards one religion—not prohibiting any aid to religion.

A leading historian, Robert L. Cord, suggests that Madison's *Memorial* is over-emphasized in trying to discern Madison's position on church-state issues. Cord notes two bills introduced by Madison in the Virginia Assembly on October 31, 1785 which indicate he did not interpret the First Amendment to mean an absolute separation between church and state.

First, Bill No. 84, "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," intended to punish those who worked on Sunday. The bill enacted into law in 1786 provided:

"84. A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers

"Be in enacted by the General Assembly, that no officer, for any civil cause, shall arrest any minister of the gospel, licensed according to the rules of his sect, and who shall have taken the oath of fidelity to the commonwealth, while such minister shall be publicly preaching or performing religious worship in any church, chapel, or meeting-house, on pain of imprisonment and amercement, at the discretion of a jury, and of making satisfaction to the party so arrested.

"And if any person shall of purpose, maliciously, or contemptuously, disquiet or disturb any congregation assembled in any church, chapel, or meeting-house, or misuse any such minister being there, he may be put under restraint during religious worship, by any Justice present, which Justice, if present, or if none be present, then any Justice before whom proof of the offense shall be made, any cause the offender to find two sureties to be bound by recognizance in a sufficient penalty for his good behavior, and in default thereof shall commit him to prison, there to remain till the next court to be held for the same county; and upon conviction of the said offence before the said court, he shall be further punished by imprisonment and amercement at the discretion of a jury.

"If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household [sic] *offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offense."* [31]

A second bill, Bill No. 85, "A Bill for Appointing Days of Public Fasting and Thanksgiving," was not enacted into law but would have imposed a fine on any "minister of the gospel" who without an excuse failed to issue such a proclamation. The bill read:

"85. A bill for Appointing Days of Public Fasting and Thanksgiving

"Be it enacted by the General Assembly, that the power of appointing days of public fasting and humiliation, or thanksgiving, throughout this commonwealth, may in the recess of the General Assembly, be exercised by the Governor, or Chief Magistrate, with the advice of the Council; and such appointment shall be notified to the public, by a proclamation, in which the occasion of the fasting or thanksgiving shall be particularly set forth. Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, *on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse."* [32]

These two bills introduced by Madison, the fact that he signed four Thanksgiving Day Proclamations and was a member of the House committee that recommended a chaplain system serve as evidence that he could not have believed Black's absolute separation of church and state principle at the time the First Amendment was adopted.

Some historians judge Madison on his *Detached Memoranda* in which he condemns chaplains and argues for a broader interpretation of the First Amendment so that it should "forbid anything like an establishment of religion." [33] Other scholars refuse to place too much emphasis on the *Memoranda* since it was written five years after Madison left the presidency and it contradicts his earlier actions as a congressman and President. Robert L. Cord writes:

"Obviously the Madison of the *Detached Memoranda* is not the Madison responsible for the First Amendment nor the President who issued Proclamations of Days of Thanksgiving and Prayer." [34]

Professor Corwin says: "In his later years Madison carried the principle of church and state to pedantic lengths." [35]

In sum, because Justice Black attempts to justify his broad interpretation on historical data he should have analyzed more fully the history surrounding the First Amendment. Robert L. Cord, who thoroughly investigated the history of the First Amendment in his book *Separation of Church and State: Historical Fact and Current Fiction* wrote:

"It is time for the Supreme Court to discontinue promulgating a distorted version of American history brought into being, and carefully maintained, by the selection and omission of primary historical sources." [36]

Those who believe in religious liberty and freedom of religion may have won a small battle in the *Everson* case, but as history shows us they lost the war. This landmark case paved the way for the court's decision in 1962 to prohibit voluntary school prayer which would have been impossible without Black's broad interpretation of the Establishment Clause based on a selective review of history and his desire to make the Establishment Clause applicable to the States.

FOOTNOTES

[1] *Adamson v. California*, 332 U.S. 46 (1947) at p. 63

[2] Paul Brest "The Misconceived Quest for the Original Understanding" *Boston University Law Review*, Vol. 60, p. 204 (1980).

[3] This interpretation of the First Amendment is discussed by: James B. McClellan, "The Making and Unmaking of the Establishment Clause," in Patrick B. McGuigan and Randall R. Rader, eds., *A Blueprint for Judicial Reform* (Washington, D.C.: Free Congress Foundation, 1981), pp. 295-326; Peter J. Ferrara, *Religion and the Constitution: A Reinterpretation* (Washington, D.C.: Free Congress Foundation, 1983); Robert L. Cord, *Separation of Church and State Historical Fact and Current Fiction* (New York: Lambeth Press, 1982); Joseph Story, III *Commentaries on the Constitution* sections 1864 thru 1873 (1833).

[4] Joseph Story, III *Commentaries on the Constitution* section 1871 (1833) (Emphasis added.)

[5] Ibid., Section 1873 (Emphasis added.)

[6] Robert L. Cord, *Separation of Church and State Historical Fact and Current Fiction* (New York: Lambeth Press, 1982) p. 49; James B. McClellan, "The Making and Unmaking of the Establishment Clause," in Patrick B. McGuigan and Randall R. Rader, eds., *A Blueprint for Judicial Reform* (Washington, D.C.: Free Congress Foundation, 1981) p. 295.

[7] McClellan, in *A Blueprint for Judicial Reform*, pp. 300-308, and Cord, *Separation of Church and State* p. 4.

[8] McClellan, in *A Blueprint for Judicial Reform*.

[9] *Mash v. Ernest Chambers* (no. 82-83) 51 L. W. 5162, June 28, 1983.

[10] Cord, *Separation of Church and State*, p. 45 citing Public Statutes at Large, Vol. I, "Acts of the Fourth Congress," Sess. I, Chap. 46, pp. 271-72.

[11] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, 1789-1897,

Vol. I (Washington, D.C.: Bureau of Literature and Art, 1901) p. 64.

[12] Ibid., p. 64.

[13] Edward S. Corwin. "The Supreme Court As National School Board," *Law and Contemporary Problems*, Vol. 14, p. 14 (1949) citing I *Messages and Papers of the Presidents* (Richardson ed. 1896).

[14] Swanson, "Religion in Public Schools; *Nebraska Law Review*, Vol. 59, p. 425 (1980) at p. 436 citing 1. stat. 52 (July 13, 1787).

[15] McClellan, in *A Blueprint for Judicial Reform*, p. 311.

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

[17] In 1937, in *De Jonge* v. *Oregon* (299 U.S. 353) the guarantee of freedom of assembly was made applicable to the states. In 1940, in *Cantwell* v. *Connecticut* (310 U.S. 296) the freedom of religion was made applicable to the states. In 1947, in *Everson* v. *Board of Education* (330 U.S. 1) the Establishment Clause of the First Amendment was made applicable to the states. In 1949, in *Wolf* v. *Colorado* (338 U.S. 25) the Fourth Amendment right to be free from unreasonable searches and seizures was made applicable to the states. In 1981, in *Mapp* v. *Ohio* (367 U.S. 643) the Fourth Amendment right to exclude from criminal trials evidence seized illegally was made applicable to the states. In 1962, in *Robinson* v. *California* (370 U.S. 660) the Eighth Amendment prohibition against cruel and unusual punishment was made applicable to the states. In 1963, in *Gideon* v. *Wainright* (372 U.S. 335) the Sixth Amendment right to counsel was made applicable to the states. In 1964, in MALLOY v. *Hogan* (378 U.S. 1) the Fifth Amendment right against self incrimination was made applicable to the states. In 1965, in *Pointer* v. *Texas* (380 U.S. 400) the Sixth Amendment right of a criminal defendant to confront the witnesses against him was made applicable to the states. Also in 1965, in *Griswold* v. *Connecticut* (381 U.S. 479) the Ninth Amendment implied right to privacy was made applicable to the states.

[18] The most notable is Charles L. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review*, Vol. 2, p. 5 (1949) Note also: Raoul Berger; *Government by Judiciary: The Transformation of the Fourteenth Amendment.* (Cambridge, Mass.: Harvard University Press, 1977): Robert L. Cord, "Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment" *Fordham Law Review*, Vol. 44, p. 215 (1975).

[19] Berger, *Government by Judiciary*, p. 156, n. 95 quoting Fairman, Standford 137.

[20] *Barron v. Baltimore* 32 U.S. (7 Peters) 242 (1833).

[21] *U.S. v. Cruikshank* 92 U.S. 542 (1875) p. 551.

[22] Ibid., p. 552.

[23] *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, p. 543 (1922).

[24] House Resolution 1, 44th Congress, 1st Session (1876).

[25] Joseph H. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* (South Orange, N.J.: Seton Hall University Press, 1954), p. 35.

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

[27] *Everson v. Board of Education, 330 U.S. 1 (1947) at p. 16. Full text of the letter: Saul K. Padover,* The Complete Jefferson (Freeport, N.Y.: Books for Libraries Press, 1943), pp. 518-19. (Emphasis added.)

[28] Corwin, "The Supreme Court As National School Board," p. 14. (Emphasis added.)

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

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

[31] Cord, *Separation of Church and State*, p. 217 citing Boyd, *The Papers of Thomas Jefferson, pp. 305-7.*

[32] Ibid., p. 220.

[33] For example, Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1967) Leo Pfeffer, *God, Caesar and the Constitution* (Boston: Beacon Press, 1975) and Supreme Court Justices Rutledge and Black.

[34] Cord, *Separation of Church and State, p. 36.*

[35] Corwin, "The Supreme Court as National School Board."

[36] Cord, *Separation of Church and State*, p. 223.

RELIGION, LIBERTY, AND LAW IN THE AMERICAN FOUNDING

(By Michael J. Malbin)

I am delighted to be here to speak on the subject of law, liberty, and religion. The subject is of immediate political interest, of course, but it also raised some of the deepest and most enduring questions of political philosophy. The political interest in the subject can be seen from the many bills before Congress in recent years concerning prayers in public schools and tax credits, vouchers, and other forms of aid for private schools. In addition, if the all-volunteer armed force does not provide adequate to the country's defense needs, we may expect Congress in future years to begin thinking again about a military draft. If it does so, we can be sure that the problem of conscientious objection will follow quickly on its heels.

What Congress will decide about these subjects cannot be predicted with any certainty. However, we can be certain about a few things: people on both sides of these issues will invoke the highest principles, they will be highly emotional, and they will be highly confused.

Public thought about the relationship between law, liberty, and religion has become almost entirely muddled over the past few decades. To some extent, this is understandable—particularly if we look at the subject from the perspective of religion. Everyone brings his own religious or nonreligious background to these debates—whether Protestant, Jewish, Catholic, Muslim, Buddhist, Shintoist, Taoist, or Secular Humanist—each brings his own deepest convictions to bear on the subject. Each has his own understanding of the proper relationship between his church, his conscience, and his country's government and its laws. The perspective of religion is in one sense simple: from that perspective, the religious person obviously should always follow the commands of his or her religion. But the perspective becomes a lot more varied when we realize that every religion has its own approach to the relationship between religious authority and conscience or between civil authority and religion.

However, while the multiplicity of voices from the religious community may be understandable, the confusion we see when people look at the subject from the law's perspective is far less understandable. I will be speaking today from the perspective of civil society and law—specifically, from the perspective of the basic documents underlying the legal framework of our own civil society. For reasons that will become obvious, that perspective necessarily conflicts with that of religion on a number of key points. The dilemma of Antigone remains with us today as we think about the First Amendment.

The public understanding of the purposes of the First Amendment has become so shallow that people during the past election campaign went so far as to suggest that the principle of separation of church and state requires ministers to be political neuters who express no opinions about politics whatsoever. This view of the First Amendment is so misguided that it would not warrant comment were it not a reflection of something more pervasive—namely, a wide-ranging debasement in our public thought about the meaning of liberty and law. Numerous other examples of a similar debasement occur all over the current political landscape—from the libertarians, on the one hand, who equate liberty with the right to avoid any form of mandatory service or taxation under law, to misguided separationists, on the other, who argue that Congress should pass no law that happens to be closer to one set of religious convictions than another, even if the law is passed to serve a valid secular purpose.

The Supreme Court has not been free from shallow thinking on the nature of liberty and the connection between liberty and law, but at least it has not been this silly in its approach to the First Amendment. The Supreme Court recognizes that religion almost invariably involves commandments or duties relating to what is right and wrong in this world, and that such commandments, for religious people, often compel overt actions within government's and law's spheres of competence. As a result, the Court has not been among those who talk about separation of church and state as if it means that religion must have nothing to do with politics.

But the Court has been utterly confusing in almost everything else it has said about religion. Its interpretations of the meaning of the First Amendment's phrase—"Congress shall make no law respecting an establishment of religion"—have almost bordered on government by *ad hocracy.* The Court ruled in 1947 that "no establishment" meant that the government may not give any form of aid to religion. However, the rule was handed down in a case that decided it was all right to give aid to children who were using buses to go to religious schools.

Subsequent decisions have been equally baffling, as the Court moved away from the phrase "no aid" and focused instead on the requirement that laws must be strictly neutral, favoring neither religion nor irreligion. According to the neutrality test, aid to religious organizations as acceptable as long as its purpose and effect are secular and as long as granting the aid does not require government to become tangled excessively with the actual operation of religious institutions. But the test again provides little guidance. For example, the Court ruled that tuition tax credits to parents of private school children in New York have a religious effect because most of the private school students in that particular state attend Catholic parochial schools. What does this imply for future cases? Would a national tuition tax credit, applicable to a broader range of schools, be all right? What about vouchers given to all students who could then turn their vouchers over to the public or private school of their choice? The decision does not answer these questions. Or, take some other cases: does it really make sense to prohibit flat grants of aid to private and religious schools, colleges, and universities, and then start sorting out specific categorical grants, saying that some are all right and some are not, depending upon whether they go for buildings, laboratories, textbooks, or standardized tests? Does that sort of differentiation really make sense? It seems clear that any likely governmental grants could be made to fit one or another judicially crafted category, if the legislators would only know what the categories were. But the cases so far have had almost no predictive value for legislators trying to figure out what to do. All the legislators can do is act in an ad hoc way and hope their ad hocracy happens to match that of the courts.

We see the same kind of confusion in free exercise law today. The Supreme Court has held that the free exercise clause gives people a constitutional right—and I emphasize that word "right"—to be exempt from

valid civil laws if the person believes the law would violate his religious conscience and if the court believes the law is not all that important. So, Amish people do not have to attend publicly accredited schools, but people who object to participating in particular wars do not have a right to be exempt from the draft. How the underlying rules will apply to future cases, such as the one now pending involving public solicitation by Hare Krishnas, cannot be predicted. Instead of clear rules of law, we again see judicial government by ad hocracy.

I would maintain that this ad hocracy by the courts is one major reason for the utter confusion we see in public discourse about the proper relationship between law, liberty, and religion. But I would go one step further in my comments about the courts. I would maintain that the courts have been forced into a set of ad hoc judgments because they have failed either to understand or to apply the principles of the Constitution that they are charged with expounding.

What I would like to do here with the rest of my time today is this. I would like to lay out the basic principles of the American founding with respect to law, liberty, and religion as I understand them. That will take up most of the rest of the time we have available. In the course of doing so, I hope I shall be shedding light on at least a few contemporary First Amendment issues, such as school prayer, aid to private schools, and conscientious objection.

In laying out the basic principles, it seems to me we ought to start with the Declaration of Independence, the most basic statement of the nation's principles. The Declaration will help us understand the relationship between law and liberty. To get to the role of religion, we then will have to move beyond the Declaration to the Constitution and Bill of Rights.

I would start discussion of the Declaration by reading its most famous sentence, the second sentence:

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

Now let us go back to the fourth of the self-evident truths: "To secure these rights Governments are instituted." Why governments? To answer this we have to back up a step. Why does the right to life, liberty, and the pursuit of happiness requires government? For the clearest answer, we should look to the source of Jefferson's phrase, namely, John Locke's Second Treatise of Government. Jefferson spoke of life, liberty, and the pursuit of happiness. Locke spoke of life, liberty, and property. With this slight change we can say—Garry Wills notwithstanding—Jefferson's thought and the Declaration are essentially Lockean. We know this from Jefferson's notes. Jefferson took extensive notes on Locke, and the Declaration very closely follows the Second Treatise, especially the chapter in the treatise on the dissolution of government.

Why are governments necessary? Locke's answer, essentially similar to one given decades earlier by Thomas Hobbes, turns upon his distinction between the state of nature and civil society. For Locke, the state of nature refers not to a historical, prepolitical human condition but to a condition that is always possible and to some extent always present. People are in a civil society, according to Locke, when they accept a common magistrate or authority above them. They are in a state of nature with respect to each other when they accept no such common magistrate. (Foreign leaders, in the absence of international law, are thus in a Lockean state of nature.) Without a common magistrate, men are free, independent, and equal. They want to preserve their life, liberty, and property, and they have a natural right to do so. The right to preserve life carries with it the right to enhance life by mixing one's labor with the scarce goods provided by nature and then to acquire or own the resulting product. However, according to Locke, it is all but impossible to use labor effectively in a purely natural state. Improving upon nature presupposes time and security. Without common magistrates, however, the person who improves upon nature should not be surprised to find someone else stealing the fruits of his labor. While people are not said to have a natural right to steal, they do have a natural right to take what they may need to survive. Since the absence of a common magistrate means that everyone must judge for himself what he needs for his own survival, and since nature cannot provide enough for human survival without improvement and labor, scarcity and conflict will inevitably result in the state of nature from the desire to preserve life. Therefore, governments are instituted to prevent conflict, to preserve the peace and security needed to permit people to improve upon nature, and thus to help preserve and enhance their lives.

So, for Locke, liberty is natural, the desire to preserve life is natural, and war is the all but inevitable consequence of nature. For Locke and for the Declaration of Independence the purpose of civil society is to preserve the peace that lets people enjoy life, liberty, and the ability to pursue property. Civil society secures the right to liberty because civil society is essential for peace. To put this another way, liberty may be enjoyed only in civil society; the fruits of liberty may be obtained only in civil society. Therefore, while the purpose of civil society has to do with liberty, the notion of liberty within civil society necessarily is self-limiting. Liberty cannot be protected without government. Therefore, liberty cannot be enjoyed without law. And, therefore, liberty must be confined within bounds that permit government and the rule of law to exist.

This creates a seeming paradox. How can you equate freedom with obedience to law? The answer is that law abidingness and freedom are not simply equated. Let us remember, the Declaration of Independence is a revolutionary document. The protection of liberty requires law, but for a law to deserve such unquestioned obedience, it must come from a government to which the citizens have given their consent. And consent, Locke argues, will be given freely only to a government that limits its activities to protecting rights that exist, but cannot be enjoyed, in a state of nature. Such governments are rare, as we all know.

Now let us go back to the sentence I just read from the Declaration, and reread another part of it. "Whenever any form of government becomes destructive of these ends [life, liberty, and the pursuit of happiness], it is the right of the people to alter or to abolish it, and to institute new government." What doest this mean? Why is the word "form" in there? The Declaration of Independence does not say that whenever the government restricts liberty, rebellion is justified. All governments necessarily restrict liberty, and liberty cannot be enjoyed without government.

According to the Declaration, and Locke, particular actions taken by the government cannot legitimately be disobeyed selectively because they restrict liberty in this or that instance. The reason is that selective disobedience undermines the principles of law that are necessary to preserve the peace. In the absence of law, people become judges of their own cases and the situation returns to a state of nature. Of course, when the government as a whole, or the form of government, becomes destructive of the ends of government, it is appropriate to change governments. But as long as the form of government works toward securing the proper ends, the need for a government of some sort means that people must put up with some restriction on their liberty to act as judges of their own cases. The protection against government's arbitrarily restricting liberty lies not in selective obedience but in the requirement that government be based on consent.

This is the theoretical basis for and backdrop to the Declaration of Independence. The presentation so far has been entirely grounded on nature and natural rights. That is, it has been entirely secular. It leaves no room for selective disobedience to law, even if the motive for disobedience rests on religious conscience.

However, while Locke's basis for civil society did not rest on religion, he did not ignore the subject. Hobbes and Locke were both familiar with religious warfare, and both saw religious zealotry as a major threat to peace. Since preserving the peace was the first goal of civil society, one major aim of their writing was to weaken the attractiveness of religion by transferring people's fears and concerns away from salvation and to this life. The Declaration retains this focus on the goods of this world.

Yet, this somehow does not seem an adequate description of the role of religion in this country. It all seems so negative. We all know that religion was an important part of the Founding Fathers' scheme of government. Far from wanting a purely secular nation, their aim was to channel religion, to transform it, to preserve the useful parts while putting the dangerous parts under the control of civil law. The idea was to retain a vital religious life, because religion was thought to be important to teaching virtue, and virtue was considered essential to good citizenship. Somehow, this had to be retained without promoting the conditions that would cause religious civil war. To see how this was to be done, let us take our next step in this theoretical journey—to Federalist No. 10.

Many of you are familiar, I am sure, with the argument of Federalist No. 10. It is essentially the same as an argument Madison presented at the 1787 Convention in Philadelphia. But for those who are not familiar with it, or who need to be reminded, let me go over the ground quickly. Federalist No. 10 is the paper in which Madison talked about the dangers of faction. He defined the term "faction" to refer to any number of citizens united by common impulse, passion, or interest, who act in a way that is adverse to the rights of others citizens or adverse to

the permanent interests of the community. Factions, Madison said, are natural. As a result, it is futile to try to eliminate them or to remove their causes. So, if you want to control the dangers of factions, it becomes necessary to pay attention to their effects. Madison discussed the effects of minority factions, factions making up only a small portion of the nation in which they exist, and majority factions. Minorities sometimes are able to get their way over majorities, but the cure is easy to prescribe, Madison says. The cure of minority factions is democracy. No group can get its way against the will of a majority provided the majority gets a chance to express its will. The particular danger of democracy is not what a minority might do to a majority but the opposite, what a majority might do to a minority. How can dangers of majority factions be minimized? According to Madison, there is no way in a democracy to prevent a determined, long-lasting majority from working its will. However, there are ways to make it more difficult for such a majority to form. The most effective way, he argued, is to extend the sphere of the republic. Make the Nation larger, make it more complex through the development of commerce, and what will result will be a multiplicity of factions so complex that it will be unlikely for a majority to coalesce around a single factional issue. If no one faction makes up a majority on its own, it means that the majority necessary for democratic rule will have to be formed by coalitions of minorities who necessarily will have to compromise with each other before they can have their way.

The basic outlines of this argument are probably familiar to most of you. It is presented most often in discussions of the role of interest groups, particularly economic interest groups. In fact, the prominence Madison gave to commerce often leads people mistakenly to assume that he was thinking solely of economic interests. Nothing could be further from the truth. Madison made it clear that a faction could be a group of people held together by common interests, common passions, or common opinions. In fact, the two main sorts of divisions Madison specifically mentioned as being dangerous to the stability of democracy were the divisions between the rich and poor and the divisions among religious sects.

Thus, we can begin to see that there is a sense in which the Constitution, broadly speaking, was meant as an answer to the problem of religion. Religious opinions were seen as sources of factions, and factions as potential threats to civil peace. The solution seems almost paradoxical. Religious factions were to be encouraged to be fruitful and multiply. As they multiply, the odds of any one faction's gaining a majority decrease. Of course, authors of the Federalist hoped to tame religious passions in other ways as well. Remember that a multiplicity of faction was seen as being most likely to flourish in a nation friendly to commerce. But a commercial nation, a nation whose people are wedded to trade, manufacture, and the spirit of profit, is not likely to be a nation whose people would be willing to destroy the civil peace for the sake of their religion.

None of this is stated explicitly in the Constitution. However, it is implied by the very fabric of that document, and it is spelled out very clearly in the Federalist. The only place in the main body of the Constitution where religion is mentioned is in Article 6, which prohibits the use of religious-test oaths for officers of the United States.

Many people during the state ratifying debates over the Constitution were concerned that there was no specific protection of religious conscience in the document, and several states called for adoption of a Bill of Rights immediately after the Constitution was ratified. Madison argued that a Bill of Rights was not necessary because the government was not delegated the power to legislate in a way that would affect speech or religion or the other matters that concerned the Antifederalists. The greatest protection for religious liberty, Madison felt, was an extended republic. But this was not enough for the Antifederalists. They wanted a Bill of Rights, and enough of the Constitution's supporters agreed with them to make adoption of a Bill of Rights politically necessary in the First Congress. Convinced by this outpouring that a Bill of Rights would help secure support for the new Constitution, Madison became its principal drafter and shepherd in the House of Representatives.

Let us now turn to the Bill of Rights, specifically to the sixteen words in the First Amendment reading: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." So far we have seen that, in the Declaration of Independence, liberty depends upon governments based on consent. We have also seen that the *Federalist* describes the Constitution as creating an extended sphere in which the multiplicity of sects and factions would promote liberty.

What do the sixteen words of the First Amendment religion clauses add to this? Does the free exercise clause say anything about the relationship between law and conscience that is not in the Declaration of Independence? Does the establishment clause, with its prohibition of an established church, say anything that is not in Madison's idea of an extended republic? I would maintain that the answer in both cases is no. That is precisley why Madison thought the Bill of Rights was redundant. But, while the Bill of Rights may have been redundant, given Madison's limited view of the powers conferred on the government by the "necessary and proper" clause, it does make the intended limits more clear—particularly in light of the broader Hamilton-Marshall view of "necessary and proper" that has prevailed.

Let me start with the free exercise clause. There was virtually no discussion or debate of the free exercise clause during the First Congress that considered and passed the Bill of Rights, so we have very little by way of direct evidence about precisely what its authors meant by the phrase. We can see from the debates in the first Congress that its authors at least meant to prevent Congress from prohibiting or compelling any form of religious worship, by, for example, either prohibiting or requiring prayers. That is, the clause protected not only the exercise of religion but the freedom of its exercise.

Beyond this, the meaning of the free exercise clause is less clear, but it did develop out of a well-known history that included, among other things, the Virginia Bill for Establishng Religious Freedom. There is absolutely nothing in this history to suggest that the authors of the Bill of Rights thought that religious people should be granted a right to be free of any legal obligations solely because law might clash with their religious consciences.

There was no direct discussion of this matter in connection with the First Amendment during the First Congress. But a very similar issue did come up during discussion of the Second Amendment. That amendment now reads as follows: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." When that militia provision passed the House of Representatives, it contained an additional clause reading as follows: "No person religiously scrupulous of bearing arms shall be compelled to render military service in person." The Senate dropped this conscientious objector clause largely because some members of the First Congress explicitly rejected the idea that religious exemptions should be treated as rights. For example, Edward Benson of New York said in the House of Representatives that "no man can claim this indulgence of right . . . [It] ought to be left to the discretion of the government."

The point here is not that the authors of the First and Second Amendments wanted to deny conscientious objector status to people who objected to bearing arms for religious reasons. It was just the opposite. They did grant exemptions to conscientious objectors. But they wanted those exemptions to be understood to be matters of grace extended by statute. They did not believe that they belonged to citizens as a matter of natural or constitutional right. The principle of law cannot permit the individual to decided whether or when to obey the law. In Locke's terms, that would make the individual the judge of his own case. Exemptions granted as a matter of grace do not violate this principle, but making exemptions a constitutional right would give the individual the right to decide when and whether the law applies to him.

As I hope this discussion of free exercise makes clear, the people who wrote the First Amendment expected the nation to be friendly toward minority religions. Moreover, we saw that the whole design of *Federalist* No. 10 involved creating an extended republic in which a multiplicity of religious sects would flourish. That being the case, why was an establishment clause necessary? It seems to go without saying that a nation with a multiplicity of sects would not tolerate the establishment of a national church or the adoption of a national credo. The First Congress considered language that simply would have prohibited the establishment of a national church, but Congress rejected that language and adopted something broader.

The language finally adopted said that Congress shall make no law "respecting an establishment of religion." What does this mean? The clause fits somewhere in that broad ground between the minimalist definition that merely would have prohibited a national church and the position of the modern Supreme Court. Without going into all of the debates here, let me say that the establishment clause originally was meant to prohibit two different things, one relating to the present controversy over governmental aid to religion and the other relating to the relationship between the national government and the states.[1]

First, the establishment clause was meant to prohibit Congress from passing any law that would tend to prefer or favor one religion over others. It was meant, in other

[1] For a detailed analysis of the debates, see Michael Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (Washington, D.C.: American Enterprise Institute, 1978).

words, to require a strict neutrality between religions, not neutrality between religion and irreligion. This is absolutely clear from the debates in the First Congress. At one point, in a speech that reiterated a theme raised often during the debates, Benjamin Huntington expressed concern about one early version of the establishment clause because he thought "the words might be taken in such latitude as to be extremely hurtful to the cause of religion." Huntington "hoped therefore, that the Amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who possess no religion at all." There were ample protections for atheists elsewhere in the Constitution—notably in the free speech clause and the clause prohibiting religious-test oaths for office. But contrary to the modern Supreme Court, the establishment clause had nothing to do with atheists. It was meant to prohibit Congress from discriminating among religions. All through the First Congress debates, the wording of the establishment clause was very different from the wording we know now. During the debates, the clause was worded "no religion shall be established by law," or "no national religion shall be established," or "no particular sect shall be established." Only at the last minute was the wording changed to "no law respecting an establishment of religion." The strange wording was responsible for the Supreme Court's mistaken idea that the amendment required strict neutrality between religion and irreligion. But the real reason for the shift related to an entirely different issue, the issue of federalism.

No single subject dominated the considerations of the First Congress as much as federalism. Thus it should be no surprise that concern over the power of the national government surfaced during consideration of the Bill of Rights. Antifederalists were concerned that Congress might restrict the power of the states to help religion. Specifically, Elbridge Gerry of Massachusetts and other Antifederalists from states with established churches wanted to make sure that Congress could not do anything to harm their states' religious establishments. That is the reason for that strange language in the First Amendment—"no law respecting an establishment of religion." Congress was prohibited not only from doing anything that tended to establish or favor a particular religion on the national level; it was also prohibited from doing anything respecting, or with respect to, the religious establishments in the states. The Supreme Court missed this point entirely in 1947. The decision to apply the establishment clause to the states involved an obvious circularity—how, after all, can the states be prohibited from passing laws that affect state religious establishments?

Let us assume, however, that the application of the establishment clause to the states is an irreversible fact. What would happen if we were to apply the rest of the original meaning of the establishment clause—no discrimination among religions—to today's religiously diverse nation? I believe that the original rule probably would prohibit Congress from doing most of what worries modern separationists. For example, it clearly would prohibit the government from prescribing school prayers for children, even supposedly voluntary prayers. A moment of silence would be all right, and probably a good idea. However, it would be impossible to write an official prayer today without offending some religious people. People from one religion would be offended by prayers chosen from another, devout people from most faiths would be offended by lowest common denominator pablum, and followers of certain Oriental religions that do not believe in a God to whom one prays would be offended by the implications of praying itself.

On the other hand, the establishment clause was not meant to prohibit truly nondiscriminatory forms of aid to religion. One such form of aid was adopted by the First Congress itself when it reenacted the Northwest Ordinance, which contained a clause giving free land to anyone who wanted to build churches or schools, including church schools, in the Northwest Territory. The land was available on a first-come, first-served basis. I would maintain that today's tuition tax credits or tuition vouchers are nondiscriminatory forms of aid not far different from the Northwest Ordinance. Tax credits and vouchers obviously raise different issues of public policy. Tax credits are easier to administer, but vouchers can be structured to give the public school system positive incentives to improve itself. Constitutionally, however, they are the same. They provide aid to parents without discriminating between secular and religious schools, let alone among religious sects.

While the issues seem clear under the original meaning of the First Amendment, they have been made less clear by the Supreme Court's reinterpretation of the religious clauses since 1947. It can almost be said of the modern court, as Karl Marx once said of the relationship between his own thoughts and Hegel's, that the Court has stood the First Amendment on its head. On the one hand, the Court correctly perceives that the framers wanted to encourage religion. But the Court has used the free exercise clause to grant religion special favors the framers never thought were required, while at the same time prohibiting the nondiscriminatory assistance the framers would have permitted. On the other hand, the Court also correctly sees that the Constitution is at its core a secular document. But the Court implements this perception through its reading of the establishment clause, while not permitting a religiously neutral application of civil law under the free exercise clause. The Court thus has created religious rights where none had existed, permitted religious opinion to stand as judge of the civil realm, while preventing the civil realm from helping religion on civil society's terms.

Lost somewhere in the theoretical murkiness of the Court's position is any indication of an awareness of the way the Founding Fathers meant the Declaration, Constitution, and Bill of Rights to promote both religious health and civil peace. Unfortunately, some of the Court's modern conservative critics seem equally unaware of the deepest purposes of the nation's founding documents. By trying to push prayer on a nation whose religions are far more diverse now than they were a century ago, these people threaten to excite exactly the same passions the Constitution was meant to damp down. Both sides would do well to give more careful study to the foundations of the constitutional democracy they are so busily trying to alter.

Separation of Church and State: Historical Fact and Current Fiction

(By Robert L. Cord, Professor of Political Science, Northeastern University)

The Genesis of the Establishment of Religion Clause

The story of the settlement of the New World in the early seventeenth century provides much of the historical background from which flowed the great guarantees of freedom of religion expressed in the First Amendment. A little more than a century before the first settlement appeared at Jamestown, the unity of the Western Christian world had been destroyed by the inception of the Protestant Reformation. The great nations of western Europe had become internally divided owing to the allegiances of different princes to different Christian codes. Many national schisms were resolved forcefully by the institution of established religions and the suppression of minority sects. Generally the reigning monarch's faith became the established faith of the state. Because of the vast political power held by the German princes or electors, the established religion in each province of the Holy Roman Empire was determined by the ruling elector.

A great many of the early American settlements were formed by dissident religious minorities fleeing from the Protestant establishments of England, Ireland, and Scotland. Paradoxically many Europeans who fled to the New World to escape established religion agreed that Church and State should be combined in their new settlements. With few exceptions, those who fled religious persecution were no more tolerant of religious dissenters than were those from whom they had fled. Thus, established churches became the order of the day in early America.[1]

At the outbreak of the American Revolution in 1775, there were established churches in nine of the thirteen colonies.[2] The Anglican Church had been established in Virginia in 1609, in New York's lower counties in 1693, in Maryland in 1702, in South Carolina in 1706, in North Carolina nominally in 1711, and in Georgia in 1758.[3] The Congregational Church was established in Massachusetts, Connecticut, and New Hamsphire.[4] By the time that the Constitional Convention assembled in Philadelphia in the summer of 1787, however, only Georgia, South Carolina, Connecticut, Massachusetts, and New Hampshire had retained their religious establishments.[5] The Anglican Church had been disestablished in Virginia in 1786, and in New York, Maryland, and North Carolina during the Revolutionary War.[6] The elimination of established churches in the several States continued after the ratification of the Federal *Constitution* in 1788 and culminated in the disestablishment of the Congregational Church in Connecticut in 1818,[7] in New Hampshire in 1819,[8] and in Massachusetts in 1833.[9]

For those in the new United States who were concerned about the union of Church and State at the level of the national government the activities of James Madison and Thomas Jefferson in disestablishing the Anglican Church in Viriginia provided a useful legacy. Madison's "Memorial and Remonstrance Against Religious Assessments," written in 1785 in opposition to the use of Virginia's public funds to pay teachers of the Christian religion,[10] and Jefferson's

Footnotes at end of article.

"Bill for Establishing Religious Freedom" in Virgina, proposed in 1779 and enacted in 1786,[11] were immensely important documents to disestablishmentarians who urged the separation of Church and State. Both documents would be invoked more than 150 years later when in 1947 the United States Supreme Court first comprehensively interpreted the "Establishment of Religion" Clause of the First Amendment.[12]

The religious guarantees of the First Amendment to the *U.S. Constitution* provide that: "Congress shall make no law respecting *an establishment of religion* or prohibiting the free exercise thereof; . . ."[13] The Amendment as written expresses two distinct constraints on the federal state's involvement in religion—one concerns religious establishments and the other the individual's free exercise of religion. The thesis advanced here is that placed in their historical context—with due consideration to the *words and actions* of the initial framers of this Amendment, to the Congress that proposed it to the States, to the States that made it part of the *Constitution*, and to the United States Government bound by it—the two religious prohibitions of the First Amendment were designed to establish a separation of Church and the national State. This separation was to be ensured by denying to Congress the constitutional authority to pass legislation providing for the formal and legal union of any single church, religion, or sect with the Federal Government. Thus the preferential status of one church, religion, or sect—elevating it to an exclusive governmental position of power and favor over all other churches or religious denominations—would be prevented. In addition, this concept of separation of Church and the national State would constitutionally prohibit Congress from interfering with any individual's religious convictions. Consequently the separation of Church and the national State envisioned by the adopters of the First Amendment would leave the matter of religious establishments or disestablishment to the wisdom of the several States.

The words that the First Congress eventually shaped into the First Amendment and its "Establishment" Clause were proposed by James Madison in the House of Representatives on June 8, 1789.[14] Madison—very aware that several States had ratified the new *Constitution* with the understanding that a series of Constitutional amendments would safeguard certain human rights from encroachment by the national government—called upon the First House of Representatives to act with swiftness tempered by reasonable care. Madison feared that undue delay in proposing that a "Bill of Rights" be added to the recently adopted *Constitution* might lower the credibility of the new central government. Referring to the unenthusiastic constitutional ratification of several States, he told his colleagues in the First House of Representatives that their constituents ". . . May think we are not sincere in our desire to incorporate such amendments in the Constitution as will secure those rights, which they consider as not sufficiently guarded. The application for amendments come from a very respectable number of our constituents, and it is certainly proper for Congress to consider the subject, in order to quiet that anxiety which prevails in the public mind. Indeed, I think it would have been of advantage to the Government if it had been practicable to have made propositions for amendments the first business we entered upon; it would have stifled the voice of complaint, and made friends of many who doubted the merits of the Constitution. Our future measures would then have been more generally agreeably supported; but the justifiable anxiety to put the Government into operation prevented that; it therefore remains for us to take it up as soon as possible. I wish then to commence the consideration at the present moment; I hold it to be my duty to unfold my ideas, and explain myself to the House in some form or other without delay. I only wish to introduce the great work, and, as I said before, I do not expect it will be decided immediately; but if some step is taken in the business, it will give reason to believe that we may come to a final result. This will inspire a reasonable hope in the advocates for amendments, that full justice will be done to the important subject; and I have reason to believe their expectation will not be defeated. . . ."[15]

Although several of the State Ratifying Conventions urged the protection of diverse individual rights, amendments guaranteeing freedom of religion were commonly suggested. These suggestions clearly indicated that the States wanted to prevent the establishment of a national religion or the elevation of a particular religious sect to preferred status as well as to prohibit interference by the national government with an individual's freedom of religious belief. For example, the Maryland Ratifying Convention proposed an amendment stating: "That there be *no national religion established by law*; but that all persons be equally entitled to protection in their religious liberty."[16] The Virginia Ratifying Convention proposed a "Declaration or Bill of Rights" as amendments to the *Constitution*, of which Article Twenty (adopted on June 27, 1788) stated:

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that *no particular religious sect or society ought to be favored or established, by law, in preference to others.*"[17]

The New York Convention similarly declared:

"That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that *no religious sect or society ought to be favored or established by law in preference to others.*"[18]

Resolutions passed by the North Carolina and Rhode Island Conventions echoed Virginia's "Bill of Rights."[19]

Madison's original wording of the Establishment of Religion Clause also supports my thesis concerning the separation of Church and the national State: "The Civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established,* nor shall the full and equal rights Conscience be in any manner, or on any pretext, infringed."[20] After the lengthy discussion the House essentially referred Madison's religious proposals—and all of the many other prohibitions restricting the national government that he sought to be put into the *Constitution*—to a "Committee of the Whole on the state of the Union."[21] Ultimately on July 21, the House of Representatives voted to establish a Select Committee empowered to consider the subject of Madison's proposed constitutional amendments and to report back to the full House.[22] Madison was appointed one of the Committee's members.[23] Interestingly, however, Madison believed that the religion amendment was not really necessary to prevent the Federal Government from establishing a national religion for he considered the national government to be merely one of delegated powers. In his judgment the general government could not legislate in this field since no power to establish a national religion had been delegated to it. Madison expressed this view before the Virginia Convention on June 12, 1788, prior to its ratification of the *Constitution:*

"Fortunately for this Commonwealth, a majority of the people are decidedly against any exclusive establishment—I believe it to be so in the other states. There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation. I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom. . . . The United States abound in such a variety of sects, that it is a strong security against religious persecution, and its is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest."[24]

When one examines the tests of the resolutions offered at the State Ratifying Conventions and the original Madison draft of the Establishment Clause, it becomes obvious, on the face, that they are concerned with preventing the Federal Government from establishing a national religion or raising one religion above the others.

Another concern of the State Ratifying Conventions was to protect freedom of conscience in religious matters. This issue is also evident in Madison's draft resolution submitted to the House. On a motion by Fisher Ames of Massachusetts, the House, acting as a "Committee of the Whole," on August 20, 1789, altered Madison's draft proposal to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[25] Essentially, the House adopted Ames's versions of the "Establishment" and "Free Exercise" Clauses, which were sent to the Senate where they underwent further revisions.[26]

The Senate version that initially emerged from debate on September 3, 1789, was: "Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience."[27] By the end of the day's deliberation, however, the Senate through further amendments had changed the Clauses to read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof."[28] After further Senate debate on September 9, 1789, the Senate version which was sent back to the House ultimately read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[29]

The conference committee for the Bill of Rights included Madison and Roger Sherman of Connecticut, among others from the House, and a contingent from the Senate. The committee reported the "Establishment" and "Free Exercise" Clauses in their current form in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This compromise language was accepted by the House on September 24, 1789, and by the Senate the following day.[30]

The words "respecting" and "establishment" are key terms in the Establishment Clause and should therefore be examined further. The word "respecting," which is synonymous with "concerning, regarding, about, anent," indicates that the First Amendment did not prohibit an establishment of religion; rather it prohibited Congress from making any law about, concerning, or regarding an establishment of religion. Since a national religious establishment did not exist at the time of the Amendment, it became unconstitutional to provide one after ratification.

As documented above, Madison took this position before the Virginia Convention on June 12, 1788. Ironically, Roger Sherman of Connecticut, when debating Madison in the House of Representatives, questioned the need for an Establishment of Religion Clause on this same Madison premise. On August 15, 1789, the debate in the House records that "Mr. Sherman thought the Amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make *religious establishments*; . . ." [31]

Madison's reply makes clear that some in the States feared that the "Necessary and Proper" Clause of Article I Section 8 might be used to "establish a religion." [32] Without doubt, Madison's retort to Sherman indicates that at that time in his career, Madison, the initial proponent of what eventually became the Establishment Clause, took the word "establishment" to mean a governmental religion such as a state church.

"Mr. Madison said, he apprehended the meaning of the words to be, that Congress should *not establish a religion, and enforce the legal observation of it by law,* nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as *might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended,* and he thought it as well expressed as the nature of the language would admit." [33]

Despite the clarity, that the concern of those who framed the Establishment Clause was addressed to the possible imposition of a *single church or religion* by the Federal Congress, an argument still noted and/or advanced by some scholars is that the European model of a constitutional single established religion *was not* what was feared by the "Fathers" of the First Amendment. This argument has been succintly summarized as follows:

"The phrase 'establishment of religion' must be given the meaning that it had in the United States in 1791, rather than its European connotation. In America there was no establishment of a single church, as in England. Four states had never adopted any establishment practices. Three had abolished their establishments during the Revolution. The remaining six states—Massachusetts, New Hampshire, Connecticut, Maryland, South Carolina, and Georgia—changed to comprehensive of 'multiple' establishments. That is, aid was provided to all churches in each state on a nonpreferential basis, except that the establishment was limited to churches of the Protestant religion in three states and to those of the Christian religion in the other three states. Since there were almost no Catholics in the first group of states, and very few Jews in any state, this meant that the multiple establishment practices included every religious group with enough members to form a church. It was this nonpreferential assistance to organized churches that constituted 'establishment of religion' in 1791, and it was this practice that the Amendment forbade Congress to adopt." [34]

Assuming, but not conceding, the validity of this broad interpretative statement about American religious establishments, this pluralistic view of the concept of established religion cannot, for the following reasons, be reconciled with the historical facts that brought the Establishment Clause into existence.

First, the resolutions of the State Constitutional Ratifying Conventions from Maryland, Virginia, New York, North Carolina, and Rhode Island, understood in their historical context, all urged a constitutional amendment prohibiting *a single national religious establishment.* [35]

Second, in response to these State Ratifying Convention's requests, James Madison introduced his original draft of the Establishment Clause which on its face is clearly designed to foreclose a national religion, *not religions.*

Third, Madison's interpretation given to Roger Sherman during the House's August 15, 1789 debate as to what the House's Select Committee's Report meant (regarding its recommended prohibition "that no religion shall be established by law") indicates clearly that Madison believed Congress was being denied the power to "establish a national religion" *not religions.* [36]

Fourth, the final wording of the religious clauses of the First Amendment—"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"—shows the intent to prevent a single and not some pluralistic national religious establishment. As Michael J. Malbin has noted:

"Had the framers prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reasons for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.

"Thus, through the choice 'an' over 'the,' conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress reenacted in 1789. One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: 'Religion, morality, and knowledge,' the clause read, 'being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged.' This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run sectarian schools." [37]

On the basis of the resolutions from the Ratifying Conventions in Maryland, Virginia, New York, North Carolina, and Rhode Island, the origin Madision text concerning religious prohibitions placed on national governmental power in the First Amendment, and Madision's own interpretation during debate in the House of Representatives of the prohibitions concerning religion, I conclude that Madison and the other supporters of these prohibitions wished to deny Congress the power to establish a national religion. Congress was to have no power to elevate by law any religion or religious sect to a preferred status, and it was barred from interfering with individual liberty of religious conscience. These limiting principles of the First Amendment are also supported by the early and widely respected scholars of the Federal *Constitution,* Joseph Story and Thomas McIntyre Cooley. [38]

An Associate Justice of the United States Supreme Court from 1811 to his death in 1845 and concurrently a professor at the Harvard Law School from 1829, Story presented in his miltivolume work on the *Constitution* an authoritative statement of attitudes toward the religious prohibitions of the First Amendment during the early days of the Republic, when "flesh" was being put on the "skeleton" that was the *Constitution.* Appointed by Madison to the Supreme Court, Justice Story held substantially the same view of the religion clauses of the First Amendment as did the former President when Madison was the Amendment's initial author and champion in the House debates. Story's *Commentaries* saw the First Amendment as prohibitive of a Federal establishment of a national Church or the official preference of a particular religion or religious sect, but not hostile to the encouragement of religion:

"The real difficulty lies in ascertaining the limits to which government may rightfully go in fostering and encouraging religion. . . ." [39]

"Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the States 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. [40]

"The real object of the First 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. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion* which had been trampled upon almost from the days of the Apostles to the present age. . . ." [41]

Like Story, Cooley did not consider that the First Amendment, or even state constitutions mandated absolute separation of Church and State. Citing many activities by which the state was aiding religion, Cooley saw no violation of any American constitutional principle as long as the national government treated all religions equally. In *Constitutional Limitations,* first published in 1868, Cooley warned that exclusive aid to a particular religious denomination or sect without doubt is the evil precluded by the principles of the U.S. *Constitution.* Con-

cerning relations between the Federal and State Governments and religion, he wrote:

But while thus careful to establish religious freedom and equality, *the American constitution contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet in finite and dependent beings.* Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, at the same time that we in contrition when visited with the penalties of His broken laws. *No principle of Constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the Army and Navy; and when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by exempting houses of religious worship from the taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of any one denomination or sect; but the power to do any of these things will not be unconstitutional, simply because of being susceptible to abuse. . . .*"[42]

Finally, that the First Amendment originally left the entire issue of governmental involvement in religion to the States is extremely clear. When ratified in 1788, the *Constitution* contained no prohibition against individual state religious establishments; indeed, some States that ratified the *Constitution* had such religious establishments at the time of ratification, some of which continued to exist even after ratification of the First Amendment until they were ended by the States themselves (as in the case of Massachusetts which finally did so in 1833).

Supporting this view of the constitutional independence of the States in religious matters, President Thomas Jefferson in 1808 noted:

"I consider the Government of the United States as interdicted by the Constitution from meddling with religious institutions, their doctrines, discipline or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, *but from that also which reserves to the States the powers not delegated to the United States.* Certainly no power to *prescribe any religious exercise, or to assume authority in religious discipline,* has been delegated to the general government. *It must then rest with the State,* as far as it can be in any human authority."[43]

Justice Story's *Commentaries on the Constitution* indicate that he also believed the First Amendment left religious establishments in the hands of the States:

"It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, *that it was deemed advisable to exclude from the national government all power to act upon the subject.* The situation, too, of the different States equally proclaimed the policy as well as the necessity of such an exclusion. In some of the States, Episcopalians constituted the predominant sect; in others, Quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. *Thus the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State Constitutions;* and the Catholic and the Protestant, the Calvinist, the Armenian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship."[44]

From the above documentation, I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite.

FOOTNOTES

[1] For a general discussion of the early development of religious establishments in the North American Colonies, see Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States,* rev. ed. in I vol. (New York: Harper and Row, 1964), chap. 1, pp. 3-29; and Leo Pfeffer, *Church, State, and Freedom,* rev. ed. (Boston: Beacon Press, 1967), chap. 3, pp. 71-90.

[2] Stokes and Pfeffer, *Church and State,* pp. 36-37.

[3] Richard B. Morris, ed., *The Encyclopedia of American History,* Bicentennial ed. (New York: Harper and Row, 1976), p. 820.

[4] Stokes and Pfeffer, *Church and State,* p. 37.

[5] Morris, *The Encyclopedia of American History,* p. 824.

[6] Ibid., p. 824; and Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), p. 293. There is disagreement as to when Maryland, Georgia, and South Carolina disestablished the Anglican Church. Stokes and Pfeffer (p. 37) claim that these States continued their establishments through 1787, while Morison (p. 293) claims that the Anglican Church was disestablished in "Maryland and the Carolinas" during the war. Morris (p. 820) has the Georgia establishment abolished in 1789, while Stokes and Pfeffer (p. 37) have it ended during the war. These discrepancies may be due to different criteria used to make the judgment as to when disestablishment was accomplished.

[7] Morris, *The Encyclopedia of American History,* p. 824.

[8] William H. Harris and Judith S. Levey, eds., *The New Columbia Encyclopedia* (New York: Columbia University Press, 1975), p. 1922.

[9] Morris, *The Encyclopedia of American History,* p. 824.

[10] Saul K. Padover, ed., *The Complete Madison* (New York: Harper and Brother, 1953), pp. 299-306.

[11] Saul K. Padover, ed., *The Complete Jefferson* (Freeport, New York: Books for Libraries Press, 1969), pp 946-49.

[12] *Everson v. Board of Education,* 330 U.S. 1 (1947).

[13] This Amendment, passed by Congress on September 25, 1789 and ratified by three fourths of the States, went into effect December 15, 1791. Emphasis added.

[14] *Annals of the Congress of the United States, The Debates and Proceedings in the Congress of the United States,* Vol. I, Compiled from Authentic Materials, By Joseph Gales, Senior (Washington: Gales and Seaton, 1834), p. 434; hereafter referred to as *Annals of the Congress.*

[15] Ibid., p. 427.

[16] Jonathan Elliott, *debates on the Federal Constitution,* Vol. II (Philadelphia: J.B. Lippincott Co., 1901), p. 553. Emphasis added.

[17] Ibid., Vol III, p. 659. Emphasis added.

[18] Ibid., Vol. I, p. 328. Emphasis added.

[19] Ibid., Vol. I, p. 334; Vol. IV, p. 244.

[20] *Annals of the Congress,* Vol. I, p. 434. Emphasis added.

[21] Ibid., Vol. I, p. 450.

[22] Ibid., pp. 664-5.

[23] Ibid., p. 665. The other members of the House appointed to the Select Committee were Messrs. Vining, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot and Gale.

[24] Padover, *The Complete Madison,* p. 306. Emphasis added.

[25] *Annals of the Congress,* Vol. I, p. 766.

[26] For an excellent detailed report and analysis of the debates in the House and Senate regarding the Establishment Clause, see Michael J. Malbin, *Religion and Politics, The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978).

[27] Ibid., p. 12.

[28] Ibid., pp. 12-13.

[29] Ibid.

[30] Ibid., pp. 13-14.

[31] *Annals of the Congress,* Vol. I, p. 730. Emphasis added.

[32] U.S. *Constitution,* Art. I Sec. 8. The last paragraph provides the Congress with the power: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers [all the enumerated powers of the Congress in Article I Section 8], and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

[33] *Annals of the Congress,* Vol. I, p. 730. Emphasis added.

[34] C. Herman Pritchett, *The American Constitution,* 3rd ed. (New York: McGraw-Hill; 1977), p. 401. This pluralistic interpretation of American "established churches" appears to be at odds with Morris, *The Encyclopedia of American History,* and Morison, *The Oxford History of the American People,* both of which indicate, that for the most part, single "establishments" existed in the States which had established churches. See also Pfeffer, *Church, State, and Freedom,* p. 73.

[35] See the text at fns. 16-19, supra.

[36] See the quote in the text at fn. 33, supra.

[37] *Malbin, Religion and Politics,* pp. 14-15.

[38] "With Story, he [Cooley] ranks as the most influential commentator on the Constitution." Morris, *The Encyclopedia of American History,* p. 1005.

[39] Joseph Story, *Commentaries on the Constitution of the United States,* 2nd ed., Vol. II (Boston; Charles C. Little and James Brown, 1851), Sec. 1872, p. 591. Emphasis added.

[40] Ibid, Sec. 1874, p. 593.

[41] Ibid, Sec. 1877, p. 594, Emphasis added.

[42] Thomas M. Cooley, *Constitutional Limitations* (Boston; Little Brown and Co., 1868), Chap. XIII, pp. 470-71. Emphasis added.

[43] Paul L. Ford, *Life of Jefferson,* Vol. 9 (Cambridge, Mass.: A. W. Elson and Co., 1904), p. 174. Emphasis added.

[44] Story, *Commentaries on the Constitution,* Sec. 1879, pp. 596-97. Emphasis added. Story relies heavily on *Lloyd's Debates,* which are frequently cited, for these conclusions.

A Restatement of the Intended Meaning of the Establishment Clause in Relation to Education and Religion

(By John Remington Graham*)

I. INTRODUCTION

On January 1, 1802, President Thomas Jefferson wrote Mssrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson an innocent and gracious letter:

Gentlemen: The affectionate sentiments of esteem and approbation which you are so good to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies soley between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your association, assurances of my high respect and esteem.[1]

Mr. Jefferson did not intend his decorative metaphor of "a wall of separation between Church and State" to be a precise formulation of legal principle, as the full text of the letter—a social event, not an executive proclamation—plainly shows. Given the general and figurative sense of the words as used in context, the phrase is little more than a literary flourish of innocuous significance. Yet some have seized upon this language as if it were a venerable landmark carved in legal stone. The Danbury Baptist Letter, which is much discussed, but seldom read, is supposed to demonstrate that the establishment clause prohibits any contact between government and religion.[2]

If that abstract principle were taken as universal law in this country, and strictly applied without qualification, it would be unconstitutional for any organ, branch, magistrate, or employee of the government of the United States, or of any state, by any official act or use of property, to promote, protect, or acknowledge any usage, belief, practice phrase, symbol, institution, conduct, or undertaking having even a remotely religious meaning. It would be unconstitutional to permit a magistrate of government to take an oath instead of an affirmation when assuming the duties of office. The preamble of the Minnesota Constitution, which says that the people are grateful to God for the gift of freedom, would be legally improper. Our coinage would reflect an unconstitutional trust in God. Pope John Paul II, who was welcomed with full state honors in communist Poland, could not be permitted to say Mass on the government-owned mall near the Washington Monument. Naturally, it would be unconstitutional to tax church property differently than other private property. And, of course, any governmental tax relief or spending tending to foster the welfare of religious schools, or to ease the burdens of parents sending their children to such institutions, would be constitutionally prohibited.

There are only a few ways out of this culde-sac. We must either grant that all these implications follow from the notion of separation of church and state as a constitutional principle and see to it that the supposed demands of the first amendment are fully enforced, or we must acknowledge that complete separation of church and state is politically too demanding, and escape the more unpopular consequences, case by case, by using some pragmatic formula made as palatable as possible by judicial rhetoric. We can, however, take another, more fundamental approach: we can reexamine the original meaning of the establishment clause to determine whether there is something radically unsound about the separation doctrine. This article will pursue the last mentioned alternative.

One particularly difficult problem under the establishment clause is caused by various statutes or other governmental acts designed to promote religion as a phase of education. In this area the cases have applied the idea of separation of church and state with varying degrees of rigor. An examination of some of the more sweeping separationist decisions of our day provides insight into what absolute separationism really means.

In *Tudor* v. *Board of Education*,[3] the New Jersey Supreme Court held that a public school board resolution permitting free distribution of copies of the King James Bible to students on the premises of primary and secondary schools, after hours and with parental consent, violated state and federal guarantees against governmental establishment of religion. The King James Bible is one of the greatest works of religious literature ever published. If free distribution of a book containing the thrilling story of David and Goliath were unconstitutional, the same would hold for an anthology including the tale of St. George and the Dragon. Suppose some organization wished to distribute copies of the *Bhagavad Gita* in which the General Arjuna and the Lord Khrishna discourse on the eternal significance of battle. Or suppose the work were Plato's *Phaedo* in which Socrates eloquently discusses life after death before drinking hemlock. If the New Jersey Supreme Court were right, it would appear inescapable that authorized distribution of any of these works to children on public school premises, even after hours and with parental consent, would be unconstitutional. This construction would be manifestly correct if the establishment clause required literal separation of, hence no contact between, government and religion.

In *Committee* v. *Nyquist*,[4] the United States Supreme Court struck down a state law providing for direct grants to qualifying primary and secondary nonpublic schools for maintenance and repair of facilities and equipment, tuition reimbursement to parents of children attending such private schools, and certain income tax relief to such parents. Against this backdrop, in *MCLU* v. *State*,[5] the Minnesota Supreme Court held unconstitutional, as a law respecting an establishment of religion, an intricate statutory scheme of tax credits for parents paying educational costs to send their children to nonpublic primary and secondary schools. The statute disallowed credits to the extent of costs for material used in religious instruction, and was designed to make it financially possible for lower-income families to enjoy private education, whether secular or sectarian, thereby reducing the cost of public schools borne by taxpayers of the state. The opinion of the court was written by Justice Todd, who considered certain precedents of the United States Supreme Court, particularly *Committee* v. *Nyquist*, and concluded that the measure was invalid. The crucial principle, or *ratio decidendi*, was that if a statute has not a primary tendency, but any tendency to advance the interests of religious denominations, it cannot pass constitutional muster. Justice Yetka wrote in a concurring opinion,

"I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. . . . Our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court of our land has spoken, and this court must adhere to its word."

Perhaps the Minnesota Supreme Court was right in its reading of the *Nyquist* case. If there can be no relationship at all between government and religion, there simply can be no direct or indirect public support of private education. Justice Yetka, therefore, may have been perfectly accurate in his comments concerning such a doctrine.

Since *Committee* v. *Nyquist* there has been further litigation, as if to ask the Justices of the United States Supreme Court if they really meant what they seemed to say. The answer has been an equivocal "maybe, maybe not."[7] While a simplistic doctrine of church-state has the virtue predictability, its great vice is an eventual government monopolization of education.

II. PRELIMINARY CRITIQUE

A central premise of the judicial trend being discussed is that tax support of public education is religiously neutral. A few years ago, Dr. Onalee McGraw published an incisive challenge to this assumption.[8] She claims that evidence indicating a fall of academic standards in public schools can be explained by the infusion of humanistic values into the curricula of instruction. She argues that children in public schools are systematically taught situation ethics, ethical relativism, and the like; and that these systems actually displace or compete with traditional, natural-law values of Judeo-Christianity. She contends further that this process of indoctrination has been so over-emphasized in some places as to exclude adequate focus on reading, writing, factual knowledge, logical reasoning, and mathematics.

This proposition should no doubt be considered with caution. And in the view of this writer, it misses the mark to condemn the religious philosophy of Humanism, which rests on a tradition as old as Epicurus, and to extol the precepts of Judeo-Christianity. But it is relevant to note that a distinctive moral system is taught with the help of public funds in some public schools. In a proper legal sense, Humanism[9] is a religion,[10] and a venerable one at that. Educators are not to be condemned for attempting to teach children how to think in moral terms. No. education would be sufficient, or

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Footnotes are at the end of the article.

even possible, without instruction concerning what ought to be, as well as what is.

This consideration provides us with a key. The first amendment ordains that there shall be "no law respecting an establishment of religion, or prohibiting the free exercise thereof." The word "religion" appears only once. Manifestly, the establishment clause and the free exercise clause deal with the same subject matter. On the face of the Constitution, whatever amounts to "religion" for purposes of free exercise is also "religion" for purposes of no establishment.[11]

Section 6(j) of the Universal Military Training and Service Act of 1951, and the Military Selective Acts of 1967 and 1971[12] provided exemption from conscription to persons who are conscientiously opposed to participation in war in any form by reason of religious training and belief. This provision has been interpreted to include persons who are opposed to all war, whether they believe in God or not, even if they belong to no religious sect, and who express their deeply held beliefs solely in worldly terms.[13] While these cases ostensibly turn on statutory construction rather than constitutional principle, an idea of "religion" defined in the broadest possible way emerges. This legal conception of religion is measured by depth of belief concerning right and wrong, and is at least influenced by the religion clauses of the first amendment.

Given a definition this broad, "religion" must permeate virtually all phases of human life including education. Thus defined, religion cannot be extracted or separated from any system of education, public or private. Why, therefore, should anyone be surprised to learn that Humanism should be taught or that some other religious influence, such as Hindusim or Judeo-Christianity, should be felt in public schools? Even if a teacher avoids the use of theological language or symbols in the classroom, he will, should, and must teach something about the foundations of right and wrong—and this amounts to "religion" in the legal sense under consideration here. If we take religion as the foundation of conscience, so as to encompass the whole human family, all education is religious, even in public schools. And why should this not be so? Religion does not cease to be taught simply because the institution is a so-called "nonsectarian" or "public" school. Religion and education are permanently married, regardless of the name of the institution, the source of revenues, or the method of instruction.[14]

Clearly, then, there is some rudimentary deficiency in current judicial trends concerning the application of the establishment clause to statutes which provide for various kinds of public support of private schools. In order to untangle the difficulty, we must go to the roots of the problem. With that end in view this article will attempt, principally by analysis of legal history, to propound a number of propositions:

(1) The establishment clause is a corollary of, and historically developed from, the free exercise clause, which, in turn, evolved as a step beyond the Toleration Acts. (2) Both the free exercise clause and the establishment clause were premised on and presuppose the existence of God. (3) The notion of religion is exactly the same for purposes of both the establishment clause and the free exercise clause, *viz.*, recognition of the ultimate foundation of conscience and morality. (4) The free exercise clause guarantees governmental noninterference with peaceable religious freedom. (5) The establishment clause, aside from doing away with an official state religion supported by public monies, guarantees government neutrality toward or equal protection of all religions peaceably practiced. (6) In the constitutional sense, all persons have a religion, whether or not they believe in a personal deity or spiritual reality. (7) In the constitutional sense, religion inescapably permeates every phase of human life in which questions of right and wrong must be decided. (8) Whether public or private, sectarian or secular, all education is necessarily religious in the eyes of the law. (9) Support of education, including the religious phases thereof, is a proper function of government, so long as religious neutrality is observed. (10) Governmental assistance to private education, even if sectarian, is not only constitutionally permissible, but constitutionally obligatory, to the extent that such aid is requisite to achieve governmental neutrality in matters of religion.

III. THE HISTORICAL FOUNDATIONS

A. Principles of constitutional interpretation

Initially, it will be well to consider a time-honored rule of constitutional interpretation which was stated by Justice Story as follows:

"The safest rule of interpretation, after all, will be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure the ends proposed."[15]

We should heed the words of Justice Gray that the "scope and effect of . . . many . . . provisions of the Constitution are best ascertained by bearing in mind what the law was before."[16] Thus Justice Black reminds us, "It is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[17] Moreover, it has traditionally been held that the Constitution must be interpreted according to what was intended and cannot be changed save by amendment.[18] To be sure, there are other theories of constitutional interpretation suggesting that the courts should be free to change the fundamental law by interpretation reflecting their own views of public policy; but, this writer substantially agrees with the position of Professor Raoul Berger[19] and other contemporary scholars that the proper aim of constitutional interpretation should be ascertainment of the intended meaning, no more or less. It is beyond the scope of this article to do more than examine the intended meaning of the religion clauses of the first amendment, particularly the guarantee against the establishment of religion as applied to the problem of public support of private education, and to seek out along those lines a more equitable solution than currently exists under contemporary case law.

B. The law of the mother country

In the aftermath of the struggle between Pope Clement VII and King Henry VIII, the Crown became the head of the Church of England. As such the King could convene, prorogue, restrain, regulate, or dissolve all ecclesiastical synods or convocations, nominate and license elections of bishops, veto episcopal elections contrary to his nominations, and vest his bishops with temporal powers and estates; moreover, he could decide in dernier resort all appeals in ecclesiastical causes, both temporal and spiritual.[20] Parsons of the established church were entitled to the enjoyment of public lands, or glebes, and compulsory taxes, or tithes, under episcopal, and ultimately royal jurisdiction.[21]

The common law condemned the crimes of apostacy (renunciation of previously professed Christianity),[22] heresy (denial of essential doctrines of the church),[23] blasphemy (contemptuous reproaches of sacred personages),[24] as well as witchcraft, conjuration, sorcery, enchantment, and the like.[25] Anciently, the punishments for these offenses were severe: in Query XVII of *Notes on Virginia*, Thomas Jefferson observed that the common-law crime of heresy was punishable by burning at the stake pursuant to the writ of *haeretico comburendo*.[26]

In due course these old common-law crimes were displaced by more moderate acts of Parliament.[27] By the Statute of 9 & 10 William III, Chapter 32 (1699), it was provided that if any professed Christian denied the truth of the religion, the divine authority of the Bible, the divinity of the persons of the Holy Trinity, or either the singularity or the existence of God, he could lose capacity to hold any public office or trust on conviction for the first offense. And, on conviction for the second offense, one could lose capacity to be a suitor in court, a guardian, executor, legatee, or purchaser of lands, and could also suffer imprisonment for three years. By the Statutes of 1 Edward VI, Chapter 1 (1547), and 1 Elizabeth I, Chapter 1 (1558), reviling the Sacrament of the Lord's Supper was made punishable by imprisonment; while the Statute of 1 Elizabeth I, Chapter 2 (1558), provided that a minister speaking in derogation of the Book of Common Prayer was subject to the loss of benefice and imprisonment. Moreover, those who refused to attend services of the established church or other approved denominations were made liable to suffer money forfeitures.[28]

Protestant dissenters from the Church of England were at one time subject to a number of disabilities and restrictions.[29] But by the Act of Toleration[30] in 1689, such dissenters were relieved of these disabilities and restrictions if they did not deny the Holy Trinity, took oaths or affirmations against popery, registered their congregations with the established church, and kept open meeting houses, and if their teachers acknowledged one true Christian faith as well as the doctrine of sacraments. Catholics, by contrast, were simply not tolerated. They were subject to heavy penalties and disabilities for hearing Mass, teaching school, keeping arms, and even for traveling to London. Their parents were deported and could be made liable for high treason should they stay in the kingdom for three days without conformity to the established church.[31]

The established church was also protected by the Corporation Act,[32] which act ordained that no person could hold public office, unless within the previous year he received the Sacrament of the Lord's Supper according to the rites of the Church of England and took an oath of allegiance to the Crown. The Test Act,[33] provided that no person could hold civil or military office unless he took an oath of allegiance to the Crown and made a formal declaration against transubstantiation.

C. The law of Colonial Virginia

Virginia was settled primarily by adherents of the Church of England. It is therefore not surprising to see colonial statutes similar to those of the mother country. During the embryonic days of the colony, a statute was enacted for compulsory taxation to support the established church.[34] Other early statutes barred Catholics from holding office, [35] and Quakers from the colony.[36] At this same period of colonial infancy, there was statutes enacted to regulate the ministry and proprietary operations of the established church, [37] and even the manner by which subjects were to keep the sabbath.[38] All of these laws were amplified and continued up to the outbreak of the American Revolution.

There was also a general reenactment of the Statute of 9 & 10 William III, which punished certain forms of heresy and apostacy, together with adoption of the Toleration Act of 1 William & Mary, which gave limited relief to Protestant dissenters.[39]

From the foregoing survey, we may deduce several characteristic features of the laws of England and colonial Virginia respecting matters of religion:

(1) The King, who was chief executive magistrate of the civil state, was also temporal head of an established church. (2) The established church held public lands, and was supported by taxes paid by all persons without regard to religious belief. (3) The established church was regulated by public law. (4) Failure to conform to the doctrines and practices of the established church, however peaceable, could result in criminal penalties, civil disabilities, and monetary or proprietary forfeitures, unless excused by acts of toleration.

D. The 16th article of the Virginia Bill of Rights

These were conditions which the Virginia Convention of 1776 sought to abolish at the dawn of independence. This extraordinary assemblage, born in the throes of revolution, was the concrete, legal form of the new sovereign, which had displaced King George III who had violated the fundamental law, made war on his American subjects, constructively fled from the realm when his royal governor left by sea, and therefore abdicated by operation of the same principle of the English Constitution that wrought the ouster of King James II in 1688.[40] On June 29, 1776, Virginia formally seceded from the British Empire.[41]

A few weeks before this act of secession, the convention framed the famous Virginia Bill of Rights of 1776, which set forth essential conceptions of a republican form of government. Only the 16th Article need concern us here. As originally proposed, the provision read:

"That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under color of religion, any many disturb the peace, the happiness, or the safety of society; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." [42]

On motion of James Madison, the proposal was amended, then adopted on June 12, 1776, so as to read:

"That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence; and, therefore, that all men are entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." [43]

The original draft of what became the 16th Article guaranteed the "fullest toleration in the exercise of religion." The final version guaranteed the "free exercise of religion." This little twist of phrase might first go unnnoticed, but it was of enormous significance: it denoted a transition from the toleration of religious dissent in the presence of an established church associated with the sovereign power of the civil commonwealth, to equal and peaceable exercise of religious freedom, entirely disassociated with any established church. The seminal idea was that "free exercise," which was a step beyond "toleration," included an implicit abolition of the "establishment." And this seminal idea was amplifed by the Virginia General Assembly in the ensuing years.

At the time of independence, there was still an established church in Virginia which enjoyed glebes and tithes. And the old colonial laws punishing various acts of religious dissent were still on the books.

The first General Assembly under the Virginia Constitution of 1776 immediately repealed all laws penalizing heresy, apostasy, and nonconformity; exempted all dissenters from payment of tithes and taxes in support of the established church; and suspended the operation of the most recent colonial statute providing for compulsory taxation to support the established church.[44] The suspension of such tax liability was continued further, then abolished in 1779.[45]

Still, the established Church of England in Virginia held title to public property, and was the official or established church of the Commonwealth. There was naturally a question of whether even this greatly reduced condition was lawful under the 16th Article of the Virginia Bill of Rights. Moreover, there was the question regarding the validity of the general assessment, a proposed scheme whereby every citizen should be compelled to pay a tax in support of some religious denomination of his own choosing. The great repealer of the first General Assembly [46] expressly provided, "That nothing in this act contained shall be construed to affect or influence the said question of assessment." These matters were subsequently dealt with by the Virginia General Assembly in the controversies over general assessment, church incorporation, and glebes liquidation.

E. The Virginia statute of religious freedom

In 1779 a bill was introduced in the Virginia General Assembly which provided substantially that Christianity, in one form or another, was the established religion of the Commonwealth; that all denominations of Christianity were entitled to the same peaceable rights or worship and practice; that all denominations of Christianity were entitled to incorporation and official recognition, so long as they subscribed to certain fundamental tenets, such as the existence of God and the divine authority of the Bible; and that every freeholder should pay compulsory taxes to support the clergy and places of worship of the Christian denomination of his choice.[47] This bill, after some debate, died without action one way or another.

But a similar bill, only slightly watered down, was introduced in the Virginia General Assembly on December 2, 1784.[48] The preamble of the bill read as follows:

"Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society, which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens as from their circumstances and want of education cannot otherwise attain such knowledge; and it is judged such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved, by abolishing all distinctions of preeminence amongst different societies or communities of Christians. . . ." [49]

The initial debate was very heated and resulted in a layover of the bill to the 1785 session, largely for the purpose of securing the sentiments of the people of the Commonwealth. A great many petitions and memorials were presented on the subject, the most notable of which was the Remonstrance composed by James Madison.[50] Madison's Remonstrance eloquently condemned the proposed general assessment as contrary to the guarantee of free exercise of religion in the 16th Article of the Virginia Bill of Rights, as against the spirit of the American Revolution, as unnecessary to the support of the civil government, as tending to frustrate the emergence of religious truth, and as contrary to the interests of public policy and domestic peace.

One noteworthy passage in the Remonstrance said,

"The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature, an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their minds, cannot follow the dictates of other men. It is unalienable, also, because what is a right towards man is a duty towards the Creator. It is a duty of every man to render to the Creator such homage, and such only, as he believes is acceptable to him. This duty is precedent, both in order of time and in degree of obligation to the claims of civil society." [51]

It is apparent that Madison saw religion as a duty to God commanded by conscience, more fundamental than the duty to government commanded by law. In other words, Madison perceived religion as the paramount duty of conscience. It will be recalled that in 1776 the General Assembly of Virginia abolished all laws which punished the profession of atheism.[52] Yet it is indisputable that this enactment was constitutionally required by, and intentionally passed in, obedience to the 16th Article of the Virginia Bill of Rights, which was premised on the existence of God. Here we have a curious legal paradox; by law God exists, yet by the same law a citizen may deny the existence of God. In order to resolve this difficulty, it is necessary to say that God has a legal existence for all persons, whatever their philosophical or theological beliefs may be.

It is undeniable that all persons have some primary obligation of conscience drawn by some moral idea or impulse. Whatever the moral imperative or standard may be in specific terms for any individual, such must be his God for legal purposes. In other words, God may be legally defined as,

and must have been considered by Madison to be, the foundation of conscience.

The 16th Article of the Virginia Bill of Rights said that religion is duty to God according to conscience. If we translate this into the legal framework just proposed, religion will be seen as following the ultimate dictates of conscience; or, to say the same thing in another way, the fundamental decisions of conscience—those which pertain to the most important questions in life—are religious acts in the eyes of the law. The right to make and execute such determinations, free from governmental interference, was protected by the 16th Article of the Virginia Bill of Rights, subject only to the limitation that no such religious or conscientious act be harmful to others.

When the Virginia General Assembly met in late 1785, not only was the bill for general assessment defeated, but a bill previously authored by Thomas Jefferson was introduced, and then passed on January 19, 1786.[53] This was the famous Virginia Statute of Religious Freedom. The enactment began with an invocation: "Almighty God hath made the mind free." This was in perfect conformity with the invocation of the "Laws of Nature and Nature's God" in the Declaration of Independence as drafted by Jefferson and adopted, without alteration in this respect, by the Second Continental Congress.[54] Far from ordaining a separation of church and state, the Virginia Statute of Religious Freedom proclaimed a cooperative friendship between the two: the existence of God who made the mind free was the statutory reason for governmental recognition of religious freedom.

Furthermore, this governmental friendship with religion was not to be confined to Christianity, but was to extend to all religions equally. Hence Jefferson said in his autobiography:

"Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion," the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination." [55]

Surely Jefferson would likewise have endorsed the very expansive definition of religion recognized relative to the military draft in cases such as *United States* v. *Seeger*[56] and *Welsh* v. *United States*.[57] There was a well-implemented system of compulsory military service in Jefferson's day, and it appears that conscientious objection to such duty was actually considered as a right included in the free exercise of religion.[58] Hence, the then existing constitutions of New Hampshire, New York, Vermont, and Pennsylvania all made reference to those who were "conscientiously scrupulous of bearing arms;" [59] whereas the constitutional ratification conventions of Virginia, North Carolina, and Rhode Island, in dealing with the same problem, mentioned those who were "religiously scrupulous of bearing arms." [60] This is another way in which the virtual identity of religion and conscience was made manifest for legal purposes. If in law religion is conscience, then in law everyone has a religion. If in law God is the foundation of conscience, then in law everyone has a God. These very broad and interacting ideas of God, religion, and conscience were part of American legal usage when Madison and Jefferson forged the principles which became the free exercise and establishment clauses of the first amendment.

The preamble of the Virginia Statute of Religious Freedom reasoned that, since God is the author of religious truth and human freedom, religious truth will best become known if left uninterrupted by governmental coercion and favoritism. The main body of the statute was short and to the point:

Be it enacted by the General Assembly. That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[61]

The statute simply said that a man cannot be taxed to support an official religion or an established church, and shall not be subject to any civil disability or criminal punishment on account of his peaceable and free exercise of religion. It did not lay down a sweeping and absolute rule that government and religion may never, under any circumstances, come into contact. It did not say that government may not encourage all religions on equal terms.

The concluding section or paragraph of the statute said that religious freedom is a natural right. This necessarily means that it is a right of all human beings, including those who do not believe in personal deity or spiritual reality. The universality of religion contemplated by the statute serves to equate religion and conscience for legal purposes.

Finally, it should not be overlooked that the establishment clause of the Virginia Statute of Religious Freedom was simply a further exposition and clarification of the free exercise clause of the Virginia Bill of Rights. What one clause said about God, religion, and conscience was carried over into the other without alteration.

F. The Incorporation Act and Liquidation of the Glebes

On January 5, 1785, the Virginia General Assembly passed an "Act for Incorporating the Protestant Episcopal Church," [62] which detailed the manner of deciding church questions, appointing officers and vesteries, selecting and removing ministers and holding church property, etc. The statute specifically reserved to the reorganized church the glebes or lands acquired for the old establishment at public expense prior to the revolution. Just after the enactment of the Virginia Statute of Religious Freedom, the evangelical denominations petitioned against the Incorporation Act because the Act maintained a degree of state control over church government and did not disturb church ownership of state-acquired property. On January 8, 1787, after a spirited controversy, the Virginia General Assembly passed a repealer [63] which abolished all state regulation of churches but left ownership of the glebes in the hands of the Episcopal Church.

The final stage of political controversy centered around the old glebes. The evangelical denominations argued that, "The colony had unjustly taxed dissenters to furnish glebes and churches for the establishment; the remedy was confiscation of the ecclesiastical property for the benefit of all citizens equally." [64] By way of defense, the Episcopal Church contended that "the contest for the glebes, churches, and chapels is not of a religious nature, but is to be decided by the rules of private property." [65] After years of struggle, the Virginia General Assembly succumbed to evangelical pressure, and, on January 20, 1802, passed a Confiscatory Act [66] providing for the liquidation of the glebes as they became vacant by reasons of the deaths of incumbent parsons, and stipulating that liquidation proceeds were to be used for the benefit of the poor and other public purposes.

The validity of the measure was raised by suit in equity brought by the vestrymen and church wardens of a vacant parish to enjoin sale of the glebe.[67] They contended that the church corporation could not be deprived of vested property rights retroactively and without just compensation, a perfectly sound proposition having nothing to do with religion as such. The Chancellor dismissed the bill, and an appeal was taken. The four judges of the Virginia Supreme Court were divided equally, so the decree of dismissal stood. Judges Tucker and Roane held essentially that the title of the established church was good before the revolution, having been vested by public donation; that the established church was dissolved by operation of the revolution; that, by reason thereof, title reverted back to the successor of the donor, which could only be the Commonwealth of Virginia; and that, therefore, the complainants had no title on which to sue for relief. Judges Carrington and Lyons answered that the revolution neither dissolved the established church, nor divested title to its lands then held, inasmuch as the governmental alteration of that time did not affect private property previously vested, and could only have prospectively changed the legal relation between the government and the church. Since the complainants were representatives of the legitimate successor to the old corporation, Judges Carrington and Lyons insisted that relief should have been granted.

A similar case reached the United States Supreme Court,[68] in which Justice Story held that the vestry of a vacant parish was the legitimate successor to the pre-revolutionary corporation. The church, the Court held, was not dissolved by the Revolution and continued to hold title to the parish glebe. Therefore, it was adjudged that the vestry was entitled to equitable intervention. That would seem to indicate final judicial condemnation of the Confiscatory Act.

Notwithstanding the downfall of the Confiscatory Act for technical reasons, there can be no doubt of the constitutional principle, applicable at least prospectively, that no church or religious body may hold state-donated property acquired by state tax revenue. This is a perfectly natural inference from the Virginia Statute of Religious Freedom.

G. Derivation of the religion clauses of the first amendment

Before attempting a summary of the foregoing, it would be well to consider how and why the free exercise and establishment clauses of the first amendment to the United States Constitution derive from, and therefore recapitulate respectively, the 16th Article of the Virginia Bill of Rights and Virginia Statute of Religious Freedom. In adopting the Federal Constitution, the Virginia Convention of 1788 annexed to its Ordinance of Ratification a long declaration of rights or proposed amendments to the new charter of the Union.

The 20th of these declarations reads as follows:

"That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." [69]

It is obvious that the language just quoted was paraphrased from the 16th Article of the Virginia Bill of Rights, save for the last clause which was a brief recapitulation of the Virginia Statute of Religious Freedom. James Madison, who had been a prominent member of the Virginia Convention of 1788, and one of the authors of the 20th declaration under consideration here,[70] was elected to the United States House of Representatives in the First Congress. There he ably executed his promise to secure a Federal Bill of Rights in order to secure the acceptance of the new Constitution.[71] Among his proposals in Congress on June 8, 1789, was an article which read:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." [72]

After further deliberations,[73] the House proposed an amendment which said, "Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed." [74]

Following a joint conference between the House and Senate, Congress proposed, on September 25, 1789, the full Federal Bill of Rights as we now have it, including the language, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." [75] Congress was full of rejoicing. Lest there be any doubt of an intent not to ordain a complete separation of government and religion, let it be well noted that the House and Senate passed the following resolution on September 26, 1789:

"Resolved, That a joint committee of both Houses be appointed to wait on the President of the United States, to request that he should recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceable to establish a constitution of government for their safety and happiness." [76]

What then did Thomas Jefferson mean by the words "a wall of separation between Church and State" in the Danbury Baptist Letter? His reference was to the establishment clause in the first amendment and the Virginia Statute of Religious Freedom. In other words, he was not writing about a general prohibition of contact or interaction between government and religion at all. The so-called "wall of separation" simply meant that there shall be no official religion of state supported by public revenues, that there shall be no penalties for the peaceable and free exercise of religion, and that all religions shall enjoy equal protection and friendship of the government.

There is another point about the Danbury Baptist Letter which is often overlooked. Jefferson plainly stated that the religion clauses of the first amendment were designed to protect the "rights of conscience." He certainly had in mind a sweeping idea of religion, an idea large enough to encompass the fundamental or primary demands of conscience for all men. Religion in this sense is so pervasive that it simply cannot be literally separated, or severed of all contact, from the operations of government. Jefferson's "wall of separation," therefore, should not be taken as a rigid rule that the government must never touch the religious affairs of men.

IV. GENERAL SUMMARY AND SPECIFIC FOCUS ON EDUCATION

From this survey, we may take a panoramic view of the intended meaning of the religion clauses of the first amendment:

(1) The civil government may not be associated with an official, preferred, or established church or religion; (2) Nevertheless, government and all forms of religion equally stand in perpetual friendship; (3) No church, ministry, or place of worship run by a particular denomination may be supported by tax revenues, or hold property purchased with tax revenues; (4) No legal disabilities, forfeitures, or penalties of any kind may be consequent on the peaceable exercise of religion; (5) God has a legal existence, which may be officially acknowledged, and a legal definition, *viz.*, the foundation of conscience; (6) For legal purposes, religion is recognition, in word or deed, of God or the ultimate basis of morality; And (7) the civil government may not regulate the peaceable execise of religion including the conduct of the religious affairs of any church, ministry, place of worship, or individual.

When the free exercise and establishment clauses are put into proper perspective, it is easier to understand why active governmental support of private and sectarian education is not unconstitutional, even where religious denominations are tangibly aided, so long as overall religious neutrality is observed.

For reasons already explained, this writer considers the intended meaning of the word "religion" in the first amendment to be a practical synonym of conscience or recognition of the ultimate basis of morality. If this theory is right, then religion, in the legal sense, is so broad as to be an inevitable permeation into virtually all phases of human life and society. One can be a militant atheist, or a devout churchman; but, in either case, there is a religion in the eyes of the law, for both undeniably seek a final measure of right and wrong. Given this premise, it follows that religion, whether so designated or not, is a necessary unavoidable part of education, as much so as physics or grammar. Hence, if tax subsidies, credits, deductions, or other direct or indirect relief to education were uncontitutional whenever religion of one kind or another were promoted, such support of all education would be uncontitutional. It is most evident that our constitutional guarantees of religious liberty were never intended to inhibit the activities of civil government in promoting education. From this it follows that public support of private education, whatever its religious content may be, is generally consistent with our fundamental law.

Nevertheless, in the interests of fairness to those who think otherwise, let it be postulated that the framers of the first amendment had a much narrower idea of religion in mind than this writer has supposed. Assume, for the sake of discussion, that our forefathers considered religion to be a personal relationship between man and spiritual God, a theological deity as such. In that case, an atheist or humanist would have no religion in the legal sense. All or most persons who do not believe in a Supreme Being would find no legal protection in the religion clauses of the first amendment. It is hard to imagine how this could be reconciled with the lofty thinking of James Madison and Thomas Jefferson. And, assuming that this narrow idea were the intended meaning of the word 'religion" in the first amendment, and that the intended meaning must control constitutional interpretation, some very large changes would have to be made in our contemporary jurisprudence. Out would go cases such as *Torcaso,*[77] *Seeger,*[78] and *Welsh.*[79]

But even assuming all this, what of the problem of public support of private education under the intended meaning of the establishment clause? It is clear enough that the establishment clause originated from the Virginia Statute of Religious Freedom, which merely prohibited tax support of religious worship or ministry, and prohibited legal disabilities or penalties imposed on account of individual religious belief or practice. The statute did not mention, much less prohibit, public support of any kind of education. If it said anything about this subject by way of implication, it said that public support of all education shall be as equal as possible, regardless of whether the teaching reflects one sectarian viewpoint or another. Even given the narrow view of religion here supposed, a denial of public money on account of religious content or perspective built into an educational curriculum would be a legal discrimination against religion, a civil disability, which the Virginia Statute of Religious Freedom and the establishment clause of the first amendment were designed to forbid.

In any event, tax support of a church, ministry, or place of worship was considered constitutionally different from tax support of education. As evidence of this, we may note the satisfaction of a clergyman in Virginia around 1850, who commented that, despite the Virginia Statute of Religious Freedom, "Religion and morals have not suffered. Four colleges, two theological seminaries, and the University have been added to the public institutions for instruction." [80] Indeed, Thomas Jefferson, the author of the Virginia Statute of Religious Freedom, clearly recognized "moral philosophy" as a normal part of public education in Query XV of *Notes on Virginia.*[81] And in a letter of April 21, 1803, to Dr. Benjamin Rush, Mr. Jefferson outlined his view that the principles of Judeo-Christianity—"religion" properly so-called—were an indispensible part of the evolution of moral philosophy. [82] As father of the University of Virginia, Jefferson certainly envisioned religion as an important phase of education.[83]

The Northwest Ordinance,[84] which was reenacted by the same Congress that framed the Federal Bill of Rights, contained two noteworthy provisions: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments . . . . Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[85] It is impossible to reconcile this language with an interdiction of direct or indirect tax support of education simply because some part thereof is religious.

Finally, let it be observed that the Statutes of 1 James I, Chapter 4 (1603) and 3

James I, Chapter 5 (1606) provided that if a parent sent his child aboard for education under Roman Catholic auspices he would forfeit 100 pounds. Likewise, the Statute of 3 Charles I, Chapter 2 (1628) ordained that if a parent sent his child abroad for education in a Catholic institution to strengthen the religious conviction of the youth, he would incur important substantial disabilities and forfeit all his property.[86] While it is doubtful whether these statutes were ever received in America,[87] the 16th Article of the Virginia Bill of Rights and the Virginia Statute of Religious Freedom, thus also the free exercise and establishment clauses of the first amendment, were certainly designed to prohibit features of this kind.

In other words, our constitutional mandate of religious liberty prohibits government from imposing financial or other penalties on parents who have chosen to send their children to schools organized or managed by some religious denomination. Parents plainly have the fundamental right to choose the religious exposure of their children in education,[88] without suffering government-created discrimination. Granting this, it is surely unconstitutional not to accommodate in some degree those parents who send their children to private schools for the sake of religious exposure.

When government establishes a system of public education, expenditures for fixed costs simply must be paid by public revenues raised from taxable wealth without regard to other considerations. Otherwise, the undoubtedly legitimate end of government-maintained education would be altogether impossible.

But government expenditures to pay the variable costs of education are another matter. As to these, there is room for flexibility to account for different kinds of education, including public, private, secular, and sectarian forms. With respect to such outlays, the aim of government should be to equalize the benefit made available to each student within each category for which support is provided, regardless of religious exposure in educational experience. While mathematical precision is not achievable, this should be required to the extent practically possible, because all education is religious, and all religions are properly equal before the law.

Therefore, if a parent sends his child to a private school, the child should receive the same practical equality of variable-cost benefit from public money as any other child in the community. On the other hand, the parent should not be required to pay more for that practical equality of variable-cost benefit than his tax liability would otherwise indicate. To whatever extent tax adjustments or school subsidies may be needed to achieve this end, in the admittedly rough terms in which government must operate, they ought to be granted. The reason is that, without these aids, the parent would suffer a money forfeiture in consequence of selecting the religious exposure of his child's education, the same sort of thing that the Statutes of 1 and 3 James I imposed, and that the first amendment was intended to forbid.

V. CONCLUSION

Our constitutional guarantee against the establishment of religion has been warped by a destructive dogmatism built upon a mild figure of speech. The establishment clause, in its intended meaning, prohibits any government-ordained religion, but does not require absolute separation of church and state. In its primary thrust, the establishment clause was intended to guarantee equal protection of all religions peaceably practiced. When considered in relation to its origins, the establishment clause not only allows public support of private schools, including those which are explicitly and formally religious, but actually requires the government to do whatever is reasonably necessary to assure that all proper education is treated with practical equality. The support of education is certainly a legitimate function of government, and all education is religious. Therefore, our judiciary should jettison all traces of separationism in passing on the constitutionality of statutes supporting private education. Instead, it is time for the courts of this country to consider statutes supporting public and private education together, and to adopt a new constitutional standard that will assure practical equality of variable-cost government support for each child, regardless of the religious exposure in his educational experience, and without imposing unnecessary burdens on parents who have made a conscientious choice of nonpublic schooling. This is true freedom of religious, and a blessing the first amendment was intended to secure.

FOOTNOTES

[1] The Life and Selected Writings of Thomas Jefferson 332-33 (A. Koch & W. Peden eds. 1944) [hereinafter cited as Selected Writings].

[2] The paradigm judical statement of the separation doctrine is the so-called "Everson Rule" in Everson v. Board of Educ, 330 U.S. 1(1947): ' Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religious, aid all religious, or prefer one over another." *Id.* at 15 (opinion of Justice Black).

[3] 14 N.J. 31, 100 A. 2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

[4] 413 U.S. 756 (1973).

[5] 302 Minn. 216, 224 N.W. 2d 344 (1974), *cert. denied*, 421 U.S. 988 (1975).

[6] 302 Minn. at 236, 224 N.W. 2d at 354-55 (Yetka, J., concurring).

[7] *See, e.g.*, Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980)(New York statute appropriating public funds to reimburse nonpublic schools for performing various services mandated by the State does not violate establishment clause if its purpose does not advance religion); Wolman v. Walter, 433 U.S. 229 (1977)(statute authorizing various forms of aid to nonpublic schools, most of which are sectarian, is not unconstitutional); Roemer v. Maryland, 426 U.S. 736 (1976)(statute providing public aid to qualifying colleges and universities does not violate first amendment's establishment clause); Meek v. Pittenger, 421 U.S. 349 (1975)(loans of instructional materials and equipment to nonpublic schools violates establishment clause). In an attempt to reconcile the notions of "separation of church and state" and "religious neutrality," the Court used a three pronged test, which had its apparent genesis in Lemon v. Kurtzman, 403 U.S. 602 (1971). According to this contemporary doctrine, to pass constitutional muster a statute must have an essentially secular purpose, must neither advance nor inhibit religion, and must not excessively entangle government with religion. *Id.* at 612-13.

[8] O. McGraw, Secular Humanism in the Schools: The Issue Whose Time Has Come (1976).

[9] *See* The Humanist Manifestos I and II (Prometheus Books 1976).

[10] *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127, 128-29 (D.C. Cir. 1957).

[11] *Cf.* Rutledge, J., dissenting in Everson v. Board of Educ., 330 U.S. 1 at 32. The United States Supreme Court has nevertheless adopted the contratextual position that "religion" is broader for purposes of free exercise than for purposes of establishment. Specifically, under present case law, "religion" in the free exercise clause means any deeply held belief system which determines right and wrong for an individual, whether theistic, nontheistic, agnostic, atheistic, or antitheistic. In the establishment clause, "religion" means a formal organization or institution which teaches or promotes a religious doctrine, program, ritual, or ideology as an integral part of its mission. For a helpful analysis of how the United States Supreme Court arrived at this curious position, see L. Tribe, American Constitutional Law 826-33 (1978).

[12] 50 U.S.C. app. § 456(j) (1968).

[13] Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). In the *Welsh* case, Justice Harlan proposed that the establishment clause, no less than the free exercise clause, required this result. 398 U.S. at 360 n.12.

[14] *C.f. Toscano, A. Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U.L. Rev. 177 (explores questions relating to whether the concept of religious neutrality required in the public schools is real illusory and suggests an alternative to the present religious doctrine).

[15] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610-11 (1842).

[16] *Ex parte* Wilson, 114 U.S. 417, 422 (1885).

[17] Adamson v. California, 332 U.S. 46, 72 (1947) (Black, J., dissenting) (quoting *Ex parte* Bain, 121 U.S. 1, 12 (1887)).

[18] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 154, 288 (1970) (Harlan, J., and Stewart, J., concurring in part and dissenting in part); Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 308 (Pa. 1795).

[19] *See* R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).

[20] 1 W. Blackstone, Commentaries * 279-80, 377-80.

[21] *Id.* at 383-87; 2 id. at 24-33.

[22] 4 *id.* at 42-44.

[23] *Id.* at 44-45.

[24] *Id.* at 59.

[25] *Id.* at 60-65.

[26] Selected Writings, *supra* note 1, at 274; 4 W. Blackstone, Commentaries* 46, 48.

[27] 4 W. Blackstone, Commentaries* 49-52.

[28] *See* Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments, 1558, 1 Eliz. 1, c. 2, § 4; Act to Retain the Queen's Majesty's Subjects in Their Due Obedience, 1581, 23 Eliz. 1, c. 1, § 5; Act for the Better Discovering and Repressing of Popish Recusants, 1606, 3 Jac., c. 4, § 27.

[29] 4 W. Blackstone, Commentaries * 53-54.

[30] Act of Toleration, 1689, 1 W. & M. 1, c. 18.

[31] *Id.* at 54-59.

[32] Act for the Well-Governing and Regulation of Corporations, 1661, 13 Car. 2, c. 1, § 12.

[33] Act for Preventing Dangers Which May Happen From Popish Recusants. 1672, 25 Car. 2, c. 2, §§ 2-10. Compare the Test Act with U.S. Const. art. VI, cl. 3: "[N]o religious Test shall ever be required as a Qualification to any Office or public trust under the United States." *Id.*

[34] 1 Virginia Statutes at Large 144, Act 9 (W. Hening comp. 1823).

[35] *Id.* at 268-69, Act 51.

[36] *Id.* at 532-33, Act 6.

[37] *Id.* at 241, Act 1.

[38] *Id.* at 434, Act 3.

[39] 3 *id.* at 358-59, ch. 30.

[40] 1 W. Blackstone, Commentaries * 152, 245.

[41] 1 Virginia Statutes at Large 50-51 (W. Hening comp. 1823).

[42] C. James, Documentary History of the Struggle for Religious Liberty in Virginia 62 (1900).

[43] *Id.* at 62.

[44] 9 Virginia Statutes at Large 164-65 (W. Hening comp. 1823).

[45] 10 *id.* at 111, 197.

[46] 9 *id.* at 164-65.

[47] H. Eckenrode, Separation of Church and State in Virginia 58-61 (1910).

[48] *Id.* at 99.

[49] C. James, *supra* note 42, at 129.

[50] *Id.* at 256-62 (appendix G).

[51] *Id.* at 256.

[52] 9 Virginia Statutes at Large 164-65 (W. Hening comp. 1823).

[53] 12 *id.* at 84, ch. 34; Selected Writings, *supra* note 1, at 311-13.

[54] Selected Writings, *supra* note 1, at 22.

[55] *Id.* at 47.

[56] 380 U.S. 163 (1965).

[57] 398 U.S. 333 (1970).

[58] *See, e.g.*, J. Graham, A Constitution History of the Military Draft 71-81 (1971).

[59] 4 American Charters, Constitutions, and Organic Laws 2455 (F. Thorpe ed. 1907); 5 *id.* at 2637, 3083; 6 *id.* at 3740-3741.

[60] 1 J. Elliot, Debates on the Federal Constitution 335 (1869); *Id.* Vol. 3 at 659; *Id.* Vol. 4 at 244.

[61] 12 Virginia Statutes at Large 86 (W. Hening comp. 1823).

[62] *Id.* Vol. 11 at 532, ch. 49.
[63] *Id.* Vol. 12 at 266, ch. 12.
[64] H. EKENRODE, *supra* note 47, at 130.
[65] *Id.* at 136, 142.
[66] *Id.* at 147.
[67] Turpin v. Locket, 10 Va. (6 Call) 113 (1804).
[68] Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815).
[69] 3 J. ELLIOT, *supra* note 60, at 659.
[70] *Id.* at 656.
[71] *See* B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 86-217 (1955). This reprints portions of Volume 1 of Gales & Seaton's Annals of Congress covering the debates leading to the proposal of the Federal Bill of Rights to the several states for adoption.
[72] *Id.* at 110.
[73] *Id.* at 60-62, 196, 209. For an excellent, recent analysis of the debates in the First Congress in 1789 leading to the formulation of the present language in the free exercise and establishment clauses of the first amendment, see M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE FRAMERS OF THE FIRST AMENDMENT (1978). The author seeks to demonstrate that individual members of Congress who participated in these debates, and whose remarks were preserved in Gales & Seaton's Annals of Congress, believed the religion clauses they were framing would not prohibit nondiscriminatory governmental assistance to all religions on equal terms, contrary to the so-called "Everson Rule," *supra* note 2.
[74] B. PATTERSON, *supra* note 71, at 86.
[75] *Id.* at 89.
[76] *Id.* at 216.
[77] 367 U.S. 488 (1961).
[78] 380 U.S. 163 (1965).
[79] 398 U.S. 333 (1970).
[80] C. JAMES, *supra* note 42, at 140.
[81] SELECTED WRITINGS, *supra* note 1, at 267.
[82] *Id.* at 566-70.
[83] *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U.L. REV. 645. *See also* Reed, J., dissenting in Illinois v. Bd. of Education, 333 U.S. 203, 245-47 (1947).
[84] Northwest Ordinance, ch. 8, 1 Stat. 51 (1789).
[85] *Id.*
[86] 1 W. BLACKSTONE, COMMENTARIES* 451.
[87] The Virginia Convention of 1776, which enacted the 16th Article of the Virginia Bill of Rights, also passed a general provision for the reception of English common law which said, "That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony." 9 VIRGINIA STATUTES AT LARGE 126, ch. 5 (W. Hening comp. 1823).

It is questionable whether the English statutes mentioned in the text could be characterized as general statutes in aid of the common law. But assuming they were, the reception provision above could countenance no more than the statutes of 1 and 3 James I. If received, these statutes of James were abolished by the 16th Article of the Virginia Bill of Rights enacted by the Virginia Convention of 1776, as enforced by the Virginia General Assembly in Chapter 2 of the Acts of October, 1776.
[88] Wisconsin v. Yoder, 406 U.S. 205, 222 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

IN DEFENSE OF RELIGIOUS AMERICA

(By Terry Eastland)

Religion in American life, Mr. Cadwell. We need it. That is the concluding line of a radio commercial which for some, perhaps providential, reason I have had occasion to hear several dozen times over the past year. It is not an advertisement for any particular religion, just religion itself, which presumably could be Christian or Jewish or Muslim or Hindu or—though I think the commercial's sponsors did not quite have this in mind—the Reverend Sun Myung Moon's. It is an innocuous ad, so ecumenical as to be able to effect no conversion to anything. But concerned as it is with religion in American life, the message serves beautifully as a kind of theme song for our times. It implicitly raises the question brought up by the activities of so many others in the past year, from Jerry Falwell to the American Civil Liberties Union: what should be the place of religion in American life? What, that is, should be the place of religion, not so much in the life of any one individual American as in American civil society?

Discussion of this question has not been especially enlightening. It has centered almost exclusively on the First Amendment, and the reflections on the First Amendment have themselves been unhelpful. Columnists and politicians have been content to repeat the mythology most famously (though not originally) articulated by Chief Justice Earl Warren when he said that the First Amendment "underwrote the admonition of Thomas Jefferson that there should be a wall of separation between church and state." The Chief Justice had a way with history, but for the sake of accuracy—and much else besides—it should be noted that Jefferson said what he said in 1802, when he was President, in a letter to the Danbury Baptists. However interesting Jefferson's thoughts may be, and however much we may wish today to regard his views as authoritative on church-state matters, this letter is simply not relevant to a consideration of the framing of the First Amendment and its original intention—unless of course Jefferson had been sitting in Congress in the summer of 1789 (in fact he was in Europe as Secretary of State and would not return until the autumn).

The invocation of Jefferson obscures history by implying that the Founding Fathers were hostile to religion, since in today's usage the idea of a wall connotes antagonism and suspicion between the two sides thus separated. As a matter of historical fact, the Founding Fathers believed that the public interest was served by the promotion of religion. The Northwest Ordinance of 1787, which set aside federal property in the territory for schools and which was passed again by Congress in 1789, is instructive. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind," read the act, "schools and the means of learning shall forever be encouraged."

It is only from history not from clichés about history, that we can understand what we once were as a nation in regard to religion, and what we have since become. Let me therefore start with these propositions: that there was a principal religion in American life from 1620 until roughly 1920; that this religion was Protestant Christianity; and that Protestant Christianity has been our established religion in almost every sense of that phrase.

The one sense in which Protestant Christianity was *not* established, of course, was as our national religion. There never has been a Church of the United States, complete with a bishop and supported by tax revenues, as in England. Nor can there be one: the First Amendment to the Constitution did make sure of that. But nothing *more* than that.

The intention of the framers of the First Amendment was not to effect an absolute neutrality on the part of government toward religion on the one hand and irreligion on the other. The neutrality the framers sought was rather among the sects, the various denominations. Accordingly, as Michael J. Malbin has shown, although there could be no national establishment of a sect, there could be state aid to religious groups so long as the assistance furthered a public purpose and so long as it did not discriminate in favor of some or against others; all sects, in other words, would have to be benefited.[1]

The perspective of colonial history in the period dating from the Great Awakening makes it all the more clear that the First Amendment could not have been meant to enforce neutrality by government as between religion and irreligion. The Society for the Propagation of the Gospel, a sort of missionary arm of the Church of England, had been in business in America since 1701. For three-quarters of the 18th century, and especially in the years just prior to the Revolution, a widespread religious attitude in America was fear—fear that the Crown would establish the Anglican religion. The principle of non-establishment of a particular denomination was a product of this historical period, and the First Amendment applied this principle at the national level. Throughout the late 18th and early 19th centuries the principle was similarly applied at the colonial and, later, the state levels. As at the national level, so at the state level: no one denomination was to be given state support; there had to be neutrality among sects.

Thus, if Anglicanism could not reign in a given colony or state, neither could Congregationalism. The Anglican establishments in Maryland, South Carolina, North Carolina, and Georgia were wiped out before 1776, and Virginia's died finally in 1802. Congregationalism held on long past 1791 in Massachusetts, Connecticut, and New Hampshire, but by 1833 had lost its privileged status in all of these states.

It should be noted that although these establishments were of different sects, they belonged to the same religious family tree—that of Protestant Christianity. This is hardly surprising. The original colonies were English, and their English settlers were primarily Protestant. The non-English minorities—the Scots, the Scotch-Irish, the French, the Dutch, the Swedes, the Germans—were also mostly Protestant. There were only a few Catholics, mostly in Maryland, and even fewer Jews. This relative mix would endure until well past the middle of the 19th century.

The heavily Protestant orientation of the churchgoers of early America should not obscure the fact that many if not a majority of Americans were unchurched in the 18th century. But with a very few exceptions these unchurched were not freethinking atheists or agnostics. Hence, while the principle of non-establishment could be extended to prohibit the establishment of one particular religion (and not just the sects within a religion), few people were sufficiently bothered, as a practical or theoretical matter, to make this extension. The prominent exception was Madison, who believed that Christianity should not be favored over any other religion. Yet even Madison agreed on the general proposition that so far as the public interest was concerned, religion itself was better than irreligion.

The particular sects, then, had been disestablished at the state level by 1833. But Christianity had not been, and would not be, until much later. In the early part of the

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[1] *Religion and Politics: The Intentions of the Authors of the First Amendment* (American Enterprise Institute, 1978).

19th century, states set up both by constitution and statute provisions declaring it the duty of all men "to worship the Supreme Being." States also regulated membership in Christian denominations, imposed fines for failure to fix the worship hour on Sundays, and even mandated that elected officials believe in "the Christian religion." [2]

State courts did their part to support the Protestant faith. In 1811 the New York state court upheld an indictment for blasphemous utterances against Christ, and in its ruling, given by Chief Justice Kent, the court said, "We are Christian people, and the morality of the country is deeply engrafted upon Christianity." Fifty years later this same court said that "Christianity may be conceded to be the established religion."

The Pennsylvania state court also affirmed the conviction of a man on charges of blasphemy, here against the Holy Scriptures. The Court said: "Christianity, general Christianity is, and always has been, a part of the common law of Pennsylvania . . . not Christianity founded on any particular religious tenets; nor Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men."

States also required the teaching of the Christian religion in state colleges and universities, and in prisons, reformatories, asylums, orphanages, and homes for soldiers. Furthermore, public aid was given to church-run hospitals and orphanages. Last, but certainly not least, many states required Bible reading and prayers in the elementary and secondary public schools.

Religion was far more integrated into the actual curriculum than these religious exercises might suggest. Textbooks referred to God without embarrassment, and schoolteachers considered one of their major tasks the development of character—an aim quite consistent, as we shall see, with America's brand of Protestant Christianity. The influence of William Holmes McGuffey (1800–1873), a Presbyterian educator and philosopher, was remarkable. His *Eclectic Readers* were published in 1836, and from that year until 1920—two years after Mississippi became the last state to institute a public-school system—his books sold more than 120 million copies, a total that put them in class with only the Bible and Webster's Dictionary. McGuffey's *Readers* stressed, as the Northwest Ordinance did, "religion, morality, and knowledge," in that order.

As with the public schools, so with almost every area of American life. The establishment of Protestant Christianity was one not only of law but also, and far more importantly, of culture. Protestant Christianity supplied the nation with its "system of values"—to use the modern phrase—and would do so until the 1920's when the cake of Protestant custom seemed most noticeably to begin crumbling. But before coming to that moment we should reflect on the content of the particular religion that held sway in American life for the better part of 300 years, and remark more precisely on the significance of its "cultural" establishment.

As a general metaphysic, Protestant Christianity was understood in ways Catholics and Jews and deists could accept. Not only Protestant Christians but most people agreed that our law was rooted, as John Adams had said, in a common moral and religious tradition, once that stretched back to the time Moses went up on Mount Sinai. Similarly, almost everyone agreed that our liberties were God-given and should be exercised responsibly. There was a distinction between liberty and license.

Beyond this it is possible to be much more specific. Protestant Christianity was Reformed in theology, Puritan in outlook, experiential in faith. It was also evangelical in its orientation toward the world. These propositions held true of not only the denominations of Puritan origin (such as the Congregational, Presbyterian, and Baptist churches) but also those with more highly qualified views on the issue of predestination (such as the Methodist church) and those we might today consider "High Church" (such as the Episcopal church). Almost everyone drank from the same reformation well, which happened to be the Westminster Confession of 1643. Reformation theology placed emphasis on the sovereignty of God and the depravity of man. It was a religion of the book—the Bible—that demanded the individual conversion of man and, in consequence, the living of a changed life.

This point had enormous social and political consequences. It is unlikely that a predominantly Catholic or Jewish America would have given birth to the type of society that eventually evolved by the late 18th century. The reason is that neither would have emphasized to the degree the American Puritans did the importance of personal development in the moral (and for them spiritual) sense of character formation. The Westminster Confession describes the preaching of the word as "an effectual means of driving them [sinners] out of themselves" and "of strengthening them against temptation and corruption, and of building them up in grace."

That is doctrine that will shape a man, and the shaping, molding emphasis of the American Puritans, the character-building emphasis, can even today be seen—literally seen—in needlework shops where samplers bearing the old, straightforwardly didactic Protestant American messages can be found. Often such messages take the form of reedited Bible verses (from the King James version). Scripture was not incidental to the Puritan American. It was to be considered, meditated upon, learned by heart. "As a man thinketh in his heart," says the Bible, "so is he." The Puritans did not think only with their heads.

The American Protestant characteristically was driven out of himself, not only into Christ but also into the world. Hence the description—"this-worldly ascetic"—so often applied to individuals in Reformed communities. The change in this history of Christianity that this phrase suggests is seismic. After Luther it was no longer necessary to withdraw from the world (and into a monastery) to serve God. A man could serve God in the secular world. ("What is the chief and highest end of man?" asks the first question of the Larger Catechism of the Westminster Confession. "Man's chief and highest end is to glorify God and fully to enjoy Him forever.") Every job had a purpose, every man a calling, a vocation, no matter how lowly or how exalted. Working in this world, furthermore, men could transform the society about them, as the New England Puritans tried to do in their Bible Commonwealths. Though these societies failed according to their own ideals, the impulse to change society remained and would manifest itself in numerous ways, including the voluntarism of the 19th century, which became such a mainstay of American life.

American Protestantism not only taught spiritual virtues but also the less heroic ones of sobriety, honesty, prudence, temperance, and diligence. In the context of these virtues, as Irving Kristol has often pointed out, capitalism made ethical sence. Protestantism was understood to tame and direct a man's interests, including his economic ones, toward worthy ends. Man was understood to be a steward upon earth, and he was to use his liberty and this talents responsibly (and diligently; there was to be no idleness, no sloth). There may be no more interesting text on this than Question 141 of the Larger Catechism of the Westminster Confession, which even as late as 1844 was described by Philip Schaff, a German writing on America's religious life, as "the reigning theology of the country." The question refers to the Eighth Commandment ("Thou shalt not steal") and asks what duties it requires:

The duties required . . . are: truth, faithfulness, and justice in contracts and commerce between man and man; rendering to everyone his due; restitution of goods unlawfully detained from the right owners thereof, giving and lending freely, according to our abilities, and the necessities of others; moderation of our judgments, wills, and affections, concerning worldly goods; a provident care and study to get, keep, use, and dispose of those things which are necessary and convenient for the sustentation of our nature, and suitable to our condition; a lawful calling, and diligence in it; frugality; avoiding unnecessary lawsuits, and suretyship, or other like arrangements; and an endeavor by all just and lawful means to procure, preserve, and further the wealth and outward estate of others, as well as our own.

This answer offers much to reflect on; there is, for instance, the implicit approval of both commerce and the creation of wealth, even of one's own wealth. But the principal concern is man's duty, which is to have moderating effects upon his commercial activities. Tocqueville observed that the law allowed the American people to do everything, but that there are things which their religion prevented them from imagining and forbade them to dare. Religion—the Protestant religion here described—was thus a major source of the virtues a nation conceived in liberty always would need. It shaped the society and the individuals within it. Protestant Christianity helped answer the oldest of political questions: what kind of people, having what kind of character, does a society produce?

Tocqueville therefore was right to say that religion was America's "foremost political institution." It was the branch of government that the Constitution, based on self-interest and envisioning a commercial Republic, obviously could not create. Yet it was the branch essential to the maintenance of the Republic. It provided a check on the liberty guaranteed by our conventional political institutions. It was responsible for the character of the people. And as this "informal" branch of government, as our "foremost political institution," Protestant Christianity enjoyed its most significant form of "establishment."

In the past sixty years, we have witnessed the disestablishment of this religion. One could argue that it was bound to happen. Good American theory—as given by Madison—holds that the more factions the better for the Republic's chances of survival. This theory applies not only to economic inter-

[2] For this and following references, see Harold Berman, "The Interaction of Law and Religion," *Humanities in Society*, Spring 1979.

ests but also to religious ones. Despite the fact that the nation had been settled by Protestants, other religious peoples could settle here, too, and eventually they did. The great immigrations from Southern and Eastern Europe after the Civil War brought millions of Catholics to the United States, and by the end of the 19th century a sizable number of Jewish and Eastern Orthodox communities were also flourishing.

Meanwhile, something was happening to the old Protestantism itself. Evangelical Protestant Christianity (revitalized by the Second Awakening in the early years of the Republic) had held on strongly throughout the first half of the 19th century, but after the Civil War the tendencies toward Arminianism—i.e., the belief in divine sovereignty and human freedom—that had been present even in the 18th century became far more pronounced.

On the one hand, a liberal variety of Protestantism developed. Liberal theology had little interest in Original Sin; indeed sin to it was nothing more than mere error. Liberal Protestantism emphasized instead man's freedom and his natural goodness. Dogma and the sacraments were slighted, and there was immense optimism about the human race. Influenced by Kant, liberal Protestants reduced Christianity to morality; they had no prophetic voice, to speak of (or with). Liberal Protestantism was an accommodation to culture. H. Richard Niebuhr perhaps best described its God as One "without wrath" Who "brought men without sin into a kingdom without judgment through the ministrations of a Christ without a cross."

Liberal Protestantism was not the only accommodation to culture. More conservative Protestant—the keepers of the old religious flame—proved to be poor stewards of it. The old Protestantism descended into revivalistic orgies, as brought to us most sensationally by Billy Sunday. Christianity was presented as something dulcet and sentimental, and as often as not it was allied to the pursuit of profit. Frequently the old Protestantism was served up as a civil religion—a heresy, as Jonathan Edwards, but not Billy Sunday, would have recognized. Here too, and not surprisingly, dogma was neglected. A remark by Dwight Moody's perhaps best captures this. "My theology!" he exclaimed, when asked about it. "I didn't know I had any."

In the 1920's H. L. Mencken would acidly but correctly assert that "Protestantism is down with a wasting disease." One of the deepest reasons for its condition was that the Enlightenment had finally made its way to America. By the end of the 19th century the higher biblical criticism had disturbed the Protestant theologians' confidence in their ultimate authority, the Bible. So had the modern sciences, not only the physical sciences (especially biology in the form of Darwinism) but also the newer, social sciences. Truth no longer seemed absolute but relative to time and place, and the insights into personality and society provided by psychology and sociology seemed at least as plausible as those found in the Bible.

The half-decade following the Civil War had been the great age of urbanization. The rise of the city had also seen for the first time in American history the development of an intellectual class, and it was not kind to the old Protestant faith. By the 20's it had become intellectual fashion not to believe in God and, if one were a writer, to attack "Puritanism."

With the great immigrations, the decline of the old Protestant religion, and the rise of an intellectual class not merely indifferent but hostile to religion, the stage had been set by the 1920's for the cultural disestablishment of the old faith. Indeed, it had begun earlier. The end of World War I in 1918 had inaugurated a period of laxity in morals and manners. This is typically what happens after wars, but the decade of the 20's eventually would prove to be a dramatic break from the past. For it was not followed by a recovery of the old morals and manners, as also typically happens after social upheavals; the Victorian era stayed firmly in the past. Church attendance declined throughout the 20's. People lost their fear of Hell and had less interest in Heaven. They made more demands for material fulfillment.

Such demands, of course, are as American as the Declaration of Independence, which after all sanctified the idea of the pursuit of happiness. That idea owed more to the Enlightenment than to the Bible; certainly it did not sail to America aboard the Mayflower. Since the Declaration of Independence America had held its commitments to liberty and to virtue in tension. By the 20's it was clear the tension had begun to resolve itself in favor of liberty. Americans now insisted, as William Leuchtenburg has noted, not only on the right to pursue happiness but also on the right to possess it. The 20's saw the beginnings of the installment-buying plan; it is impossible to imagine such a purchasing scheme in the American culture of 200 or even 100 years earlier.

Since the 20's the disestablishment of the old Protestant religion has taken place most obviously in the intellectual, governing, bureaucratic, and cultural classes, and to a lesser but no less real and increasing degree in the rest of society. Today the disestablishment is perhaps most easily detected on the college campus. Logical positivism may have long ago fallen out of favor among philosophers, but as a cultural attitude among intellectuals and academics it is still going strong. Godtalk (the literal meaning of theology) is not fashionable, not even, it sometimes seems, in a college chapel.

The campuses of the old Protestant culture emphasized the importance of the Christian faith. Now their chapels still stand, but university policies have changed. There is probably no more striking instance of this than at Princeton University, over which both Jonathan Edwards and John Witherspoon once presided. Last year Princeton went looking for a new Dean of the Chapel. A Presbyterian of deep commitment and faith had retired, and his retirement provided the occasion for a reevaluation of the Dean's function. A trustee report came forth with a new job description: henceforth the Dean should be a person of "deep religious faith" but "above all, he or she must be personally gracious and open, and his or her own religious commitment must include sensitivity to the vulnerability of human finitude and the particularity and relativity of the views he or she espouses." The clauses following "above all" say everything that needs to be said about the distance Princeton has traveled.

Other evidences of disestablishment abound. Today the old idea that law has its roots in the Judeo-Christian ethic, as was believed at the Founding and throughout most of American history, is no longer much discussed, let alone believed in by many American legal philosophers and judges. The public philosophy of America, as Harold Berman has pointed out, has in the past two generations "shifted radically." Law is in theory no longer religious but secular; no longer moral but political and instrumental; no longer communitarian but individualistic. (People increasingly engage in "unnecessary lawsuits.") It is no wonder that Aleksandr Solzhenitsyn, at Harvard for the commencement address three years ago, left his audience stunned when he spoke of law in a religious context.

Meanwhile, liberty, like law, has been severed from its religious basis. What Jefferson once called the "firm conviction" in the minds of Americans that their liberties derive from God is hardly so firm anymore, certainly not among political scientists, columnists, television personalities, and others who influence public opinion. Having been given its own existence, ontologically speaking, liberty fairly runs riot now. The distinction between liberty and license transmitted to us by the old Protestant culture has faded almost completely among the educated classes. Consider again the college campus, where the old doctrine of *in loco parentis* is out of fashion. Administrators now run their campuses as if there is no God, since virtually everything is permitted, Probably the most libertine societies in America today exist on those very campuses that were originally the creations of the old Protestant culture.

To be sure, many other parts of America are closing fast on the campuses. It is the style nowadays not only among the college-educated but also among many blue-collar workers to be economically conservative but socially and morally liberal. This, translated, means balance the budget but decriminalize marijuana and cocaine and let us have abortion on demand. If the liberalism of the 60's has a definite legacy, it is found in the far more liberalized and hedonistic lives many Americans, including many older Americans, and indeed many political conservatives, now lead.

The "Me-Decade" has been well chronicled. Perhaps less obvious, but no less significant, is the change in ethical *thinking* that has occurred throughout society. A book could be written on what has happened to the idea of character. People in authority—teachers, parents, and even ministers—resist the fact that they are in authority. They will not "impose" their values; the idea is to let the young "clarify" *their* "values" (now considered as relative as any matter of taste). Moral education is no longer rooted in the virtues of courage, temperance, prudence, and the like. It is full of form but empty of content. What matters is that you felt sure the "option" you have chosen for yourself is the right one for you. I have seen a course in "values clarification" offered to adults in a Presbyterian Sunday School curriculum—and as an "option," no less!

Perhaps because the old imperative of "America the Beautiful"—confirm thy soul in self-control"—has become too hard to follow, ethical teaching, while studiously neutral about personal life, is assiduously assertive in social matters. Where once the major emphasis was on tidying up the individual soul, on making it conform to reality, now the focus has shifted to the external world, to tidying up the laws that regulate the public lives of man and man (or woman). Where people, whether of secular or religious disposition, seem to feel most comfortable, and certainly most confident, is in talking about "social injustice" or "racism" or "poverty" or "exploitation." Recently I joined a panel at a major university on the subject of religion and virtue. A par-

ticipant who was a professor of theology centered most of his remarks on "corporate sin." I don't recall his once mentioning the idea of virtue, let alone any particular virtue. Sometimes it is hard to find a difference between what ministers and theologians say and what many secular intellectuals say.

This, then, is the picture so far of an America that has experienced the cultural disestablishment of its old religion, the dissolution of its once "foremost" political institution. Consideration of a few trends within the Supreme Court will help complete the picture.

In 1947 the Supreme Court, in *Everson* v. *Board of Education of Ewing Township*, said the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers." This new doctrine of neutrality not only would seem to forbid the establishment of a religion—as Madison would have had it—but also the establishment of religion in general over non-religion and thus irreligion.

With its doctrine of neutrality, the Court has denied substantial public aid to elementary and secondary church-related schools. And by striking down prayers and Bible readings and now, this past fall, even the posting of the Ten Commandments in the public schools, it has acted according to an implicit doctrine that the public schools should be secular—and "value-free."

In 1961, in *Torcaso* v. *Watkins*, the Court so enlarged the definition of religion that an observer might say irreligion had now become a religion. The Court decreed that neither a state nor the federal government can "constitutionally pass laws nor impose requirements which aid all religions based on a belief in the existence of God as against those founded on *different beliefs*" (emphasis added). A footnote listed "Ethical Culture" and "Secular Humanism" among other examples of "religions" founded on "different beliefs."

In other contexts the Court has said that virtually anything may qualify as a "religion," so long as the "religious person" believes in whatever he believes in with, as Justice Black put it, "the strength of traditional religious conviction." This definition of religion celebrates individual conscience. It is hardly surprising that in cases involving "privacy" the Court has reduced public restrictions on private choice (as with its abortion decision in 1973). The legal trend here, like the cultural trend, has been toward a pronounced individualism in matters of religion and morals.

These trends of the Court round out the portrait. We are all "pluralists" now. And it should be stipulated that this is not altogether a bad thing. I doubt that any serious religious believer would wish a return to the days of intolerance that were an admitted ill of the old Protestant culture. But people who take religion seriously—and I mean here religion that has social and historical dimension, not merely something you might believe with "the strength of traditional religious conviction" in the midst of a Saturday night drunk—will find much in this picture that is disturbing. For the disestablishment of the old Protestantism has meant defeats not only for Protestants but for Catholics and Jews as well.

By contradicting the historical meaning of the establishment clause of the First Amendment, the Court has said, in effect, that promotion of religion is not in the public interest. Daniel P. Moynihan has correctly written that the recent decisions based on the establishment clause are "an intellectual scandal," and it is perhaps not too much to hope that the Court will one day reverse itself on this matter. Meanwhile, however, the severing of both law and liberty from their historic rooting in religion has serious and more immediate implications. Instrumentalists may argue that obedience to law can be brought about solely through the threat of coercive sanctions, but, as Berman has written, what is far more important is "the tradition of being law-abiding, which in turn depends upon a deeply or passionately held conviction that law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life."

As for the loss of the religiously-grounded distinction between liberty and license, we have all witnessed the proliferation of rights with no concomitant responsibilities that has been the result. With traditional religion now pushed to the margin of our public life, not only thanks to the Court's doctrines of neutrality and secularism but also, and more importantly, thanks to the pedagogy of school and college teachers alike, religion is less able to exercise its historic role as a political counterweight, as the voice of constraint and responsibility.

The shift in ethical thinking away from character formation toward personality adjustment and values clarification on the one hand, and social problems on the other, is perhaps the most disturbing change of all. The emphasis on virtues that the old Protestant culture provided was precisely what the Founding Fathers achnowledged their new Constitution could not provide. And yet the Founders also know that just these virtues were what the best thinkers in antiquity had thought necessary to the maintenance of a republican order. If the old evangelical Protestantism had a special fire in it that burned the ancient virtues into the souls of men, the virtues themselves were not special to that faith. For these were virtues agreeable to Catholic and rabbinical tradition, to the Deists of the Founding period, to the Greeks and Romans. The old Protestant religion understood, as ancient philosophy did, that politics is ultimately about the cultivation of character. It is unclear today that our modern culture even understands this point, let alone wants to deal with it.[3]

Even so, it is answered, by default if not by design. Protestant Christianity is no longer America's "foremost political institution," but this fact does not obviate the need for a system of values in which Americans can move and live and have their commercial (and now leisure) being. If our morality is not engrafted upon Protestant Christianity, it will be engrafted on something else—God only knows what. The brilliance of the Founding Fathers did not anticipate this situation, but surely they did not believe that any institution could ever be "value-free." We are all the time engrafting our way of life upon *some* set of values.

If we are today a secular society, we are still also a liberal society. And in the current groping toward what inevitably will be our public philosophy, the religious person is entitled, if not to prevail, at least to be heard. The religious person can expect to be allowed a voice in matters of public policy. He can expect that his religion will not disqualify him from speaking on political matters, and that if he offers a religious or ethical justification for his position on a public issue, it will not *ipso facto* be considered out of the bounds of public discourse. The question here is ultimately one of where you get your basic beliefs. If, as Michael Novak has written, we should be willing to let people get their politics as much from the Bible as from Gloria Steinem, then biblical or religious values should be permissible in public debate. Unless the free exercise of religion, vouchsafed in the First Amendment, is to mean only trivial whispers, something practiced in the closet, then it must mean a voice equal to that of anyone who is not religious.

The trends go against even this minimal kind of free exercise of religion. It has been argued by serious public philosophers that only a rational, utilitarian morality should ever be enforced by law, and that this morality by definition would exclude any influenced by or grounded in religious considerations. Today this argument, spoken by non-philosophers, is used against the Moral Majority and their kind. You cannot legislate morality, it is said, meaning you cannot legislate a particular kind of morality—the kind having to do with religion as traditionally conceived.

History is not irreversible, but the trends for the past hundred years suggest that traditional religion will have an increasingly marginal influence on our public life. America is still one of the most religious countries in the world, and yet church affiliation (40 percent of Americans profess one) continues to decline, as Seymour Martin Lipset and Earl Raab noted recently in these pages ("The Election & the Evangelicals," March). These are just the circumstances to expect in a country to which the Enlightenment came late. The much-touted religious renaissance of recent years does not promise to change this state of affairs, at least not soon. Lacking is what has been lacking in much of American religious life for the past hundred years—solid theological content—and on this score the seminaries that have brought us the "death of God," "liberation theology," and other similar inspirations cannot inspire hope. As for the turning of a few scientist toward God, this is hardly a full-blown theological revolution. To postulate, as Sir John Eccles has done, that the brain is the product of evolution but that only God could have created the mind may prove an invaluable service to religion. But we are still a long way from any *Summa*, and a longer way from a great cultural movement.

One need not hold a brief for Jerry Falwell, nor for his cousin evangelists who appear on the television screen in the shank of the evening, to acknowledge what they have done, which at the least has been to flush the anti-religious bias out into the open. The early reaction to Falwell was dominated by comments from civil libertarians who implied, ironically enough, that

[3] Can a government, asks Francis Canavan, "committed to absolute neutrality among 'religions' . . . be capable of educating anyone? . . . The right questions were raised, but not answered, by Justice Jackson in his dissenting opinion in *Everson* where he said: 'Our public school . . . is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer'" ("The Impact of Recent Supreme Court Decisions on Religion in the United States," *Journal of Church and State*, Vol. 16, No. 2, 1974).

Falwell had no right to speak out on public issues. Such was not the reaction when the Reverend Martin Luther King wrote his letter from a Birmingham jail, but the hypocrisy is less interesting, I think, than the secular bias that produced it.

If, someday, people with traditional religious views should be effectively banned from public debate, not only will the free exercise of religion have been denied but a new religion will have been culturally established as our "foremost political institution." It would no doubt look very much like what the Supreme Court alluded to in its *Torcaso* ruling—the religion of "secular humanism." God save us—from that.

SHOULD PRAYER BE RESTORED TO OUR PUBLIC SCHOOLS?

The Supreme Court has said no. Yet three out of four Americans favor voluntary school prayer—and the remedy is in Congress's hands

(By Eugene H. Methvin)

In 1962 the U.S. Supreme Court ruled by a six-to-one vote that voluntary prayers said in public school classrooms violated the U.S. Constitution. Few Supreme Court decisions have stirred such public controversy and outrage, encountered such open disobedience [1] or stimulated such sustained efforts for reversal.

Public-opinion polls have shown that a stable majority of about 75 percent of Americans favor restoring public-school prayer. Last April the U.S. Senate, by a 51-40 vote, approved legislation introduced by Sen. Jesse Helms (R., N.C.) that would restore voluntary prayers to the classrooms. And once again the issue has touched off a torrent of mail to Capitol Hill, this time to the House of Representatives, whose members may soon consider the question.

The Senate's action would largely restore the situation that existed before the 1962 Supreme Court opinion: decisions would be left to the states or to local authorities, and justices in Washington would be out of the business of refereeing local arrangements for voluntary classroom prayer. Which is precisely the way the Founding Fathers, who wrote that First Amendment guarantee of freedom for religion, wanted it.

The First Amendment says: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Those words, known as the establishment and free-exercise clauses, were meant to guarantee that religious matters would be decided at the local level.

The record leaves no doubt. When the First Amendment was presented to Congress in 1789, five states had established churches; others had recently disestablished or refused to establish churches. A major purpose of the amendment, as James Madison assured Congress, was to provide that the national government would have no power to disturb these local arrangements. It clearly forbade federal interference either *for* or *against* community decisions.

No one would have been more astonished at the Court's 1962 interpretation than the framers of the First Amendment. The same day in 1789 that Congress approved the Bill of Rights, the legislators asked President George Washington to proclaim "a day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God." Washington thereupon issued the first Thanksgiving Day proclamation—an act that by the Warren Court's logic violated the First Amendment while its ink was still wet.

The more obvious conclusion is that it was the 1962 justices themselves who trifled with the Constitution. Said Harvard Law Dean Erwin Griswold: "We have a spiritual and cultural tradition of which we ought not to be deprived by judges carrying into effect . . . absolutist notions not expressed in the Constitution itself and surely never contemplated by those who put the constitutional provisions into effect. To say that they require that all trace of religion be kept out of any sort of public activity is sheer invention."

Yet that is precisely what the Warren Court decided in 1962, when the justices decided the Supreme Court's first prayer case. The New York State Board of Regents, in consultation with the clergy of Protestant, Catholic, Jewish, Greek Orthodox and other faiths, had developed this nonsectarian prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Local school boards decided whether to use the prayer, and individual students could excuse themselves from participation if they wished. The Warren Court found this a violation of the establishment clause.

To reach its result, the Court had to ignore the First Amendment's clause forbidding the federal government to interfere in the "free exercise" of religion and adopt a new theory advanced by Justice Hugo L. Black. He contended that the establishment clause forbidding Congress to establish a religion had been applied to the states through the Fourteenth Amendment clause which says that no state shall "deprive any person of life, liberty, or property without due process of law." That language, the Court decided, somehow requires Washington—the form of the justices—to maintain a "wall of separation between church and state," and strict "neutrality" between religion and irreligion.

Potter Stewart was the only justice to dissent: "With all respect, I think the Court has misapplied a great consitutional principle. I cannot see how an official religion is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these schoolchildren to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation."

The Warren Court's coupling of the First and Fourteenth Amendments was a bold new seizure of authority from both Congress and grassroots institutions. Other decisions followed: The justices ruled against a Maryland law that provided for the reading of a chapter of the Bible and/or recitation of the Lord's Prayer in schools. When the Netcong, N.J., board of education voted to permit students to come to school early for a "period for free exercise of religion" under the expressed First Amendment authority, the state court refused to allow it. This court even refused to permit schoolchildren to read the daily prayer of the House or Senate chaplain as printed in the Congressional Record. By not accepting the case on appeal, the Supreme Court justices let the state decision stand.

These anti-prayer decisions set off a wave of protest that has not stopped. At first, Capitol Hill opponents backed an amendment to the Constitution that would revise the Supreme Court's interpretation of the Fourteenth and First Amendments. In 1966, the Senate voted 49-37 to submit such an amendment to the state legislatures for ratification, but the vote was nine short of the constitutionally required two-thirds majority. In 1971, responding to a nationwide drive sparked by Ohio housewife Louise Ruhlin, the House voted 240-162 for an amendment, 28 short of the necessary two-thirds. In each case, many legislators balked for fear that the wording of such an amendment might be interpreted to do harm to other First Amendment provisions regarding freedom of speech and the press.

But today the outlook for prayer proponents is brighter. In the years since 1962, both the makeup of the Supreme Court and opinion about the limits on its powers have changed. The current Chief Justice, Warren E. Burger, has led this different Court in a substantial federalist restoration, curtailing some of the more ambitious activist claims of judicial power of the 1960s, pointing out, among other things, that Congress has remedies against such claims short of amending the Constitution. In fact, the Constitution provides two clear ways to limit the Supreme Court's role in the interpretation of our constitutional rights:

1. Article III, which created the Court, empowers Congress to make "exceptions and regulations" to the Court's appellate jurisdiction. Thus, by a simple majority, legislators can vote to take whole classes of cases away from the Court's jurisdiction.

2. The Fourteenth Amendment, under which the Court claims authority to impose its interpretations of the Bill of Rights on the states, specifically provides: "The Congress shall have power to enforce, by appropriate legislation," the rights the amendment creates. So if the legislators disapprove of the Court's rulings, presumably they can pass statutes—again by simple majority—substituting their own rules.

For three decades the nation has seen decisions and responsibilities transferred from local communities to Washington, thus steadily eroding the federalist concept of our government. When Senator Helms introduced his legislation last April, he emphasized the significance of his proposal in maintaining the Constitution's original plan of a divided and carefully limited power: "Congress must not yield its responsibility under the Constitution to ensure that the freedoms protected by the First Amendment are not undermined by actions of other institutions."

That is why many legal and editorial commentators welcome the Senate move to moderate the harsh anti-prayer rules adopted by the Warren Court. Says columnist James J. Kilpatrick: "When Senator Helms undertakes to restore the possibility of truly voluntary prayer, he merits the support of all those who believe that, while governmental establishments of religion must be resisted, the free exercise of religion should be encouraged. The Constitution expressly authorizes Helms's approach as a form of restraint upon the judiciary short of a constitutional amendment."

Regardless of our views on voluntary classroom religious exercises, all Americans—Christian, Jew, atheist, agnostic, whatever—have cause for alarm when a group of officials in Washington claims the right to dictate radical changes in our lives without consulting us. By debating and deciding such matters locally, we actually

[1] Many schools simply disregarded the Supreme Court's ruling and continued to conduct prayers, freely excusing those who did not wish to participate.

strengthen our democratic traditions of tolerance and liberty.

In taking such decisions away from the people, the 1960s-era justices pushed the Court far along the road to a more sweeping tyranny than any that might result from a local excess of religious zeal. As Harvard law professor Raoul Berg says in his recent book "Government by Judiciary": "A democratic system requires adherence to constitutional limits, by courts no less than presidents. Respect for the limits on power is the essence of a democratic society."

THE FIRST AMENDMENT AND FREEDOM OF SPEECH IN AMERICA

THE ISSUE

A problem of increasing concern in American society has been that of the burgeoning production of pornographic materials in the form of books, magazines, photographs, films, and motion pictures. While this problem has in itself attracted considerable attention, an even more notorious aspect of it has been the use of children in pornography. Recent accounts and studies by the police departments of various cities, by social workers and psychiatrists, and by local leaders indicate that the abuse of juveniles in the production of obscene materials is increasing. Authorities estimate that pornography in the United States has revenues of $1 billion a year and that child pornography ("kid-porn") accounts for 10 percent of this. The Los Angeles Police Department has conducted an extensive survey of this type of pornography and has concluded that 70 percent of the child pornography market caters to homosexual depictions of boys, that 25,000 juveniles under 17 are currently involved in this aspect of the trade alone. In Mineola, New York, a pornographic ring was broken up which was estimated to make $250,000 a year.

Many congressmen and senators have expressed concern over the brutalizing effects of the production process on the children who are forced, intimidated, or gulled into participating. This aspect of the issue is not seriously in question; and, accordingly, several bills have been introduced in both the House and Senate to penalize the production of child pornography and to prevent more effectively the abuse of juveniles in its production.

However, due to the well-attested difficulties of apprehending the producers, some legislators feel that a more stringent approach is necessary. They point out, as have police officials, that pornographers are often transient and do not sign their work. Much of the production is on a short-term basis and occurs in private homes, motels, or abandoned locations. Children are often not the most reliable witnesses and cannot identify their victimizers; and the process of testifying may be traumatic for them. Thus, the legislators believe the only effective way to curb pornography, especially of this genre, is at the level of distribution rather than at the level of production. They advocate the punishment of the mailhouses and booksellers that sell child pornography.

This aspect of the proposed legislation is more controversial. Critics charge that such provisions would be a violation of the First Amendment, particularly if passed by Congress. The American Civil Liberties Union, for example, has supported the prosecution of the producers, but argues that prosecution of the distributors would be unconstitutional. When confronted with the difficulties of the police in this field, Alan Reitman of the ACLU said, "The police will just have to try harder." Congressman Paul Findley (R-Ill.) has stated, "The first amendment's guarantee of free speech and a free press cannot be set aside even to gain a conviction of a smut peddler." [1] On the other hand, Congressman Robert Dornan (R-Calif.) has stated, "As anyone who really understands the Constitution knows, the first amendment was never intended to protect gross indecency and the corruption of the public marketplace." [2]

In order to review the background of this debate, which goes to the core of meaning of our Constitution, let us examine the historical and legal implications of the First Amendment.

THE FIRST AMENDMENT: HISTORICAL AND LEGAL BACKGROUND

The First Amendment states the following:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Throughout American history many historians and legislators have believed that this statement guarantees an untrammeled right to say, write, or depict any and every opinion, argument, or statement whatever (though sometimes they would except libel), that the First Amendment creates the United States as an "open society." But whatever the value of the recognition of such rights and whatever the implications of the concept of an open society, there can be little doubt that the Founding Fathers were not for the most part proponents of this interpretation, nor did they believe in an open society as it has come to be thought of today.

Benjamin Franklin, for instance, in an early essay, "An Apology for Printers" (1731), argued that vice and immorality in printed material for public consumption should not be countenanced. In 1789, writing on the First Amendment in "The Court of the Press," Franklin said, "few of us, I believe, have distinct Ideas of Its Nature and Extent," indicating that he did not believe it had very large implications.[3]

Alexander Hamilton, writing in *Federalist No. 84*, argued that freedom of the press was indefinable and opposed the whole idea of a Bill of Rights in the first ten amendments. One of the men who, after Madison, was most responsible for the framing of the Constitution was James Wilson of Pennsylvania. Wilson argued in the ratifying convention of Pennsylvania that

"The idea of the liberty of the press is not carried so far as this [the open society idea] in any country—what is meant by liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual." [4]

In 1790, Wilson drafted the state constitution of Pennsylvania. He included a long section on liberty of the press, in which he stated,

"The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, *being responsible for the abuse of that liberty* (Article IX, section 7)." [Emphasis added] [5]

This interpretation of the freedom of the press is quite different from that upheld by advocates of an open society. It argues that "liberty of the press" consists of liberty from prior inspection and censorship of publications before they are distributed, but that after publication the authors are responsible for what they said and can be prosecuted for it if they harmed public safety or morality or were guilty of libel. Delaware and Kentucky also had similar provisions in their constitutions. It is an interpretation that was based on the ideas of the eighteenth century English jurist William Blackstone, whose defense of the rule of law greatly influenced the Founders.

Others of the Founders who qualified their endorsement of the First Amendment were Hugh Williamson of North Carolina and John Adams. The latter believed that the press should be free within the bounds of truth but that falsehoods, scandals, and bad motives should be criminally prosecuted. Williamson also expressed belief in the Blackstonian idea that when government placed not prior restraints or license on publishing, "the press became perfectly free." John Marshall, in the Virginia ratifying convention of 1788, made statements that implied his belief that Congress could suppress minority critics if it had the support of public opinion.[6]

It might be objected that many of these men—e.g., Adams, Hamilton, and Marshall—were on the "conservative" or "authoritarian" wing of the Revolution and that others, such as Jefferson and Madison, expressed more libertarian views. It is true that Jefferson and Madison did express a wider interpretation of the First Amendment, especially at the time of the Sedition Act. But it should be noted that this Act was passed by their political opponents, that the U.S. courts never denied its constitutionality, and that Jefferson, when he became President, did not hesitate to support the prosecution of Federalist editors under the very Act. Jefferson's early opposition to the Sedition Act was clarified by him in a letter to Abigail Adams on September 11, 1804:

"While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so." [7]

In 1803, writing to Governor McKean of Pennsylvania, Jefferson said,

". . . the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses." [8]

And in his Second Inaugural, Jefferson said,

"These abuses of an institution [the press] so important to freedom and science are deeply to be regretted, inasmuch as they tend to lessen its usefulness and to sap its safety. They might, indeed, have been corrected by the wholesome punishments reserved to and provided by the laws of the several States against falsehood and defamation, but public duties more urgent press on the time of public servants . . ." [9]

In other words, Jefferson several times expressed the belief that it was indeed unconstitutional for the federal government to legislate against the abuses of freedom of expression but that the states were free and authorized to do so. This does not support the current popular view of Jefferson as an exponent of the "open society" so much as it does the view that he dreaded the centralization of power in Washington. In any case,

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Footnotes at end of article.

Jefferson's beliefs did not restrain his Administration from prosecuting the Federalist editor Henry Croswell in 1801 for his attacks on Jefferson's party.

Thus it cannot be said that the Founding Fathers were libertarians in any modern sense or that they believed seriously in the theory that the United States was an open society by virtue of the First Amendment. Franklin, Wilson, Hamilton, Jefferson, and several other less important of the Founders believed in what today would be considered a very limited role for the First Amendment: It pertained to the federal government but not to the states or it pertained to antecedent restraints (prohibition or press licensing), or both. In almost every case, these men believed that government had the right and the duty to prosecute irresponsible or seditious publications that threatened public safety.

COURT DECISIONS

The Blackstonian concept that regards liberty of the press as consisting in the absence of prior restraints is not a mere legal antiquity. Until well into the twentieth century it was the dominant interpretation of the meaning of the First Amendment and was expressed by Oliver Wendell Holmes in 1907. Holmes later modified his interpretation in *Schenk* v. *U.S.*, where he gave his famous "clear and present danger" opinion; but one week later he expanded on his conception of the meaning of the First Amendment, with unanimous consent, in *Frohwerk* v. *U.S.*, 249 U.S. 204 (1919):

". . . it is necessary to add to what has been said in *Schenk* v. *United States* . . . only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity to every possible use of language . . ."

Although the Supreme Court in the 1950s and 1960s considerably modified its interpretation of the meaning of the First Amendment and moved towards a wide libertarian concept, the current status of Supreme Court rulings on freedom of speech is far from recognizing a constitutionally mandated open society. A brief review of some of these decisions in two areas of First Amendment cases will serve to indicate the existing judicial consensus on this issue.

NATIONAL SECURITY

In *Dennis* v. *U.S.*, 341 U.S. 494 (1951), the Court upheld the conviction of eleven Communists for violation of the Smith Act, which forbids advocacy of violent overthrow of the government. In *Yates* v. *U.S.*, 354 U.S. 298 (1957), the Court overturned the conviction of several CPUSA leaders, but this decision was based on construction of the statute, not on the First Amendment. In 1961, the Court upheld the Internal Security Act of 1950 (McCarran Act) requiring registration of the CPUSA in *Communist Party* v. *SACB*, 367 U.S. 1 (1961), with only Justice Black dissenting. In *Scales* v. *U.S.*, 367 U.S. 203 (1961), the Court upheld the constitutionality of proceedings against the members or organizers of a group proscribed by the Smith Act.

However, in 1969, the Court went far toward reversing this long-standing trend. In *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), the Court forbade states to legislate against advocacy of illegal or violent action unless such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

It is possible to see this recent trend in Court rulings as a deviation from the traditional juristic interpretation. There can be little doubt that it does represent a radically different understanding of the First Amendment from that held by the earlier interpreters and the Framers themselves. But some, with apparent incongruity, believe that it is a "fulfillment" of the lines laid down by the Framers. It is difficult to accept this idea when there is such a broad disparity between their recorded statements and the current trend.

OBSCENITY

There is little doubt in this area that the Supreme Court has excluded obscenity from the protection given by the First Amendment. Thus, in *Roth* v. *U.S.*, 354 U.S. (1957), Justice Brennan argued that "the unconditional phrasing of the first amendment was not intended to protect every utterance." The Court pointed out that practically all of the state legislatures ratifying the First Amendment had laws against blasphemy or profanity or both. "Implicit in the history of the First Amendment, wrote the Court, "is the recognition of obscenity as utterly without redeeming social importance."

The clear and present danger test, applicable in internal security cases, was rejected for obscenity. However, the problem is not whether the First Amendment protects obscenity but what obscenity is. Brennan held that "obscene material is material which deals with sex in a manner appealing to prurient interest." And the Court arrived at the test for obscenity that a publication in its dominant theme appealed to the prurient interest of the average person, applying contemporary community standards. This test was again upheld in the Fanny Hill decision, 383 U.S. 413 (1966). But despite this affirmation, rulings since 1966 have tended to broaden the definition of obscenity, to reverse convictions for obscenity, and, in the opinion of many, to undermine the meaning of the Roth decision. In *Stanley* v. *Georgia*, 394 U.S. 557 (1969), the Court upheld the right of an individual to possess obscene materials in his home, though it reasserted the Roth standards. In *U.S.* v. *Reidel*, 402 U.S. 351 (1971), the Court upheld the constitutionality of prohibiting the distribution of obscene materials through the mails and the authority of customs officials to seize obscene materials from travelers' baggage. The Court again specifically reasserted the Roth standards.

However, in decisions of 1973, notably *Miller* v. *California*, 43 U.S. 15 (1973), the definition of obscenity was altered somewhat. Henceforward, a work is to be considered obscene if, as a whole, it appeals to a prurient interest, portrays sexual conduct in a patently offensive manner, and does not, taken as a whole, have "serious literary, artistic, political, or scientific value." This latter phrase replaced the Roth ruling that it must be "utterly without redeeming social importance" and is thus a more stringent standard. The Court also emphasized the role of the community in providing determination of obscenity, but whether this is to be the state or local community is not yet clear. A national, uniform definition of obscenity is, however, no longer required to declare a work obscene.

EXISTING FEDERAL LEGISLATION

At the present time there are five federal statutes which regulate obscenity and its distribution. These are: 19 U.S.C. section 1305, which forbids the importation of obscene materials into the United States; 18 U.S.C., section 1461, which prohibits the mailing of such materials; 18 U.S.C., section 1464, which prohibits obscene broadcasts; and 18 U.S.C., sections 1462 and 1465, which prohibit interstate transportation of obscene materials or the use of common carriers to transport them. In 1968, Congress enacted the Anti-Pandering Act (39 U.S.C., section 3008) which gave postal patrons authority to terminate the mailing of unsolicited, sexually offensive materials.

IS AMERICA AN OPEN SOCIETY

The legal history recounted above would indicate that there is little basis for the often-heard contention that the Founding Fathers, the Framers of the Constitution, or the Supreme Court have established through the First Amendment an "open society"—i.e., a society in which all expressions, regardless of their moral value or social and political consequences, have an equal status of permissibility before the law. It is true that the Court, especially in recent years, appears to have moved in this direction, but even here its record is as yet ambiguous and far from unequivocal. There yet remains adequate constitutional authority for the legal punishment of expressions which threaten national security or public morality.

But an increasing number of citizens finds such precedents irrelevant to what they regard as the progressive trends of contemporary society. Even if American legal traditions do not support an open society, these persons would argue, we should move toward one in recognition that government has no business in protecting morality or deciding what is dangerous, if the act or statement does not actually hurt anyone. In other words, these persons advocate the creation of an open society regardless of American traditions.

The problem of whether an open society is a desirable, or even a possible, one is an ancient question of social philosophy. Critics of the concept of an open society have pointed out that human society consists in a set of beliefs or affirmations shared by all or most members, past and present, of the society. This "consensus" or "public orthodoxy," they argue, is what really gives definition and meaning to what would otherwise be a disparate aggregation of individual wills. Without such a consensus, this aggregation would be incapable of any sustained or concerted enterprise: to support a policy calling for public sacrifice, to fight a war, or to have any agreed sense of what the goals and basic values of the society are.

Those who hold this belief that a consensus must undergird social cohesion point out that it is at odds with the "open society" concept. The latter admits no such consensus and assumes that individuals may do and say what they please within the limits of not harming others or preventing them from doing or saying what they please. Many of the consensus school also emphasize that, though the majority in a society believe in and live by the consensus, a minority may violate it or at least parts of it. This violation by a numerical minority can have disruptive effects on the consensus and on the society's perception of its common purposes. It is therefore the duty of the government to enforce the consensus and to provide appropriate sanctions and legislation in support of it.

Such a position is often caricatured as "repressive" and presented as leading to a totalitarian system of thought control. The libertarian advocates of openness often charged that, once public authorities enter the field of enforcing moral values, there is

no logical stopping place on the road to philistinism in taste, the complete suppression of dissent, and a return to Victorian standards of public morals. Consensus advocates reply, however, that there is no necessary progression from the punishment of those forms of expression which threaten subversion or the debasement of morals to these extreme results. In any case, they argue, the dangers of repression are not now our problem. Philistinism is already triumphant in "Deep Throat" and Larry Flynt's Hustler magazine. Dissent is already threatened when demonstrators are legally able to enforce silence on those with whom they disagree and when advocates of traditionally morality are denied access to public forums. As for the much dreaded return to "Victorian morality," many advocates of stricter public discipline point out that 45% of the American people favor stricter standards for the sale of "sexually explicit material" (only 6% believe in less strict standards, as reported in the *Gallup Opinion Index* of May, 1977, page 4) and that this large cross-section of the population cannot be limited to those who have socially extremist or unrepresentative opinions.

LEGISLATING MORALITY

Libertarians also argue against legal protection of public morality by advancing the argument that morality cannot, or should not, be legislated. But it is difficult to see what else can be legislated. Any law forbidding one act or permitting or commanding another contains an assumed judgment of value that the forbidden acts are wrong and anti-social or that a legal act is good and pro-social. A law against murder condemns murder as wrong just as much as a law against obscenity condemns obscenity. The libertarian question, "Who decides what is wrong?" is essentially a political problem in this context. The duly appointed political representatives of a society decide this, whether they are to be the courts, the Congress, or the state and local governments.

It is precisely the point of the consensus advocates that hostility to permissiveness and to the highly vocal radicalism that attacks both public decency and national security is in keeping with the mainstream of American life and society, and not just a transient whim or a prudish backlash. As the late Willmoore Kendall of Yale once wrote:

"Those beliefs that the people share are what defines its character as a political society, what embodies its meaning as a political society, what above all, expresses its understanding of itself as a political society, of its role and responsibility in history, of its very destiny. . . . In such a society by no means are all questions open questions; some questions involve matters so basic to the consensus that the society would, in declaring them open, abolish itself, commit suicide, terminate its existence as the kind of society it has hitherto understood itself to be." [10]

Many in the consensus school argue that those who favor more permissive standards for the sale of pornography or who indulge in support for un-American political causes are alienated from or hostile to the way of life characteristic of American society. They object that it is unjust and undemocratic that these minorities or their allies are able to dominate not only public discourse but also that increasingly the Supreme Court seems to be imposing the peculiar values and beliefs of this minority on the large remainder of the population.

CONCLUSION

It would appear from the above review that federal legislation prohibiting or controlling the distribution of obscene materials is in keeping with the long-standing traditions of American Constitutional law. Such legislation may be open to other criticism: it cannot be adequately enforced; it requires too much of the time and effort of local or federal police agencies; it is inconsistent with the movement toward an open society that the United States has experienced in the recent past. But these are pragmatic considerations, and in the last case, a question of social and political philosophy. As such, they are separate from and independent of the more narrow question of the meaning of the First Amendment for the future of public morality and national security.—(Samuel T. Francis, Policy Analyst.)

FOOTNOTES

[1] Congressional Record, March 2, 1977, p. E1121.
[2] Congressional Record, May 18, 1977, p. H4686.
[3] Leonard W. Levy, "Freedom of Speech and Press in Early American History: Legacy of Suppression" (New York: Harper and Row, 1963), pp. 126-127, 200.
[4] Op. cit. pp. 201-202.
[5] Op. cit., p. 203.
[6] Op. cit., pp. 216-217.
[7] Walter Berns, "The First Amendment and the Future of American Democracy" (New York: Basic Books, 1976), p. 82.
[8] "The Constitution of the United States of America: Analysis and Interpretation: Annotations of Cases by the Supreme Court of the United States to June 29, 1972" (Washington, D.C.: U.S. Government Printing Office, 1973) p. 938, n. 12.
[9] "Inaugural Addresses of the Presidents of the United States from George Washington 1789 to Richard Milhous Nixon 1973" (Washington, D.C.: U.S. Government Printing Office, 1974), p. 19.
[10] Willmore Kendall, "The Conservative Affirmative" (Chicago; Henry Regnery Company, 1963), pp. 74-75.

Do School Prayers Violate the Constitution?

(Dr. Hermine Herta Meyer)

A federal law, namely title 36, section 172 of the United States Code, has designated the following words as the pledge of allegiance to the Flag:

"I pledge allegiance to the Flag of the United States of America, and of the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

The Congress of the United States opens each session with a prayer.

At the opening of each session of the United States Supreme Court, the judges stand while one of the Court's officials, the Crier of the Court, invokes the protection of God with the words: "God save the United States and this honorable Court."

If these invocations of God do not violate the Constitution of the United States, how could it be violated, when children do this in the schools?

Yet, in 1962, the United States Supreme Court ruled in *Engel* v. *Vitale*[1] that the Constitution was violated by the New York State Board of Regents when it provided that those children in the public schools of New York who wished to do so may join at the beginning of each school day in the following little prayer:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

Justice Black wrote the opinion of the Court. The petitioners had argued that "the State's use of the Regent's prayer in its public school system breaches the constitutional wall of separation between Church and State." Justice Black agreed with them. He said that this was embodied in the religion clause of the First Amendment, "as reinforced by the provisions of the Fourteenth Amendment," and that prayers in public schools violated the establishment part of the religion clause of the First Amendment.

On 14 printed pages, Justice Black gave a historical review of the quarrels over the Book of Common Prayer in England and of the history of the early establishment and later rejection of official churches in the American States. But the one thing he did *not* do was to look into the history of the religion clause in the First Amendment to the United States Constitution in order to find out its intended meaning, and tell us where in the provisions of the Fourteenth Amendment that clause had been "reinforced."

In 1963, the Supreme Court ruled in *Abington School District* v. *Schempp*[2] that State laws providing for prayers and Bible reading in public schools violated the establishment part of the First Amendment's religion clause which had been made "applicable" to the States by the Fourteenth Amendment. In that case, Justice Clark wrote the opinion of the Court. It is 22 printed pages long. But he also did not give us the constitutional history and meaning of the First Amendment's religion clause, nor did he explain where in the Fourteenth Amendment that clause has been made "applicable" to the States. Only in a footnote are we told that in previous cases the Supreme Court had decided that the "liberties" of the First Amendment were protected by the due process clause of the Fourteenth Amendment.[3]

Evidently, in order to know whether the Religion clause of the First Amendment together with the due process clause of the Fourteenth Amendment really forbid prayers in the public schools of the States, we will have to know the constitutional meaning of these two clauses.

The first amendment's religion clause was meant to prevent Federal interference with the right of the States to make their own laws respecting religion.

The religion clause of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

As can be seen, it says nothing about separation between Church and State. As the language shows, it is a restriction on the federal government only. There is no provision in the entire Constitution which says that the States shall make no such law. The debates in the First Congress, where the first ten amendments were made, show clearly that the purpose of the religion clause was to prevent Congress from establishing a national church and from interfering with the exercise of religion in the States. The expression "establishment of religion" in those days meant an official state church.[4]

At least one judge of the Supreme Court must have read those debates, namely, Justice Stewart, because he stated the constitutional meaning of the clause correctly in his dissenting opinion in *Abington School District* v. *Schempp*. There he said that the First Amendment was adopted "solely as a limitation of the newly created National Government." It was to insure "that Congress not only would be powerless to establish a national church, but would also be

Footnotes at end of article.

unable to interfere with existing state establishments. Each State was left free to go its own way and pursue its own policy with respect to religion. Thus Virginia from the beginning pursued a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the 19th century." [5]

The fourteenth amendment nowhere mentions religion.

The Supreme Court said that the Fourteenth Amendment has made the religion clause "applicable" to the States.

Anyone who takes the trouble of reading the Fourteenth Amendment, will find that it nowhere mentions religion. Where then did the Fourteenth Amendment make the religion clause of the First Amendment applicable to the States?

In *Engel* v. *Vitale* the Supreme Court did not say anything about it.

In *Abington School District* v. *Schempp* the Supreme Court referred to other cases where the Court had ruled that "the liberties guaranteed by the First Amendment" are "embraced" by the "fundamental concept of liberty" embodied in the due process clause of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment reads: "* * * nor shall any State deprive any person of life, liberty, or property without the process of law."

The clause does mention the word "liberty". However, it expressly permits the States to take "liberty," but not without due process of law. The clause was copied from the Fifth Amendment where it applies only to the federal government. It came from the English law, and at the adoption of the Fifth Amendment in 1791 it was already over 500 years old. It has always meant the same; namely, that no person accused of crime may be sentenced to death, or to imprisonment, or to forfeiture of property without first having been given an opportunity to defend himself in a proof procedure, today called trial. Since the due process clause in the Fifth Amendment did not bind the States, they were able to make different procedural rules for blacks and for Chinese, than they made for whites. This placed the blacks and the Chinese at a considerable procedural disadvantage. The purpose of the due process clause in the Fourteenth Amendment was to make it applicable to the States and thus insure to "any person," meaning any human being, without distinction as to race or color, the same procedural rules without which he could not have "due process of law," or in the words of Representative (later President) Garfield, "an impartial trial according to the law of the land." In short, the due process clause guarantees to any person charged with crime by the federal government (in the Fifth Amendment), as well as by a State (in the Fourteenth Amendment) access to a trial before he can be sentenced to death, or imprisonment, or forfeiture of his property.[6]

The due process clause of the Fifth Amendment is the only provision of the Federal Bill of Rights, as amendments one to eight are commonly called, which the Fourteenth Amendment to the Constitution has made applicable to the States. None of the other provisions of the Federal Bill of Rights is mentioned in the Fourteenth Amendment.[7] Therefore, the Supreme Court originally correctly held that the due process clause of the Fourteenth Amendment cannot possibly be interpreted as including other provisions of the Federal Bill of Rights.[8] This is the only logical conclusion that can be drawn from the language and the history of the Fourteenth Amendment. To place freedom of religion into its due process clause, would read: "nor shall any State deprive any person of freedom of religion without due process of law." That would mean that a State could deprive a person of freedom of religion if it provided a procedure for doing so. This makes no sense. The due process clause makes sense only if given its constitutional and historical meaning; namely, that no person charged with crime can be sentenced to death, or imprisonment, or forfeiture of property without first having been given access to a trial pursuant to the preexisting laws.

Did the Supreme Court interpret the Constitution when it declared that school prayers are unconstitutional?

Article VI of the U.S. Constitution provides that every federal and state official and all judges "shall be bound by Oath or Affirmation to support this Constitution," that is the Constitution as written and intended by the framers and as legally amended by the representatives of the people in Congress and the legislatures of the States.

In the same article it is said that this Constitution shall be the supreme law of the land.

When interpreting a law, courts have a duty to give effect to its language. If the language is not clear, they have a duty to ascertain the intent of the framers and for what purpose a legal provision was adopted. This can be found from the legislative history.

In the two cases in which the Supreme Court ruled that prayers in State public schools violated the Constitution of the United States, the Court respected neither the language of the constitutional provisions nor their history. Rather, the Court read into them a meaning which the Court wanted them to have, in order to force the Court's own ideas on the people. Thereby the Court did not interpret the Constitution, but illegally amended it, because the Court deprived the States and their people of their constitutional right to determine for themselves whether or not they wanted to have prayers in the public schools.

To understand this fully, it will be necessary to explain briefly the nature of the United States Constitution.

The nature of the Constitution of the United States.

With the Declaration of Independence of July 4, 1776, the 13 North-American Colonies constituted themselves into 13 independent States. Each State assumed full sovereignty, internal as well as external. The people of the States proceeded to give themselves constitutions. All were based on the principle of self-government of the people. Many state constitutions had express provisions to that effect, as for instance the Constitution of Pennsylvania of 1776 which said, "That all power being originally inherent in, and consequently derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." [9]

With the Articles of Confederation, signed by each of the 13 States between July 9, 1778 and March 1st, 1781 (Maryland signing as the last State), the States entered "into a firm league of friendship" and delegated some of their powers to the United States in Congress assembled, reserving to themselves every power not so delegated.

The Articles of Confederation were soon preceived to be inadequate. On February 21, 1787, Congress passed a resolution providing for a Federal Convention of delegates to be appointed by the several States to be held at Philadephia for the purpose of revising the Articles of Confederation.

The Federal Convention convened in May 1787. Twelve States sent delegates. (Only Rhode Island sent no delegates). These delegates represented 12 individual States which possessed all the powers of sovereignty with the exception of the few powers which they had delegated by the Articles of Confederation to the United States in Congress. Thus, whether the Federal Convention would merely add to the powers of Congress or, as it did, create a new "general government" for the States that never before existed, in either case the additional powers would have to be delegated by the several States. Powers that were not delegated, were retained by the States or their people, which means the same, because in a Republic based on the principle of the sovereignty of the people, the people are the States. No State could be forced to accept the new central government without its individual consent. This is clearly expressed in Article VII, paragraph 1 of the U.S. Constitution which says, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same."

In 1789, when the First Congress convened under the new Constitution, only eleven States had ratified the Constitution and thereby become members of the Union. Two States, North Carolina and Rhode Island, joined later.

When the proposed constitution was presented to the States for ratification, there were objections that the powers of the general government were too wide and often too ambiguous. It was feared that they might be used to oppress the States as well as individuals. Therefore there were demands for a Federal Bill of Rights "to serve as a barrier between the general government and the respective States and their citizens." These became amendments one to eight, commonly called the Federal "Bill of Rights". They are special restrictions on the federal government, not grants of power. They all represent rights retained by the States and their people. In order to guard against an interpretation that other rights retained by the people of the States, which had not been singled out as special restrictions on the federal government, were assigned to the federal government by implication, the Ninth Amendment was added, as follows: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

As an added precaution to protect the reserved rights of the States, several States particularly requested that it should be declared in the Constitution.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This become the Tenth Amendment.

Thus, it should be clear that the federal government has only such powers as were granted to it by the States, which are enumerated in the United States Constitution. In order to carry into execution these enumerated powers, the Constitution has authorized Congress to make laws "necessary and proper" for this purpose. Madison explained in No. 44 of the Federalist Papers that they are the means of carrying out the powers enumerated in the Constitution. They are the only "implied" or "inherent"

powers possible in the Constitution. As Chief Justice John Marshall expressed it, "inherent powers" can only be such powers as are necessary and proper for carrying into execution powers expressly given in the Constitution.

Outside of the U.S. Constitution, no federal power can legitimately exist. As late as 1957, in *Reid* v. *Covert*,[10] the Supreme Court acknowledged that "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."

The "law of the land" in the U.S. Constitution.

It should be noted that the U.S. Constitution has given the courts no authority to make generally binding laws. The very first article says without any possibility of misunderstanding, "*All* legislative Powers herein granted shall be vested in a Congress of the United States." This means that the Constitution has entrusted the authority to make generally binding federal laws exclusively to persons elected by and responsible to the people, not to judges appointed for life and responsible to no one.

The Supreme Court also recognized in *Ullmann* v. *United States*,[11] "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."

Article V of the Constitution has given the power to amend it to persons elected by, and responsible to, the people, namely to the Congress and the legislatures of the States, not to a handful of life appointed judges responsible to no one.

All this shows that, like the constitutions of the States, the Constitution of the United States is based on the democratic principle of self-government of the people. Under such a system, only the people can make generally binding laws, either directly through initiative and referendum, or indirectly through elected representatives whom the people can influence either through personal contacts, such as letter writing or telephoning or at the ballot box.

The people have no influence over court decisions. The claim that a Supreme Court decision is "the law of the land" finds no support anywhere in the Constitution. The only place where the words "the law of the land" appear in the Constitution, is in the so-called Supremacy Clause of Article VI. It was intended to bind the judges in the States to accept as the "supreme law of the land" this Constitution, that is the Constitution as written and intended by the framers and as legally amended; the laws passed by the United States Congress in pursuance of this Constitution; and the treaties made under the authority of the United States. The Constitution nowhere says that a Supreme Court decision shall be the supreme law of the land or the law of the land.

The text of the U.S. Constitution reflects the intent of its framers, as it appears from Madison's notes which he made at the Federal Convention of 1787 where the Constitution was drafted. An earlier draft had given the Supreme Court general jurisdiction only over "all cases arising under laws passed by the Legislature of the United States." Dr. Johnson of Connecticut moved that the jurisdiction be extended "to all cases arising under this Constitution." Madison doubted "whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution." But then he agreed after it was generally understood "that the jurisdiction given was limited to cases of a Judiciary nature." Madison emphasized that "the right of expounding the Constitution in cases not of this nature ought not to be given to that Department." [12] This was understood to mean that the federal courts, including the Supreme Court, would have jurisdiction to interpret constitutional questions in a case or controversy brought before them, but that such interpretation would bind only the parties properly before the courts.[13] The rule that a court decision binds only the parties to a suit and is not a generally binding law was the rule prevalent in the entire western world. Had the framers of the U.S. Constitution wanted to depart from it and make a Supreme Court decision the "law of the land," they would have said so in the Constitution.

It follows that when the Supreme Court creates a "constitutional right" or a "constitutional prohibition" which appears nowhere in the language of the Constitution, the Supreme Court in reality acts against the Constitution, because it takes this right from the States and their people without a legitimate constitutional amendment. There is no vacuum in the Constitution of the United States. The Tenth Amendment says very clearly that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

The powers to regulate schools and school prayers belong to the retained rights of the States and their people.

The words "schools" or "prayers in the public schools" nowhere appear in the Constitution of the United States. The clause of the First Amendment which prohibits Congress from making any law respecting an establishment of religion and from interfering with the free exercise thereof is not a grant of power but a special restriction on the federal government. The Fourteenth Amendment which provides for restrictions on the States, contains no language which forbids the States from making laws with respect to religion or to schools, nor does such a prohibition appear anywhere else in the Constitution.

It follows that the States have never delegated to the federal government their authority over their schools nor their right to make any laws they like with respect to religion. These powers belong to the reserved rights of the States and therefore cannot possibly violate the Constitution of the United States.

As explained above, in its decisions prohibiting prayers in the public schools of the States, the Supreme Court has not only misinterpreted the religion clause of the First Amendment in disregard of its language and its historical meaning, it also has made nonsense of the due process clause of the Fourteenth Amendment for the purpose of misusing it as a constitutional cloak to cover up the Court's lack of authority to deprive the States of their reserved powers to make their own laws with respect to religion. The nature of the U.S. Constitution makes clear that a right reserved by the States can legally be taken from them only by a constitutional amendment. As said before, the right to amend the Constitution was given by it to persons elected by and responsible to the people, not to a handful of judges appointed for life and responsible to no one.

Thus, by illegally amending the Constitution in the guise of "interpretation", the Supreme Court has been guilty of horrendous usurpation. It has usurped the right reserved to the States and their people to make their own laws with respect to religion, and the power of Congress and of the legislatures of the States to whom alone the Constitution has given the power to amend it. In the process, the Supreme Court did what the Constitution expressly prohibited Congress from doing, namely prohibited the free exercise of religion in the States.

The Constitution has given the people protection against judicial usurpation.

As shown above, the United States Constitution, like the constitutions of the States, is based on the principle of self-government of the people. It would be strange if such a Constitution had left the people without protection against the misuse of power by life appointed judges.

Article III, Section 2, Clause 2 of the Constitution gives Congress complete control over the entire jurisdiction of the lower federal courts and over the appellates jurisdiction of the United States Supreme Court. Almost all states cases reach the Supreme Court by way of appeal. Therefore Congress could prohibit the federal courts, including the Supreme Court, from taking jurisdiction in all cases concerning prayers in the public schools of the States. Thereby Congress would merely prevent the federal courts from taking jurisdiction in cases in which the Constitution has given them no jurisdiction in the first place.

Article III, Section 2, Clause 1 of the Constitution provides that the judicial power of the United States "shall extend to all Cases, * * * arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." As shown before, the right to make laws concerning prayers in the schools of the States belongs to the retained rights of the States. There is, therefore, no federal question involved and no good faith constitutional issue. Therefore there is no federal jurisdiction, and the Supreme Court should have dismissed such cases for want of federal jurisdiction.

What the people can do.

Repeatedly, bills have been introduced in Congress to prevent the federal courts from taking jurisdiction in cases in which the Supreme Court had created trumped up constitutional issues to deprive the States and their people of their retained rights as, for instance, in cases of apportionment of State Legislatures, abortion and prayers in the schools of the States. They never succeeded in passing both houses of Congress because the people had voted too many persons into Congress who agreed with the results of the respective Supreme Court decisions and, therefore, told the people, falsely, that what the judges said was the Constitution, while in truth the judges had illegally amended the Constitution.

In September 1979, an article in the Readers Digest, entitled, "Should Prayer be Restored to our Public Schools?" by Eugene H. Methvin, reported that public opinion polls have shown "that a stable majority of about 75 percent of Americans favors restoring public-school prayer."

Each member of Congress is elected by the people in the States. Therefore, if all those people really want to reestablish Constitutional conditions with respect to prayers in the schools, they have to vote into Congress persons who are willing to use their constitutional powers for the purpose of truly "conserving" the Constitution with respect to the people's right of governing themselves. This includes their right to de-

termine for themselves whether or not they want to revive prayers in their public schools.

As has been shown, Congress can do that by a simple law to prevent the federal courts, including the Supreme Court, from taking jurisdiction in such cases. This would restore the constitutional right of the people in the States to be free from federal interference in accordance with the prohibition of the First Amendment which the Constitution has never made applicable to the States.

The truth about the United States Constitution is that school-prayers do not violate the Constitution.

FOOTNOTES

[1] 370 U.S. 421 (1962).
[2] 374 U.S. 203 (1963).
[3] Id. at 216 n. 8.
[4] 1st Cong., 1st Sess., 1 Annals of Congress 474-438, 729-731. (1789).
[5] 374 U.S. at 309-310, J. Stewart dissenting.
[6] H. H. Meyer, The History and Meaning of the Fourteenth Amendment 125-137 (New York 1977).
[7] Id. 12-17.
[8] Hurtado v. California, 110 U.S. 516, 534-535 (1884); In re Kemmler, 136 U.S. 436, 448-449 (1890); Maxwell v. Dow, 176 U.S. 581, 582, 584 (1900).
[9] Constitution of Pennsylvania—1776, Declaration of Rights Art. IV, 5 Francis N. Thorpe, The Federal and State Constitutions and other organic Laws 3082 (Washington, D.C. 1909).
[10] Reid v. Covert, 354 U.S. 1, 5-6 (1957).
[11] Ullmann v. United States, 350 U.S. 422, 428 (1956).
[12] 2 Max Farrand, The Records of the Federal Convention of 1787, p. 430.
[13] 2 George Bancroft, History of the Formation of the Constitution of the United States of America 198 (New York 1882); Wm. M. Meigs, The Relation of the Judiciary to the Constitution, 19 American Law Review 175, 190-194 (1886).

For the information or additional copies please contact the National Committee to Revive Voluntary School Prayer which is located in the Washington, D.C. metropolitan area. The telephone number is (301) 986-0115. Mrs. G. G. Bull, President.

THE MAKING AND THE UNMAKING OF THE ESTABLISHMENT CLAUSE

(By James McClellan)

The disestablishment of the Anglican Church in Virginia, which Thomas Jefferson accomplished in 1786 with the help of James Madison, is commonly thought to have prepared the way for the adoption of the First Amendment to the Constitution of 1791, declaring that "Congress shall make no law respecting the Establishment of a Religion." [1] As Justice Joseph Story later observed in his famed "Commentaries on the Constitution," "the real object of the [First] Amendment was not to countenance, much less to advance, Mohametanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the national government." [2] Directed solely against Congress, the establishment clause gave the states, by implication, full authority to determine church-state relations within their respective jurisdictions. Thus the establishment clause actually had a dual purpose: to guarantee to each individual that Congress would not impose a national religion, and to each state that it was free to define the meaning of religious establishment under its own state constitution and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations. To be sure, one of the principal reasons for the adoption of the entire Bill of Rights, as we shall see, was to deny the federal government a commanding voice in the general area of civil liberties, except as stipulated in the Constitution itself.[3] The power to define civil liberties within the several states, including the power to decide what practices were acceptable under the general heading of church-state relations, was, in the true sense of that much abused term, the state's right, as determined by state constitutions and state bills of rights.

Such is where matters stood until 1947, when the Supreme Court endeavored for the first time to expound upon the meaning of the establishment clause in the landmark case of *Everson* v. *Board of Education* (1947).[4] Pursuant to a state law, the township of Ewing, New Jersey authorized the reimbursement to parents of money expended for the transportation of their children to and from public and parochial schools. A taxpayer challenged the validity of the law on the grounds that it violated the due process clause of the Fourteenth Amendment, and also constituted an unconstitutional "establishment of religion." Speaking for a sharply divided Court, Mr. Justice Black announced that: "The First Amendment, as made applicable to the states by the fourteenth . . . commands that a *state* 'shall make no law respecting an establishment of religion.' " [5] This was the first instance in which the Court interpreted the establishment clause as a restriction on the states. It was a bold and revoluntionary step, overturning more than a century and a half of established precedent that had uniformly permitted the States to set public policy regarding their relations with religious organizations. No less novel was the Court's newfangled theory of the establishment clause and its formal adoption of Thomas Jefferson's "Wall of Separation" doctrine. The First Amendment, said Black, "erected a wall of separation between church and state," prohibiting the federal and state governments from giving aid of any kind not only to particular religious sects, but to all religions in general. "Neither a state nor the federal government," contended Justice Black, "can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. . . . No tax in *any* amount, large or small, can be levied to support *any* religious activities or institutions. . . ." [6]

This absolutist pronouncement by Justice Black, it must be emphasized, has become the foundation stone for the modern Court's interpretation of the establishment clause. Whether the issue has been Bible-reading, prayer in the public schools, or tuition grants for parochial school children, Black's oft-quoted dictum is sure to be found at the heart of the Court's opinion. But in *Everson* the Court softened the impact of its new view of the establishment clause by upholding the law in question as a welfare measure assisting children rather than religion. Thus the real significance of *Everson* lies not in the Court's ruling, but in its adoption of an absolutist theory of church-state relations. Both the majority and dissenting members of the Court were unanimously agreed that the establishment clause should be interpreted as an absolute restriction on governmental aid to religion. "In the words of Jefferson," concluded the Court, "the clause against the establishment of religion by law was intended to erect 'a wall of separation between church and state.' " [7]

The judicial history of the establishment clause since 1947 has been little more than a replay of *Everson*, each justice endeavoring to apply Black's dictum to the factual situation under review, while at the same time attempting to refine it as a workable test for determining the limits of state involvement in the religious affairs of the community. In *McCollom* v. *Champaign Board of Education* (1949),[8] the Court invalidated a "released time" program in an Illinois school district which allowed children to receive religious instruction in the public schools. The program provided that pupils whose parents had signed a "request card" were excused from their classrooms to attend religious lectures given without pay by Protestant, Catholic, and Jewish teachers, but within the school building and during the regular class day. Pupils not participating in the program were required to continue their secular studies in other classrooms. Speaking again through Mr. Justice Black, a divided Court held that this program of religious education violated the establishment clause, as applied to the states by the due process clause of the Fourteenth Amendment. Following the dictum laid down in *Everson* that the First Amendment erected an absolute wall of separation between church and state, the Court ruled that the program was unconstitutional because it utilized a "tax-established and tax-supported school system to aid religious groups to spread their faith." [9]

The case of *Engel* v. *Vitale*,[10] decided in 1962, involved a local school district in New York, which under state law had directed the principal of a public school to cause a prayer to be said aloud by each class at the commencement of the school day. Students who did not wish to participate were permitted to remain silent or to leave the classroom. Seemingly innocuous on its face, the non-denominational prayer, composed and recommended by the State Board of Regents, read simply: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country," In a brief opinion, again written by Black, the Court invalidated the authorizing statute as a violation of the First and Fourteenth Amendments. Clearly, argued the Court, the recitation of a prayer was a religious activity. There was no doubt in Justice Black's mind that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." [11]

Citing these decisions and a mixed variety of other legal and historical precedents, the Court arrived at a conclusion similar to that reached in the Prayer decision when it decided in 1963 that Pennsylvania and Maryland had breached the "wall of separation" between church and state by requiring public schools to begin each day with readings from the Bible. Despite the fact various Protestant, Catholic and Jewish versions of the Holy Scriptures were used, without prefatory statements, questions, or explanations, and non-participants were allowed to absent themselves from the classroom, Mr. Justice Clark found for the Court that the practice of governmental sponsored Bible-reading was not permissible under the Constitution. As applied to the states, the First Amendment, Clark declared, requires "that the Government maintain strict neutrality, neither aiding nor opposing religion." [12]

Footnotes at end of article.

Board of Education v. *Allen* (1968), the last case of major importance on church-state relations in the Warren Court, represented a return to the "child benefit" theory of *Everson*. In sustaining a state statute authorizing the loaning of secular textbooks to all public and parochial students under New York's education law, the Court, speaking this time through Justice White, reasoned that "[t]he law merely makes available to all children the benefits of a general program to lend schoolbooks free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus, no funds or books are furnished to parochial school, and the financial benefit is to parents and children, not to schools." [13] Citing *Everson* and *Schempp*, White announced that the test of constitutionality was whether the statute in question had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." [14] He acknowledged that "[t]his test is not easy to apply," [15] but concluded that under these standards the statute in question was no different from that which the Court found acceptable in *Everson*.

Since 1969, when Warren Burger succeeded Earl Warren as Chief Justice, the Court has endeavored to follow the difficult course laid out in *Everson*, steering between the Scylla of Black's absolutist theory and the Charybdis of his actual holding in *Everson*. From the standpoint of uniformity, the decisions have not been entirely satisfactory, and the Court seems to have made little progress in resolving what Chief Justice Burger has accurately described as the "internal inconsistency in the opinions of the Court. . ." [16] Certainly it is difficult to disagree with Justice Powell's contention that the Court's decisions, viewed as a whole, lack a coherent rationale. The cases, for example, reflect the questionable assumption that government aid to church-related colleges is less obtrusive than government aid to primary and secondary schools, where the students are supposedly more susceptible to religious indoctrination.[17] It is not entirely clear why government funding of bus transportation to and from parochial schools is acceptable under the establishment clause, but public funding of transportation for field trips is not; [18] nor is there a sharp analytical distinction between state aid in the form of textbooks, which is not prohibited, and state aid in the form of other instructional materials, such as maps, which is prohibited.[19] In terms of aid to religion, it would also seem that a tax exemption to a house of worship has a more direct effect than a tax credit to the parent of a child enrolled in a church-affiliated school. [20] These distinctions without a difference, suggests Powell, may be justified on the grounds that the Court has wisely sacrificed logical consistency in order "to establish principles that preserve the cherished safeguard of the Establishment Clause" while at the same time encouraging "the positive contributions of sectarian schools. . . ." [21]

The balancing of these diverse interests is surely a delicate task that has produced much disagreement and doctrinal confusion in the Court. In reality, the Court seems to have worked itself into a corner, straining on the one hand to maintain Black's absolutism, while on the other to accommodate deeply rooted habits and practices that actually breach the wall of separation. Comparing the decisions of the present Court with those of the Vinson-Warren era, it is nevertheless reasonable to say that "[b]oth the absolutism of Mr. Justice Black and his particular conceptions of religion's relation to government seem, on the whole, to wane in influence as the Burger Court takes shape." [22] Although this modest departure has not been applauded by all the members of the Court, there is no denying that "the heritage of Mr. Justice Black appears presently to receive a somewhat skeptical attention. The present Court expressly abjures 'absolutism'; it 'balances' or 'accommodates' the First Amendment provisions which Mr. Justice Black regarded as unqualified." [23] Whether this trend will continue, and the ultimate fate of Justice Black's absolutism, are questions that cannot now be answered. But this much seems obvious: The number of ways in which public funds can be channeled into the private sector for the benefit of nonpublic education is not infinite. There are some schemes which have yet to be examined by the Court, such as the experimental voucher system, but on the whole it may be that we have already reached the limits of possible funding alternatives. If this is so, then we can expect fewer decisions under the establishment clause and a greater likelihood that the theory of church-state relations adopted by the Court, despite its internal contradictions, will become a more permanent fixture of the American constitutional system.

To a generation of Americans raised under the common assumption that it is only natural and fitting that the Supreme Court should determine state policies and practices respecting church-state relations, these cases handed down over the past thirty-four years are seldom viewed as unconstitutional usurptions of state authority. When examined in the light of the historical setting of the Bill of Rights and state religious practices before 1947, however, the *Everson* line of cases can be seen as one of the most radical innovations in American constitutional law since 1787. This article maintains that *Everson* and the entire body of case law built upon it, including the Prayer and Bible-reading decisions, represent an unhistorical view of church-state relations in the early Republic, and are actually contrary to the expressed intent of the Framers and the very purpose of the establishment clause at the time of its adoption. Moreover, it is contended here that the Fourteenth Amendment, which serves as the constitutional vehicle for the application of the establishment clause to the states, was not intended by those who participated in its framing and adoption to alter the scope or original meaning of the establishment clause.

CHURCH-STATE RELATIONS IN THE EARLY REPUBLIC

Although all of the American colonies in the revolutionary period were eager to loosen the existing bonds of religious establishment, each pursued an independent course in reaching this objective. At the outbreak of the Revolution, there were varying forms of established churches in nine of the colonies. In the Southern colonies of Maryland, Virginia, North Carolina, South Carolina and Georgia, the established religion was Anglicanism. In New England, Congregationalism was, in effect, the established church in three colonies—Massachusetts, New Hampshire, and Connecticut. New York had a unique arrangement allowing for the establishment of the Protestant religion.[24] But in all of these nine colonies, the established churches were linked politically with the colonial governments rather than the mother country, so that when the colonies became independent states the connection between church and state remained in force. Hence the Revolution itself did not alter the system of church-state relations; what it did was to set in motion the forces of disestablishment that ultimately prevailed throughout most of the American colonies.[25]

Religious Disestablishment in New England. Led by Isaac Backus, the Baptists agitated for disestablishment in New England throughout the revolutionary period. But their memorials and petitions failed to dislodge the Congregationalists, who enjoyed widespread support among a majority of the population, and church-state relations in New England remained essentially the same.

Rhode Island and Connecticut became states in the new confederation under their old charters, and no changes were made regarding the civic relations of the church. Rhode Island remained committed by its charter of 1663 to the principle of separation of church and state, guaranteeing its subjects "the free exercise and enjoyment of all their civil and religious rights." As long as they did not "disturb the civil peace" or abuse their religious liberty to promote "lycentiousnesse and profanenesse," citizens of the state were free to state their "differences of opinion in matters of religion." Such a broad scope of religious liberty was actually an aid to the Christian religion, implied the framers of the charter, because it placed the citizens "in the better capacity to defend themselves, in theire just rights and libertyes against all the enemies of the Christian faith." [26]

In Connecticut, the establishment of the Congregational Church was retained, but other Protestant sects were allowed to practice their faith. In 1778, Congregationalists who had separated from the mother church were exempted from taxes for its support; and in 1784 an act was passed stating that no person professing the *Christian* religion would be required to pay taxes for the established church, or penalized for not attending worship there, providing he continued to attend and helped to maintain worship at his own church. Those who did not belong to any religious society were to be taxed for the support of the established church, and *Protestant* dissenters were allowed by law to maintain their own societies. Entitled an "Act for Securing The Rights of Conscience," this statute specified that citizens of Connecticut were expected "on the Lord's day carefully to apply themselves to the duties of religion and piety." Persons failing to "attend the public worship of God on the Lord's day in some congregation allowed by law" were to be fined three shillings "unless hindered by sickness or otherwise prevented" from attending church.[27]

The state constitution of New Hampshire, adopted in 1776, contained no provisions concerning religious matters; but in 1784, a new constitution, prefaced by a bill of rights, was adopted where it was declared that every citizen "has a natural and unalienable right to worship God according to the dictates of his own conscience." Under the provisions of this constitution, however, the old colonial law which in effect gave to the Congregational churches the status of a town institution, remained in force. Each town was authorized to elect its own minister; and to promote "morality and piety," the state legislature was empowered to authorize "the several towns, parishes, bodies

politic, or religious societies . . . to make adequate provision, at their own expense, for the support and maintenance of public *Protestant* teachers of piety, religion, and morality, with the understanding that "no person of any one particular religious sect" would be "compelled to pay towards the support of the teacher of another persuasion." [28] The constitution further stipulated that all members of the state legislature "shall be of the *Protestant* religion." [29]

The arrangement in Massachusetts, determined by the constitution of 1780, was strikingly similar to that of New Hampshire. Indeed, the Massachusetts constitution had served as a model for the architects of the New Hampshire constitution. Massachusetts retained its colonial practice of giving the Congregational church a civil status, allowing every taxpayer to indicate his preference as to which church should receive his support. Those who failed to state their choice were required to pay taxes for the support of the Congregational Church. According to the constitution, each town in the state was authorized "to make suitable provision," at its own expense, "for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality." [30] All public officials were required to take an oath that they "believe in the *Christian* religion and have a firm persuasion if its truth." [31]

Standing between the liberality of the Rhode Island charter and the more restrictive fundamental law of New Hampshire, Connecticut, and Massachusetts, the Vermont constitution of 1777 meekly urged "every sect or denomination . . . to observe the Sabbath," while declaring that "no man ought, or of a right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his own conscience." At the same time, the constitution specified that no man professing the *Protestant* religion should be deprived of his civil rights "on account of his religious sentiment, or peculiar mode of religious worship," [32] In addition, every member of the state house of representatives was required to meet a religious test for office by swearing: "I do/believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked; and I do acknowledge the scriptures of the Old and New Testaments to be given by divine inspiration; and own and profess the Protestant religion." [33] All of these provisions were carried over into the revised constitution of 1786. Moreover, a law enacted by the state legislature in 1783 allowed for support of the Congregational Church in the townships through local taxation.[34]

Religious Disestablishment in the Middle-Atlantic States. Turning southward, a similar pattern of discrimination against Dissenters and non-Protestants is encountered. The New York constitution of 1777, supplemented by an act of 1784, abrogated all laws establishing or maintaining "any particular denomination of Christians or their ministers," and all laws "which do grant certain emoluments and privileges to the Episcopal Church." The constitution also declared that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed." Making an about-face, the constitution also demanded, however, that all persons naturalized by the state be required to take an oath abjuring their foreign allegiances and subjection in all matters, "ecclesiastical as well as civil." [35] (This provision, as Judge Story later pointed out, "was doubtless intended to exclude all Catholics, who acknowledged the spiritual supremacy of the Pope, from the benefits of naturalization.") [36]

In New Jersey, the constitution of 1776 guaranteed each person "the inestimable privilege of worshipping God according to the dictates of his own conscience," but at the same time imposed a religious test for office, limiting eligibility for the state legislature to "persons professing a belief in the faith of any *Protestant* sect." [37] Similarly, the Delaware constitution of 1776, while declaring that "[t]here shall be no establishment of any one religious sect in this state in preference to another," required all persons holding public office to declare by oath their faith in the doctrine of the Trinity and in the divine inspiration of the Old and New Testaments.[38]

Pennsylvania, which in the colonial period had limited inhabitancy to believers in God and had denied both the franchise and public office to Catholics and disbelievers in the doctrine of the Trinity, "entered the revolutionary period with a restrictive legislation unsurpassed by that of any other" state. In "so far as terms of law made definitions, there was less liberty in Pennsylvania than in theocratic Massachusetts and conforming Virginia" [39] These restrictions were removed in part by the constitution of 1776, which declared that "all men have a natural and inalienable right to worship God, according to the dictates of their own consciences." In addition, the constitution forbade government to support religion through public taxation and "to interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." Nevertheless, civil rights were confined to persons "who acknowledge the being of a God," [40] and officeholders were required to affirm by oath their belief in God and in the divine inspiration of the Old and New Testaments.[41]

Religious Disestablishment in the South. Nor was a total separation of church and state sought in the Southern colonies during the revolutionary period, except in Virginia. In Maryland, for example, the constitution adopted in 1776 authorized the state legislature to lay a general tax for the support of the *Christian* religion.[42] The North Carolina constitution of 1776 established a religious qualification for office, declaring that no person could hold a place of public trust if he denied "the truth of the *Protestant* religion, or the divine authority of either the Old or New Testament." [43] The South Carolina constitution of 1778 flatly stated that "The *Christian Protestant* religion shall be deemed . . . the established religion of the State." Accordingly, no religious society was entitled to incorporation as a church of the state unless its members agreed "that there is one Eternal God and a future state of reward and punishment; that God is publicly to be worshipped; that the *Christian* religion is the true religion; that the Holy Scriptures of the Old and New Testaments are of divine inspiration and . . . that it is lawful and the duty of every man . . . to bear witness to the truth." Moreover, pastors were required to declare that they would instruct their congregations in the lessons of Scripture.[44] Finally, in Georgia, the constitution adopted in 1777 disestablished the Anglican Church, but at the same time allowed for the public support of religion through taxation. "All persons whatever shall have the free exercise of their religion," it was asserted in Article LVI, and they "shall not, *unless by consent,* support any teacher or teachers except those of their own profession." [45] This meant that Georgians could be taxed for the support of their own religion. Accordingly, a law was passed in 1785 stipulating that all Christian sects would receive tax support in proportion to the amount of property owned by their members.[46] The constitution of 1777 further required that "all members of the legislature shall be of the *Protestant* religion." [47]

Among the Southern states, only in Virginia, it seems, was a complete separation of church and state accepted in principle. But only grudgingly did Virginians advance to this state of mind. At the convention of 1776, Episcopalians and Methodists petitioned unsuccessfully against disestablishment, and the Church of England was severed from the civil authority. A bill of rights was drafted by George Mason, but the section on religion suggested by Patrick Henry was worded in such a way as to imply that there would be no guarantee of complete religious freedom in the Old Dominion. Henry's proposal stated "that all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society." James Madison insisted that the word *toleration* contained a "dangerous implication," as did the reference to a magistrate. "Toleration," he argued, "belonged to a system where [there] was an established church, and where a certain liberty of worship was granted, not of right, but of grace; while the interposition of the magistrate might annul the grant." The convention agreed, and the objectionable clause was rejected in favor of Madison's amendment, which read: "all men are equally entitled to the full and free exercise of religion, according to the dictates of conscience." Madison was also successful in gaining acceptance of a restraining clause, which declared that "[n]o man, or class of men, ought on account of religion to be invested with peculiar emoluments of privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered." Thus committed to a broad and revolutionary concept of religious liberty, the Virginia bill of rights stood out conspicuously with the Rhode Island charter against the prevailing mood of quasi-establishment in other states.[48]

The task of implementing these principles now fell to the Virginia legislature. Although disestablished, the Church of England still enjoyed certain advantages over other religious sects. Only the Anglican clergy, for example, could marry without a special license. Meeting soon after the convention, the legislature proceeded under the leadership of Thomas Jefferson to remove the last pillars of religious establishment. All previous acts providing for ministers' salaries were repealed, Quaker and Mennonite ministers were empowered to perform marriages without a license, and in general the Episcopal Church was left to regulate its own affairs.[49]

But Patrick Henry and the supporters of religious establishment were not without power and influence, and in 1784 the legislature reversed its position, passing a bill to the second reading which stated that Vir-

ginia should promote the Christian religion and render financial aid to all religious sects. This was to be accomplished through a general assessment whereby each taxpayer would be allowed to select the church that should receive his tax. General Washington, Richard Henry Lee, John Marshall, and Patrick Henry, joined by the Episcopal and Presbyterian clergy, supported the measure. They were opposed by Madison and Jefferson, who made a direct appeal to the people for support against the bill. Accordingly, a Memorial and Remonstrance, drafted by Madison, was circulated throughout the state for signature, declaring that under the Virginia Bill of Rights, no government could come to the aid of religion. So great was public opinion in favor of Madison's position that the legislature was compelled to abandon the bill.[50]

These accomplishments of Madison were further embellished by the actions of Jefferson, who, sensing weakness in the opposition, now came forward with a proposal advocating complete religious freedom for all religious sects and for all dissenters. Entitled, "An Act Establishing Religious Freedom," this measure was enacted into law in 1786. Henceforth, no Virginian could be "compelled to support any religious worship, place, or ministry whatever; nor shall be enforced, restrained, molested, or burthened in his body or goods," nor otherwise caused "to suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." [51]

Thus, after prolonged debate, Virginia emerged from the revolutionary period embracing the broadest sort of religious liberty possible. But at this juncture in the movement toward religious disestablishment, the Virginia experience was almost wholly unprecedented in America. On the eve of the Philadelphia Convention of 1787, the wall of separation doctrine espoused by Madison and Jefferson had been rejected in every state but Virginia and Rhode Island. Strictly speaking, of course, there was not an established church in any of the fourteen states at this time, for even in those states where a specifically identifiable sect or group of sects enjoyed a favored status, other religious denominations were allowed to worship as they pleased.[52] In four states, Massachusetts, Connecticut, Vermont, and New Hampshire, the Congregationalist Church occupied a position of quasi-establishment as a result of direct or indirect benefits conferred by the state constitutions and statutes. Ten states extended preferential treatment to the Protestant religion, and two states, Delaware and Maryland, favored simply the Christian religion. Add to this fact that, "Four [states], Pennsylvania, Delaware, and the Carolinas, required assent to the divine inspiration of the Bible. Two, Pennsylvania and South Carolina, demanded a belief in heaven and hell. Three, New York, Maryland, and South Carolina, excluded ministers from civil office. Two, Pennsylvania and South Carolina, emphasized belief in one eternal God. One, Delaware, required assent to the doctrine of the Trinity. And five, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, adhered to a religious establishment. In one, South Carolina, the obnoxious term toleration found a constitutional place." [53]

From the foregoing it would appear that there were basically three patterns of church-state relations in late eighteenth century America: quasi-establishment of a specific Protestant sect, as seen in most of New England; quasi-establishment of the Protestant religion, as seen throughout most of the nation; and the disestablishment of all religious sects, as seen in Rhode Island and Virginia. Three states adopted the position that allowed one sect of *Protestants, viz.,* Congregationalists, to be preferred over other Protestant sects. Most of the states disclaimed all preference of one sect of *Protestants* over another. And two states, Virginia and Rhode Island, disclaimed at preference of *any* religious sect over another. Only two states, Delaware and Maryland (and possibly Georgia) disclaimed all preference of one sect of *Christians* over another. But all of the states still retained the Christian religion as the foundation stone of their social, civil and political institutions. Not even Rhode Island and Virginia renounced Christianity, and both states continued to respect and acknowledge the Christian religion in their system of laws.

Thus it may be seen that not only did nearly every state reject the Jeffersonian system of church-state relations, but most states also went beyond what is nowadays termed the "No Preference" theory of church-state relations, which holds that most states arranged matters in such a way that all religions would receive political support and none would be preferred over another. But in fact ten of the fourteen states at the time of the adoption of the Constitution simply refused to prefer one *Protestant* sect over another; that is, they placed Protestants in a preferred status over Catholics, Jews, and Dissenters. In the ensuing years, as we shall see, the standard to which most states advanced was more like that of Delaware and Maryland than that of Virginia. Thus it can be seen that in the formative period of the American political tradition of church-state relations, there is little room for the Rhode Island-Virginia model or for the historical interpretation introduced by the Supreme Court in 1947. Developments in the early nineteenth century, to which we now turn, show that most states continued to reject the concept of total separation after the adoption of the First Amendment.

DISESTABLISHMENT IN THE EARLY NINETEENTH CENTURY

It is important to keep in mind that the adoption of the Federal Constitution in 1789 and the Bill of Rights in 1791 had no legal effect whatsoever on church-state relations in the separate states. Article VI of the Constitution stipulated that "no religious test shall ever be required as Qualification to any Office or public trust under the United States;" and the First Amendment forbade Congress to pass any law "respecting an establishment of religion, or prohibiting the free exercise thereof." But as students of the Constitution have so frequently observed, "neither of these prohibitions was laid upon the individual states. . . . Broad as were the principles upon which the national government was based, the matter of church establishment or disestablishment, of taxation compulsory or by voluntary contribution, of test acts, oaths and religious qualifications for office, was left entirely to the discretion of the sovereign states." [54] The significance of this fact in relation to the Supreme Court's involvement in the issue will be explored later; for the moment it is enough to say that "The real battle of religious liberty [and disestablishment] was fought out in the State legislatures and conventions." [55]

In New England, where the principal issue was financial support of religion, the established churches managed to retain their status in some states for more than a quarter of a century after the adoption of the First Amendment. Connecticut is a case in point. Here, the pillars of religious establishment were actually strengthened in 1791 by a law requiring dissenters to file certificates demonstrating proof of membership in a dissenting church in order to avoid the state tithe.[56] Not until 1818, when a new constitution was narrowly adopted, did religious establishment cease to exist in Connecticut. Article I proclaimed the free exercise of religion and ordained that "no preference shall be given by law to any Christian sect." [57] It was further stipulated in Article VII that "no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association." [58] Vermont, eleven years earlier, had already abandoned the practice of tithes and town-support of churches.[59]

But New Hampshire stood against the tide of disestablishment. Although a new fundamental law was adopted in 1792, the provisions of the 1784 constitution providing for public support of "Protestant teachers of Piety" remained intact and were even extended to the constitution of 1912. The dominant position of the Congregationalist Church was nevertheless eroded by a series of legislative acts between 1792-1807 granting exemptions to Episcopalians, Baptists, and Methodists, which ultimately gave rise to a toleration act in 1819 granting complete freedom to all *Christian* sects.[60] Repeated attempts by dissenters to strike the words *Protestant* and *Christian* from the New Hampshire constitution were unsuccessful, however, and both were carried over to the revised constitution of 1889. The requirement that members of the state legislature be of the Protestant religion was not dropped from the state constitution until 1877.

Similarly, in Massachusetts, the movement toward disestablishment met with heavy resistance. In 1800 the state legislature passed a law requiring each town or parish to provide "a public Protestant teacher of piety." The statute further provided that delinquent towns were liable to heavy fines; and all citizens were required to cover the ministers' salaries and the costs of building and repairing the churches through public taxation.[61] As late as 1832 one Nathaniel P. Fisher was arrested for refusing to pay a tax of $2.38 which had been levied upon him at a town meeting.[62]

Under Massachusetts law, the established church was a town institution, but the choice of ministers remained with the town meeting rather than the church itself. Surprisingly, this eventually worked to the disadvantage and ultimate defeat of the established Congregationalist Church. In 1818, the minister of the town of Dedham resigned. The non-communicants of the town united with the Unitarian minority in the church and at the town meeting a Unitarian was elected pastor. Most members of the church opposed the new pastor and moved their religious services to another location.[63] They subsequently brought suit for possession of the church property, but in *Baker* v. *Fales* (1820), the Supreme Judicial Court of Massachusetts ruled that they had no right to it. The constitution, stated the Court flatly, "gives to towns, not to churches, the right to elect the minister in the last resort." [64] This decision prompted about

half the towns in eastern Massachusetts to elect Unitarian ministers. Thus were the Congregationlists ejected from their own churches, "turned out of house and home by the very powers [they] had contrived to give [them] lasting security." Finally, in 1833, tithes were abolished, the towns were relieved of their responsibilities over church affairs, and the old Puritan church was formally disestablished.[65]

In the middle-Atlantic states, where religious establishment was not so deeply entrenched, dissenters and minority sects encountered fewer obstacles. In 1792, Delaware quietly abandoned the religious oath of office, and in 1844 New Jersey finally discontinued her religious test for office. The New York constitution of 1821 removed the restrictions of the 1777 charter against naturalization of Catholics.[66] Pennsylvania, on the other hand, reached a compromise. The constitution of 1790 extended civil rights to non-believers but at the same time narrowed the liberty of public officeholders by requiring them to acknowledge "the being of God and a future state of rewards and punishments."[67] This requirement was retained in subsequent constitutions of Pennsylvania throughout the remainder of the nineteenth century.

The Old South rather cautiously followed the movement toward disestablishment. In the border state of Maryland, the power of the legislature to lay taxes for the support of the Christian religion was revoked by a constitutional amendment in 1810.[68] But throughout the remainder of the nineteenth century, the state held tenaciously to the constitutional requirement of 1776 that every public officeholder "subscribe [to] a declaration of his belief in the Christian religion." In North Carolina, where officeholders were required to affirm the truth of the Protestant religion under the constitution of 1776, an amendment was passed in 1835 substituting the word "Christian" for "Protestant."[69] By the terms of the constitution of 1876, however, "All persons who shall deny the being of Almighty God" were declared ineligible for public office.[70]

The South Carolina constitution of 1790 formally disestablished the Protestant religion and abolished all religious tests for office.[71] Reflecting a resurgence of religious belief, the constitution of 1868 stipulated, however, that persons denying the existence of God could not take office.[72] Following the Rhode Island and Virginia model, the state of Georgia abolished all religious tests for office in 1789 and did not thereafter reinstate them.[73]

Despite the unique achievements of Madison and Jefferson in the 1780s, religious matters remained unsettled in the Old Dominion. To clarify the issue of whether the Bill of Rights was part of the constitution, the legislature repealed all laws in 1798–1799 seemingly in conflict with the Bill of Rights, thereby sealing the disestablishment of the Episcopal Church. There remained, however, the question of ownership of glebe lands, which had been originally given to the Church by the Crown. Rival sects often laid claim to the glebes on the theory that possession by the Episcopal Church constituted preference of one religion over another. To resolve the issue, the legislature enacted a statute in 1802 providing for the public sale of vacant glebe lands. This left most glebe lands in the hands of the Church. The Church nevertheless challenged the constitutionality of the act, and the Virginia Court of Appeals finally ended the controversy in 1840, affirming the position of the legislature.[74]

The pattern of church-state relations in new states entering the Union after 1789 did not differ substantially from that in the original fourteen. By 1860—and the situation did not radically change for the next three quarters of a century—the quasi-establishment of a specific Protestant sect had everywhere been rejected; quasi-establishment of the Protestant religion was abandoned in most but not all of the states; and the quasi-establishment of the Christian religion still remained in some areas. A new pattern of church-state relations, the multiple or quasi-establishment of all religions in general, i.e., giving all religious sects a preferred status over disbelievers (the No Preference doctrine) became widespread throughout most of the Union. Thus at the turn of the century, for example, no person who denied the existence of God could hold office in such states as Arkansas, Mississippi, Texas, North Carolina, or South Carolina. Arkansas also discharged witnesses in court proceedings who uttered such denials. In Pennsylvania and Tennessee, public office was restricted to persons who "believe in God and a future state of reward and punishment." Maryland required this belief in witnesses and jurors, but for officeholders demanded simply a belief in God.[75] Indeed, a good case can be made to show that during the latter part of the nineteenth and well into the twentieth centuries, the trend was not toward disestablishment but toward a strengthening of the ties between church and state. In the nineteenth century, for example, only one state (Massachusetts, 1826) required Bible reading in the public schools. Between 1913–1930, however, eleven more states enacted similar statutes.[76] Such practices as these are hardly in accord with the putative notion that the Jeffersonian doctrine of church-state relations was increasingly popular from the moment of its inception until it was formally adopted by the Supreme Court.

Needless to say, this cursory treatment here of church-state relations in the late eighteenth and early nineteenth centuries is not intended to be definitive. A bare catalogue of church-state relations in all of the States before and after the adoption of the Constitution would require many volumes. But this survey of state constitutions and organic laws does indicate quite sufficiently that the doctrine of a total separation of church and state, or "no aid of any kind to religion," as the Supreme Court has put it, was not espoused or followed by any significant number of states in the formative era of the American Republic or in the early nineteenth century.

In many of the establishment cases, particularly those decided during the Vinson-Warren period, the Court has nevertheless been at pains to defend its position on historical grounds. From Justice Black's opinion in *Everson* through Clark's in *Schempp* (1963)[77] and the concurring opinions of Justices Douglas and Brennan in *Lemon v. Kurtzman* (1971),[78] there are lengthy discourses on religious liberty purporting to show a national acceptance, throughout American history, of the Jeffersonian proposition that the First Amendment built a "wall of separation" between church and state. "What strikes the critical student of the Constitution as peculiar is the fact the historical material dredged up by the Court, much of which relates to religious conflict in England in the seventeenth century, is totally irrelevant to the absolutist position the Court is attempting to substantiate, and invariably refers to the consequences and dangers of political aid to one religious sect rather than religion generally."[79]

The Court has consciously based its interpretation of the establishment clause on the historical record. To comprehend the original understanding of separation of church and state, at the least a careful scrutiny of contemporary opinion from 1787 to 1791 and a review of state practices in the Republic would seem essential. But the Court has made no such effort and has instead confined its historical inquiry to religious persecutions in Europe and the Virginia struggle against the Anglican establishment; and it has treated the rather unique Virginia experience, relying on carefully selected writings of Madison and Jefferson, to be that of the Congress of 1791 and of the nation at large. In the words of Justice Black, the Court has "recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [of Religious Freedom of 1786]."[80]

Does history support the Supreme Court's assertion that the First Amendment forbids governmental aid to religion? Here is the answer provided by the late Edward S. Corwin: "The historical record shows beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of *preference;* and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase. Undoubtedly the Court has the right to make history, as it has often done in the past; but is has no right to *make it up.*"[81] If Justice Clark's attitude on this issue is representative of the Court as a whole, the likelihood that the Court will cast aside Black's absolutism is slim. In *Schempp*, Clark indicated that the Court was weary of historical debate, and that as far as he and other members of the Court were concerned, the proper meaning of the establishment clause was settled. Objections by lawyers and scholars to the Court's distortion of history, declared Clark, "seem entirely untenable and of value only as academic exercises."[82] Significantly, historical inquiry among the Justices into the origin and development of church-state relations, which never commanded the attention of the Court much beyond the pre-constitution experience of Virginia in the first place, has practically vanished since Justice Clark wrote these words. Yet it was Justice Black himself, the author of the *Everson* doctrine, who insisted that "[i]t is never to be forgotten that, in the construction of the language of the Constitition . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[83] That almost every member of the Court has clung tenaciously to Black's absolutist interpretation of the establishment clause since 1947, in spite of the conflicting historical evidence, while at the same time rejecting his absolutist views on the other provisions of the First Amendment, is a curiosity of modern civil rights law that invites skepticism concerning the Court's selfproclaimed sincerity in seeking out the intent of the Framers in construing the Constitution.

Independent of these considerations, we are reminded that "the Supreme Court as a

whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth a criterion for communication in public affairs."[84] The importance of keeping the Court honest is a concern that all free men must share. "To the extent that dignity and honesty in the conduct of human affairs rest on the belief in historical objectivity," observes Sidney Hook, "reflection on it goes to the very heart of the question concerning the nature and possibility of liberal civilization. . . . There is a difference between using our knowledge of the history of the past in order to influence the future . . . and making or manufacturing a history of the past solely with an eye to achieve our aims."[85]

JURISDICTION AND THE ISSUE OF INCORPORATION

During the Federal Convention of 1787, George Mason of Virginia proposed that a declaration of rights be included in the Constitution; but a motion offered by Elbridge Gerry that a committee be appointed to prepare such a statement was voted down unanimously, it being generally agreed that a bill of rights was not necessary since the expressly enumerated powers of the federal government did not include power over the rights in question. Without much of a struggle, however, the Federalist supporters of the Constitution agreed to the adoption of a bill of rights during the ratification effort in the state conventions. One reason they acceded to Anti-Federalist demands for a bill of rights was that such a declaration changed nothing regarding the constitutional structure, and neither reduced federal power nor increased state power. The Bill of Rights, in other words, simply declared what was already understood by the Framers of the Constitution—*viz.*, that the national government had no authority in the general area of civil liberties. Federalists and Anti-Federalists were in general agreement that the states, not the federal government, would determine under their own bills of rights the meaning and substance of civil liberty within their respective jurisdictions. The debate was thus over the proper wording of the Constitution regarding the *enforcement* of civil liberties rather than their substantive content.[86]

As we previously noted, the Bill of Rights had a dual purpose: to protect each *individual* against the abridgment of civil liberties by the federal government, and to assure each *state* that the federal government would not encroach upon the jurisdiction of the states over such matters. The Bill of Rights, then, is essentially a states' rights document. Each amendment was a guarantee to the individual *and* to the states. Indeed, the federalism of the Bill of Rights was widely regarded in 1791 as far more important than the protection it afforded to the individual.[87] Odd as it may seem today, the First Amendment was not only a guarantee to the individual that Congress could not establish a national religion, but also a guarantee to the states that they were free to determine the meaning of religious establishment within their jurisdictions, and to newly establish, maintain, or disestablish religion as they saw fit.

Particularly significant in this regard is the fact that the First Congress, which proposed the Bill of Rights, rejected an attempt to apply portions of it to the states. The fifth resolution of James Madison's proposed series of amendments for a bill of rights provided that "[n]o *State* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[88] Madison's proposal was defeated in the Senate. "This [proposal] is offered," Tucker of South Carolina observed, "as an amendment to the Constitution of the United States, but it goes only to the alteration of the Constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much."[89]

For nearly a century and a half, the Supreme Court respected these views, thereby securing one of the major objectives of the Bill of Rights. Speaking for a unanimous Court, Chief Justice Marshall declared in *Barron v. Baltimore* (1833) that the first eight amendments "contain no expression indicating an intention to apply them to the state governments."[90] This position was consistently maintained in subsequent decisions involving the First, Fifth, Seventh, and Eighth Amendments between 1833-1868. In *Permoli v. New Orleans* (1845), for example, a unanimous Court upheld a municipal ordinance challenged by the Catholic Church, asserting that "[t]he Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws."[91] And even after the adoption of the Fourteenth Amendment, which forbade any State from denying an individual life, liberty, and property, the Supreme Court continued to follow *Barron*—a fact strongly indicating that the Fourteenth Amendment was not intended by those who witnessed its creation and sought to apply its provisions to defeat the original purpose of the Bill of Rights.[92] As late as 1922, in *Prudential Insurance Co. v. Cheek*, the Court declared that "neither the Fourteenth Amendment nor any other provision of the Constitution imposes restrictions upon the States about freedom of speech."[93]

The Court suddenly reversed itself in 1925 when if offhandedly remarked in *Gitlow v. New York* that "[f]or present purposes we may and do assume that freedom of speech and of press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states."[94] Thus began the piecemeal incorporation of the First Amendment into the word "liberty" of the due process clause of the Fourteeth Amendment, reversing *sub silentio* the *Barron* ruling and thereby undermining one of the great objects of the Bill of Rights by applying it to the states. In 1931, in *Near v. Minnesota*,[95] the Court embarked upon the revolutionary course outlined in *Gitlow* by incorporating freedom of speech and press into the Fourteenth Amendment. In subsequent cases, the Court arbitrarily transferred freedom of assembly and freedom of religion[96] to the Fourteenth Amendment, finally completing the incorporation of the First Amendment with the inclusion of the establishment clause in *Everson*.[97]

As Professor Corwin has amply demonstrated, the application of the establishment clause to the states through the due process clause requires a rather bizarre juggling of words and artful manipulation of legal and historical precedents. In the first place, "the principal importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion, rather than its bearing on the question of the Separation of Church and State."[98] In other words, it is the federalism of the First Amendment, and the desire of Congress in 1791 to assure the states that the new national government would have no authority over the subject of church-state relations, that explains the underlying purpose of the establishment clause of the First Amendment. The refusal of the Court to recognize this significant aspect of the Amendment has, in the view of Mark de Wolfe Howe, led the Court "to disregard—even to distort—the intellectual background of the First Amendment."[99] The Court, Howe has suggested, has arbitrarily embraced the erroneous idea "that the policies of freedom and equality enunciated in 1868 in the Fourteenth Amendment must be read back into the prohibitions of the First Amendment—the familiar process of incorporation carried out, as it were, in reverse. The consequences may be admirable law, but it is . . . distorted history."[100] What the delegates in the various state ratifying conventions in 1787-1788 sought was a guarantee that the new national government would neither set up a national church nor interfere with the various types of establishments, quasi-establishments, and church-government arrangements existing in several states. Thus, New Hampshire proposed an amendment which read: "Congress shall make no laws touching religion. . . ." Since the Constitution of New Hampshire provided special privileges for the Protestant religion, the amendment was very likely aimed at excluding the new government from passing any law that might "touch" [i.e. alter] their particular type of establishment.[101]

Against this backdrop, it requires no little skill to reconcile the original understanding of the First Amendment with Mr. Justice Rutledge's disingenuous reading of the establishment clause in *Everson:*

"The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbiding every form of public aid or support for religion."[102]

Unless it be assumed that the establishment clause was an invitation to the national government to interfere with existing church-state relations, Rutledge's generally accepted interpretation of the First Amendment among members of the Court is wholly unhistorical. No such assumption is supportable on the record; indeed a number of the states, as we have seen, already had some form of existing establishment or quasi-establishment at the time of adoption, and it is difficult to believe that they ratified the establishment clause with the understanding that "The First Amendment put an end to placing any one church in a preferred position."[103] One is tempted to conclude, therefore, that the modern Court, by applying the establishment clause to the states, has accomplished the very purpose which that clause was designed to prevent—*viz.*, the involvement of the national government in the religious affairs of the several states.

If it could be demonstrated satisfactorily that the Framers of the Fourteenth Amendment deliberately sought to apply the Bill

of Rights to the States, and to reverse both *Barron v. Baltimore* and *Permoli v. New Orleans*, then the original purpose of the establishment clause would not be paramount. The intent of the Framers of 1868 would have superseded that of the Framers of 1791. But again, there is a paucity of evidence to support such a proposition; and there is an abundance of documentary material drawn for the debates of the 39th Congress and contemporaneous newspapers throughout the Union which, thanks to the research of Charles Fairman, points to the conclusion that the Fourteenth Amendment was not intended to confer jurisdiction over the First Amendment to the federal government or upset *Barron*.[104]

With respect to the establishment clause itself, another constitutional scholar has observed that "a conclusive argument against the incorporation theory, at least as respects the religious provisions of the First Amendment, is the 'Blaine Amendment' proposed in 1875."[105] That year, James Blaine of Maine introduced an important resolution in the Senate, upon the recommendation of President Grant, which provided that: "No *State* shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." Significantly, the Congress which considered the Blaine Amendment included twenty-three members of the 39th Congress which adopted the Fourteenth Amendment.

"Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier . . . . Senator Stevenson, in opposing the proposed amendments, referred to Thomas Jefferson: "Friend as he [Jefferson] was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a Government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion." Remarks of [other Members of Congress] . . . give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First."[106]

Thus the debates on both the adoption of the Fourteenth Amendment and the rejection of the Blaine Amendment reveal a general understanding among the participants that the Fourteenth Amendment left undisturbed the system of church-state relations established under the Bill of Rights.

CONCLUSION

A strong case can be made to show that the Supreme Court has adopted a constitutional doctrine nationalizing the establishment clause which the Framers of the Bill of Rights and the Fourteenth Amendment clearly rejected. First, the Court ignores the federalism of the First Amendment. The common understanding in 1791, and for more than a century thereafter on the question of church-state relations, is unmistakably clear: A principal underlying purpose of the First Amendment was to prevent the national government from usurping the powers of the states over the subject of church-state relations, and to reaffirm the authority or right of each state to define, without federal interference, the nature of those relations within its own boundaries. The establishment clause, applying only to the federal government, was calculated to prevent not only the establishment of a national church, but to safeguard and leave undisturbed existing relations between church and state at the state and local level. Second, there is serious doubt whether the Fourteenth Amendment was intended by its framers and backers to nationalize the establishment clause. And third, "the prohibition on the establishment of religion by Congress is not convertible into a similar prohibition on the States, under the authorization of the Fourteenth Amendment, unless the term 'establishment of religion' to given an application which carries with it invasion of somebody's freedom of religion, that is, of 'liberty.'"[107] Taken together, these are powerful denials of the Court's right to assume jurisdiction over cases involving state aid to religion.

A Final Note. Since 1975, Senator Jesse Helms (R-NC) has been introducing legislation to deny all federal courts jurisdiction over cases involving voluntary prayer in the public schools, and in 1979 such a measure passed in the Senate.[108] Should such legislation be enacted by Congress, it would represent the first step in the arduous process of restoring the Bill of Rights to its original purpose; for its effect would be to lodge in the highest courts of each state final authority over questions involving such practices. Senator Helms has again introduced this measure in the 97th Congress, and it is expected that the Separation of Powers Subcommittee of the Senate Judiciary Committee will begin consideration of the bill in early 1982. Whether it succeeds or fails, it will serve to focus public attention on the origin and nature of both the establishment clause and the Bill of Rights generally, while possibly generating debate on the doctrine of incorporation itself, certainly a debate going to the very heart of the question of whether it is either wise or proper for nine unelected officials to possess the incredible power of deciding what our freedoms shall be.

FOOTNOTES

[1] The Virginia Declaration of Rights of 1776 proclaimed the principle of religious liberty, but not until 1779 was the Anglican Church disestablished; even so, the complete separation of church and state did not come about until the adoption of the Virginia Statute of Religious Liberty—drafted by Thomas Jefferson and enacted by the Virginia legislature on Janaury 16, 1786.

[2] Joseph Story, III, *Commentaries on the Constitution* § 1871 (1833) (Emphasis added). For an analysis of Justice Story's position, including his refutation of Jefferson's assertion that Christianity was not a part of the common law, *see* my study of Story's jurisprudence in James McClellan, *Joseph Story and the American Constitution* (Norman, Oklahoma: University of Oklahoma Press, 1971), pp. 118-59.

[3] For an extended discussion of this issue, *see* McClellan, *supra* n. 2 at pp. 142-59.

[4] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[5] *Id.* at p. 8.

[6] *Id.* at pp. 15, 16. (Emphasis added.)

[7] *Id.* at p. 15. The phrase is taken not from the Constitution, of course, but from a letter which Jefferson wrote to the Baptist Association of Danbury, Connecticut in 1802. It reads in part: "I contemplate with sovereign reverence that act of the whole American people, which declared that *their legislature* should 'make no law respecting as establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." [As quoted with emphasis added, in Charles Rice, *Supreme Court and Public Prayer* (New York: Fordham University Press, 1964), p. 63.] The term "their legislature" clearly refers to Congress. Jefferson never suggested that the several states built a "wall of separation" between their governments and religion.

[8] *McCollom v. Champaign Board of Education*, 333 U.S. 203 (1948).

[9] *Id.* at p. 210. In *Zorach v. Clauson*, 343 U.S. 306 (1952), however, the Court upheld a New York "dismissed time" program of religious instruction which, unlike that in Illinois, dismissed children from public schools at the request of their parents to attend religious class off school grounds. The Court attempted to distinguish the two cases by pointing out that the New York plan did not involve the use of public property during the time of religious instruction. In 1879, a taxpayer attempted to restrain Illinois school authorities, acting under a statute, from allowing a school to be used as a religious meeting house. The Supreme Court of Illinois upheld the law, arguing that "religion and religious worship are not so placed under the ban of the (state) Constitution that they may not be allowed to become recipients of any incidental benefit whatever from the public bodies or authorities of the state." *Nichols v. The School Directors*, 93 Freeman 61 (Illinois) 1879.

[10] *Engel v. Vitale*, 370 U.S. 421 (1962).

[11] *Id.* at p. 425. In *Chamberlain v. Dade County Board of Instruction*, 377 U.S. 402 (1964), the Court reversed a Florida state Supreme Court ruling which had upheld public school prayers and "devotional" Bible-reading, even though the state court had enjoined the holding of Christmas and Channuka programs and the showing of religious films; and in *Dekalb County Community School District v. DeSpain*, 390 U.S. 906 (1968), the Court upheld a lower court decision holding that a prayer recited in verse form by kindergarten children was still a prayer, although the words "God" and "Amen" had been eliminated from it.

[12] *Abington School District v. Schempp*, 374 U.S. 225 (1963).

[13] *Board of Education v. Allen*, 392 U.S. 236 (1968).

[14] *Id.* at pp. 243-44.

[15] *Id.* at p. 243. *See Abington School District v. Schempp*, 374 U.S. at p. 222.

[16] *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

[17] *Compare, Tilton v. Richardson*, 403 U.S. 672 (1971) and *Hunt v. McNair*, 413 U.S. 734 (1973) (The First Amendment does not forbid federal or state grants to church-related colleges for the construction of buildings) to *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (The First Amendment forbids state grants to nonpublic primary and secondary schools for maintenance and repair of existing facilities).

[18] *Compare, Everson v. Board of Education*, 330 U.S. 1 (1947) (The First Amendment does not forbid reimbursement for transportation to nonpublic schools) to *Wolman v. Walter*, 433 U.S. 229 (1977) (The First Amendment forbids State funding of field trips for nonpublic schools).

[19] *Compare, Board of Education v. Allen*, 392 U.S. 236 (1968) (The First Amendment does not forbid state loans of textbooks to nonpublic schools) to *Wolman v. Walter*, 433 U.S. 229 (1977) (The First Amendment forbids state funding of maps for nonpublic schools).

[20] In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Court upheld property tax exemptions to religious organizations, but in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) ruled that tax relief for tuition payments to nonpublic schools was unconstitutional.

[21] *Wolman v. Walter*, 433 U.S. 229, 263 (1977).

[22] D. Meiklejohn, *Religion in the Burger Court: The Heritage of Mr. Justice Black*, 10 Indiana Law Reviews 647 (1977).

[23] *Id.*

[24] Under the "Duke's Laws" of 1664, every township in the colony of New York was obliged to support a Protestant church and minister. This, in effect, allowed the Dutch Reformed Church to remain as the established church in most localities, since a majority of the settlers were Dutch. In 1686, James II instructed the Royal Governor of New York to establish the Angelican Church in the colony; but the governor failed to act. Finally, in 1693, the colonial assembly enacted a peculiar bill which seemed to establish the Anglican Church in a few designated counties. This confused situation was clarified in 1731 by the provincial court of New York, which accepted the claim of the Presbyterians to hold the Jamaica Church of Queens (sought by the Anglicans) and to collect taxes for its support. This decision allowed each community to establish and support a Protestant church of its own choosing, and the establishment of the Anglican Church was rendered a legal fiction. *See* Sanford Hoadley Cobb, *The Rise of Religious Liberty in*

America, (New York: Johnson Reprint Corporation, 1970).

[25] William Sweet, *The Story of Religion in America* (New York: Harper Publishing Company, 1950), p. 189.

[26] Benjamin Perley Poore, I, II, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, D.C.: Government Printing Office, 1877), pp. 1596-97.

[27] Cobb, *supra* n. 24, p. 501.

[28] Poore, II, *supra* n. 26, pp. 1280-81.

[29] *Id.* at p. 1286.

[30] *Id.* at I, p. 957.

[31] *Id.* at p. 970.

[32] *Id.* at II, p. 1859.

[33] *Id.* at p. 1861.

[34] Cobb, *supra* n. 24, p. 517. Vermont was originally claimed by Massachusetts, New Hampshire, and New York. At the outbreak of the Revolution she sought independence not only from Great Britian but from these States as well. In 1781 and 1782, New Hampshire and Massachusetts assented to her independence, but it was 1790 before New York consented to Vermont's formal admission into the Union.

[35] Poore, *supra* n. 26, at II. p. 1339.

[36] Story, *supra* n. 2, at I, § 114.

[37] Poore, *supra* n. 26, at II, p. 1313. The 1776 Constitution provided further that no person should "ever be obliged to pay tithes, taxes or any other rates, for the pupose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform."

[38] *Id.* at I, p. 276.

[39] Cobb, *supra* n. 24, p. 483.

[40] Poore, *supra* n. 26, at II, p. 1541.

[41] *Id.* at p. 1543.

[42] *Id.* at I, p. 819. The protection of religious liberty was restricted to "all persons professing the *Christian* religion." The term "Christian" rather than "Protestant" was used apparently because of the presence of a large Catholic population.

[43] *Id.* at II, p. 1413.

[44] *Id.* at pp. 1626-27.

[45] *Id.* at I, p. 383.

[46] Reba Carolyn Strickland, *Religion and the State of Georgia in the Eighteenth Century* (New York: Columbia University Press, 1939), p. 164.

[47] Poore, *supra* n. 26, at I, p. 379.

[48] Cobb, *supra* n. 24, pp. 490-92.

[49] *Id.* at pp. 493-94.

[50] *Id.* at pp. 495-97.

[51] *Id.* at pp. 497-98. *See*, Leonard Williams Levy, *Judgments: Essays on American Constitutional History* (Chicago: Quadrangle Books, 1972), pp. 200-01.

[52] In Massachusetts, for example, "(i)t was not an establishment like that of the Church of England . . . because the Legislature had no power to regulate doctrine and enforce conformity; and because dissenters received a share of the taxes levied for religious purposes. Consequently, it is more technically accurate to describe the Congregationalist order as favored rather than legally established in Massachusetts." John Francis Thorning, *Religious Liberty in Transition* (Washington, D.C.: The Catholic University of America, 1931), p. 27.

[53] Cobb, *supra* n. 24, p. 507. Actually four states excluded ministers from public office, after Georgia adopted a new constitution in 1789. *See* Article I, § 18 in Poore, *supra* n. 24, at I, p. 385.

[54] Thorning, *supra* n. 52, p. 3. *See also* Cobb, *supra* n. 24, p. 510. Issac Cornelison, *The Relation of Religion to Civil Government in the United States of America* (New York: Putnam, 1895), pp. 95, 111.

[55] Thorning, *supra* n. 52, p. 7.

[56] Cobb, *supra* n. 24, p. 512.

[57] Poore, *supra* n. 26, at I, p. 259.

[58] *Id.* at p. 264.

[59] Cobb, *supra* n. 24, p. 517.

[60] *Id.* at p. 516.

[61] Cornelison, *supra* n. 54, p. 106.

[62] *Id.* at p. 108.

[63] *Id.* at p. 109.

[64] *Baker v. Fales*, 16 Massachusetts 487 (1820).

[65] Cornelison, *supra* n. 54, p. 110. Religious tests for office were abolished at the State constitutional convention of 1820.

[66] *See*, Poore, *supra* n. 26, pp. 278-88 (Delaware); II, pp. 1314-25 (New Jersey); II, pp. 1341-51 (New York).

[67] *Id.* at II, p. 1554.

[68] *Id.* at I, p. 832.

[69] *Id.* at II, p. 1418.

[70] *Id.* at p. 1446.

[71] *Id.* at pp. 1632-3.

[72] *Id.* at p. 1663.

[73] *See Id.* at I, pp. 384-426.

[74] Cobb, *supra* n. 26, pp. 511-12.

[75] *Id.* at p. 520.

[76] Pennsylvania 1913; Delaware and Tennessee, 1915; New Jersey, 1916; Alabama, 1919; Georgia, 1921; Maine, 1923, Kentucky, 1924; Florida and Idaho, 1925; Arkansas, 1930. Avin Johnson and Frank Yost, *Separation of Church and State in the United States* (New York: Greenwood Reprint Company, 1948), p. 33.

[77] *Abington School District* v. *Schempp*, 374 U.S. 203 (1963).

[78] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

[79] McClellan, *supra* n. 2, pp. 135-36.

[80] *Everson* v. *Board of Education*, 330 U.S. 13 (1947).

[81] Edward S. Corwin, "The Supreme Court as a National School Board," as reprinted in *A Constitution of Powers in a Secular State* (Charlottesville, Virginia: Michie Company, 1951), p. 116.

[82] *Abington School District* v. *Schempp*, 374 U.S. at p. 217.

[83] *Adamson* v. *California*, 332 U.S. 72 (1947). "An Amendment to the Constitution should be read," said Justice Frankfurter in the same case, "in a sense most obvious to the common understanding at the time of its adoption." *Id.* at p. 63.

[84] Charles Miller, *The Supreme Court and the Uses of History*, (Cambridge, Massachusetts: Harvard University Press, 1969), p. 195.

[85] Sidney Hook, as quoted in Miller, *id.*

[86] In *The Federalist* No. 45, James Madison explained that "the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, *liberties* and properties of the people; and the internal order, improvement and prosperity of the State." *The Federalist* p. 303 (Modern Library Edition).

[87] Six of the States which ratified the Constitution before it went into effect proposed lengthy lists of amendments. "It has frequently been stated that the motive behind these amendments was a desire to secure greater protection for the natural rights of the people. This is true only in part. An examination of the proposals of the first three states to make them, Massachusetts, South Carolina, and New Hampshire, will afford sufficient evidence of the fact that the members of these conventions were much more perturbed about the rights and powers of the states than about the rights of the people." Massachusetts proposed nine amendments but only the sixth, referring to indictment by grand jury, dealt with individual liberty as such. In one place the short list proposed by South Carolina makes mention of "the freedom of the people," but otherwise it deals with the issue of the "sovereignty of the states." Of the twelve proposed amendments offered by New Hampshire, only the last three have a direct bearing on individual liberty. Only Virginia and North Carolina, it seems, proposed a true bill of rights to the people. Benjamin Wright, *American Interpretations of Natural Law* (Cambridge, Massachusetts: Harvard University Press, 1931), p. 147.

[88] As quoted in McClellan, *supra* n. 2, p. 147.

[89] *Id.* at pp. 147-48.

[90] *Barron v. Baltimore*, 7 Peters 250 (1833).

[91] *Permoli v. New Orleans*, 3 Howard 609 (1845).

[92] *See* C. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 34, Harvard Law Review 436 (1926).

[93] *Prudential Insurance Company* v. *Cheek*, 259 U.S. 530 (1922).

[94] *Gitlow* v. *New York*, 268 U.S. 666 (1925).

[95] *Near* v. *Minnesota*, 283 U.S. 697 (1931).

[96] *DeJonge* v. *Oregon*, 299 U.S. 353 (1937) [freedom of assembly]; *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) [Free exercise of religion].

[97] Since 1961 the doctrine of incorporation has been extended beyond the First Amendment to the Fourth, Fifth, Sixth, Eighth and Ninth Amendments, *See e.g., Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

[98] Corwin, *supra* n. 81, p. 106.

[99] Mark Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History*, (Chicago: University of Chicago Press, 1965), p. 31.

[100] *Id.*

[101] Francis O'Brien, *Justice Reed and the First Amendment*, (Washington, D.C.: Georgetown University Press, 1958), p. 134. The significance of the word "respecting" in the establishment clause should thus be noted: Congress is to make no law "respecting" (i.e., dealing with the subject of) the establishment of religion, so that existing church-state relations in each State shall remain undisturbed. In the words of Justice Story: "the whole power over the subject of religion is left exclusively, to the State governments, to be acted upon according to their own sense of justice, and the State constitutions." Story, *supra* n. 2, at III, § 1873. Jefferson embraced the same view: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States . . ." Jefferson to Rev. Samuel Miller, XI, *The Writings of Thomas Jefferson* (Washington, D.C.: Andrew Lipscomb Co., 1903-04, issued under the auspices of the Thomas Jefferson Memorial Association of the United States), p. 428.

[102] *Everson v. Board of Education*, 330 U.S. 1, 31 (Rutledge, J. concurring).

[103] *Engel v. Vitale*, 370 U.S. at p. 442 n. 7 (Douglas, J. concurring).

[104] *See* C. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stanford Law Review 5-139 (1949).

[105] O'Brien, *supra* n. 101 at p. 116.

[106] *Id.* at pp. 116-17. "A majority of people in any state in this union can, therefore, if they desire it," said Blaine in an "open letter" to *The New York Times*, "have an established church. . . ." Francis O'Brien, *The States and 'No Establishment': Proposed Amendments to the Constitution Since 1798*, 4 Washburn Law Journal 188 (1965). Between 1876-1930, notes O'Brien, nineteen separate amendment proposals were introduced without success in Congress for the purpose of making the religious provision of the First Amendment binding on the States. *Id.* at p. 210. *See also* A. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harvard Law Review 939 (1951).

[107] Corwin, *supra* n. 81, at p. 116. Under the doctrine of incorporation, the Court interprets the word "liberty" of the due process clause to include the absence of an established religion, even though it is not a personal liberty like freedom of speech, press, assembly or religion that an individual can exercise. Nevertheless, it is not necessary, according to the Court, for parties protesting state religious programs to produce evidence that their religious liberty has in any way been abridged. As the Court asserted in *Schempp:* "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the establishment clause, unlike those relating to the free exercise clause, do not include proof that particular religious freedoms are infringed." *Abington School District v. Schempp*, 374 U.S. at p. 224. Why the requirements should not be the same for the free exercise clause and the establishment clause the Court has not explained. Moreover, there is a compelling argument that by its actions the Court itself has denied the right of free exercise to a majority of public school children, who are in effect compelled through a combination of federal court rulings and state compulsory school attendance laws to shed their constitutional rights of religious freedom while under the control of government authorities.

[108] The Helms Amendment to S. 210, 96th Cong. 1st Sess. was subsequently shifted to S. 450, a bill dealing with the jurisdiction of the Supreme Court. The House Judiciary Committee, however, refused to take action on the measure. *See* Gerald Gunther, *Constitutional Law* (Mineola, New York: Foundation Press, 1979 Supplement) pp. 1-2. Proposed amendments to the Constitution to reverse the Prayer Decision have been introduced in most sessions of Congress since 1962, that sponsored by Everett Dirksen (R.-Ill.) achieving the widest support. On September 21, 1966, Dirksen carried a majority with him, but the vote of 49-37 fell short of the two-thirds majority necessary to propose a constitutional amendment. Dirksen's proposed amendment (S.J. Res. 148) was one of 150 measures introduced

in the 88th Congress to reverse the Court's holding in the Prayer Decision. *See* Congressional Quarterly, 11 *Congress and the Nation, pp.* 410-11 (1969).

Mr. HATCH. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. TRIBLE). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. EXON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. EXON. Mr. President, I have been following the school prayer debate with great interest. I have always believed that allowing the opportunity to reflect and to pray during the schoolday would not in any way harm our children and, indeed, would enhance their overall educational experience. Education is a preparation for adult life. While public education should not teach religious doctrine, in my view, the respect for and belief in a Supreme Being is fundamental to nearly all Americans.

When I was a child, the teachers at our school would start each day with the Pledge of Allegiance and a short prayer. Much like the phrase on our currency, "In God We Trust," that moment of prayer reminded me that there is a force in the universe much greater than any of us. In my personal view, that order and direction was and is God, through the birth of His son, Jesus Christ. All of my classmates shared the same view since, in that public school climate, we were conveniently all Christians. I do not recall that any of my classmates was offended by that prayer, and I do not recall that my classmates, parents, or teachers ever felt that they were less free because of that prayer. A way can certainly be found by people of good will to have prayer in school without being offensive to reasonable people. This Senator would grant that not all public schools are so "neatly" united in basic faith as was mine. Therein may lie a problem, but not an insurmountable one, which members of all faiths can work out.

It seems strange to me that it took 186 years after the Declaration of Independence, 171 years after the ratification of the first amendment, and 94 years after the adoption of the 14th amendment to decide that the prayers recited in our public schools—initiated before and during the time of the beginning of the Republic—were somehow contrary to the Constitution. Such logic must result in the conclusion that either the Founding Fathers were dumb or that their latter day wisemen, serving by appointment on the modern-day courts, knew or have discovered a unique principle not enunciated in the 1776 era.

If we look to the intentions of the Founding Fathers in interpreting the meaning of the first amendment, I do not think that we would find that they intended to outlaw a practice in which they themselves participated. That is why I believe school prayer is worthy of constitutional protection, made necessary only because of a recent-period court mandate by a handful of appointed judges with supposedly superintellect on what the constitutional fathers intended. Of course, citizens maintain the right to change the Constitution, but it should not be easy. Nor should it be conveniently upset by a few appointees in robes meeting around a table with a bunch of books seeking loopholes. For that matter, neither is it necessarily appropriate to tie in and promote constitutional changes as part of a Presidential reelection campaign.

Clearly, Mr. President, the people of this Nation believe their children should be allowed to benefit from prayer in school. In the last 2 weeks alone, of the hundreds of phone calls to my office from Nebraskans on this matter, 92 percent have been in favor of allowing prayer in school through a constitutional amendment. They know of no other way to regain this right that was snatched away by the Supreme Court in its 1962 decision.

Unfortunately, even among those who support prayer in schools, there is disagreement as to which amendment the Senate should adopt. I applaud the efforts of the sponsors of the various amendments to reach a workable and meaningful compromise. While I personally support the President's proposal, Senate Joint Resolution 73, I am hopeful that those of us supporting school prayer, in both nonelection and election-year timeframes, can and will unite behind a single amendment and move forward to address the other pressing issues facing this body.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DANFORTH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DANFORTH. Mr. President, over the past week a remarkable change has occurred in the public attitude to the proposed amendment to the Constitution on school prayer. We have found in our office that whereas a week or so ago most of the telephone calls and most of the mail was in favor of an amendment, to the point of being almost unanimous, now it is much more evenly split. I think the reason for this is that many denominations, many church leaders and church groups have taken a very strong position against amending the Constitution because they feel this is an abridgement of the traditional separation of church and state, and they also feel that it is a potential interference of outsiders, namely school teachers who cannot be controlled in any way by the parents, into the religious education of children which traditionally in our country has been the role of parents and of the churches.

Mr. President, today an amazing thing occurred on the steps of the Capitol, amazing because of the weather. In a driving rainstorm, very chilly, bleak weather, in the neighborhood of about a hundred churchmen gathered for the purpose of making their views known on the proposed constitutional amendment. Bishop John Walker, the Episcopal Bishop of Washington, read a statement, and I will now read that statement to the Senate because I think it indicates very clearly the position that a number of church people take on the proposed constitutional amendment. The title of the statement is: "A Call to Work and Pray for the Preservation of the First Amendment."

We the undersigned urge leaders of the religious community to join us at noon on Tuesday, March 13, on the East Central Steps of the Capitol to oppose the proposed amendments to the Constitution regarding prayer in public schools.

It has been said in recent days by politicians and clerics that God has been excluded from the public schools and that by amending the Constitution we must put God back into the public schools. This is blasphemy! God cannot be kept out of our schools by mere mortals, not even by the Supreme Court. This is not a quibble! These spokesmen for amending the Constitution presume to speak for God, but the God for whom they speak is not the God of the Bible who thunders down from Mt. Zion. No, their God is but a household God who does the whims of people.

We know that God is there in the public schools right now stirring the hearts of teachers and children, yes, stirring them to prayer. There is prayer right now in public schools. There are prayers of compassion and concern and simple prayers for God's help. We have taught our children to pray and they are there praying now.

We have taught them to pray and we don't want government teaching them. Prayer is for the parents to teach and not the board of education. Prayer is for the church and synagogue to teach and not the government. We don't want some board of education committee watering down our faith as it toils to write a prayer which offends no one. Some of us address God known as Father, Son and Holy Spirit and some speak to the God of Abraham, Isaac and Jacob. These are our traditions and they are dear to us. We don't want any court or school superintendent imposing his or her belief on our children or worse still, taking all traditions and turning them into tasteless porridge.

We rejoice in our nation's pluralism and we have taught our children to celebrate its diversity. Furthermore, we have taught them to respect those who pray as well as those who don't. We don't want a government edict violating that respect whether it be by state prayer or by state imposed medi-

tation. We religious people want the government off our backs and those of our children.

It has been said that religious men and women favor the prayer amendments and that atheists and non-believers oppose them. Don't demean us! We yield to no one in the passing of our belief. We stand here as Christians and Jews opposed to tampering with our priceless constitution, opposed to state enforced prayer or state enforced prayer hiding under a government imposed silence. We will not be silent. In the name of prayer, in the name of God, stop this nonsense and get on with the pressing business of state: peace and justice in the world and at home. The prolonged debate is diverting the attention of the Congress of the United States from these critical issues.

Prayer is our business, the concern of a religious people. Keep the long arm of government out of our discourse with God and leave the First Amendment alone!

Mr. President, this statement is signed by, among other people, the following: Bishop John Hurst Adams, Second Episcopal District, African Methodist Episcopal church; Rabbi Andrew Baker, Washington director, American Jewish Committee; Bishop Cecil Bishop, Presiding Bishop, 12th Episcopal District, African Methodist Episcopal Zion Church; Bishop Oree Broomfield, Christian Methodist Episcopal Church; Dr. James M. Dunn, executive director, Baptist Joint Commission on Public Affairs; the Reverend Ernest R. Gibson, executive director, Council of Churches of Greater Washington; Rabbi Joshua O. Haberman, president, Washington Board of Rabbis; the Reverend Arnold Keller, Church of the Reformation (Washington, D.C.), chairman, Inter-Lutheran Commission for Ministry and Mission; Dr. James Langley, executive director, D.C. Baptist Convention; Mr. Edward N. Leavy, director, District of Columbia/Maryland Office Anti-Defamation League of B'nai B'rith; Mr. Nathan Lewin, president, Jewish Community Council of Greater Washington; Dr. C. J. Malloy, Jr., general secretary, Progressive National Baptist Convention Inc.; the Right Reverend William B. Spofford, Jr., assistant Episcopal Bishop of Washington; the Reverend John F. Steinbruck, Luther Place Memorial Church; Dr. Richard L. Taylor, regional minister, Christian Church, Disciples of Christ; the Right Reverend John T. Walker, Episcopal Bishop of Washington; Bishop D. Frederick Wertz, the Washington area, the United Methodist Church; the Reverend Edward A. White, Presbytery Executive, National Capitol Union Presbytery; Mr. E. Raymone Wilson, executive secretary, emeritus, Friends Committee on National Legislation; and others.

Mr. President, representatives of the Methodist Church, the Presbyterian Church, the Episcopal Church, the Baptist Church, the Jewish community, and a variety of other churches gathered today in the rain and read the statement because it spoke from the depths of their religious convictions that the proposed amendment to the Constitution is offensive.

There are religious people in America who feel very strongly that we should amend the Constitution. There are also people of deeply held religious convictions who think that this is a debasing of their religion, that it is getting Government into the prayer business, that it is secularizing the sacred. We, in the Senate, will have to make a choice between these two positions.

As I stated 1 week ago, my own view is that the best choice is to do nothing; because, if we take the affirmative step of amending the Constitution, the effect of that step is to weigh in on behalf on one side of a religious argument.

I might also say, Mr. President, that it is my understanding that for the first time in 195 years, since the Bill of Rights was written, we are now focusing on a constitutional amendment which would alter or amend, in effect, the Bill of Rights. That is no small matter. To alter the understanding, developed over a number of years, of the first amendment to the Constitution is no small undertaking. That is what we are doing. We are doing it by having under consideration now, on the floor of the Senate, a veritable avalanche of different proposals for a constitutional amendment.

I have not counted the number of proposed constitutional amendments. I know that at least two have been submitted by the Judiciary Committee, one of which is now on the floor. I know that Senator BAKER has proposed at least one alternative. I know that Senator GORTON has proposed at least one alternative. I do not know how many other proposals there are.

Senator BAKER has solicited the views of Senators and asked that the various options be printed in the CONGRESSIONAL RECORD. We do not know what we are debating. We do not know what proposal we are debating. We are supposed to change the effect of the first amendment to the Constitution by voting on something out of the blue.

My own hope is, if we intend to go through with this—and I sincerely hope that we do not—that the very least we do is develop some procedure on the floor of the Senate so that eventually we can focus on one of the myriad of proposals and then debate that one proposal for a period of time. I do not mean setting aside all other Senate business. So far as I am concerned, we can go on a double track. We can follow other legislation, but, at least, it would seem to me that there should be a period of several weeks in which we can focus our attention on the one amendment that we will end up voting for. The procedure might be to vote on amendments to the committee resolution and then go to third reading and then set the matter aside for several weeks or for a month; and let the lawyers flyspeck it, let the religious community look at it, let Members of the Senate look at it, and then, at some date several weeks away, we can vote on it. Maybe that would be the best proposal. I do not know. But I do know that to have a number of proposals and to be talking about the general concept of a prayer amendment, without knowing exactly what the prayer amendment is going to be, is to face the possibility of arriving on the floor of the Senate someday without a clear idea of what we are about and voting on a general proposition instead of voting on the precise wording of the constitutional amendment.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BAKER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SPECTER). Without objection, it is so ordered.

Mr. BAKER. Mr. President, since Thursday last and then again on Monday and today, I have indicated that I thought it was time to get on with a vote on this issue or matters related to it. As Members will surmise, I am sure, based on their experience in previous situations, there have been a number of conferences going on between interested parties, notably the Senator from Connecticut, the minority leader and I have talked, and a number of others who are engaged in a major way in our deliberations on this issue.

It may be that we can arrange a time certain for a vote or votes. Those negotiations are not complete and they may not be successful. But I feel that they are sufficiently promising to warrant an additional effort for another hour or thereabouts this afternoon.

So I anticipate that for the next little while, we will not have anything except general debate on this subject and perhaps not that. But at around 5 o'clock or a little after, it would be my hope that I might be in a position, after consulting with the minority leader, the managers on both sides, and parties directly interested in this controversy, to put some sort of unanimous-consent request that would lead to a vote on this matter.

With that, Mr. President, by way of explanation and by way of alert to Members who may be listening in their offices, in order to gain time to complete those conversations, I once more suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HELMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

(Remarks by Mr. HELMS at this point relating to the Agricultural Programs Adjustment Act of 1984 are printed later in today's RECORD.)

Mr. HELMS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. JEPSEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JEPSEN. Mr. President, during the past several days a number of my colleagues have risen to speak in support of restoring our children's right to pray voluntarily in public schools. Children in America have been denied this religious right since the Engel and Schempp Supreme Court decisions which banned prayer and the reading of Bible verses in our public schools over 20 years ago. Since that time, efforts have been made to restore prayer in public schools, most notably those of the former Senator Dirksen and our distinguished majority leader, Senator BAKER. Unfortunately, they were unsuccessful. Now, however, I believe the time is right to adopt a constitutional amendment which would restore a right our children once had to pray in our public schools.

Each of us will be asked to cast our vote either for or against the constitutional amendment now before us. However, before we vote, I would like my colleagues to consider a very important factor—our children and how our decision will affect them. While much of the debate has focused on our Founding Father's intent when drafting the establishment clause in the U.S. Constitution and the Supreme Court's interpretation of this clause, I believe we must also consider what is best for the children.

Today's children are exposed to a difficult, sometimes depressing life. Many times a life without hope. They constantly hear of the threat of a nuclear holocaust in their schools, on television, and in the magazines and newspapers they read. Many of them have the attitude that life will not exist when they reach adulthood.

In fact, a growing problem facing our Nation is the epidemic of teenage suicide, a serious problem that needs urgent attention. In addition, our children are watching their classmates destroy their minds and bodies by the use of drugs and alcohol. They see teenage sexual promiscuity, crime, violence, and other things in their schools and their neighborhoods.

And as our children are being asked to cope with society, they are also being denied the opportunity to pray out loud to God in our public schools, a God who Benjamin Franklin acknowledged as "ruling over the affairs of men." Our schools, as well as our secular society, give our children no "God consciousness." While the Supreme Court's intent in banning prayer and Bible-reading in our public classrooms was to make the State neutral with respect to religion, Justice Stewart remarked in his dissenting opinion in the Schempp case that:

> A compulsory State educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. 374 U.S. at 203.

As children are presented with the serious problems of our day, often they are told that mankind is the only source of solutions for these problems. Our children have been permitted to study everything from first aid to tennis, chess to communism, yet they have not been permitted to pray out loud, discuss God, or even acknowledge that God exists. While students can gather together to discuss stamps or socialism, they cannot gather for prayer or Bible-reading.

The courts have stripped away the strong religious foundations upon which our children could rely and build their lives: A foundation which could add stability and strength to their lives. In many cases, children have been left to flounder on their own, in a world that offers no lasting answers. Is that a responsible inheritance to give the children and grandchildren we love so much? I think not.

And, in addition, who are we to pass judgment upon the quality of prayers which come forth from the hearts of children. I would suggest that we, in our great adult sophistication, could take a lesson from the simple, uncomplicated faith of a child. We adults of this great age of intellectualism have often sacrificed simplicity on the altar of sophistication and have come up wanting. Perhaps the prayers uttered by children in simple faith might touch the heart of God, bringing a blessing to us all. Let us not forget the children.

Mr. President, I will conclude my remarks regarding the impact our vote will have on children with a story. It is a true one. It is a story about a little 4-year-old boy who was recently in my home with his father who was called in to fix our plumbing. His father did the plumbing work part time to bring in additional income and was recommended by our building manager. He brought his 4-year-old son with him. It was 7 o'clock in the evening. While he was waiting for his father, this 4-year-old boy was looking around our living room and he noticed a big, huge coffee table that we have there. It is kind of a spread open wooden stand where there is one of these huge, huge old Bibles. He noticed that large Bible we have sitting on the table and he asked my wife, Dee, "What is that book?" Dee replied, "It's a book about God. Do you know who God is?" And the little boy said, "Yeah." And my wife said, "Do you know that God loves you?" And the little boy replied, "Yeah, God loves us all. He loves us all the same."

That simple faith and grasp of truth that was shown by this little boy would do more than all the legislation, rhetoric, or governmental rules to eliminate bigotry and prejudice, much more than we could ever create here on the Senate floor. We ought to make sure that our children have the glorious freedom and the committed opportunity to commune with God who loves us all the same.

I urge my colleagues to vote for this constitutional amendment which would restore the right of our children to pray out loud in their classrooms.

It is not anything that we are trying to force on anybody. It is something that we had for 188 years and it worked fine. But 20 years ago someone decided we should forget about the last half of that first amendment, that last half that says "nor shall we prohibit the free exercise thereof."

Mr. President, on Tuesday of last week after my opening remarks on the issue of voluntary prayer, my friend and colleague, Senator WEICKER, and I discussed several issues that I would like to expand upon today. I told him I would expand on them later and I intend to do that at this time.

First, the Senator from Connecticut asked, "* * * where can a child not pray?" He contended that a child can pray as an individual in school or anywhere else. Unfortunately, I believe he misunderstands the state of religious freedom in American schools today. There have been many lower court decisions since the Supreme Court's Engel and Schempp decisions that prohibit spoken prayers and some which prohibit moments of silent prayer. Let me give you an example of a case where a child was prohibited from saying the following prayer:

> We thank you for the flowers so sweet
> We thank you for the food we eat
> We thank you for the birds that sing
> We thank you, God, for everything.

The parents in this case of *Stein* v. *Oshinsky*, 348 F. 2d. 999 (1965), argued that the Engel case prohibited the State from directing teachers to recite a prayer but that it did not hold that the States could not permit prayer. A district court judge ruled that the school should provide an opportunity

for prayer in order to accommodate those who wanted to pray.

Now, it all started with this prayer:

We thank you for the flowers so sweet
We thank you for the food we eat
We thank you for the birds that sing
We thank you, God, for everything.

However, on appeal to the second circuit court of appeals, Judge Friendly overturned the lower court decision. He held that no prayer—not even voluntary, nondenominational prayer would be permitted.

If two or more children choose to join together to pray or read the Bible in a public school, they would be prohibited from doing so by the authority of decisions such as *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F. 2d. 759 (1980); *Karen B.* v. *Treen*, 653 F. 2d. 987 (1981); and *Collins* v. *Chandler Unified School District*, 644 F. 2d. 759 (1981), among others.

I could go on and on. There is a whole laundry list.

Another issue that was raised was the interpretation of Thomas Jefferson's writings and actions involving the relationship between church and state. I indicated at that time that those opponents who continually refer to the wall of separation of church and state by Mr. Jefferson are using what sophisticated or at least learned scholars throughout the years have written in books, an interpretation of what Mr. Jefferson said, and that someone interprets what the scholar or the writer of a book thought that Mr. Jefferson meant, and so on down the line.

I mentioned that Mr. Jefferson was the president of the University of Virginia, which he founded with public funds. In his plan for the school, he provided for a special room in the rotunda "for religious worship."

In addition, he supported a proposal to invite the four major religious denominations of Virginia to establish seminaries within or adjacent to the university and to have their clerical professors preach there occasionally.

It does not sound like a wall to me.

He did not include a department of theology at the university because he feared giving preferential treatment to one sect over another. It was such preferential treatment that he viewed as a key to the establishment clause, rather than the act of giving aid or benefits to religion.

Mr. Jefferson wrote:

It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities as indifferent to the interests of society. On the contrary, the relations which exist between man and his maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation.

Thomas Jefferson.

Another example involves Mr. Jefferson as the first president of the Washington, D.C., Public School Board. In the first official report on file by this board—it is a matter of record, it is in the book—the Bible and Watts Hymnal were listed as the principal books used for reading and teaching. It does not sound like a wall to me.

I appreciate the concerns expressed by my distinguished colleague from Connecticut. However, I am thoroughly convinced that the strict prohibition of religious activity in public schools as currently defined by numerous court decisions was not intended by the writers and the supporters of the first amendment, nor by Mr. Jefferson, who, by the way, was in France during the entire time that amendment was evolved.

Mr. President, I ask my colleagues to support Senate Resolution 73 not because it is popular but because it is right.

● Mr. LAUTENBERG. Mr. President, America is a pluralistic society. It embraces people of all colors, national origins, and creeds. We are proud of our traditions of toleration and acceptance. The richness and diversity of this country is what makes it a beacon of hope for the rest of the world.

Freedom of religion is a major part of this heritage. Indeed, the first settlers in America came here to flee religious persecution. William Penn, who established one of the Original Thirteen Colonies as a refuge for victims of such persecution, provided a fundamental formulation of the nature of religious freedom. He wrote, "No man, nor number of men upon earth hath power or authority to rule over men's consciences in religious matters."

Religious freedom was foremost in the thoughts of those who wrote our Constitution when the Bill of Rights was drafted. The first amendment of the Constitution, the first article in the Bill of Rights, begins with the assurance that government will be neutral with respect to religion. Government will neither support religion, nor interfere with its practice. This principle of neutrality guided the Supreme Court's decisions regarding prayer in the public schools over 20 years ago.

What the Court ruled against was the organized reading of prayers or Bible portions in school. It did not prohibit personal, private prayer. Any child, indeed any person in this country, can pray by himself or herself, quietly and without disruption, at any time.

Mr. President, the Supreme Court has said only that school officials cannot officially sponsor prayer in school. This ruling upholds the provision of the first amendment against the establishment or State support of religion. The Court never ruled that individuals cannot pray at their choosing. This is because the first amendment also bars the prohibition of the free exercise of religion. By this provision, the private practice of religion, through prayer or other means, is protected. Schoolchildren are not, therefore, prevented from praying on their own in school.

The Supreme Court decision on school prayer is consistent with the spirit which informed the drafting of the Bill of Rights. The Bill of Rights was intended to be a limitation on the power of government. It is an important, basic protection for all of our citizens. It protects the rights of minorities against majorities. It guarantees that individuals who do not adhere to the same religion as the majority of their fellow citizens are guaranteed the right to practice their religion. It guarantees that no established State religion or prescribed prayer will interfere with their rights.

Mr. President, I recognize the importance of prayer in individual, family, and community life. For many, it is an integral part of each day and enriches life. But prayer is an intensely personal experience. It is not something that can or should be prescribed by government. Indeed, many deeply religious leaders have expressed to us their view that religious practices must stay private, without intervention by public officials or even peers.

The Constitution now protects the child who wants to pray before, during, or after school. Personal prayer is exactly what the first amendment guarantees. At the same time, the present treatment of school prayer protects the child who may not share the religious views of a majority of his or her classmates. These children should not be subjected to practices which are personally alien to them.

Mr. President, it is for these reasons that I cannot support any of the present proposals before the Senate to amend the Constitution to provide for formal periods of prayer in the schools. Prayer should continue to be a personal and individual experience. This is the best way to protect both religious faith and religious freedom.●

Mr. JEPSEN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BAKER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The majority leader is recognized.

Mr. BAKER. Mr. President, earlier today, I said on the floor that I hoped and thought we might make progress and provide a time certain for a vote on the prayer amendment. The Sena-

tor from Connecticut has played a major part in that today. He, of course, will speak for himself. But he first broached the subject this morning, may I say for the record, of getting an up-and-down vote on the President's resolution, which he knows and understands has been an objective I have sought for a long time—to get a vote—and I am grateful for that. I wish to express that appreciation to him now. I rejoined by saying that I felt we should consider also adopting the committee amendment which was reported by the Judiciary Committee.

After some extensive talks and conversation, it is my understanding that the Senator from Connecticut indicated that he had no objection to that, either, and then we began fashioning a unanimous-consent agreement to submit to the minority leader and others, especially to the managers of the bill, which would provide for a time certain to have two votes, one on the committee amendment and then one on the resolution itself, with no other amendment in order.

That is still my wish, and I still hope and modestly am optimistic that we will succeed in getting that agreement. But we are not near yet to doing that, I understand.

Without describing the matter any further, let me say to Members who may be listening that we will persist in trying to work this out. There is some possibility that we still can get a unanimous-consent agreement on that today; but if we do not, we will try in the morning and see if we can do that.

The objective that I seek and that the Senator from Connecticut has indicated a general willingness to consider, I think—indeed, may have suggested—is that we vote at some time in the afternoon on Thursday. I have discussed that with the minority leader and Members on both sides who have been wrestling with that issue during debate today. As I say, it is not yet ready for me to present in the form of a unanimous-consent agreement.

Having said that by way of explanation to Members as to what has been going on during the course of this afternoon, I continue to believe that we may be nearing the place where we will have a definitive vote on the prayer amendment that is now pending before the Senate.

Mr. WEICKER. If I might respond to the distinguished majority leader, he states the sequence of events totally accurately. I had occasion to read the CONGRESSIONAL RECORD this morning, and more specifically the comments of the distinguished Senator from North Carolina, where, on the floor last night, he said the time had come to vote on Senate Joint Resolution 73. I contemplated that, and felt, indeed, we had spent enough time. There is no reason why we should not vote on Senate Joint Resolution 73. Specifically, that was my proposal to the majority leader this morning. He added the provisions of the committee amendment, to which I have no objection and suggested that we do it this week. I have no objection to that.

I would hope that my colleagues would follow the lead of both the majority leader and the minority leader. We can fashion something that gets us to voting.

I knew that, like any Gordian knot, like any complex problem, we cannot resolve it all at once. My feeling was—and I am sure this is also in the back of the mind of the distinguished Senator from North Carolina—let us just take the first step and see where we can go from there. I cannot say any more than that.

I did not discuss with the majority leader equal access of amendments, silent prayer amendments, and on down the long list that is here. I did not even get into that. I said, let us just take this first step. That is all, either in terms of the letter of what we discussed or the spirit of what we discussed, that was accomplished in the course of these negotiations.

I am the first to say that if everybody is going to try to piggyback on Senate Joint Resolution 73, we are right back where we started. That just is not going to happen.

It is very difficult for those of us who are on the side of the argument presented by Senator DANFORTH, myself, and others, to deal with this myriad of proposals that we have. It is not the most orderly process, to begin with, but there is no point in complaining about it. That is the situation. What we can do is address ourselves to the matter that has been on the desk now for 10 days, and then let the chips fall where they may. I have asked for no other concessions. The majority leader has asked for nothing except the vote on this amendment.

I would hope that—specifically we are contemplating Thursday, sometime in the middle of the afternoon—my colleagues would allow us to get to that point. Then, having untied that small piece of the Gordian knot, let us see what is left, and we can all go ahead and divide up on that. Maybe we will be getting together again down the road on what needs to be done next. But the majority leader, I think, has been very patient.

As I said at the outset, there have been no filibusters. I certainly hope this is an indication of the good faith of those on my side to go to a vote and that everyone who has an amendment at least allow this matter to proceed apace and not try to come into a comprehensive solution. That can never happen. I assure my colleagues on the floor as to that.

I said this matter could very well be on the principal effort of the President of the United States, and as amended by the committee amendment, that we can have a vote, if we all agree, on Thursday of this week.

Mr. BAKER. Mr. President, I thank the Senator from Connecticut. He, too, describes the situation accurately.

I might now describe in language the unanimous-consent request I should like to propound. I will not now propound it. We have not quite cleared it as yet. I still hope we will. The request would go something like this: that on Thursday, at 3 o'clock, the Senate proceed to vote on the committee amendment; that after the disposition of the committee amendment, the Senate proceed to vote, without further debate or intervening amendments, on the resolution itself; and that paragraph 4 of rule XII be waived. That is the essence of the agreement. It would also provide that no amendment other than the committee amendment to accompany Senate Joint Resolution 73 would be in order.

That embodies the situation as the Senator from Connecticut described it and as I have described it and as I have circulated to a number of Senators, and I have submitted it to the minority leader for his consideration.

Once again, Mr. President, I will not now make that request, but it will be my hope that before the day is out we can do that. If we cannot do it, then we will do it first thing in the morning.

Mr. BYRD. Mr. President, will the distinguished majority leader yield?

Mr. BAKER. I yield.

Mr. BYRD. May I say that I personally have no trouble with the proposal that the distinguished majority leader has outlined and would be perfectly agreeable as far as my own vote is concerned to vote on the amendment and then go directly to the resolution.

I think that there would be difficulty in getting the agreement this evening. I understand that the Senator from Illinois (Mr. DIXON) would be agreeable to this procedure but be would want to offer an amendment relating to the silent prayer and equal access. He would be willing to have a time limitation on that amendment.

There has been some problem with getting acceptance of his wishes in that regard.

That is about all I can say to the distinguished majority leader. I assume that the majority leader and/or Members on his side of the aisle are aware of Mr. DIXON's amendment. Whether or not there could be agreement that Mr. DIXON could call up that amendment and have a time limitation, say of an hour to be equally divided, I cannot say. But I think I am prepared to say that if it would be agreeable that Mr. DIXON could call up such an amendment, get a time limitation on it, I think that would probably fly on this side of the aisle except for an-

other Senator who has an amendment of perhaps somewhat the same nature, but I am not prepared to say that is the case.

Mr. HATCH. Mr. President, will the Senator yield on that point?

Mr. BYRD. I believe the majority leader had the floor.

Mr. BAKER. If the Senator from West Virginia has finished, I am happy to yield.

Mr. HATCH. I hope the distinguished Senator from Illinois will not call up the silent prayer amendment.

As the Senator knows, I am the author of that amendment, and I would prefer that it not be called up at this time because I believe that the President deserves a vote up or down on his amendment. Since the distinguished Senator from Connecticut is willing to let that vote occur, I would like to see it occur. I wish to see the President given his day here on the floor, given that courtesy.

I would really feel bad if the silent prayer amendment was brought up in this context because it seems to me I might be forced to vote to table my own amendment. That would really be a sorry day for me.

So I just wish to make that point. I hope the distinguished Senator from Illinois does not bring that up at this point.

Mr. BAKER. Mr. President, I wish to thank the Senator from Utah. He has been a courageous soldier in this fight. I have never seen anyone else handle himself any better under difficult circumstances than he has. By that I mean I know his principal preferences are for the silent prayer amendment. I am aware of that. I believe most people are. But he sat here in this chair and managed the President's resolution and he has spoken just now in a way that required courage and character. I wish to commend him for that.

The fact of the matter is, Mr. President, that if we open Pandora's box to another amendment, whether it is silent prayer on vocal or silent prayer on the option, or any of the other 60-some-odd amendments that have been called to my attention, I do not know where you stop. At some point it is the duty of the Senate, in my opinion, to speak its judgment on something, and I was especially blessed this morning. The Senator from Connecticut first raised the question of simply getting a vote on the President's resolution. I commend him for that. I think that is very senatorial and very appropriate.

So I join the Senator from Utah in saying that I hope that Senator from Illinois will not insist on that.

The day may come when we do that, but this is not the place for it and this is not the time for it.

Mr. President, it is, I guess, clear now that we are not going to be able to get this agreement this afternoon, so I will not put it, but Senators should be aware tomorrow shortly after we convene, perhaps during leader time, it will be my intention to try to reach an agreement of that sort.

THE WHEAT PROGRAM—H.R. 4072

Mr. BAKER. There is one other matter, Mr. President, that I wish to bring up. The chairman of the Agriculture Committee is here. Senator DOLE was here a moment ago. If I can get him on the floor, I wanted to bring up, to ask the minority leader about another matter, and that is the wheat program, which is a bill reported by the Agriculture Committee yesterday, Calendar Order No. 74, H.R. 4072.

Before I do that, Mr. President, I wish to try to locate the Senator from Kansas (Mr. DOLE).

Mr. BYRD. Mr. President, will the distinguished majority leader yield?

Mr. BAKER. I yield.

Mr. BYRD. I brought up this matter in conference today. There was one Senator, and there may have been others—I am not sure—but I am sure that one Senator responded that as of now until he knew more about this legislation he could not agree to proceeding to take it up by unanimous consent, and this particular Senator is not a member of the Agriculture Committee. So this objection might be removed if he has an opportunity to study the legislation a little more.

Mr. BAKER. Mr. President, may I say that as the minority leader knows, and he and I have discussed this, the signup for the wheat program, as I understand it, runs through Friday of this week, March 15.

Mr. HELMS. That is right.

Mr. BAKER. We have a real ox in the ditch. But I understand his position, and there is a member who apparently wishes to examine it overnight. But may I say to the minority leader I wish in the morning then also to see if we can reach this bill and the unanimous-consent request that I wish to put at that time would be to ask unanimous consent to temporarily lay aside the prayer amendment for not more than 3 hours so that we may consider this matter and at the end of 3 hours, notwithstanding the disposition of the matter or the failure to dispose of it, the Senate then would return to the consideration of the prayer amendment. That would be my request.

Once again, I will not put that request at this time. But I wish to put it first thing in the morning.

Mr. HELMS. Mr. President, will the Senator yield to me a second?

Mr. BAKER. Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. JEPSEN). The Senator from North Carolina is recognized.

Mr. HELMS. Mr. President, I thank the Chair, and I certainly thank the majority leader and minority leader.

Let me say to my friend from West Virginia, if the Senator who tentatively at least is objecting to this measure being considered will contact me, I wish to work with him about any problem he may have with it, and as the distinguished majority leader has indicated, it is absolutely essential that we move with it because of the Friday signup deadline.

So if the distinguished minority leader would make that arrangement for me, I would appreciate it so we can work with the Senator.

Mr. BYRD. I will be glad to do that.

Also, I am happy that the majority leader has indicated for the record what his request will be in the morning. If he should still choose to submit that request to the Senate, this will give Senators on both sides an opportunity to study the request.

I cannot say that the Senator to whom I alluded is the only Senator who might have an objection, but one Senator did express an objection in conference and if I can paraphrase him at least it was at this time until he could know more about the legislation.

Mr. HELMS. I understand the minority leader.

Mr. BYRD. May I ask the distinguished Senator from North Carolina, I have been caused to understand that the Secretary of Agriculture can extend that deadline himself; is that correct?

Mr. HELMS. I would say to my friend that he can and I believe that he will, but he needs some indication from Congress about what will happen to this bill.

Mr. BYRD. Very well, then. Will the Senator yield further?

Mr. HELMS. I yield.

Mr. BYRD. I will cause to have the distinguished Senator to whom I referred contact the distinguished Senator from North Carolina.

Mr. HELMS. I do appreciate that.

Mr. BYRD. And perhaps some agreement can be worked out.

I will certainly overnight and in the morning see if we can clear the request.

Mr. HELMS. I thank the Senator.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. BAKER. Mr. President, just to complete the record on this and for no purpose other than to refresh the memories of Senators, during the debate on another matter, the distinguished Senator from Oklahoma (Mr. BOREN) offered an amendment dealing with wheat allocations and at the urging of the Senator from Kansas, the Senator from North Carolina, and others, including this Senator, the Senator from Oklahoma changed his

amendment from an amendment to a sense of the Senate resolution, a statement of the sense of the Senate on this matter.

In exchange for that, I represented to him on the floor of the Senate, which is in the RECORD, that I would agree that when the Agriculture Committee reported a bill such as this that I would seek consent to lay aside whatever we were on and take it up for a limited period of time, 3 or 4 hours, I believe I said, overall. And that is the pledge that I am trying to redeem at this time. I only say that because I wish to remind Senators who were not present that this is an effort to redeem that commitment made at this time by Senators on both sides of the aisle.

Mr. DOLE. Will the majority leader yield?

Mr. BAKER. Yes; I yield to the Senator from Kansas.

Mr. DOLE. Mr. President, first I wish to thank the majority leader for the attempt. I certainly have no objection to making a determination on where the objections may lie. But it would seem to me we are very close to an agreement that affects a number of commodities. In addition, there is an increase in Public Law 480 and an increase in credits. In fact, it was reported out of the Agriculture Committee, and I think the chairman would verify this, by voice vote, with no audible opposition to the final package. So it is very important, particularly in wheat areas, to Senator ANDREWS from North Dakota, who is here, myself, and others who come from wheat areas because there is a Friday deadline.

Of course, if we pass the bill, the Secretary has indicated he could extend that signup period for 1 week or 2 weeks. So it is my hope, through the efforts of Senator HELMS, Senator HUDDLESTON, and others, that maybe we can get this on the floor if not tomorrow, at least on Thursday.

Mr. ANDREWS. Will the majority leader yield?

Mr. BAKER. I am happy to yield to my friend from North Dakota.

Let me say before he speaks, however, that I was not fully aware of the importance of this matter, in terms of the Friday deadline, until he brought that matter forcefully to my attention today in another meeting. I wish to thank him for that, because he was absolutely right. He has been prime among those insisting that we try to get to this as soon as possible. And I agree with that.

Mr. ANDREWS. Mr. President, I would like to state that the majority leader has done a service to American agriculture, and the minority leader, as well, in agreeing to look toward a unanimous-consent request tomorrow for this most important subject, not just because of the timeliness of the signup, Mr. President, which is important—as we all know—the signup expiring on Friday, that signup can be extended for another 2 weeks—but, Mr. President, the situation in farm areas today economically is extremely difficult. And while the Senate may postpone and while the Secretary of Agriculture might, indeed, allow more time for signup, the Lord controls the planting season and the farmer has to arrange for credit to put those crops in the ground. If this new program passes, the farmers' ability to get credit will be enhanced because of a number of features that the Senator from Kansas pointed out, such as the increased enhancement of our export potential, our direct loans that are extremely important to those farmers in drought disaster areas, as well as the up-front payment as part of the set-aside.

So, Mr. President, what the majority leader has done today, and what the minority leader and the majority leader have reached a tentative agreement to bring as a unanimous-consent request tomorrow, is extremely important to agriculture. It would be my hope that no Senator would object to it, since the crisis is there and very evident in the farm areas of our country.

I appreciate, certainly, as one Senator, and I am sure many more appreciate the expeditious action that is being taken finally to resolve this problem.

Mr. BAKER. Mr. President, I thank the Senator and I thank the minority leader and the Senator from Kansas and the Senator from North Carolina.

Once again, when we convene in the morning it will be the intention of the leadership on this side to seek a unanimous-consent agreement that will provide an opportunity for us to turn temporarily to the consideration of the wheat bill, so-called, and to do so on a time limitation of 3 hours, all inclusive.

Mr. President, there is one other matter I would like to do this afternoon, but it has been beset by problems also, apparently. As soon as we finish and I have a moment of leisure, I intend to consult my astrologer and I am going to also consult my biorhythms for I am convinced I will have three red lights as soon as I put the data in the machine and my astrologer will no doubt tell me that all of my star systems are crossed today and nothing good was going to come of this Tuesday and, indeed, nothing has so far.

Mr. BYRD. Will the majority leader yield?

Mr. BAKER. Yes, I yield.

Mr. BYRD. It may come as some consolation to the distinguished majority leader that he need not blame himself because someone long ago said that the fault is not in our stars but in ourselves.

Mr. BAKER. I was afraid the Senator might say that—and I prefer the stars.

But, in any event, nothing has worked today, and I apologize to the Senate for that and to everyone else. But, believe me, there have been negotiations, sometimes without end, seemingly, trying to work out these matters; that is, the farm bill, the supplemental appropriations bill on low-income energy assistance, on the prayer amendment, to say nothing of negotiations that have continued during most of this day, beginning early this morning, on the budget. And there is one other, also, the extensive negotiations on the Meese nomination.

If there is any other crisis lurking on the horizon, I do not know what it is, but it will find me before the day is out. And I wish to report these things now in case I do not show up in the morning.

Mr. President, I have to make another check to see if we are going to be able to proceed either with the unanimous-consent agreement to provide for the disposition of the Low-Income Energy Assistance Act or perhaps pass it by unanimous consent tonight. If the minority leader will bear with me for just a few more moments, I will make a phone call and, if the phone does not dissolve in my hand, I will report back to him what I find.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BAKER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AGRICULTURAL PROGRAMS ADJUSTMENT ACT OF 1984

Mr. HELMS. Mr. President, on March 3, 1984, the Committee on Agriculture, Nutrition, and Forestry ordered reported H.R. 4072, the Agricultural Programs Adjustment Act of 1984.

Because of the urgency of this legislation, it was reported without a report.

This bill makes adjustments in the farm commodity programs for wheat, feed grains, upland cotton, and rice and provides for modifications in several Farmers Home Administration loan programs that are designed to target available Federal funds to farmers most seriously burdened with the consequences of the devastating 1983 drought. The bill is part of a package that also includes significant agricultural export assistance and credits to further assist in helping make U.S. ag-

ricultural commodities and products more competitive in world markets.

Mr. President, this legislation is designed to improve the operation of the farm programs and to better target resources to where they will do the most good. I am pleased to report that it does these things while accomplishing savings estimated to be in excess of $3 billion over the next 3 years.

The bill had its origin in a series of meetings held over the last 2 weeks at the instigation of the distinguished Senator from Kansas (Mr. DOLE) in an effort to provide for more effective participation in the 1984 wheat program. But the scope of the meetings quickly grew to making necessary adjustments in other commodity programs. This was possible because of the participation of the administration, members of the committee, and a number of interested Senators who do not serve on the committee but who have a strong interest in farm programs.

The net result of this legislation will be to improve the operation of the farm programs and establish improved farm policy with very substantial savings. It has been a truly bipartisan effort, and I want to commend Senator DOLE, Senator HUDDLESTON, and Senator JEPSEN in particular—though many others gave very generously of their time and effort to help develop this important package.

I urge Senators to study it carefully, and to support it as we attempt to move it to enactment at the earliest possible time.

Mr. President, so that Members, staff, and other interested persons will be able to study the legislation, I ask unanimous consent that a copy of the bill, a brief summary of its provisions, and a section-by-section explanation prepared by the committee staff be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

H.R. 4072

That this Act may be cited as the "Agricultural Programs Adjustment Act of 1984".

TITLE I—WHEAT

TARGET PRICES

SEC. 101. Section 107B(b)(1)(C) of the Agricultural Act of 1949 (7 U.S.C. 1445b-1(b)(1)(C)) is amended by striking out "$4.45 per bushel for the 1984 crop, and $4.65 per bushel for the 1985 crop" and inserting in lieu thereof "and $4.38 per bushel for the 1984 and 1985 crops".

ACREAGE LIMITATION AND PAID DIVERSION PROGRAM FOR WHEAT

SEC. 102. Section 107(e) of the Agricultural Act of 1949 (7 U.S.C. 1445b-1(e)) is amended by—

(1) striking out in the first sentence of paragraph (1)(A) "subparagraph (B)" and inserting in lieu thereof "subparagraphs (B), (C), and (D)";

(2) adding at the end of paragraph (1) the following new subparagraphs:

"(C) Notwithstanding any previous announcement to the contrary, for the 1984 crop of wheat the Secretary shall provide for a combination of (i) an acreage limitation program as described under paragraph (2) and (ii) a land diversion program as described under paragraph (5) under which the acreage planted to wheat for harvest on the farm would be limited to the acreage base for the farm reduced by not more than 30 per centum, consisting of a reduction of 20 per centum under the acreage limitation program and a reduction of 10 per centum under the land diversion program, and (iii) a voluntary payment-in-kind land diversion program under which the acreage planted to wheat for harvest on the farm would be reduced by not less than 10 per centum nor more than 20 per centum of the acreage base for the farm, in addition to any reduction under the acreage limitation and land diversion programs provided for under clauses (i) and (ii), as determined by the Secretary. Under the payment-in-kind land diversion program, compensation in kind for diverted acres shall be made available to producers by the Secretary under such terms and conditions as the Secretary shall prescribe and in such amounts as the Secretary determines appropriate to encourage adequate participation in such program, except that the rate of such compensation shall not be less than 85 per centum of the farm program payment yield. As a condition of eligiblity for loans, purchases, and payments on the 1984 crop of wheat, the producers on a farm must comply with the terms and conditions of the combined acreage limitation program and land diversion program.

"(D) For the 1985 crop of wheat the Secretary shall provide for a combination of (i) an acreage limitation program as described under paragraph (2) and (ii) a land diversion program as described under paragraph (5) under which the acreage planted to wheat for harvest on the farm would be limited to the acreage base for the farm reduced by not more than 30 per centum, consisting of a reduction of not more than 20 per centum under the acreage limitation program and a reduction of 10 per centum under the land diversion program. As a condition of eligibility for loans, purchases, and payments on the 1985 crop of wheat, the producers on a farm must comply with the terms and conditions of the combined acreage limitation program and land diversion program.";

(3) inserting "for the 1983 crop" immediately before the comma in the eighth sentence of paragraph (5); and

(4) inserting immediately before the last sentence of paragraph (5) the following: "Notstanding the foregoing provisions of this paragraph, the Secretary shall implement a land diversion program for the 1984 and 1985 crops of wheat under which the Secretary shall make crop retirement and conservation payments to any producer of the 1984 and 1985 crops of wheat whose acreage planted to wheat for harvest on the farm for each such crop is reduced so that it does not exceed the wheat acreage base for the farm less an amount equivalent to 10 per centum of the wheat acreage base in addition to the reduction required under paragraph (2), and who devotes to approved conservation uses an acreage of cropland equivalent to the reduction required from the wheat acreage base under this paragraph. Such payments shall be made in an amount computed by multiplying (i) the diversion payment rate, by (ii) the farm program payment yield for the crop, by (iii) the additional acreage diverted under this paragraph. The diversion payment rate for the 1984 and 1985 crops of wheat shall be established by the Secretary at not less than $2.70 per bushel. The Secretary shall make not less than 50 per centum of any payments under this paragraph to producers of the 1984 and 1985 crops of wheat as soon as practicable after a producer enters into a land diversion contract with the Secretary for each such crop and in advance of any determination of performance.".

HAYING AND GRAZING DIVERTED WHEAT ACREAGE

SEC. 103. Notwithstanding the provisions of section 107B(e) of the Agricultural Act of 1949 (7 U.S.C. 1445b-1(e)), in carrying out acreage limitation, cash land diversion, and payment-in-kind land diversion programs for the 1984 crop of wheat, the Secretary of Agriculture shall permit, at the request of the State committee established under section 8(b) of the Soil Conservation and Domestic Allotment Act for a State and subject to such terms and conditions as the Secretary may prescribe, all or any part of the acreage diverted from production under such programs by participating producers in such State to be devoted to haying and grazing.

TITLE II—FEED GRAINS

TARGET PRICES

SEC. 201. Section 105B(b)(1)(C) of the Agricultural Act of 1949 (7 U.S.C. 1444d(b)(1)(C)) is amended by striking out "$3.03 per bushel for the 1984 crop, and $3.18 per bushel for the 1985 crop" and inserting in lieu thereof "and $3.03 per bushel for the 1984 and 1985 crops."

ACREAGE LIMITATION AND PAID DIVERSION PROGRAM FOR FEED GRAINS

SEC. 202. Section 105B(e) of the Agricultural Act of 1949 (7 U.S.C. 1444d(e)) is amended by—

(1) striking out in the first sentence of paragraph (1)(A) "subparagraph (B)" and inserting in lieu thereof "subparagraphs (B) and (C)";

(2) adding at the end of paragraph (1) the following new subparagraph:

"(C) For the 1985 crop of feed grains, if the Secretary estimates that the quantity of corn on hand in the United States on the last day of the marketing year ending September 30, 1985 (not including any quantity of corn produced in the United States during calendar year 1985), will exceed one billion one-hundred million bushels, the Secretary (i) shall provide for a land diversion program as described under paragraph (5) under which the acreage planted to feed grains for harvest on the farm would be limited to the acreage base for the farm reduced by a total of not less than 5 per centum and (ii) may provide for an acreage limitation program as described under paragraph (2). If the Secretary implements a combined acreage limitation program and land diversion program, the total reduction required by the Secretary in the acreage planted to feed grains for harvest on the farm shall not exceed 20 per centum of the acreage base for the farm. Any reduction required by the Secretary in excess of 15 per centum of the acreage base for the farm shall be equally proportioned between an acreage limitations program and a land diversion program. As a condition of eligibility for loans, purchases, and payments on the 1985 crop of feed grains, if the Secretary implements a land diversion program or a combined acreage limitation and land diversion program, the producers on a farm must

comply with the terms and conditions of such programs."; and (3) in paragraph (5)—

(A) adding immediately after the sixth sentence the following new sentence: "Notwithstanding the foregoing provisions of this paragraph, if the Secretary implements a land diversion program for the 1985 crop of feed grains under the provisions of paragraph (1)(C), the Secretary shall make crop retirement and conservation payments to any producer of the 1985 crop of feed grains whose acreage planted to feed grains for harvest on the farm is reduced so that it does not exceed the feed grain acreage for the farm less an amount equivalent to not less than 5 per centum of the feed grain acreage base in addition to the reduction required under paragraph (2), if any, and who devotes to approved conservation uses an acreage of cropland equivalent to the reduction required from the feed grain acreage base under this paragraph.";

(B) striking out "Such payments" in the eighth sentence (as redesignated under subparagraph (A) of this paragraph) and inserting in lieu thereof "Diversion payments made to producers under this paragraph";

(C) in the ninth sentence (as redesignated under subparagraph (A) of this paragraph)—

(i) striking out "for corn" and inserting in lieu thereof "for the 1983 crop of corn"; and

(ii) inserting immediately before the period at the end thereof ", and at not less than $1.50 per bushel for the 1985 crop of corn"; and

(D) striking out "1983 crop" in the eleventh sentence (as redesignated under subparagraph (A) of this paragraph) and inserting in lieu thereof "1983 and 1985 crops".

TITLE III—UPLAND COTTON

TARGET PRICES

SEC. 301. Section 103(g)(3)(B) of the Agricultural Act of 1949 (7 U.S.C. 1444(g)(3)(B)) is amended by striking out "$0.81 per pound for the 1984 crop, and $0.86 per pound for the 1985 crop" and inserting in lieu thereof "and $0.81 per pound for the 1984 and 1985 crops".

ACREAGE LIMITATION AND PAID DIVERSION PROGRAM FOR UPLAND COTTON

SEC. 302. Section 103(g)(9) of the Agricultural Act of 1949 (7 U.S.C. 1444(g)(9)) is amended by—

(1) in the first sentence of subparagraph (A), inserting "except as provided in the second and third sentences of this subparagraph," immediately after the first comma;

(2) inserting immediately after the first sentence of subparagraph (A) the following new sentences: "For the 1985 crop of upland cotton, if the Secretary estimates that the quantity of upland cotton on hand in the United States on the last day of the marketing year ending July 31, 1985 (not including any quantity of upland cotton produced in the United States during calendar year 1985), will exceed four million bales, the Secretary shall provide for a combination of an acreage limitation program as described under this subparagraph and a land diversion program as described under subparagraph (B) under which the acreage planted to upland cotton for harvest on the farm would be limited to the acreage base for the farm reduced by a total of not less than 25 per centum, consisting of a reduction of not less than 5 per centum under the land diversion program and a reduction under the acreage limitation program equal to the difference between the total reduction for the farm and the reduction under the land diversion program. As a condition of eligibility for loans, purchases, and payments on the 1985 crop of upland cotton, the producers on a farm must comply with the terms and conditions of the combined acreage limitation program and land diversion program."; and

(3) adding at the end of subparagraph (B) the following new sentences: "Notwithstanding the foregoing provisions of this subparagraph, if the Secretary implements a land diversion program for the 1985 crop of upland cotton under the provisions of subparagraph (A), the Secretary shall make crop retirement and conservation payments to any producer of the 1985 crop of upland cotton whose acreage planted to upland cotton for harvest on the farm is reduced so that it does not exceed the upland cotton acreage base for the farm less an amount equivalent to not less than 5 per centum of the upland cotton acreage base in addition to the reduction required under the acreage limitation program under subparagraph (A), and who devotes to approved conservation uses an acreage of cropland equivalent to the reduction required from the upland cotton acreage base under this subparagraph. Such payments shall be made in an amount computed by multiplying (i) the diversion payment rate, by (ii) the farm program payment yield for the crop, by (iii) the additional acreage diverted under this subparagraph. The diversion payment rate shall be established by the Secretary at not less than $0.25 per pound. The Secretary shall make not less than 50 per centum of any payments under this subparagraph to producers of the crop as soon as practicable after a producer enters into a land diversion contract with the Secretary and in advance of any determination of performance. If a producer fails to comply with a land diversion contract after obtaining an advance payment under this subparagraph, the producer shall repay the advance immediately and, in accordance with regulations issued by the Secretary, pay interest on the advance.".

TITLE IV—RICE

TARGET PRICES

SEC. 401. Section 101(i)(2)(C) of the Agricultural Act of 1949 (7 U.S.C. 1441(i)(2)(C)) is amended by striking out "$11.90 per hundredweight for the 1984 crop, and $12.40 per hundredweight for the 1985 crop" and inserting in lieu thereof "and $11.90 per hundredweight for the 1984 and 1985 crops".

ACREAGE LIMITATION AND PAID DIVERSION PROGRAM FOR RICE

SEC. 402. Section 101(i)(5) of the Agricultural Act of 1949 (7 U.S.C. 1441(i)(5)) is amended by—

(1) striking out in the first sentence of subparagrah (A) "third and fourth" and inserting in lieu thereof "third, fourth, and fifth";

(2) inserting immediately after the third sentence of subparagraph (A) the following new sentence: "For the 1985 crop of rice, if the Secretary estimates that the quantity of rice on hand in the United States on the last day of the marketing year ending July 31, 1985 (not including any quantity of rice produced in the United States during calendar year 1985), will exceed twenty-five million hundredweight, the Secretary shall provide for a combination of an acreage limitation program as described under this subparagraph (B) under which the acreage planted to rice for harvest on the farm would be limited to the acreage base for the farm reduced by a total of not less than 25 per centum, consisting of a reduction of not less than 5 per centum under the land diversion program and a reduction under the acreage limitation program equal to the difference between the total reduction for the farm and the reduction under the land diversion program.";

(3) striking out "1983 crop" in the fifth sentence of subparagraph (A) (as redesignated under paragraph (2) of this section) and inserting in lieu thereof "1983 and 1985 crops";

(4) inserting immediately after the sixth sentence of subparagraph (B) the following new sentence: "Notwithstanding the foregoing provisions of this subparagraph, if the Secretary implements a land diversion program for the 1985 crop of rice under the provisions of subparagraph (A), the Secretary shall make crop retirement and conservation payments to any producer of the 1985 crop of rice whose acreage planted to rice for harvest on the farm is reduced so that it does not exceed the rice acreage base for the farm less an amount equivalent to not less than 5 per centum of the rice acreage base in addition to the reduction required under the acreage limitation program under subparagraph (A), and who devotes to approved conservation uses an acreage of cropland equivalent to the reduction required from the rice acreage base under this subparagraph.";

(5) striking out "Such payments" in the eighth sentence of subparagraph (B) (as redesignated under paragraph (4) of this section) and inserting in lieu thereof "Diversion payments made to producers under this subparagraph";

(6) in the ninth sentence of subparagraph (B) (as redesignated under paragraph (4) of this section)—

(A) striking out "$3.00 per hundredweight," and inserting in lieu thereof "$3.00 per hundredweight for the 1983 crop of rice,"; and

(B) inserting immediately before the period at the end thereof ", and at not less than $2.70 per hundredweight for the 1985 crop of rice"; and

(7) striking out "1983 crop" in the tenth sentence of subparagraph (B) (as redesignated under paragraph (4) of this section) and inserting in lieu thereof "1983 and 1985 crops".

TITLE V—EXPORT ASSISTANCE

EXPORT ASSISTANCE

SEC. 501. It is the sense of Congress that the President should implement, as soon as practicable after the enactment of this Act, the actions, proposed by the Administration to complement the provisions of this Act, to further assist in the development, maintenance, and expansion of international markets for United States agricultural commodities and products thereof, as follows—

(1) for the fiscal year ending September 30, 1984, the President will—

(A) request congressional approval for the appropriation of funds in the amount of $150,000,000, in addition to the President's February 1984 request for a supplemental appropriation of $90,000,000, to carry out programs of assistance under titles I, II, and III of the Agricultural Trade Development and Assistance Act of 1954 (Public Law 480); and

(B) direct the Secretary of Agriculture to increase funding, over the current budgeted level, for the Export Credit Guarantee Program (GSM-102), carried out through the Commodity Credit Corporation, by not less than $500,000,000; and

(2) for the fiscal year ending September 30, 1985, the President will—

(A) request congressional approval for the appropriation of funds in the amount of at least $175,000,000, in addition to the current funding level contained in the President's budget for that year, to carry out programs of assistance under titles I, II, and III of Public Law 480;

(B) direct the Secretary of Agriculture to increase funding, over the levels contained in the President's budget for that year or otherwise required by law, by not less than $1,100,000,000 for the Export Credit Guarantee Program (GSM-102) and by not less than $100,000,000 for direct export credit programs carried out through the Commodity Credit Corporation, (GSM-5, GSM-201, and GSM-301); and

(C) request or use an additional amount of $50,000,000 (over the amounts specified in clauses (2)(A) and (2)(B)) either for increased funding for direct export credit programs carried out through the Commodity Credit Corporation or for additional assistance under Public Law 480, in such proportions as determined necessary and appropriate by the President.

TITLE VI—AGRICULTURAL CREDIT

SHORT TITLE

SEC. 601. This title may be cited as the "Emergency Agricultural Credit Act of 1984".

NATURAL DISASTER EMERGENCY LOANS

SEC. 602. (a) Section 321(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961(a)) is amended by adding at the end thereof the following new sentence: "The Secretary shall accept applications from, and make or insure loans pursuant to the requirements of this subtitle, to, applicants, otherwise eligible under this subtitle, that conduct farming, ranching, or aquaculture operations in any county contiguous to a county that has been designated by the Secretary as having been substantially affected by a natural disaster in the United States or by a major disaster or emergency designated by the President under the Disaster Relief Act of 1974.".

(b) Section 321(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961(a)), as amended by subsection (a), is further amended by adding at the end thereof the following new sentence: "The Secretary shall accept applications for assistance under this subtitle from persons affected by a natural disaster at any time during the eight month period beginning (A) on the date on which the Secretary determines that farming, ranching, or aquaculture operations have been substantially affected by such natural disaster or (B) on the date the President makes the major disaster or emergency designation with respect to such natural disaster, as the case may be.".

(c) Section 324(d) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1964(d)) is amended by adding at the end thereof the following new sentence: "If farm assets (including land, livestock, and equipment) are used as collateral to secure a loan made under this subtitle, the Secretary shall value the assets based on the higher of (A) the value of the assets on the day before the date the governor of the State in which the farm is located requests assistance under this subtitle or the Disaster Relief Act of 1974 for any portion of such State, or (B) the value of the assets one year before such day.".

ECONOMIC EMERGENCY LOANS

SEC. 603. Section 211 of the Emergency Agricultural Credit Adjustment Act of 1978 (7 U.S.C. prec. 1961 note) is amended by—

(1) inserting "(a)" immediately before "The provisions"; and

(2) inserting, at the end thereof, a new subsection (b) as follows:

"(b) With respect to the economic emergency loan program operated under this title during the period beginning December 22, 1983, and ending September 30, 1984, the Secretary—

"(1) shall make available to eligible applicants during such period new contracts of insurance totaling, in the aggregate, $310,000,000, and

"(2) as appropriate to achieve the goals of the economic emergency loan program and taking into consideration the amount of funds used for loan guarantees, may make available to eligible applicants during such period additional new contracts of insurance totaling, in the aggregate, not more than $290,000,000.".

OPERATING LOANS

SEC. 604. (a) Section 313 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1943) is amended by striking out "$100,000, or, in the case of a loan guaranteed by the Secretary, $200,000" and inserting in lieu thereof "$200,000, or, in the case of a loan guaranteed by the Secretary, $400,000".

(b) Section 316(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1946(b)) is amended by—

(1) in the second sentence, inserting "(or, in the case of loans for farm operating purposes, fifteen years)" after "seven years"; and

(2) in the fifth sentence, striking out "The interest rate" and inserting in lieu thereof "Except as otherwise provided for farm loans under section 331B of this title, the interest rate".

FARM LOAN INTEREST RATES

SEC. 605. The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) is amended by inserting after section 331A a new section 331B as follows:

SEC. 331B. Any loan for farm ownership purposes under subtitle A of this title, farm operating purposes under subtitle B of this title, or disaster emergency purposes under subtitle C of this title, other than a guaranteed loan, that is deferred, consolidated, rescheduled, or reamortized under this title shall, notwithstanding any other provision of this title, bear interest on the balance of the original loan and for the term of the original loan at a rate that is the lower of (1) the rate of interest on the original loan or (2) the rate being charged by the Secretary for loans, other than guaranteed loans, of the same type at the time of the deferral, consolidation, rescheduling, or reamortization.".

LIMITED RESOURCE BORROWERS

SEC. 606. Section 346 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1994) is amended by adding at the end thereof a new subsection (e) as follows:

"(e)(1) Notwithstanding any other provision of law, not less than 20 per centum of the loans for farm ownership purposes under subtitle A of this title, and not less than 20 per centum of the loans for farm operating purposes under subtitle B of this title, authorized to be insured, or made to be sold and insured, from the Agricultural Credit Insurance Fund during fiscal year 1984 shall be for low-income, limited-resource borrowers.

"(2) The Secretary shall provide notification to farm borrowers under this title, as soon as practicable after the date of enactment of the Emergency Agricultural Credit Act of 1984 and in the normal course of loan making and loan servicing operations, of the provisions of this title relating to low-income, limited-resource borrowers and the procedures by which persons may apply for loans under the low-income, limited-resource borrower program.".

Amend the title to read as follows: "An Act to make adjustments in the commodity programs for wheat, feed grains, upland cotton, and rice, to provide agricultural credit assistance, and for other purposes.".

SUMMARY OF THE AGRICULTURAL PROGRAMS ADJUSTMENT ACT OF 1984

TITLE I—WHEAT

The bill makes the following changes in the 1984 and 1985 wheat programs:

Provides for a target price of $4.38 per bushel for both 1984 and 1985 (instead of $4.45 for 1984 and $4.65 for 1985 as in current law);

Provides for a 10 percent paid diversion with 50 percent of the payment to be made at the time of signup and a payment rate of $2.70 per bushel;

Provides for a 20 percent acreage reduction program with no payment;

Provides for a 10 to 20 percent payment-in-kind diversion program for the 1984 crop with compensation-in-kind based on 85 percent of the farm program yield;

Permits haying and grazing of acreage diverted from production under the 1984 wheat program at the option of each State.

TITLE II—FEED GRAINS

The bill makes the following changes in the 1985 feed grain program:

Freezes the target price for corn at $3.03 per bushel (instead of $3.18 per bushel as in current law);

Provides that if corn carry-over on October 1, 1985, is estimated to exceed 1.1 billion bushels, the Secretary of Agriculture shall provide for a total acreage cutback of 5 to 20 percent (through a combination acreage reduction program and a paid diversion) with not less than 5 percent of the acreage cutback to be achieved through a paid diversion and any reduction over 15 percent to be equally divided between paid diversion and acreage reduction programs;

Provides for 50 percent of the diversion payment to be made at the time of signup and for a payment rate of $1.50 per bushel for corn.

TITLE III—UPLAND COTTON

The bill makes the following changes in the 1985 upland cotton program:

Freezes the target price at 81 cents per pound (instead of 86 cents as in current law);

Provides that if upland cotton carry-over on August 1, 1985, is estimated to exceed 4 million bales, the Secretary shall provide for a total acreage cutback of at least 25 percent (through a combination acreage reduction program and a paid diversion) with at least 5 percent of that cutback to be achieved through a paid diversion;

Provides for 50 percent of the diversion payment to be made at the time of signup and for a payment rate of 25 cents per pound;

TITLE IV—RICE

The bill makes the following changes in the 1985 rice program:

Freezes the target price at $11.90 per hundredweight (instead of $12.40 as in current law);

Provides that if rice carry-over on August 1, 1985, is estimated to exceed 25 million hunderedweight, the Secretary shall provide for a total acreage cutback of at least 25 percent (through a combination acreage reduction program and a paid diversion) with at least 5 percent of that cutback to be achieved through a paid diversion;

Provides for 50 percent of the diversion payment to be made at the time of signup and for a payment rate of $2.70 per hundredweight.

TITLE V—EXPORT ASSISTANCE

The bill states that it is the sense of Congress that the President should implement, as soon as practicable after enactment of the bill, the actions, proposed by the Administration to complement the provisions of the bill, to further assist in the development, maintainance, and expansion of international markets for United States agricultural commodities and products. The actions the President would take include:

(1) for fiscal year 1984—

(A) requesting $150 million in additional appropriations to carry out the Public Law 480 programs; and

(B) directing the Secretary of Agriculture to increase funding for the export credit guarantee program by at least $500 million;

(2) for fiscal year 1985—

(A) requesting $175 million in additional appropriations to carry out Public Law 480 programs;

(B) directing the Secretary of Agriculture to increase funding for the export credit guarantee program by at least $1.1 billion and for direct export credit programs by at least $100 million; and

(C) either requesting additional appropriations of $50 million to carry out the Public Law 480 program (in addition to the amounts specified above) or increasing the funding for the direct export credit programs by that same amount.

TITLE IV—AGRICULTURAL CREDIT

The bill makes the following changes in the Farmers Home Administration farm loan programs:

Natural Disaster Emergency Loans: Requires the Secretary of Agriculture to make Farmers Home Administration (FmHA) natural disaster emergency loans available based on individual production losses suffered by producers whose operations are located in counties contiguous to counties that have been designated as eligible for disaster assistance;

Permits natural disaster emergency loan applications to be filed by persons affected by the natural disaster within 8 months of the date the Secretary determines that agriculture operations have been substantially affected by the disaster or the President makes a disaster declaration or designation;

Permits the valuation of farm assets to be used as collateral for natural disaster emergency loans to be based on the value of those assets one year before the date of the governor's request for disaster assistance, if that value is higher than the current value.

Economic Emergency Loans: With respect to the funds provided for the economic emergency loan program during the period beginning December 22, 1983, and ending September 30, 1984, requires that at least $310 million be made available for insured economic emergency loans, with the Secretary having discretionary authority to make additional amounts of such funds available for insured loans in order to achieve the goals of the economic emergency loan program.

Operating Loan Limits: Raises the loan limits for FmHA farm operating loans to $200,000 for insured loans (currently $100,000) and $400,000 for guaranteed loans (currently $200,000).

Reamortization and Rescheduling: Requires that, for any farm loan (other than a guaranteed loan) that is deferred, consolidated, rescheduled, or reamortized by FmHA, the interest loan will be the lower of (1) the rate of interest for the original loan or (2) the current interest rate being charged.

Limited Resource Borrowers: Requires that not less than 20 percent of the amounts authorized for FmHA insured farm ownership and farm operating loans in fiscal year 1984 be made available for the low-income, limited-resource borrower program (under which borrowers who qualify for the program receive loans at a reduced rate of interest).

Repayment Period: Extends the maximum repayment period, for FmHA farm operating loans that have been consolidated or rescheduled, from seven to fifteen years from the date of the consolidation or rescheduling.

SECTION-BY-SECTION EXPLANATION OF THE AGRICULTURAL PROGRAMS ADJUSTMENT ACT OF 1984

TITLE I—WHEAT

Target prices

Section 101 of the bill amends section 107B of the Agricultural Act of 1949 to establish the target price for the 1984 and 1985 crops of wheat at not less than $4.38 per bushel. Under current law the minimum target price for the 1984 crop of wheat would be $4.45 per bushel and the minimum target price for the 1985 crop of wheat would be $4.65 per bushel.

Acreage limitation and paid diversion program for wheat

Section 102 of the bill amends section 107B of the Agricultural Act of 1949 to specify the provisions of the acreage limitation and land diversion programs for the 1984 and 1985 crops of wheat. In addition to various technical and conforming changes, the principal changes are as follows:

Section 102 (paragraph (2)) provides that notwithstanding any previous announcement by the Secretary to the contrary, for the 1984 crop of wheat the Secretary shall provide for a combination of programs consisting of (i) an acreage limitation program under which wheat producers would be required to reduce the acreage planted to wheat for harvest on the farm by 20 percent from the wheat acreage base for the farm, (ii) a paid diversion program under which such producers would be required to make an additional 10 percent reduction in the acreage planted to wheat for harvest on the farm, and (iii) a payment-in-kind land diversion program under which such producers could, at their own option, make an additional 10 to 20 percent reduction in the acreage planted to wheat for harvest on the farm. Under the payment-in-kind program, the Secretary would be required to provide producers compensation in-kind for the acreage taken out of production at a rate equivalent to not less than 85 percent of the farm program payment yield. Participating producers would be required to comply with the terms and conditions of the combined acreage limitation program and paid diversion program to be eligible for loans, purchases, and payments on the 1984 crop of wheat.

Section 102 further provides, that for the 1985 crop of wheat, the Secretary shall provide for a combination of (i) an acreage limitation program under which wheat producers would be required to reduce the acreage on the farm planted to wheat for harvest by not more than 20 percent below the wheat acreage base for the farm and (ii) a paid diversion program under which such producers would be required to make an additional reduction of 10 percent in the acreage on the farm planted to wheat for harvest. As in the case of the 1984 crop of wheat, to be eligible for loans, purchases, and payments, producers on the farm are required to comply with the terms and conditions of the combined acreage limitation and paid diversion programs. There is no requirement that the Secretary implement a payment-in-kind program for the 1985 crop of wheat, however, the Secretary has discretionary authority to do so if the Secretary determines that additional acreage reduction is necessary.

Section 102 (paragraph (4)) reiterates the requirement that the Secretary shall implement a 10 percent paid diversion program for each of the 1984 and 1985 crops of wheat, and provides that the payment rate for acreage diverted from production shall be established by the Secretary at not less than $2.70 per bushel. Payments are to be computed by multiplying the payment rate times the farm program payment yield for the crop times the additional wheat acreage diverted from production under the paid diversion program. This paragraph also requires that the Secretary make advance diversion payments to producers, equal to at least 50 percent of the payments due a producer under the paid diversion program, as soon as practicable after a producer enters into a land diversion contract with the Secretary and before there has been any determination of performance.

Haying and grazing diverted wheat acreage

Section 103 of the bill provides that, in carrying out the acreage limitation, paid diversion, and payment-in-kind diversion programs for the 1984 crop of wheat, the Secretary is required, at the request of the State Agricultural Stabilization and Conservation Committee for a particular State, to allow participating producers within such State to use the wheat acreage diverted from production under such programs for haying and grazing.

TITLE II—FEED GRAINS

Target prices

Section 201 of the bill amends section 105B of the Agricultural Act of 1949 to establish the target price for the 1985 crop of corn at not less than $3.03 per bushel. Under current law the minimum target price for the 1985 crop of corn would be $3.18 per bushel.

Acreage limitation and paid diversion program for feed grains

Section 202 of the bill amends section 105B of the Agricultural Act of 1949 to specify the provisions of the acreage limitation and land diversion programs for the 1985 crop of feed grains. In addition to making various technical and conforming changes, the principal changes are as follows:

Section 202 (paragraph (2)) provides that for the 1985 crop of feed grains, if the Secretary estimates that the quantity of corn on hand in the United States (excluding any quantity of corn produced in the United States during calendar year 1985) on the last day of the 1984-1985 marketing year (September 30, 1985) will exceed 1.1 billion bushels, the Secretary shall implement a program for the diversion of acreage from production of feed grains in the total amount of not more than 20 percent of the feed grain acreage base for a farm. In implementing such a program the Secretary (i) shall provide for a paid diversion program under which the producers of feed grains would be required to reduce the acreage planted to feed grains for harvest on the farm by not less than 5 percent from the acreage base for the farm and (ii) may, in addition, provide for an acreage limitation program. Any reduction of acreage required by the Secretary for the 1985 crop of feed grains in excess of 15 percent of the acreage base for the farm (up to the maximum reduction of 20 percent), however, must be equally proportioned by the Secretary between an acreage limitation program and a paid diversion program. To be eligible for loans, purchases, and payments on the 1985 crop of feed grains, if the Secretary implements a paid diversion program, or a combination acreage limitation program and paid diversion program, participating producers would be required to comply with the terms and conditions of the program or programs.

Section 202 (paragraph (3)) provides that if the Secretary implements a paid diversion program for the 1985 crop of feed grains, the Secretary shall make diversion payments, at a rate of not less than $1.50 per bushel for corn, to producers of the 1985 crop who reduce the acreage on the farm planted to feed grains for harvest so that it does not exceed the feed grain acreage base for the farm less an amount specified by the Secretary (at least 5 percent) in addition to the amount of any reduction required by the Secretary under an acreage limitation program, if any. Diversion payments on the 1985 crop of feed grains are to be computed by multiplying the payment rate times the farm program payment yield for the crop times the additional acreage diverted from production of feed grains under the paid diversion program. This paragraph also requires that the Secretary make advance payments to producers of the 1985 crop of feed grains, equal to at least 50 percent of the payments due a producer under the paid diversion program, as soon as practicable after a producer enters into a land diversion contract for the crop with the Secretary and before there has been any determination of performance.

TITLE III—UPLAND COTTON

Target prices

Section 301 of the bill amends section 103(g) of the Argicultural Act of 1949 to establish the target price for the 1985 crop of upland cotton at not less than $0.81 per pound. Under current law the minimum target price for the 1985 crop of upland cotton would be $0.86 per pound.

Acreage limitation and paid diversion program for upland cotton

Section 302 of the bill amends section 103(g) of the Agricultural Act of 1949 to specify the provisions of the acreage limitation and land diversion programs for the 1985 crop of upland cotton. In addition to various technical and conforming changes, the principal changes are as follows:

Section 302 (paragraph (2)) provides that for the 1985 crop of upland cotton, if the Secretary estimates that the quantity of upland cotton on hand in the United States (excluding any quantity of upland cotton produced in the United States during calendar year 1985) on the last day of the 1984-1985 marketing year for upland cotton (July 31, 1985) will exceed 4 million bales, the Secretary shall provide for a combination of (i) a paid diversion program under which producers would be required to reduce the acreage planted to upland cotton for harvest on the farm by not less than 5 percent from the acreage base for the farm and (ii) an acreage limitation program under which such producers would be required to make an additional reduction in the acreage planted to upland cotton for harvest on the farm in such amount, to be specified by the Secretary, that the total reduction in the acreage on the farm planted to upland cotton for harvest from the combination of programs would be not less than 25 percent of the farm acreage base. Participating producers would be required to comply with the terms and conditions of the combined acreage limitation program and diversion program to be eligible for loans, purchases, and payments on the 1985 crop of upland cotton.

Section 302 (paragraph (3)) provides that if the Secretary implements a paid diversion program for the 1985 crop of upland cotton, the Secretary shall make diversion payments, at a rate of not less than $0.25 per pound, to producers of the 1985 crop who reduce the acreage on the farm planted to upland cotton for harvest so that it does not exceed the upland cotton acreage base for the farm less an amount specified by the Secretary (at least 5 percent) in addition to any reduction required by the Secretary under an acreage limitation program. Diversion payments on the 1985 crop of upland cotton are to be computed by multiplying the payment rate times the farm program payment yield for the crop times the additional acreage diverted from production of upland cotton under the paid diversion program. This paragraph also requires that the Secretary make advance payments to producers of the 1985 crop of upland cotton equal to at least 50 percent of the payments due a producer under the paid diversion program, as soon as practicable after a producer enters into a land diversion contract for the crop with the Secretary and before there has been any determination of performance. This paragraph further provides that if any producer fails to comply with a land diversion contract after obtaining an advance payment, the producer is required to immediately repay the advance with interest as provided in regulations issued by the Secretary. (A similar repayment requirement is already contained in the current provisions for wheat, feed grains, and rice.)

TITLE IV—RICE

Target prices

Section 401 of the bill amends section 101(i) of the Agricultural Act of 1949 to establish the target price for the 1985 crop of rice at not less than $11.90 per hundredweight. Under current law the minimum target price for the 1985 crop of rice would be $12.40 per hundredweight.

Acreage limitation and paid diversion program for rice

Section 402 of the bill amends section 101(i) of the Agricultural Act of 1949 to specify the provisions of the acreage limitation and land diversion programs for the 1985 crop of rice. In addition to various technical and conforming changes, the principal changes are as follows:

Section 402 (paragraph (2)) provides that for the 1985 crop of rice, if the Secretary estimates that the quantity of rice on hand in the United States (excluding any quantity of rice produced in the United States during calendar year 1985) on the last day of the 1984-1985 marketing year for rice (July 31, 1985) will exceed 25 million hundredweight, the Secretary shall provide for a combination of (i) a paid diversion program under which producers would be required to reduce the acreage planted to rice for harvest on the farm by not less than 5 percent from the rice acreage base for the farm and (ii) an acreage limitation program under which such producers would be required to make an additional reduction in the acreage on the farm planted to rice for harvest in such amount, to be specified by the Secretary, that the total reduction in the acreage on the farm planted to rice for harvest from the combination of programs would be not less than 25 percent of the farm acreage base. Participating producers would be required to comply with the terms and conditions of the combined acreage limitation program and paid diversion program to be eligible for loans, purchases, and payments on the 1985 crop of rice.

Section 402 (paragraph (3)) provides that if the Secretary implements a paid diversion program for the 1985 crop of rice, the Secretary shall make diversion payments, at a rate of not less than $2.70 per hundredweight, to producers of the 1985 crop who reduce the acreage on the farm planted to rice for harvest so that it does not exceed the rice acreage base for the farm less an amount specified by the Secretary (at least 5 percent) in addition to any reduction required by the Secretary under an acreage limitation program. Diversion payments on the 1985 crop of rice are to be computed by multiplying the payment rate times the farm program payment yield for the crop times the additional acreage diverted from production under the paid diversion program. This paragraph also requires that the Secretary make advance payments to producers of the 1985 crop of rice, equal to at least 50 percent of the payments due a producer under the paid diversion program, as soon as practicable after a producer enters into a land diversion contract for the crop with the Secretary and before there has been any determination of performance.

TITLE V—EXPORT ASSISTANCE

Export assistance

Section 501 of the bill expresses the sense of Congress that, as soon as practicable after enactment of the bill, the President should implement the actions, proposed by the Administration to complement the provisions of the bill, to further assist in the development, maintenance, and expansion of United States agricultural export markets. This section also sets forth the proposed actions, which are as follows—

(1) for fiscal year 1984, the President will (i) request that an additional amount of $150 million (in addition to the President's February 1984 request for a supplemental appropriation of $90 million for fiscal year 1984) be appropriated by Congress for use in carrying out programs under Public Law 480 and (ii) direct the Secretary of Agriculture to use at least $500 million additional (over current budgeted levels) of Commodity Credit Corporation funds to carry out the

Export Credit Guarantee Program (GSM-102); and

(2) for fiscal year 1985, the President will (i) request Congress to appropriate at least $175 million additional (over the current budgeted level for fiscal year 1985) for use in carrying out programs under Public Law 480, (ii) direct the Secretary to use at least $1.1 billion additional (over current budgeted levels for fiscal year 1985) of CCC funds to carry out the Export Credit Guarantee Program and at least $100 million additional (over current budgeted levels for fiscal year 1985) of CCC funds for direct export credit programs of the CCC (GSM-5, GSM-201, and GSM-301), and (iii) request that Congress appropriate, or direct the Secretary to use CCC funds in the amount of, an additional $50 million (over the amounts specified in (2)(i) and (2)(ii)) to be used either for Public Law 480 or to provide additional direct export credit assistance through the CCC, as the President determines necessary and appropriate. The funds required to be used for direct export credit programs are to be in addition to any CCC funds otherwise required by law to be used for export activities.

TITLE VI—AGRICULTURAL CREDIT

Short title

Section 601 provides that this title may be cited as the "Emergency Agricultural Credit Act of 1984".

Natural disaster emergency loans

Section 602 makes several changes in the natural disaster emergency loan provisions of the Consolidated Farm and Rural Development Act. Section 602(a) amends section 321(a) of the Consolidated Farm and Rural Development Act to require that the Secretary of Agriculture accept applications from and make natural disaster emergency loans to otherwise eligible applicants that conduct farming, ranching, or aquaculture operations in a county contiguous to a county designated by the Secretary as having been substantially affected by a domestic natural disaster or by a major disaster or emergency designated by the President under the Disaster Relief Act of 1974.

Section 602(b) also amends section 321(a) of the Consolidated Farm and Rural Development Act. The amendment would require that the Secretary of Agriculture accept emergency loan applications from persons affected by a natural disaster at any time during the 8-month period following the date (1) on which the Secretary determines that such persons have been substantially affected by the natural disaster, or (2) the date on which the President makes the major disaster or emergency designation with respect to the natural disaster affecting the applicants.

Section 602(c) amends section 324(d) of the Consolidated Farm and Rural Development Act to provide that if farm assets (including land, livestock, and equipment) are used as collateral for an emergency loan, the Secretary is to value the assets based on the higher of (1) their value on the day before the date the governor of the State in which the farm is located requests Federal assistance under (i) the emergency loan provisions of the Consolidated Farm and Rural Development Act or (ii) the Disaster Relief Act of 1974, or (2) their value 1 year before such day.

Economic emergency loans

Section 603 amends section 211 of the Emergency Agricultural Credit Adjustment Act of 1978 to provide that, with respect to the court-ordered economic emergency loan program operated during the period beginning December 22, 1983 and ending September 30, 1984, the Secretary is to make $310,000,000 available in insured loans to eligible applicants. Also, this section provides that the Secretary has discretion to make an additional $290,000,000 available in insured loans to eligible applicants if such activity is appropriate, taking into consideration the amount of funds used for loan guarantees, in order to achieve the goals of the economic emergency loan program.

Operating loans

Section 604 makes several changes in the farm operating loan program carried out by the Farmers Home Administration. Section 604(a) amends section 313 of the Consolidated Farm and Rural Development Act to raise the loan limits for farm operating loans. The loan limit for direct or insured farm operating loans to an individual borrower would be $200,000, instead of $100,000 as under current law. The loan limit for guaranteed farm operating loans to an individual borrower would be $400,000, instead of $200,000 as under current law.

Section 604(b) amends section 316(b) of the Consolidated Farm and Rural Development Act to authorize the Secretary to consolidate or reschedule loans made for farm operating purposes for a period not to exceed 15 years, instead of 7 years as under current law.

Farm loan interest rates

Section 605 amends the Consolidated Farm and Rural Development Act to add a new section 331B. This new section provides that any loan made for farm ownership, farm operating, or disaster emergency purposes, other than a guaranteed loan, that is deferred, consolidated, rescheduled, or reamortized is to bear interest on the balance of the orignial loan and for the term of the original loan at rate that is the lower of (1) the rate of interest on the original loan or (2) the rate being charged by the Secretary for loans, other than guaranteed loans, or the same type at the time of the deferral, consolidation, rescheduling, or reamortization.

Limited resource borrowers

Section 606 amends section 346 of the Consolidated Farm and Rural Development Act to provide that not less than 20 percent of the insured farm ownership and insured farm operating loans made during fiscal year 1984 shall go to eligible low-income, limited resource borrowers.

Section 606 also provides that the Secretary shall, as soon as practicable after the date of enactment of the bill and in the normal course of loan making and servicing operations, notify Farmers Home Administration farm borrowers of the provisions pertaining to low-income, limited resource loans and the procedures by which persons may apply for loans designated for eligible low-income, limited resource borrowers.

NURSE EDUCATION AMENDMENTS OF 1984

Mr. HATCH. Mr. President, on February 9, I introduced a series of five health bills, initiating the process of reauthorizing the health programs included in the Omnibus Reconciliation Act of 1981. Soon I will also introduce the Nurse Education Amendments of 1984, a bill reauthorizing nursing education programs—currently authorized in title VIII of the Public Health Service Act. We will be holding full Labor and Human Resources Committee hearings related to nursing issues on March 14, 1984.

The Congress, recognizing the need for programs to increase the supply and improve the education of registered nurses, established the Nurse Training Act in 1965; 19 years and some $1.6 billion later, the number of registered nurses has doubled, improving both the distribution to rural and urban underserved areas, and the quality of nursing services to the Nation as a whole.

Since World War II, the Nation has faced a national shortage of nurses in both hospitals and nursing homes. The growing need for nurses fueled the Federal engines until 1976, when President Carter, the second of three administrations that would do so, stated that there was no longer a national nursing shortage.

Had the shortages and maldistribution problems been met? What did $1.6 billion buy in the way of nursing care? In short, has the need for Federal support to nursing education ended?

The Nurse Training Act Amendments of 1979 mandated a study that would determine the answers to these questions. The Institute of Medicine was to conduct the study and completed their work on that project in January 1982. The result was a 300-page document listing some 21 recommendations to Congress regarding nursing practice and nursing education.

The report recommends that there be no Federal support to increase the overall supply of nurses, but certain Federal, State, and private actions should be undertaken to alleviate particular shortages and needs. It is this philosophy which forms the general focus of the reauthorization.

To accomplish this goal, I am recommending that the Division of Nursing, now housed within the Bureau of Health Professions, be elevated to a Bureau of Nursing with three new divisions: the Division of Nurse Educational Support, the Center for Nursing Research, and the Division of Advanced Nurse Education.

The most important effort resulting from this change will be the creation of a new Center for Nursing Research. Through the efforts of the Division of Nursing, many resources have been tapped to support nurses interested in careers in research. Many of today's nurse researchers are a result of these educational efforts and have obtained the skills and gained access to the resources they need to continue in this field. It is my hope that through the creation of this Center, many more nurses will become interested in and seek research career opportunities.

Also a new demonstration authority included in these amendments, will

enable development of cost-effective institutional and nursing service organizational frameworks, along with demonstrations regarding educational and practice methods. These demonstrations are designed to enhance nursing efficiency in a variety of health care settings. This increased efficiency would save health dollars and encourage nurses to choose careers that would improve the provision of care to our Nation's elderly and needy patients in both home and community-based settings.

To help students obtain these goals, changes in the nursing student loan programs would be made. These changes make the loan program more efficient, while encouraging the schools to continue to develop proper loan and collecting procedures.

I would note that nursing schools, nationwide have worked diligently to reduce their high loan delinquency rates. Because of their dedication to solving this problem, I will continue to encourage the Department of Health and Human Services to develop a definition of due diligence regarding loan recovery that is fair and consistent with other public and private loan collection procedures.

I have included in my remarks an outline of the bill I intend to introduce to reauthorize these programs. I am grateful to the Tri-Council of Nursing, the American Nurses Association, the American Association of Colleges of Nursing, and the National League of Nurses, as well as the Division of Nursing in the Department of HHS and other interested groups for their comments.

I encourage my colleagues to support this bill and join me in my effort to continue and expand these important programs. I ask unanimous consent that an outline of the bill appear at the conclusion of my remarks.

There being no objection, the outline was ordered to be printed in the RECORD, as follows:

NURSE EDUCATION AMENDMENTS OF 1984

I. CREATION OF A NEW BUREAU OF NURSING

A. General authority

To create a Bureau of Nursing within the Health Resources and Services Administration. The Bureau will have three Divisions; the Division of Nurse Educational Support, the Center for Nursing Research, and the Division for Advanced Nurse Education.

1. Authority for the Bureau Director under the Secretary to carry out all of the programs within the bureau.

2. Authority to establish systems to collect, compile and analyze data on professional nursing and nurse education, and report annually to the Congress on nursing education and educational requirements.

B. Division of Nurse Educational Support

The Division will oversee—Financial Assistance to Nursing Students and Nursing Schools.

1. Traineeships—Sec. 830 is amended to read as follows; "grants to schools of nursing to cover the cost of traineeships for the education of master's and doctoral level nurses—(A) to prepare to practice as nurse practioners and nurse midwives, (B) to serve in and prepare for practice as nurse administrators, educators and nurse researchers; (C) or to serve in and prepare for practice in other professional nursing specialties determined by the Secretary to require advanced training."

2. Nurse Anesthetists—Sec. 831 is amended to read as follows: (b) The Secretary may also make grants to public or private nonprofit institutions to cover the cost of projects to improve and upgrade existing programs for the training of registered nurses to be nurse anesthetists which are accredited by an entity or entities designated by the Secretary of Health and Human Services."

3. Student Loans Provisions

Section 836 is amended to read as follows:

a. Delete preference to LPN's.

b. Grant Secretary authority to retain excess cash from school loan programs that have been terminated within the NSL program. These funds can then be recycled to newly accredited schools to start-up loan programs, existing schools with new loan programs and existing schools.

c. Extend authority granted federal agencies by the Debt Collection Act of 1982 to obtain addresses from IRS records to institutions who participate in the HPSL and NSL programs.

C. Center for Nursing Research

A. General authority to the Secretary to create a Center for Nursing Research. The purpose of the Center will be to conduct, support and disseminate basic and clinical research, training and related programs, through grants awarded on a competitive basis to qualified nurse researchers. The Center's activities will be oriented towards basis and applied scientific research related to the promotion of health, prevention of illness, and understanding human responses of individuals and families to acute and chronic illnesses, disabilities and the aging process.

2. The Secretary shall report biannually on the activities of the Center, the coordination of nursing research activities within the Center and with other government entities (both agencies and departments) and the status of nursing research.

D. Division of Advanced Nurse Education

1. Advanced Nurse Training—Sec. 821 is amended to read:

"(1) plan, develop and operate,

"(2) expand; and

"(3) maintain programs at the master's and doctoral degree level to prepare nurse educators, administrators, consultants, researchers or to serve as clinical nurse specialists or other professional nurse specialities as determined by the Secretary.".

2. Nurse Practitioner Programs—Sec. 822 is amended to read:

"The Secretary may make grants to and enter into contracts with public and private collegiate schools of nursing to meet the costs of projects to:

"(1) plan, develop and operate,

"(2) expand; and

"(3) maintain programs for the education of nurse practitioners at the master's degree level, and accredited certificate programs for nurse midwives."

3. Special Projects—Section 820 is amended to read as follows:

"(6) the Secretary may make grants and enter into contracts with public and private collegiate schools of nursing to carry out demonstrations with regard to: institutional and nursing service organizational frameworks that support more cost effective delivery systems and nursing education/practice collaborations."

II. AUTHORIZATION LEVELS

A. Proposed Budget for the Nurse Education Amendments of 1984.

	Proposed authorization
Special projects	[1] $9,000,000
Advanced nurse training	11,000,000
Nurse practitioners	9,000,000
Traineeships	9,000,000
Nurse anesthetists	400,000
Student loans	4,000,000
Startup money for new bureau	2,000,000
Center for Nursing Research	10,000,000
Total	54,400,000

[1] $7,000,000 for grants and contracts and $2,000,000 for demonstrations

III. REPEALS

A. Sections 801 through 805 (have not been funded since mid 1970's).

B. Section 810 through 815 (have not been funded since mid 1970's).

C. Section 815 (has not been funded for past 2 years).

REAUTHORIZATION OF HEALTH PROFESSIONS TRAINING ASSISTANCE ACT

Mr. HATCH. Mr. President, I am pleased to report that soon I will introduce the Health Professions Training Assistance Act of 1984. This legislation reauthorizes current programs in title VIII of the Public Health Service Act, and deletes obsolete sections, focusing the statute on current national concerns. This bill makes clear that the Federal Government continues to play a vital role, albeit limited, in the education of health professional students. It does this by diminishing the economic barriers for qualified needy students to obtain an education in their chosen health profession. Furthermore, it recognizes the past accomplishments of Federal incentives which encouraged medical students to select careers in one of the primary care specialties—family practice, general internal medicine, and pediatrics—and continues the current level of support for predoctoral and postdoctoral residency training programs to maintain their vitality.

Mr. President, health education is at a crossroad in our history. We are rapidly approaching a time when there will be an ample number of health professionals, in most categories, and in most regions of our country. There has been a dramatic increase in the number of health professionals—physicians, nurses, dentists, and allied health personnel—over the past 20 years, thanks to Federal and State initiatives. These efforts have been surprisingly successful and have resulted in almost doubling the number of students graduating annually from many

of our health professional schools. In fact, the 1981 report of the Graduate Medical Education Advisory Committee (GMENAC) suggests there will be a significant surfeit of physicians by 1990, possibly as many as 70,000 more physicians than required to provide adequate medical services. However, these projections for excess numbers of physicians vary according to medical specialty, and the same report estimated there will be an ongoing need for more primary care physicians, rehabilitation specialists—physiatrists—and preventive and public health experts. So, in spite of an overall abundance of health care providers, believe it essential we maintain present programs which train individuals capable of providing primary health services, particularly in medically underserved areas. I want to emphasize that nothing in this legislation provides incentives to train more health professionals. I believe an important responsibility of the private sector, that is professional and academic organizations, is to grapple with concerns related to projections of significant excesses of health professionals, and determine the appropriate response.

This legislation has a proud history of providing a Federal response to concerns from our citizens related to inadequate access to health care. It has been successful in addressing those concerns by providing student assistance through loans and loan guarantees, increasing the numbers of providers, and encouraging careers in family medicine, primary care, general dentistry, and allied health.

However, today's needs are considerably different than they were when much of this legislation was passed into law. Access to health care is far less of a problem than a decade ago, but access by qualified students to a career in one of the health professions is a problem. It is limited by the cost of such education. This bill repeals past incentives for growth of such schools or increasing the overall numbers of providers, but maintains those provisions for student assistance, and emphasizes the importance of aid to economically disadvantaged and minority students, and maintains Federal support for educational programs in primary care.

Mr. President, the bill is essential to our Nation's young people who desire, and deserve, to pursue a goal of becoming health professionals, and to maintain our supply of well-trained primary care providers. I ask unanimous consent that the following summary of the bill be printed in the RECORD.

There being no objection, the summary was ordered to be printed in the RECORD, as follows:

SUMMARY OF HEALTH PROFESSIONS TRAINING ASSISTANCE ACT OF 1984

This bill reauthorizes current programs in Title VII of the Public Health Service Act for four years at funding levels consistent with FY 84 appropriations. The following is a summary of changes made in the statute:

(1) Redefine "program for the training of physicians assistants" to focus on training primary health care providers and emphasize training in disease prevention, health promotion, geriatric medicine and home health care. (Sec. 701(8)(A))

(2) Redefine "allied health professional" to include higher degree than the baccalaureate level. (Sec. 701(10))

(3) Include at least one representative of an allied health professions education program on the National Advisory Council on Health Professions Education. (Sec. 702)

(4) Include acquisition of equipment or instrumentation under grant authority for construction of teaching facilities. (Sec. 721)

(5) Maintain level of federal loan insurance program to a total principal amount not to exceed $250,000,000. (Sec. 728)

(6) Include students enrolled in post baccalaureate program in allied health among those entitled to participate in federally insured loan programs. (Sec. 729)

(7) Amend Health Education Assistance Loan Program in order to improve administration, collection rate, and allow the Student Loan Marketing Association to originate loans. (Sec. 734)

(8) Amend the Health Professions Student Loan Program to improve its administration and collection rate, including changing a penalty for outstanding loans. (Sec. 741)

(9) Limit funds from the new authority for Health Professions Student Loan Program to schools that have established such loan funds after July 1, 1972. (Sec. 742)

(10) Give authority to the Secretary of HHS to use student loan funds from a school which closes, or has an excess cash balance, to capitalize student loan funds at another school in need of such funds. (Sec. 742)

(11) Extend authority for the Health Professions Student Loan Program through 1991. (Sec. 743)

(12) Amend authority for Area Health Education Programs to give them more flexibility.

(13) Redefine dentistry to "advanced, educational program in general dentistry." (Sec. 786)

(14) Amend project grant authority for interdisciplinary training and curriculum development to focus on current national health priorities, including: health promotion/disease prevention, training in geriatrics and long term care; promoting economics in health professions, teaching and practice; faculty development for health professional schools; and nutrition. Authorization level is increased to $6.0 million. (Sec. 788)

(15) New Section: Require a study be submitted October 1, 1985, regarding student indebtedness, and the association, if any, between level of indebtedness and specific career choices. This study will include recommendations for a national policy, if needed, to assure an appropriate distribution of medical specialists.

(16) Repeal several sections which are obsolete or redundant, including:

Advance Funding—Title VIII (Sec. 703) This authority has not been used for many years. "Advance funding" (appropriations of funds this year for obligation in the future year) is different from "forward funding" (appropriation and obligation of funds this year for expenditure by the recipient of the award next year).

Lister Hill Scholarship Program (Sec. 759). This authority, added by the Health Professions Educational Assistance Act of 1976, never was implemented. It expired (for new awards) at the end of fiscal year 1980.

Part D—Grants to Provide Professional and Technical Training in the Field of Family Medicine (Secs. 761—1st 768). This authority was never implemented. It expired at the end of fiscal year 1973.

Grants for Training, Traineeships, and Fellowships in Family Medicine (2nd Sec. 767). This authority expired at the end of fiscal year 1977 and has been replaced by the family medicine training authority in Sec. 786.

Grants for Support of Postgraduate Training Programs for Physicians and Dentists (2nd Sec. 768). This authority never was implemented and expired at the end of fiscal year 1976.

Grants for Training, Traineeships, and Fellowships for Health Professions Teaching Personnel (Sec. 769).

Grants for Computer Technology Health Care Demonstration Programs (Sec. 769A. This authority expired at the end of fiscal year 1977.

General Provisions (Relating to Expired Secs. 767-769A) Sec. 769B). This section should be repealed with Secs. 767-769A.

Capitation Grants (Sec. 770-771). Repeal capitation grants for health profession schools with the exception of schools of public health.

Education of Returning U.S. Students from Foreign Medical Schools (Sec. 782). This authority expired at the end of fiscal year 1980 and is no longer needed.

Occupational Health Training and Education Centers (Sec. 785). This authority, which expired at the end of fiscal year 1980, never was implemented as such. Similar training centers have been established under more general authorities administered by the National Institute for Occupational Safety and Health.

Training in Emergency Medical Services (Sec. 789). This authority expired at the end of fiscal year 1982 (per P.L. 96-142). Responsibility for EMS training is more appropriately assumed by State and local governments or other non-Federal entities.

MESSAGES FROM THE HOUSE

At 3:24 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House has passed the following bill, without amendment:

S. 912. An act to modify the authority for the Richard B. Russell Dam and Lake project, and for other purposes.

ENROLLED BILLS AND JOINT RESOLUTIONS SIGNED

The message also announced that the Speaker has signed the following enrolled bills and joint resolutions:

S. 820. An act to authorize appropriations for the Earthquake Hazards Reduction Act of 1977 and the Federal Fire Prevention and Control Act of 1974 for fiscal year 1984 and fiscal year 1985, and for other purposes;

S. 2354. An act to rename the "River of No-Return Wilderness" in the State of Idaho as the "Frank Church—River of No Return Wilderness";

H.R. 2173. An act to amend the Contract Services for Drug Dependent Federal Offenders Act of 1978 to authorize additional appropriations to carry out such Act;

H.R. 2809. An act to establish a National Fish and Wildlife Foundation;

S.J. Res. 112. Joint resolution to proclaim the month of March 1984, as "National Social Work Month";

S.J. Res. 132. Joint resolution to designate the week beginning May 6, 1984, as "National Correctional Officers Week"; and

S.J. Res. 225. Joint resolution designating the month of March 1984 as "National Eye Donor Month".

The enrolled bills and joint resolutions, except for Senate Joint Resolution 225 were subsequently signed by the President pro tempore (Mr. THURMOND).

The enrolled joint resolution, Senate Joint Resolution 225 was subsequently signed by the Vice President.

ENROLLED BILLS AND JOINT RESOLUTIONS PRESENTED

The Secretary reported that on today, March 13, 1984, he had presented to the President of the United States the following enrolled bills and joint resolutions:

S. 820. An act to authorize appropriations for the Earthquake Hazards Reduction Act of 1977 and the Federal Fire Prevention and Control Act of 1974 for fiscal year 1984 and fiscal year 1985, and for other purposes;

S. 2354. An act to rename the "River of No-Return Wilderness" in the State of Idaho as the "Frank Church—River of No Return Wilderness";

S.J. Res. 112. Joint resolution to proclaim the month of March 1984, as "National Social Work Month"; and

S.J. Res. 132. Joint resolution to designate the week beginning May 6, 1984, as "National Correctional Officers Week".

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-2773. A communication from the Secretary of the Federal Energy Regulatory Commission transmitting, pursuant to law, a report on final valuations of pipeline company properties; to the Committee on Commerce, Science, and Transportation.

EC-2774. A communication from the Administrator of the Veterans' Administration and the Secretary of Defense transmitting, pursuant to law, a joint report relative to the sharing of medical resources; to the Committee on Veterans' Affairs.

EC-2775. A communication from the chairperson of the Architectural and Transportation Barriers Compliance Board transmitting, pursuant to law, the fiscal year 1983 annual report of the Board; to the Committee on Environment and Public Works.

EC-2776. A communication from the Chairman of the D.C. Council transmitting, pursuant to law, a copy of D.C. ACT 5-113; to the Committee on Governmental Affairs.

EC-2777. A communication from the Chairman of the D.C. Council transmitting, pursuant to law, a copy of D.C. ACT 5-114; to the Committee on Governmental Affairs.

EC-2778. A communication from the Chairman of the D.C. Council transmitting, pursuant to law, a copy of D.C. ACT 5-115; to the Committee on Governmental Affairs.

EC-2779. A communication from the Director of ACTION transmitting, pursuant to law, a report on the agency's accounting system and other financial operations; to the Committee on Governmental Affairs.

EC-2780. A communication from the Administrator of the Panama Canal Commission transmitting, pursuant to law, a report on the Commission's systems of internal accounting and administrative control; to the Committee on Governmental Affairs.

EC-2781. A communication from the Solicitor of the U.S. Commission on Civil Rights transmitting, pursuant to law, the 1983 report under the Freedom of Information Act; to the Committee on the Judiciary.

EC-2782. A communication from the General Counsel of the Administrative Conference of the United States transmitting, pursuant to law, the Conference's 1983 Freedom of Information report; to the Committee on the Judiciary.

EC-2783. A communication from the chairman of the Merit Systems Protection Board transmitting, pursuant to law, the Board's 1983 Freedom of Information report; to the Committee on the Judiciary.

EC-2784. A communication from the Veterans of World War I of the U.S.A. transmitting, pursuant to law, their financial statements for the quarter ended December 31, 1983; to the Committee on the Judiciary.

EC-2785. A communication from the Secretary of Health and Human Resources transmitting, pursuant to law, the fifth special report on alcohol and health; to the Committee on Labor and Human Resources; to the Committee on Labor and Human Resources.

EC-2786. A communication from the Secretary of Health and Human Resources transmitting a draft of proposed legislation to amend and extend runaway and homeless youth programs; to the Committee on Labor and Human Resources.

EC-2787. A communication from the Administrator of the Environmental Protection Agency transmitting a draft of proposed legislation to amend and extend the Federal Insecticide, Fungicide, and Rodenticide Act; to the Committee on Agriculture, Nutrition, and Forestry.

EC-2788. A communication from the Director of the Office of Management and Budget transmitting, pursuant to law, the cumulative report on rescissions and deferrals for March 1, 1984; jointly, pursuant to the order of January 30, 1975, to the Committee on Appropriations and the Committee on the Budget.

EC-2789. A communication from the Deputy Assistant Secretary of Defense for Personnel and Force Management transmitting, pursuant to law, the report on special pay for duty subject to hostile fire or imminent danger; to the Committee on Armed Services.

EC-2790. A communication from the Principal Deputy Assistant Secretary of the Navy for Shipbuilding and Logistics transmitting, pursuant to law, a report on a decision to convert the central files function at the Naval Shipyard, Puget Sound, Washington to performance under contract; to the Committee on Armed Services.

EC-2791. A communication from the Secretary of Transportation and the Secretary of Defense transmitting, pursuant to law, the DOT/DOD plan for joint use of military airfields; to the Committee on Commerce, Science, and Transportation.

EC-2792. A communication from the General Counsel of the Department of Energy transmitting a draft of proposed legislation to authorize appropriations for DOE civilian programs for fiscal years 1985 and 1986; to the Committee on Energy and Natural Resources.

EC-2793. A communication from the Deputy Assistant Secretary of the Interior transmitting a draft of proposed legislation to provide reimbursement for certain investigation expenses by the Bureau of Reclamation; to the Committee on Energy and Natural Resources.

EC-2794. A communication from the Administrator of the Environmental Protection Agency transmitting a draft of proposed legislation to extend the Safe Drinking Water Act for 2 years; to the Committee on Environment and Public Works.

EXECUTIVE REPORTS OF COMMITTEES

The following executive reports of committees were submitted:

By Mr. HATCH, from the Committee on Labor and Human Resources:

Mr. HATCH. Mr. President, for the Committee on Labor and Human Resources, I report favorably a nomination list in the Public Health Service which was printed in its entirety in the February 9, 1984, RECORD. I ask, to save the expense of reprinting them on the Executive Calendar, that these nominations lie at the Secretary's desk for the information of Senators.

The PRESIDING OFFICER. Without objection, it is so ordered.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. MITCHELL:

S. 2415. A bill to provide for the public financing of general elections for the United States Senate and for other purposes; to the Committee on Rules and Administration.

By Mr. BAKER (for Mr. PERCY) (by request):

S. 2416. A bill to provide for increased participation by the United States in the International Development Association, and for participation by the United States in the Inter-American Investment Corporation; to the Committee on Foreign Relations.

By Mr. DECONCINI (for himself and Mr. BAUCUS):

S. 2417. A bill to amend the Sherman Act to prohibit a rail carrier from denying to shippers of certain commodities, with intent to monopolize, use of its track which affords the sole access by rail to such shippers to reach the track of a competing railroad or the destination of shipment; to the Committee on the Judiciary.

By Mr. MATHIAS (for himself, Mr. FORD, Mr. HATFIELD, Mr. WARNER and Mr. INOUYE):

S. 2418. A bill to authorize and direct the Librarian of Congress, subject to the supervision and authority of a federal civilian or military agency, to proceed with the construction of the Library of Congress Mass Book Deacidification Facility, and for other purposes; to the Committee on Rules and Administration.

By Mr. MATHIAS (for himself and Mr. SARBANES):

S. 2419. A bill to authorize the Secretary of the Interior to convey certain land located in the State of Maryland to the Maryland-National Capital Park and Planning Commission; to the Committee on Energy and Natural Resources.

By Mr. MATHIAS:

S. 2420. A bill to amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes; to the Committee on the Judiciary.

By Mr. SPECTER (for himself and Mr. HEINZ):

S. 2421. A bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) to provide for cleanup authority and liability for petroleum releases and to regulate underground storage tanks used for the storage of hazardous substances; to the Committee on Environment and Public Works.

By Mr. BRADLEY (for himself and Mr. DODD):

S. 2422. A bill to provide a program of planning grants, demonstration grants, and formula grants to assist local educational agencies to improve the basic skills of economically disadvantaged secondary school students, and for other purposes; to the Committee on Labor and Human Resources.

By Mr. THURMOND (for himself and Mr. BIDEN, Mr. LAXALT, Mr. HEINZ and Mr. GRASSLEY) (by request):

S. 2423. A bill to provide financial assistance to the States for the purpose of compensating and otherwise assisting victims of crime, and to provide funds to the Department of Justice for the purpose of assisting victims of Federal crime; to the Committee on the Judiciary.

By Mr. KENNEDY (for himself Mr. PELL, Mr. RIEGLE and Mr. CRANSTON):

S. 2424. A bill to provide for the solvency of the medicare program and to reform the health care financing system; to the Committee on Finance and the Committee on Labor and Human Resources, jointly, by unanimous consent.

By Mr. BIDEN:

S.J. Res. 258. Joint resolution to designate the week of June 24 through June 30, 1984 as "National Safety in the Workplace Week"; to the Committee on the Judiciary.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. MITCHELL:

S. 2415. A bill to provide for the public financing of general elections for the U.S. Senate, and for other purposes; to the Committee on Rules and Administration.

SENATE CAMPAIGN COST LIMITATION AND PUBLIC FINANCING ACT

Mr. MITCHELL. Mr. President, political campaigns last too long and cost too much.

The British House of Commons came to the same conclusion when, in the 17th century, it passed a standing order that if any one should spend above 10 pounds before election to win, "it shall be accounted bribery" and the seat vacated.

George Washington must have held a similar belief. George Thayer, author of an authoritative work on campaign financing, tells us that when Washington "* * * ran for the Virginia House of Burgesses from Fairfax County in 1757, he provided his friends with the 'customary means of winning votes:' namely 28 gallons of rum, 50 gallons of rum punch, 34 gallons of wine, 46 gallons of beer, and 2 gallons of cider royal. Even in those days this was considered a large campaign expenditure, because there were only 391 voters in his district, for an average outlay of more than a quart and a half per person."

The excessive length and cost of campaigning became very clear to me in 1981 and 1982 when I was seeking election to this body. Despite the fact that Maine has about 830,000 citizens of voting age, I and my general election opponent each spent over $1 million in our efforts to win the election.

Following the election, I expressed my concern about the high and growing costs associated with modern campaigns. I decided to examine carefully the current legal and institutional framework of campaign financing in an effort to determine what constructive steps can be taken to reduce the cost and length of campaigns and lessen the perceived influences of money in the electoral process.

My very first act following the 1982 general election was to ask 31 outstanding Maine citizens to assist me in this examination. The group included the chairwoman of the Republican Party, broadcasting executives, journalists, academicians, labor and business leaders, legislators, lawyers, a former Maine Governor, a retired member of the Maine Supreme Judicial Court and prominent civic representatives. This Task Force on Campaign Reform was chaired by Attorney Harold C. Pachios of Cape Elizabeth, a deputy Presidential Press Secretary to President Lyndon B. Johnson and former chairman of the Maine Democratic Party.

The task of finding ways to limit the enormous amounts of money being spent on campaigns was a difficult one, particularly in light of the constitutional guarantee of free speech. However, the members of the task force enthusiastically accepted the challenge presented to them, organized into committees, and worked diligently to determine the extent to which there are any solutions to this problem.

The result of many hours of research, discussion, and compromise was a task force report, the text of which appears after these introductory remarks. Its fundamental conclusions were summarized as follows:

The only viable proposition for controlling campaign spending lies with public financing of Congressional campaigns. Recognizing the practical difficulty in structuring a realistic spending limit given the enormous demographic differences in House of Representatives districts, the task force recommends that initially public financing legislation apply only to campaigns for the U.S. Senate. The task force was reluctant to recommend details which could be incorporated into draft legislation, believing that maximum technical flexibility should be given to the legislative draftsmen.

On the other hand, the task force does recommend that public financing be funded through taxpayer support in a manner similar to the Presidential campaign funding mechanism; that candidates accepting such funds be subject to a statutory expenditure limitation; that in 1984 public financing of Senate campaigns be restricted to the general election as opposed to primary elections; and that the legislation require the Federal Election Commission to monitor the efficacy of the public financing scheme during the 1984 Senate elections, and the report to Congress no later than April 1, 1985 its recommendation for revisions to the plan.

(In a footnote, the Task Force stated that it may be more realistic to assume that 1986, rather than 1984, will be the initial year to which public financing of Senate campaigns would be applicable.)

With these task force recommendations in mind, I set about drafting the "Senate Campaign Cost Limitation and Public Financing Act," which I am introducing today. The bill incorporates the task force's recommendations and supplements them as well. Its principal features include the following:

GENERAL ELECTION

The bill sets forth a procedure under which qualified candidates for a general election to the U.S. Senate would be entitled to partial Federal funding of their campaigns. Funds raised during the primary period but not spent could be counted as new contributions for the general election.

OVERALL EXPENDITURE LIMIT

The bill would establish an overall limit on expenditures for those who wish to participate in the public financing program. The limit would be determined by the following formula: $500,000 plus $0.15 times voting age population (VAP). Using the most recent VAP figure issued by the Federal Election Commission, this formula would, for example, establish an overall limit on expenditures of $624,500 for Maine. While some may consider the base figure of $500,000 too high, I think it important that such legislation not be seen as, and not in fact be,

an effort to protect incumbents. There must be an opportunity for unknown challengers to compete effectively with well-known incumbents.

FEDERAL MATCHING FUNDS

Once a candidate has passed a serious candidate test and met other basic qualifications, the Federal Election Commission would match all contributions from individuals of $100 or under.

SERIOUS CANDIDATE TEST

The Federal Election Commission would only begin to match small contributions—$100 or under—from individuals when the participating candidate had raised an amount equivalent to 5 percent of the overall expenditure limit from in-State residents.

CANDIDATES DETERMINE FUNDING SOURCE MIX

The candidate, not the statute, would determine the mix of funding sources (party contributions, Political Action Committee (PAC) contributions, personal wealth contributions, individual contributions, and public matching funds). However, the candidate would have to keep in mind the fact that he or she may not collect from all sources more than the overall expenditure limit, and that only contributions from individuals of $100 or less will be matched.

SOURCES OF PUBLIC MATCHING FUNDS/ EFFECTIVE DATE

A "Senate dollar check-off," modeled after the "Presidential dollar check-off," would be offered to taxpayers when they file their IRS forms for calendar year 1985. Should the resulting funds be insufficient to finance the demands on the program, the shortfall would be financed with general revenues.

LIMITATION ON PERSONAL WEALTH CONTRIBUTIONS

A candidate who decides to participate in the public financing program could contribute no more than $35,000 (plus COLA) from his or her personal wealth to the general election campaign.

EXPENDITURE LIMIT WAIVER

A candidate would be released from the overall expenditure limit if he or she qualified and agreed to participate in the public financing program and an opponent did not.

INDEPENDENT EXPENDITURES REGISTRATION

Any individual or group making an independent expenditure in excess of $50 (plus COLA) for or against a candidate running in a general election to the Senate would be required to register such an expenditure with the Federal Election Commission. A participating candidate would be entitled to a grant of public funds equivalent to the amount independently obligated against his candidacy once such amount exceeds 5 percent of the participating candidate's overall expenditure limit. Such an offsetting grant shall not be counted toward the overall expenditure ceiling to which the participating candidate is bound.

To illustrate how the system would work I will use Maine as an example.

As I previously stated, Maine now has a voting age population of 830,000 people. Under the formula set forth in the bill, qualifying candidates wishing to participate in the public financing program could spend no more than $624,500 each in pursuit of a general election victory.

Participating candidates could choose from whom they wished to receive their general election campaign funds. Although they could not spend more than $35,000 of their own personal wealth, they could, within existing law, accept any amount from party sources, PAC sources, and individuals, so long as they did not collect more than they are permitted to spend.

For purposes of discussion, assume a participating candidate for a Maine Senate seat decided to contribute $10,000 of his own funds to the campaign and to accept $50,000 from political party sources and $100,000 from PAC's. The total, or $160,000, would be subtracted from the overall expenditure limit of $624,500. The difference between $624,500 and $160,000 is $464,500. Up to one-half of this amount—$232,225—could be provided by the Federal Election Commission in the form of matching funds, providing the candidate raises an equivalent amount in contributions from individuals in amounts $100 or under.

Should my bill become law, it is wholly conceivable that a candidate for the Senate from Maine might chose to accept no PAC or political party money whatsoever. That would be up to the candidate. As long as the overall spending limit is not exceeded, a participating candidate conceivably could finance his or her entire election effort with contributions from individuals of $100 or under, and FEC matching funds.

My bill has a unique feature which is certain to generate considerable debate in the Congress. This is the provision which provides a participating candidate with an FEC grant designed to offset substantial adverse independent expenditures. This provision would allow a participating candidate to respond in a fair way to attacks waged against him or her by individuals or groups operating apart from the opponent's political organization.

I offer the "Senate Campaign Cost Limitation and Public Financing Act" in good faith, with the hope that it will receive the careful consideration of the committee, or committees, to which it will be referred. While recognizing that some may feel this bill has features that are premature, I believe it is time to make a start.

While I cannot with any certainty predict the future of the bill I am introducing today, I believe that at some time in the future—probably in the aftermath of a major campaign financing scandal—some form of public financing of Senate campaigns will be enacted. I ask: why not act now? If we do not act soon, and if present trends continue, Members should worry—as the late Senator Metcalfe cautioned—about serving time rather than their constituents. Something has to be done.

This Chamber is controlled by Members of the Republican Party. I am aware that the Republican Party in its 1980 platform placed itself firmly in opposition to public financing of congressional campaigns, and that the President and the Senate leadership are also opposed.

I believe that position to be wrong and shortsighted. In my judgment, the bill I am introducing today, if enacted, would directly address the public's widespread concerns without inhibiting free speech and the right to participate actively in the electoral process. I ask my colleagues to consider it carefully keeping clearly in mind the present intolerable situation.

I ask unanimous consent that my bill and the task force report to which I have referred appear in the RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2415

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Senate Campaign Cost Limitation and Public Financing Act".

SEC. 2. The Federal Election Campaign Act of 1971 is amended by adding at the end thereof the following new subchapter:

"Subchapter III—Public Financing of Senate General Election Campaigns

"DEFINITIONS

"SEC. 501. For purposes of this subchapter—

"(1) the definitions set forth in section 301 of this Act apply to this subchapter;

"(2) 'general election' means any regularly scheduled or special election held for the purpose of electing a candidate to the United States Senate;

"(3) 'eligible candidate' means a candidate who is eligible, under section 502, for payments under this subchapter;

"(4) 'authorized committee' means, with respect to any candidate for election to the United States Senate, any political committee which is authorized in writing by such candidate to accept contributions or to make expenditures on behalf of such candidate to further the election of such candidate; and

"(5) the term 'immediate family' means a candidate's spouse, and any child, parent, grandparent, brother, half-brother, sister, or half-sister of the candidate, and the spouses of such individuals, and any child, parent, grandparent, brother, half-brother, sister, or half-sister of the candidate's spouse, and the spouses of such individuals.

"ELIGIBILITY FOR PAYMENTS

"SEC. 502. (a) To be eligible to receive payments under this subchapter, with respect to an election—

"(1) a candidate in an election shall—

"(A) certify to the Commission that he or she is seeking election to the United States Senate, and such candidate and the authorized committees of such candidate have received contributions from individuals—

"(i) in amounts of $100 or less, which qualify for matching funds pursuant to this subchapter, for that compaign in a total amount of not less than 5 percent of the overall expenditure limit; and

"(ii) received such contributions only from residents of the State in which such candidate is seeking election; and

"(B) certify that at least two candidates have qualified for the election ballot for election to the same seat under the law of the State involved;

"(2) a candidate of a political party in a State that has legal requirements for such candidacy, shall, within 7 days after receiving such nomination, certify to the Commission his intention to accept payments under section 507 and to comply with applicable provisions of law with respect to such payments;

"(3) an independent candidate or a candidate of a political party in a State other than a State referred to in paragraph (2), or a write-in candidate, shall, within 7 days after announcing his intention to become a candidate, certify to the Commission his intention to accept payments under section 507 and to comply with applicable provisions of law with respect to such payments;

"(4) a candidate shall certify to the Commission that the candidate and the authorized committees of such candidate—

"(A) will not make campaign expenditures greater than the limitations set forth in section 315(j) of this Act;

"(B) will not accept any contributions in violation of section 315(a) of this Act; and

"(C) will not make expenditures which exceed the limitation established in section 503;

"(5) a candidate in an election shall, within 7 days after qualifying for the election ballot under the law of the State involved, agree that such candidate and the authorized committees of such candidate—

"(A) will obtain and furnish to the Commission any evidence such Commission may request about the campaign expenditures and contributions of such candidate; and

"(B) will keep and furnish to the Commission any records, books, and other information it may request; and

"(6) a candidate shall—

"(A) agree to cooperate in the case of an audit and examination by the Commission under section 508 and to pay any amounts required under such section;

"(B) certify to the Commission that such candidate and the authorized committees of such candidate have received contributions aggregating not less than the amount of contributions certified under section 504; and

"(C) apply to the Commission for the initial matching payment referred to in section 504(b)(1)(A).

"(b) Agreements, certifications, and declarations under this section shall be filed with the Commission at the time required by the Commission.

"LIMITATION ON EXPENDITURES OF PERSONAL FUNDS

"SEC. 503. (a) No candidate who is eligible under section 502 to receive payments under section 507 shall make expenditures from the personal funds of such candidate, or the funds of any member of the immediate family of such candidate, aggregating in excess of $35,000, with respect to the election involved.

"(b)(1) At the beginning of each calendar year, as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (a) of this section, and subsection (b) of section 3 shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

"(2) For purposes of paragraph (1)—

"(A) the term 'price index' means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

"(B) the term 'base period' means the calendar year of 1984.

"ENTITLEMENT TO PAYMENTS

"SEC. 504. (a) Every candidate who meets the eligibility requirements in section 502 is entitled to payments for use in such candidate's general election campaign in an amount equal to the amount of contributions, qualified to be matched pursuant to this subchapter, as such candidate and the authorized committees of such candidate receive for that campaign up to an amount equal to one-half of the amount of allowed expenditures as provided in section 315(j).

"(b)(1) Except as provided in paragraph (2), a candidate eligible to receive payments pursuant to this subchapter shall be entitled to—

"(A) an initial payment in an amount equal to the contributions certified under section 502(a)(1)(A); and

"(B) additional matching payments equal to the amount of contributions received from individuals in amounts of $100 or less, to be paid in—

"(i) multiples of $20,000 under section 507, if, with repect to each such payment, the eligible candidate and the authorized committees of such candidate have received, in addition to the amount of contributions certified by the candidate to the Commission under section 502(a)(1)(A), contributions aggregating $20,000 which have not been matched under this section and which qualify for matching funds; and

"(ii) a final payment (designated as such by the candidate involved) of the balance of the matching funds to which such candidate is entitled under this section.

"(2) The total of the payments to which a candidate is entitled under paragraph (1) shall not exceed 50 percent of the expenditure limitation applicable to such candidate under section 315(j).

"(3) An eligible candidate for whom the limitation on expenditures established in section 315(j) is made inapplicable under section 505, shall be entitled to matching payments equal to the total amount of qualified contributions received by such candidate from individuals in amounts of $100 or less, to be paid in the manner prescribed in paragraph (1)(B).

"(c) In determining the amount of contributions received by a candidate and the authorized committees of such candidate for the purposes of providing matching funds pursuant to this subchapter—

"(1) no contribution received by the candidate or any of the authorized committees of such candidate as a subscription, loan, advance, deposit, or as a contribution of products or services, shall be taken into account;

"(2) no contribution shall be taken into account if such contribution is not made by a written instrument which identifies the person making such contribution by full name and mailing address;

"(3) no contribution received from a political committee or any other organization shall be taken into account;

"(4) no contribution received from any individual shall be taken into account to the extent that such contribution exceeds $100 when added to the amount of all other contributions made by that individual to or for the benefit of such candidate in connection with the general election campaign of such candidate;

"(5) no contribution (A) which is received before September 1 of the year immediately preceding the year in which the general election for the campaign to which the contribution is made is held and (B) which is not maintained in separate account until the date on which such candidate qualifies under the law of the appropriate State for election, shall be taken into account;

"(6) no contribution received from any person or source other than an individual shall be taken into account;

"(7) no contribution received 90 days after the date on which the election involved is held shall be taken into account; and

"(8) no contribution made through an intermediary or conduit referred to in section 315(a)(4) shall be taken into account.

"(d) Notwithstanding the provisions of subsection (a), no candidate is entitled to the payment of any amount under this section which, when added to the total amount of contributions received by such candidate and the authorized committees of such candidate and any other payments made to the candidate under this subchapter for such candidate's general election campaign, exceeds the amount of the expenditures limitation applicable to such candidate for that campaign under section 315(j)(1) of this Act unless the provisions of such section have been waived by this subchapter.

"(e) All payments received by a candidate or the authorized committees of such candidate under this subchapter shall be deposited at a national or State bank in a separate checking account which shall contain only funds so received. No expenditures of funds received under this section shall be made except by checks drawn on such account.

"(f) No contribution received and maintained pursuant to subsection (c)(7) shall be used to make any expenditure until the date on which the candidate qualifies for election under the law of the appropriate State.

"(g) Each candidate who is qualified to receive funds pursuant to this subchapter shall receive matching funds equal to the amount of independent expenditures made on behalf of such candidate's opponent or against such candidate when such amount of independent expenditure exceeds 5 percent of such candidate's overall expenditure limit. Any amounts so received shall not be included in the limits provided for in section 315(j) or subsection (b)(2) of this section.

"WAIVER OF OVERALL EXPENDITURE LIMITATION; ADDITIONAL PUBLIC FINANCING FOR CERTAIN CANDIDATES

"SEC. 505. (a)(1) Not later than the date on which a candidate qualifies for election under the law of the appropriate State, or 90 days before the date of any general election, whichever is earlier, each candidate for election shall file with the Commission a declaration of whether such candidate intends to make expenditures in excess of the limitations on expenditures provided under section 315(j) of this Act.

"(2) Not later than 60 days before the date of such general election, each candidate who has reason to believe that he may make expenditures in excess of such limitations shall notify the Commission to that effect, unless such candidate filed with the Commission a timely declaration that he intended to exceed such limitations, as provided in paragraph (1).

"(3) Each candidate for election shall notify the Commission and each other candidate for the same election within 48 hours after such candidate, or any of the authorized committees of such candidate—

"(A) makes any expenditures, or incurs any obligation to make an expenditure, in excess of the limitation on expenditures contained in section 315(j) of this Act; or

"(B) receives any contribution which, when added to the total amount of contributions received by such candidate and the authorized committees of such candidate, exceeds the limitations on expenditures contained in section 315(j)(1) of this Act.

"(4) The Commission is authorized to determine, upon its own initiative or upon the request of any candidate for election, whether any candidate has made expenditures or incurred obligations to make expenditures in excess of the limitations contained in section 315(j) of this Act, or has received contributions in excess of the limitation contained in section 315(j)(1).

"(b) The limitation on expenditures contained in section 315(j)(1) of this Act shall not apply to any candidate for election if any other candidate in the same election—

"(1) fails to file with the Commission a timely declaration as provided in paragraph (1) of subsection (a);

"(2) files with the Commission a notice as provided in paragraph (2) of subsection (a);

"(3) is required to notify the Commission in connection with the making of expenditures or the receipt of contributions as provided in paragraph (3) of subsection (a); or

"(4) is not bound by the limitations on expenditures provided in section 315(j)(1), or does not accept matching payments pursuant to the provisions of this subchapter.

"(C)(1) The provisions of section 504(d) shall not apply to a candidate who elects to receive payments under this subchapter if the expenditure limitation contained in section 315(j)(1) of this Act is made inapplicable to such candidate under subsections (b) or (d) of this section.

"(2) The additional amount to which a condidate is entitled under this subsection shall be based only upon the amount of contributions received after the date on which such expenditure limitation is made inapplicable, except that any contribution which is received from an individual after the date on which the limitation on expenditures is made inapplicable shall not be subject to the limitation provided in section 504(c)(3).

"(d) The limitation on expenditures contained in section 315(j)(1) shall not include any matching payments received, pursuant to section 504(g), by a candidate for election.

"CERTIFICATIONS BY COMMISSION

"SEC. 506. (a) No later than 48 hours after a candidate files a request with the Commission to receive payments under section 507, the Commission shall certify the eligibility of such candidate to the Secretary of the Treasury for payment in full of the amount to which such candidate is entitled. Such request shall contain—

"(1) such information and shall be made in accordance with such procedures as the Commission may provide by regulation; and

"(2) a verification signed by the candidate and the treasurer of the principal campaign committee of such candidate stating that the information furnished in support of the request, to the best of their knowledge, is correct and fully satisfies the requirements of this subchapter.

"(b) Initial certifications by the Commission under subsection (a), and all determinations made by such Commission under this subchapter, shall be final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 508 and judicial review under section 512.

"(c) Any candidate who knowingly and willfully submits false information to the Commission under this section shall be punished as provided in section 513.

"PAYMENTS TO ELIGIBLE CANDIDATES

"SEC. 507. (a) The Secretary of the Treasury shall maintain in the Presidential Election Campaign Fund established by section 9006(a) of the Internal Revenue Code of 1954, in addition to any other accounts he maintains under such section, a separate account to the known as the Senate General Election Campaign Account. The Secretary shall deposit into the account, for use by candidates eligible for payments under this subchapter, the amount available after the Secretary determines that amounts in the fund necessary for payments under subtitle H of the Internal Revenue Code of 1954 are adequate. The moneys in the account shall remain available without fiscal year limitation.

"(b) Upon receipt of a certification from the Commission under section 506, the Secretary of the Treasury shall pay the amount certified by such Commission to the candidate to whom the certification relates.

"(c) Payments received under this section shall be used only to defray election campaign expenses incurred with respect to the period beginning on the day after the date on which the candidate qualifies for the election ballot under the law of the State involved, and ending on the date 90 days after the date of the election, or the date 90 days after the date on which the candidate withdraws from the campaign or otherwise ceases actively to seek election, whichever occurs first. Such payments shall not be used (1) to repay any loan to any individual, or (2) to make any payments, directly or indirectly, to such candidate individually or to any member of the immediate family of such candidate.

"EXAMINATION AND AUDITS; REPAYMENTS

"SEC. 508. (a)(1) After each general election, the Commission may conduct an examination and audit of the campaign accounts of the eligible candidates, as designated by the Commission, in order to determine whether the contributions certified for matching payments and the expenditures made from such matching payments complied with the provisions of this subchapter.

"(2) After each special election, the Commission may conduct such an examination and audit of the campaign accounts of each eligible candidate in such election.

"(b)(1) If the Commission determines that any payment made to an eligible candidate under section 507 was in excess of the aggregate amount of the payments to which such candidate was entitled, the Commission shall notify such candidate, and such candidate shall pay to the Secretary of the Treasury an amount equal to the excess amount.

"(2) If the Commission determines that a candidate who has received funds under section 506 for use in his general election campaign has campaign funds in excess of the amount of the campaign expenses allowed pursuant to section 506(c), the Commission shall so notify the candidate and such candidate shall pay to the Secretary an amount equal to the amount of the unexpended funds. In making its determination under this paragraph, the Commission shall consider all amounts received as contributions to have been expended before any amounts received under this title are expended.

"(3) If the Commission determines that any amount of any payment made to a candidate under section 507 was used for any purpose other than to defray campaign expenditures, it shall notify the candidate of the amount so used, and the candidate shall pay to the Secretary of the Treasury an amount equal to two times the amount of such misused funds.

"(4) No payment shall be required from a candidate under this subsection in excess of the total amount of all payments received by the candidate under section 507 in connection with the campaign with respect to which the event occurred which caused the candidate to have to make a payment for repayment under this subsection.

"(5) Any amount received by an eligible candidate may be retained for a period not exceeding 60 days after the date of the election for the liquidation of all obligations to pay election campaign expenses incurred during the period specified in section 504(b). At the end of such 60-day period that portion of any unexpended balance remaining in the accounts of the candidate's authorized committees shall be promptly repaid to the Secretary. In making such determination, all amounts received as contributions shall be considered as having been expended before any amounts received under this subchapter are expended.

"(c) No notification shall be made by the Commission under subsection (b) with respect to a campaign more than 24 months after the day of the election to which the campaign related.

"(d) All payments received by the Secretary under subsection (b) shall be deposited by him in the appropriate account.

"OTHER POWERS AND DUTIES OF THE COMMISSION

"SEC. 509. (a) The Commission is authorized to conduct examinations and audits, in addition to the examinations and audits under sections 506 and 508, to conduct investigations, and to require the keeping and submission of any books, records, or other information necessary to carry out the functions and duties imposed on such Commission by this subchapter.

"(b) The Commission shall consult from time to time with the Secretary of the Senate, the Clerk of the House of Representatives, the Federal Communications Commission, and other Federal officers charged with the administration of laws re-

lating to Federal elections, in order to develop as much consistency and coodination with the administration of those other laws as the provisions of this subchapter permit. The Commission shall use the same or comparable data as that used in the administration of such other election laws whenever possible.

"REPORTS TO CONGRESS

"SEC. 510. (a) The Commission shall, as soon as practicable after the close of each calendar year, submit full reports to the Senate setting forth—

"(1) the expenditures incurred by each candidate in the Senate, and the authorized committees of such candidates, who received any payment under section 507 in connection with an election;

"(2) the amounts certified by it under section 506 for payment to that candidate; and

"(3) the amount of payments, if any, required from that candidate under section 508, and the reasons for each payment required.

Each report submitted pursuant to this section shall be printed as a Senate document.

"(b) The Commission shall submit, not later than March 1 of each year immediately following a year in which any Federal election is held, special reports to the Senate setting forth—

"(1) the amounts certified by it under section 506 of this subchapter; and

"(2) an estimate, to the extent practicable, of the amount of money necessary to make all payments to which eligible candidates and the national committees of each political party will be entitled with respect to the next two Federal elections to be held.

"PARTICIPATION BY COMMISSION IN JUDICIAL PROCEEDINGS

"SEC. 511. (a) The Commission is authorized to appear in and defend against any action filed under section 512, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to tne provisions of chapter 51 and subchapter III of chapter 53 of such title.

"(b) The Commission is authorized to appear, through attorneys and counsel described in subsection (a), in the district courts and other appropriate courts of the United States to seek recovery of any amounts determined to be payable to the Secretary of the Treasury as a result of any examination and audit made pursuant to section 508.

"(c) The Commission is authorized to petition the courts of the United States for declaratory or injunctive relief concerning any civil matter arising under this subchapter, through attorneys and counsel described in subsection (a). Upon application of the Commission, an action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal from the determination of such court shall lie to the Supreme Court of the United States. Judges designated to hear the case shall assign the case for hearing at the earliest practicable date, participate in the hearing and determination thereof, and cause the case to be in every way expedited.

"(d) The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court of the United States for certiorari to review judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

"JUDICIAL REVIEW

"SEC. 512. (a) Any certification, determination, or other action by the Commission made or taken pursuant to the provisions of this subchapter shall be subject to review by the United States Court of Appeals for the District of Columbia Circuit upon petition filed in such court by any interested person. Any petition filed pursuant to this section shall be filed within thirty days after such certification, determination, or other action by the Commission.

"(b)(1) The Commission, the national committee of any political party, and any individual eligible to vote for a candidate for the office of Senator of the United States are authorized to institute an action under this section, including an action for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provision of this subchapter.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise such jurisdiction without regard to whether a person asserting rights under the provisions of this subsection shall have exhausted administrative or other remedies provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court of the United States. Judges designated to hear the case shall assign the case for hearing at the earliest practicable date, participate in the hearing and determination thereof, and cause the case to be in every way expedited.

"PENALTY FOR VIOLATIONS

"SEC. 513. Violation of any provision of this subchapter is punishable by a fine of not more than $10,000, or imprisonment for not more than 5 years, or both.".

LIMITATIONS OF EXPENDITURES IN GENERAL ELECTION CAMPAIGNS

SEC. 3. (a) Section 315(a) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)) is amended—

(1) by inserting after paragraph (3) the following new paragraph:

"(4) If any person (other than the candidate involved or the candidate's authorized agent) acts as an intermediary or a conduit for, or in any other way collects and transmits contributions that are earmarked or otherwise directed to the candidate, such contributions shall, for purposes of this Act, be considered contributions by both the original contributor and the intermediary or conduit."; and

(2) by redesignating paragraphs (4) through (8) as paragraphs (7) through (11), respectively.

(b) Section 315 of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a) is amended by adding at the end thereof the following:

"(i) For purposes of this section expenditures made on behalf of any candidate (as determined under section 315(b)(2)(B)) for the office of Senator of the United States shall be considered to be expenditures made by such candidate.

"(j) Except as otherwise provided in section 504 of this Act, a candidate who receives payments for use in his general election campaign for the office of Senator of the United States, pursuant to section 506 of this Act may not make expenditures in such campaign in excess of $500,000, plus 15 cents multiplied by the voting age population, as certified under subsection (e), of the State in which the election is held.

"(k) Every person (other than a political committee) who makes independent expenditures in excess of $50 for or against a candidate under subchapter III of this Act during a calendar year shall file a statement with the Federal Election Commission containing such information and at such time as the Commission has by regulation determined.".

(c) Section 315(c)(1) is amended by striking out "subsection (b) of this section and subsection (d) of this section" and inserting in lieu thereof "subsections (b), (d), (j), and (k) of this section".

(d) Section 315(c)(2)(B) of such Act (2 U.S.C. 441a(c)(2)(B)) is amended by inserting before the period a comma and "except that with respect to the limitation established by subsection (j) the term 'base period' means the calendar year of 1984".

STUDY AND REPORT BY COMMISSION

SEC. 4. The Federal Election Commission shall, for one year, study and monitor the efficacy of the programs resulting from amendments made by this Act. The Commission shall begin such study one year after the date of the first election in which the amendments made by this Act apply and shall report to Congress no later than April 1 of the year following the completion of such period of studying and monitoring.

EFFECTIVE DATE

SEC. 5. The amendments made by this Act apply to any campaign for election to the United States Senate for which the election is held more than one year after the date of enactment of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated, in addition to the amounts available pursuant to section 507 of the Federal Election Campaign Act of 1971, as added by this Act, such additional sums as may be necessary to carry out the provisions of this Act.

MITCHELL TASK FORCE ON CAMPAIGN REFORM—FINAL REPORT TO HON. GEORGE J. MITCHELL, U.S. SENATOR

BACKGROUND

In accordance with your instructions the thirty-three members of the Task Force on Campaign Reform have assessed the various sub-topics submitted to them for consideration, and make this report to you of their conclusion.

I am delighted to report that this group constituted one of the most enthusiastic, dedicated and thoughtful committees with which I have been associated.

Four subcommittees were created, each with the task of analyzing one of the four sub-topics. Each subcommittee met at least three times, and the entire task force met on three occasions as well. Recommendations of the subcommittees were discussed and refined or modified by the full task force, and then adopted as part of this final report. I think it is fair to say that while there was vigorous discussion in our deliberations, with a variety of points of view expressed, our conclusions represent as near to a concensus as one might have thought possible. To be sure, some came to the concensus more reluctantly than others, but all, it can be said, are relatively comfortable with the conclusions reached.

The four sub-topics analyzed are as follows:

1. Limiting the length of campaigns, including consideration of a September primary and changes in the party nominating structure.

2. Expenditure limitations, including consideration of the constitutional barriers discussed in the Buckley v. Valeo decision, an analysis of the constitutional amendment being proposed by Congressman Bingham, and, finally, an analysis of the concept of public financing of Senate and House campaigns as a means of overcoming the inhibitions contained in the Buckley decision.

3. Methods of restricting certain sources of campaign funds such as political action committees (PACs) and independent campaign committees, and instead encouraging campaign funding through traditional and institutionalized political party structures.

4. Reduction of expenditures through limitation of access to broadcast media or provision of "free" broadcast time to candidates.

RECOMMENDATION

The task force concluded that the only viable proposition for controlling campaign spending lies with public financing of Congressional campaigns. Recognizing the practical difficulty in structuring a realistic spending limit given the enormous demographic difference in House of Representatives districts, the task force recommends that initially public financing legislation apply only to campaigns for the U.S. Senate. The task force was reluctant to recommend details which could be incorporated into draft legislation, believing that maximum technical flexibility should be given to the legislative draftsmen. On the other hand, the task forces does recommend that public financing be funded through taxpayer support in a manner similar to the Presidential campaign funding mechanism; that candidates accepting such funds be subject to statutory expenditure limitation; that in 1984 public financing of Senate campaigns be restricted to the general election as opposed to primary elections; and that the legislation require the Federal Election Commission to monitor the efficacy of the public financing scheme during the 1984 Senate elections, and report to Congress no later than April 1, 1985 its recommendations for revisions to the plan.[1]

OTHER CONCLUSIONS

The work of the task force is, I believe, as noteworthy for the incisive and substantive thinking that produced some of its negative findings as it is for the sole affirmative recommendation.

For instance, one subcommittee concluded that there is no basis to limit either the amount of television campaigning or the cost of what television campaigning occurs. It was felt (1) that companies in the television business ought not to be required to subsidize political campaigns any more than other types of companies, such as newspapers, campaign consultants, or pollsters; (2) that expenditure limitations should be general rather than specific because candidates should be free to choose where to spend the money they are allowed to spend; (3) that a limitation of one specific type of expenditure merely leads to more spending in some other form of campaigning; (4) that, in the view of some task force members, some campaign techniques, such as direct mail, are very expensive and more dangerous to the public welfare than television; and (5) regulation of current uses of television for political campaigns might well become meaningless given the rapid and profound technological changes in communication such as cable and satellite programing.

Another subcommittee concluded that changing the primary date from June to September would have no impact on the cost of mounting a campaign. In partial support of its conclusion, this subcommittee cites the case of Minnesota, which has a September primary, and which experienced a $13 million campaign for the U.S. Senate in 1982.

The fourth subcommittee provided some specific recommendations for reducing the influence of PACs, encouraging reliance upon the broad-based and institutional political parties for campaign funding, and inducing reliance upon smaller contributions. It was felt, however, that public financing would accomplish these goals in a more effective manner.

We have provided to your office the various preliminary reports and discussion papers produced by the task force. They are most informative and will, I believe, be a useful tool in the legislative process. Moreover, I believe that you will be favorably impressed with the quality of those documents and the thinking that went into them.

Finally, let me express to you the appreciation of all task force members for the opportunity to participate in these deliberations, as well as our appreciation to you for taking the unusual step of trying to bring good sense into the campaign spending process. You are to be commended.

Respectfully submitted,

HAROLD C. PACHIOS,
Chairman.

[1]The task force understands that it may be more realistic to assume that 1986, rather than 1984, will be the initial year to which public financing of Senate campaigns would be applicable. The optimistic 1984 target utilized by the task force was selected so as to emphasize the urgency with which the task force views the crisis in political campaign spending practices.

By Mr. BAKER (for Mr. PERCY, by request):

S. 2416. A bill to provide for increased participation by the United States in the International Development Association, and for participation by the United States in the Inter-American Investment Corporation; to the Committee on Foreign Relations.

AMENDMENTS TO INTERNATIONAL DEVELOPMENT ASSOCIATION ACT

● Mr. PERCY. Mr. President, by request, I introduce for appropriate reference a bill to provide for U.S. participation in the International Development Association and the Inter-American Investment Corporation.

This legislation has been requested by the Treasury Department and I am introducing the proposed legislation in order that there may be a specific bill to which Members of the Senate and the public may direct their attention and comments.

I reserve my right to support or oppose this bill, as well as any suggested amendments to it, when the matter is considered by the Committee on Foreign Relations.

I ask unanimous consent that the bill be printed in the RECORD at this point, together with a section-by-section analysis, and the letter from the Secretary of the Treasury to the President of the Senate dated March 8, 1984.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2416

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INTERNATIONAL DEVELOPMENT ASSOCIATION ACT AMENDMENTS

SEC. 101. The International Development Association Act, as amended (74 Stat. 293; 22 U.S.C. 284 *et seq.*) is further amended by adding at the end thereof the following new section:

"SEC. 18. (a) The United States governor is hereby authorized to agree on behalf of the United States to pay to the association $2,250,000,000 as the United States contribution to the seventh replenishment of the resources of the Association; *Provided, However,* That any commitment to make such contributions shall be made subject to obtaining the necessary appropriations.

(b) In order to pay for the United States contribution provided for in this section, there is hereby authorized to be appropriated, without fiscal year limitation, $2,250,000 for payment by the Secretary of the Treasury.

TITLE II—INTER-AMERICAN INVESTMENT CORPORATION ACT

SEC. 201. This title may be cited as the "Inter-American Investment Corporation Act".

ACCEPTANCE OF MEMBERSHIP

SEC. 202. The President is hereby authorized to accept membership for the United States in the Inter-American Investment Corporation (hereinafter in this title referred to as the "Corporation") provided for by the agreement establishing the Corporation (hereinafter in this title referred to as the "agreement") deposited in the archives of the Inter-American Development Bank.

GOVERNOR AND ALTERNATE GOVERNOR

SEC. 203. The Governor and Executive Director of the Inter-American Development Bank, and the alternate for each of them, appointed under section 3 of the Inter-American Development Bank Act, as amended (72 Stat. 299; 22 U.S.C. 283 *et seq.*), shall serve as Governor, Director and Alternates, respectively, of the Corporation.

APPLICABILITY OF BRETTON WOODS AGREEMENTS ACT

SEC. 204. The provisions of section 4 of the Bretton Woods Agreements Act, as amended (59 Stat. 512, 22 U.S.C. 286b) shall apply with respect to the Corporation to the same extent as with respect to the International Bank for Reconstruction and Development and the International Monetary Fund. Reports with respect to the Corporation under paragraphs (5) and (6) of subsection (b) of section 4 of that Act shall be included in the first and subsequent reports made thereunder after the United States accepts membership in the Corporation.

RESTRICTIONS

SEC. 205. (a) Unless authorized by law, neither the President, nor any person or agency, shall, on behalf of the United States—

(1) subscribe to additional shares of stock of the Corporation;

(2) vote for or agree to any amendment of the agreement which increases the obligations of the United States, or which changes the purpose or functions of the Corporation; or

(3) make a loan or provide other financing to the Corporation.

FEDERAL RESERVE BANKS AS DEPOSITORIES

SEC. 206. Any Federal Reserve bank which is requested to do so by the Corporation shall act as its depository or as its fiscal agent, and the Board of Governors of the Federal Reserve System shall supervise and direct the carrying out of these functions by the Federal Reserve banks.

SUBSCRIPTION OF STOCK

SEC. 207. (a) The Secretary of the Treasury is authorized to subscribe on behalf of the United States to five thousand one hundred shares of the capital stock of the Corporation; Provided, however, that the subscription shall be effective only to such extent or in such amounts as are provided in advance in appropriations Acts.

(b) There is authorized to be appropriated, without fiscal year limitation, for payment by the Secretary of the Treasury of the subscription of the United States for those shares, $51,000,000.

(c) Any payment of dividends made to the United States by the Corporation shall be deposited into the Treasury as a miscellaneous receipt.

JURISDICTION OF U.S. COURTS

SEC. 208. For the purposes of any civil action which may be brought within the United States, its territories or possessions, or the Commonwealth of Puerto Rico, by or against the Corporation in accordance with the agreement, the Corporation shall be deemed to be an inhabitant of the Federal judicial district in which its principal office within the United States or its agent appointed for the purpose of accepting service or notice of service is located, and any such action to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States, including the courts enumerated in section 460 of title 28, United States Code, shall have original jurisdiction of any such action. When the Corporation is a defendant in any action in a State court, it may at any time before the trial thereof remove the action into the appropriate district court of the United States by following the procedure for removal provided in section 1446 of title 28, United States Code.

EFFECTIVENESS OF AGREEMENT

SEC. 209. Article VI, Section 4(c), and Article VII, Sections 2 to 9, both inclusive, of the agreement shall have full force and effect in the United States, its territories and possessions, and the Commonwealth of Puerto Rico, upon acceptance of membership by the United States in the Corporation.

SECURITIES ISSUED BY THE CORPORATION

SEC. 210. (a) Any securities issued by the Corporation (including any guarantee by the Corporation, whether or not limited in scope) in connection with the raising of funds for inclusion in the Corporation's resources as defined in Article II, Section 2 of the agreement, and any securities guaranteed by the Corporation as to both principal and interest to which the commitment in Article II, Section 2(e) of the agreement is expressly applicable, shall be deemed to be exempted securities within the meaning of section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. 77c) and section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c). The Corporation shall file with the Securities and Exchange Commission such annual and other reports with regard to such securities as the Commission shall determine to be appropriate in view of the special character of the Corporation and its operations as necessary in the public interest or for the protection of investors.

(b) The Securities and Exchange Commission, acting in consultation with such agency or officer as the President shall designate, is authorized to suspend the provisions of subsection (a) at any time as to any or all securities issued or guaranteed by the Corporation during the period of such suspension. The Commission shall include in its annual reports to Congress such information as it shall deem advisable with regard to the operations and effect of this section and in connection therewith shall include any views submitted for such purpose by any association of dealers registered with the Commission.

TECHNICAL AMENDMENTS

SEC. 211. (a) The seventh sentence of paragraph 7 of section 5136 of the Revised Statutes of the United States, as amended (12 U.S.C. 24), is further amended by striking out "or" after "the Asian Development Bank" and inserting in lieu thereof a comma, and by inserting "or the Inter-American Investment Corporation," after "the African Development Bank".

(b) Section 51 of Public Law 91-599, as amended (84 Stat. 1657; 22 U.S.C. 276c-2), is amended by striking out "and" after "the African Development Fund," and inserting "and the Inter-American Investment Corporation," after "the African Development Bank,".

THE SECRETARY OF THE TREASURY,
Washington, March 8, 1984.

DEAR MR. PRESIDENT: Transmitted herewith is a draft bill, "To provide for increased participation by the United States in the International Development Association, and for participation by the United States in the Inter-American Investment Corporation."

Submission of the bill is required by Section 5 of the International Development Association Act, 22 U.S.C. 284 *et seq.*, in order to increase U.S. participation in the International Development Association ("IDA").

INTERNATIONAL DEVELOPMENT ASSOCIATION

Title I of the draft bill authorizes the Secretary of the Treasury, as U.S. Governor in IDA, to agree on behalf of the United States to pay $2,250,000,000 as the U.S. contribution to the seventh replenishment of IDA. In compliance with the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344) ("Budget Act"), the bill authorizes appropriations for that sum. In accordance with the President's budget, we intend to seek appropriations for that sum in three equal annual installments beginning in fiscal year 1985.

IDA is one of the most important development institutions for the poorest countries in the world—those in Sub-Saharan Africa and South Asia. U.S strategic interests in these areas are self-evident. IDA can assist in the promotion of sound economic policies and the building of institutions to support economic growth in these regions.

The level of U.S participation in the seventh replenishment of IDA reflects extensive consultations with concerned Members of the Congress and represents a responsible balance between maintaining budgetary stringency and continuing traditional U.S. support for sound economic development activities.

Many Members have emphatically supported higher replenishment levels in view of the development needs of borrowing countries, while other Members have stressed that budgetary resources should be husbanded to meet other pressing domestic and foreign needs or to contribute to a reduction in future budget deficits. The funding level proposed in the bill—$750 million annually for three years—seeks to meet the concerns of as broad a cross-section of the Membership as possible. IDA is an American commitment—indeed, in origin, an American initiative—and should enjoy bipartisan support.

I have had many exchanges with Members of the Congress in the last three years over budgetary expenditures and revenues and expect the dialogue over budget deficits to continue. These considerations weighed heavily in our decisions about the appropriate level of IDA funding. The proposed annual funding level is about 30 percent less than initially negotiated for the previous replenishment but approximately the same as provided by the Congress in the previous four years. It is based on a considered judgment which has taken into account both development assistance priorities and budget constraints.

I am convinced that the proposed funding level—when combined with the contributions of other countries—will make a meaningful contribution to the development and political stability of the poorest developing countries. The World Bank has devoted substantial efforts in recent years to analyzing the development problems of Sub-Saharan Africa and to formulating strengthened economic policies in these countries. This replenishment is consistent with those efforts.

INTER-AMERICAN INVESTMENT CORPORATION

Title II of draft bill also authorizes the President to accept membership for the United States in the Inter-American Investment Corporation ("IIC"), an international financial organization which will be closely related to the Inter-American Development Bank, and which is to promote the development of the private sector in Latin America. The draft bill also authorizes the President to subscribe to 5,100 shares of the capital stock of the IIC, and, consistent with the Budget Act, the bill authorizes appropriation of $51,000,000 for payment for those shares. In accordance with the President's budget, we intend to seek appropriations for that sum in four equal annual installments, beginning in fiscal year 1985. (The other provisions of the draft bill are described in detail in the section-by-section analysis appended hereto, and are patterned after similar provisions in the legislation of other international financial institutions.)

In reviewing the economies of the countries in Latin America and the Caribbean, I have been struck by the very substantial achievements and progress over the last two decades since the Inter-American Development Bank became a major force for growth in the region. Substantial investments in infrastructure and economic services are now in place to permit further sustained growth in many countries.

However, in future years the continued productivity of the private sector will be crucial. Long-term development programs in Latin America and the Caribbean will have to rely increasingly on the private sector in

order to realize the full growth potential of these countries. The IIC is an effort to strengthen this aspect of the overall IDB development effort.

The IIC will be limited to making loans and equity investments in private sector-controlled firms. We expect the IIC staff will be composed of a small number of individuals with a solid background in business in Latin America or the Caribbean.

Balanced, non-inflationary economic growth with employment creation is one of the most important objectives we should be pursuing. I believe the IIC—directly through its program activities and indirectly through its example to other national and international development institutions—can make a solid, productive contribution to meet this objective.

The importance of strengthening efforts to support the private sector has been broadly recognized. The IIC negotiations have included more than twenty countries, including at least five developed countries from outside the hemisphere. This broad participation will allow our share of the capital to be 25.5 percent, the lowest level in any hemispheric financial institution in which we participate.

Negotiations of the IIC Articles of Agreement are complete, and, though not all countries have notified the precise amounts of intended share subscriptions, there are no significant unresolved issues of importance to the United States. If any new issue should arise, you will be informed promptly and, if appropriate, amended legislation will be submitted.

The bill thus authorizes U.S. participation in programs of high importance to U.S. foreign economic policy. On behalf of the President, I would appreciate your laying this proposal before the Senate, and I urge its early enactment.

The Office of Management and Budget has advised that there is no objection to the submission of this proposed legislation to Congress, and that its enactment would be in accord with the program of the President.

Sincerely yours,

DONALD T. REGAN

SECTION-BY-SECTION ANALYSIS

TITLE I—AMENDMENTS TO THE INTERNATIONAL DEVELOPMENT ASSOCIATION ACT

Section 101 authorizes the U.S. Governor to the International Development Association ("IDA") to contribute $2,250,000 to the seventh replenishment of IDA resources. Consistent with the Congressional Budget and Impoundment Control Act of 1974 (88 Stat. 297) (the "Budget Act"), Section 101 makes it clear that any commitment to make such contributions is subject to obtaining the necessary appropriations.

The U.S. intends to seek appropriations for that sum in three equal annual installments (beginning in fiscal year 1985), and plans to agree to make a contribution (subject to obtaining future appropriations) only after it has obtained appropriations in respect of the first of the three planned installments. The IDA resolution allows the U.S. to submit a qualified instrument of commitment, so that payment of the unpaid portion is subject to obtaining budgetary appropriations.

TITLE II—INTER-AMERICAN INVESTMENT CORPORATION ACT

Title II authorizes U.S. participation in the Inter-American Investment Corporation (the "Corporation"), which is to promote equity investment in the private sector in Latin America.

Section 201 states that the title may be cited as the "Inter-American Investment Corporation Act."

Section 202 authorizes the President to accept membership for the United States in the Corporation.

Section 203 reflects and implements the provisions in the Agreement Establishing the Inter-American Investment Corporation (the "Agreement") which make it clear that the U.S. Governor, Executive Director, and alternates in the Inter-American Development Bank (the "IDB") are to serve in similar roles in the Corporation. The section is similar to a comparable section in the International Finance Corporation Act, as amended (22 U.S.C. 282 et seq.).

Section 204 is similar to provisions contained in other development bank implementing legislation and provides for oversight by the National Advisory Council on International Monetary and Financial Policies (the "NAC"), as provided for in Section 4 of the Bretton Woods Agreements Act, as amended (22 U.S.C. 286b). Moreover, as provided in paragraphs (5) and (6) of subsection (b) of Section 4, the annual reports of the NAC to the President and the Congress following United States participation in the Corporation, shall contain reports on United States participation in the Corporation, including data concerning the operations and policies of the Corporation, recommendations and other data and material.

Section 205 is similar to provisions in other development bank implementing legislation, and requires Congressional authorization for any person on behalf of the United States to subscribe to additional shares of the stock of the Corporation, or to agree to any amendment of the Agreement which would increase the obligations of the United States or change the purpose or functions of the Corporation, or to provide a loan or other financing for the Corporation.

Section 206 also is similar to language in other development bank legislation, and provides that any Federal Reserve bank shall act as the depository or fiscal agent of the Corporation, upon request by the Corporation, and in so acting will be supervised and directed by the Board of Governors of the Federal Reserve System.

Section 207 authorizes the Secretary of the Treasury to subscribe to 5,100 shares of the capital stock of the Corporation. Under the Agreement, payment for that subscription may be made subject to budgetary appropriations. (Art. II, Sec. 3(b)) Consistent with the Budget Act, the section makes it clear that any U.S. subscription to shares is subject to obtaining budgetary appropriations. (The full U.S. subscription is to be counted in determining whether the Agreement enters into force under Article XI, Section 2(a), which *inter alia* requires that two-thirds of total subscriptions be made prior to entry into force of the Agreement.)

Section 208 provides that the district courts of the United States shall have original jurisdiction in any civil action brought by or against the Corporation with respect to actions which may be brought within the United States, its territories or possessions, or the Commonwealth of Puerto Rico. The Corporation is deemed to be a resident of the Federal judicial district in which its principal office within the United States, or its agents appointed for the purpose of accepting service or notice of service of process, is located. The Corporation will have its principal office in Washington, D.C. (Art. X, Section 1) The section also provides that when the Corporation is a defendant in any action in any State court, it may, at any time before the trial, remove the action to the appropriate U.S. district court.

* * * * *

Assets of the Corporation (Article VI, Sec. 4) and the status, immunities, exemptions and privileges of the Corporation and its employees (Article VII, Sections 2-9), shall have full force and effect in the United States, its territories and possessions, and the Commonwealth of Puerto Rico, upon acceptance of membership by the United States in the Corporation. These privileges and immunities include the following:

1. The Corporation will have legal personality and the ability to contract, acquire and dispose of property, and to sue in U.S. courts.

2. The Corporation will be subject to suit only in cases arising out of the exercise of its borrowing powers, or when it has appointed an agent for the purpose of accepting service or notice of process. Its property and assets shall be immune from attachment, except to execute a final judgment.

3. The property and assets of the Corporation shall be immune from taking or foreclosure by executive or legislative action. Its archives shall be inviolable.

4. The property and assets of the Corporation shall be exempt from restrictions to the extent necessary to carry out its purpose and functions.

5. The communications of the Corporation will be treated with the same respect as those of foreign governments.

6. The officials and employees of the Corporation, and experts and consultants performing missions for it, will be given treatment substantially similar to that accorded to persons in the diplomatic service.

7. The Corporation will be immune from taxation. In general, officials and employees will be immune from taxation by any country on salary or emoluments, but governments will be able to tax local citizens and local nationals. The U.S., thus, will be able to tax its citizens or nationals working for the Corporation.

Section 210 provides that any securities or guarantees issued by the Corporation in connection with raising funds for inclusion in the ordinary capital of the Corporation and any securities guaranteed by the Corporation and backed by the callable capital of the Corporation shall be deemed exempted securities within the meaning of 15 U.S.C. 77c(3)(a)(2) and 15 U.S.C. 78c(3)(a)(12). The section provides further that the Corporation shall file such reports with the Securities and Exchange Commission as the SEC determines and that the SEC is authorized to suspend the exemption granted to Corporation securities and guarantees.

Section 211(a) amends 12 U.S.C. 24 to include the Corporation among the list of multilateral development banks whose securities are approved for investment by national banks.

Section 211(b) adds the Corporation to the list of multilateral development banks, contained at 22 U.S.C. 262c-2. Under that provision, the executive directors and alternates shall, at the discretion of the Secretary of the Treasury, be eligible for all employee benefits afforded employees in the civil service of the United States.●

By Mr. DECONCINI (for himself and Mr. BAUCUS):

S. 2417. A bill to amend the Sherman Act to prohibit a rail carrier from

denying to a shipper of certain commodities, with intent to monopolize, use of its track which affords the sole access by rail to such shippers to reach the track of a competing railroad or the destination of shipment; to the Committee on the Judiciary.

CONSUMERS RAILROAD TRANSPORTATION ANTIMONOPOLY ACT

Mr. DECONCINI. Mr. President, I have introduced today a bill to insure a greater measure of competition in the railroad freight industry's hauling of products such as coal, ore, grain, forest products, chemicals, or fertilizers—products for which in most cases shipment by rail is the only feasible means of transportation.

When Congress passed the Staggers Rail Act of 1980, it was our intent to remove from the railroads the burden of restrictive regulations which hampered their ability to earn a profit. At the same time, however, we were determined to continue to provide regulatory protection to so-called captive shippers—those shippers who must move their product by rail and are situated such that only a single rail carrier can provide transportation.

A basic premise of the Staggers Act deregulation was that under these circumstances, competition in the free market would act to restrain the railroads from raising freight rates too high. This premise has proved untrue. In many areas of the United States, where captive shippers of bulk products are dependent upon railroad freight service, there simply is no competition. Such captive shippers are locked into a noncompetitive transportation situation for their product.

The Interstate Commerce Commission appears to be ignoring provisions of the Staggers Act which provided protecton for captive shippers. The Commission has proposed a system of nationwide rail rates which will result in a doubling of already high present rates within 5 years. The ICC will allow rail carriers a 15-percent increase in rail rates annually above any upward adjustments allowed for the effects of inflation. If after a 5-year period, the railroads have not achieved "revenue adequacy", as defined by the ICC, the annual increases may continue, and the result could be a trebling of present rates within 8 years. Notably, at the present time, there is not a single class I railroad in the Nation that is rated revenue adequate by the ICC.

Although the 15-percent annual increase has been publicly conceded by staff of the Commission as having provoked the greatest opposition among comments received on the rate proposal, there has not been any suggestion that the amount will be reduced. Even if there were a small change in the 15-percent figure, however, the ICC's actions up to now in implementing the Staggers Act would indicate that the amount of annual increase allowed would still be too high from the standpoint of captive shippers—particularly coal producers, coal users such as industry and electric utilities, and ultimately the individual consumers of electricity. All will be harmed by dramatic rate increases.

An effective remedy for captive shippers and the consumers they serve would be to restore competition to rail service in areas that are now served by only a single railroad. Although in many cases such monopolies are natural, as opposed to deliberately contrived, the effect on consumers and shippers is the same—they are denied the benefits of competition. Restoration of competition would be accompanied by lower rates, improved service, and increased efficiency.

The bill I have introduced would amend the Sherman Act in a manner which would assure captive shippers fair and reasonable freight rates for the transportation of their product. The bill is similar to H.R. 4559, introduced by Representative SEIBERLING of Ohio. It would make it unlawful for a rail carrier to deny to any shipper the use of a railroad facility which is the sole facility over which such shipper can connect by rail with the trackage of a competing railroad or with a water carrier or can reach the destination of a shipment, when such denial is with the intent to monopolize. The bill further provides that a rail carrier shall be conclusively presumed to have denied use of such railroad facility with intent to monopolize if it has denied use of the facility upon reasonable terms, as defined in the bill, to a shipper and is not permitting any other rail carrier to use that facility to transport the shipper's goods. The effect would be to provide relief for captive shippers by restoring competitive pricing, either through the reasonable rate provision or through the requirement to permit another rail carrier to utilize sole trackage.

Our Nation depends heavily on the mining and use of coal to meet an important part of its energy needs. More than half of the country's electricity is produced by burning coal, and more than 70 percent of that coal is moved by railroads that are the sole available carriers. The costs of fuel, including the cost of transportation, are of course passed through by utilities to the individual electric consumer. Without competition, these captive coal shippers, as well as the electric utilities and consumers they serve, have good reason to be concerned about a likely doubling or trebling of freight rates over the next 5 to 8 years.

Recently, citing the important need to restrain excessive price increases for captive shippers locked into noncompetitive shipping situations, the American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA), and the National Association of Regulatory Utility Commissioners (NARUC) have all adopted resolutions endorsing legislative action similar to the provisions of this bill.

Mr. President, it is important that we take immediate steps to insure that consumers' costs are not unnecessarily increased as a result of unconstrained monopoly in railroad freight hauling. The bill I have introduced today would provide needed protection by restoring competition to the captive shipper situation.

I urge my colleagues to carefully study this proposal and give it their support, and I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2417

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Sherman Act is amended by inserting after section 8 the following new section:

"SEC. 9. (a)(1) It shall be unlawful for a rail carrier, with intent to monopolize, to deny to any shipper the use on reasonable terms of a railroad facility which is the sole facility over which such shipper can move its goods by rail to connect with the tracks of a competing rail carrier or to reach the destination of shipment.

"(2) The terms offered by the rail carrier for the use of such sole facility shall not be deemed reasonable if—

"(A) they condition the use of the sole facility upon use of other facilities of the rail carrier;

"(B) the rates required by the rail carrier for use of the sole facility are such as to yield a revenue-to-variable cost ratio higher than the lower of the revenue-to-variable cost ratios yielded by

"(i) its single line rate or

"(ii) its divisions of a competing joint line rate; if there are such, to the destination of shipment; or

"(C) the rates required by the rail carrier for use of the sole facility are higher than would, under generally accepted regulatory standards, yield a fair return on the proportion of the rail carrier's prudent investment in the railroad facility that the shipper's traffic bears to all traffic using such railroad facility.

"(3) The shipper may elect to connect with water carriage at any point within or not substantially beyond the first rail connection with a competing rail carrier.

"(b) A rail carrier shall be conclusively presumed to have denied use of such railroad facility with intent to monopolize if it has denied use of the facility upon reasonable terms to a shipper and is not permitting any other rail carrier to use the railroad facility to transport the shipper's goods.

"(c) A shipper permitted to move goods over a railroad facility pursuant to the requirements of subsection (a) above shall not be deemed a 'rail carrier' or a 'carrier' under any provision of law.

"(d) For purposes of this section—

"(1) the term 'rail carrier' means any 'rail carrier' as defined in section 10102(19) of title 49, United States Code, subject to the jurisdiction of the Interstate Commerce Commission under title 49, United States Code, chapter 105, subchapter I;

"(2) the term 'shipper' includes, but is not limited to, a person engaged in a business other than transportation who, in furtherance of such business, moves its own goods;

"(3) the term 'railroad facility' includes all railroad components enumerated in section 10102(20)(A), (B), and (C) of title 49, United States Code;

"(4) the phrase 'use of a railroad facility' means the movement of any shipper's goods consisting of coal, ore, grain, forest products, chemicals, or fertilizers, and includes movement of such shipment over such railroad facility either by shipper with its own rolling stock or by the rail carrier;

"(5) the phrase 'permitting any other rail carrier to use the railroad facility' means permitting such other carriers to use such railroad facility from the point of origin of the shipment to the connecting point with the track of the competing carrier;

"(6) the term 'track of the competing carrier' means track subject to the competing carrier's use but does not include tracks jointly used with the rail carrier denying use of the sole facility.

"(7) the term 'rail carrier' includes all affiliates of the rail carrier controlled by it or under common control with it.".

By Mr. MATHIAS (for himself, Mr. FORD, Mr. HATFIELD, Mr. WARNER, and Mr. INOUYE):

S. 2418. A bill to authorize and direct the Librarian of Congress, subject to the supervision and authority of a Federal civilian or military agency, to proceed with the construction of the Library of Congress Mass Book Deacidification Facility, and for other purposes; to the Committee on Rules and Administration.

LIBRARY OF CONGRESS DEACIDIFICATION FACILITY

● Mr. MATHIAS. Mr. President, I introduce legislation today to authorize the Librarian of Congress to construct the Library of Congress Mass Book Deacidification Facility at Fort Detrick near Frederick, Md., subject to the supervision and construction authority of a Federal civilian or military agency. This new facility would be used to neutralize acid in book paper thereby extending the life of books in the Library's collections by 400 to 600 years. At present the effective life or acid paper books is 30 to 40 years.

The Library of Congress, and librarians throughout the world, face a crisis caused by the rapid deterioration of books printed on paper produced since the 1850's. It is ironical that the very technology which has enabled inexpensive books to be produced in vast numbers carried with it the seeds of its own destruction. The industrial revolution a century and a half ago increased the demand for paper products of all sorts phenomenally, especially the demand for newspapers, magazines, and above all, the printed book. As a result, scientists and engineers began casting about for a cheaper and more plentiful paper supply. Prior to the 1850's, books had been printed on linen or cotton rag paper and, in some cases, on vellum made from animal skins. Technologists discovered their new paper supply in the cellulose fibers from ordinary wood pulp. Finding the right absorbency for the dried and finished paper, however, required treating and sizing the wood pulp paper with a variety of chemicals. Unfortunately, these chemical additives, especially aluminum sulfate, combine with the moisture in the air to form sulfuric acid. Any of us with books published since the 1850's have experienced this same disheartening phenomenon—the books literally disintegrating in our hands.

I think we can all take great pride in the fact that the ingenious chemists in Library of Congress own preservation and restoration office have found the solution to this problem. These chemists have developed a patented process that will neutralize the harmful acids destructive to paper and leave an alkaline reserve on the paper to combat the return to an acid condition in the future. The process is based on the vaporphased impregnation of books and other library materials with diethyl zinc resulting in the neutralization of the acidity and a residue of zinc carbonate to protect the paper from further acid-induced loss of strength. Invention of this process by the Library's chemists began with tests in an ordinary pressure cooker. After further successful tests with larger numbers of books in facilities of the General Electric Co. in Valley Forge, Pa., the Library staff worked with scientists at the National Aeronautics and Space Administration to develop and test an economical technique for the mass deacidification of books printed on paper susceptible to this type of deterioration. NASA's experience with vacuum technology and its facilities at Goddard Space Flight Center in nearby Greenbelt, Md., made it possible for the Library to demonstrate the feasibility of large-scale applications. The success of the Library and NASA's first large experiment with 5,000 books proves it is time to establish a permanent book deacidification facility for the Library of Congress at Fort Detrick.

This bill would authorize $11.5 million for this new building, its equipment, and its laboratory facilities. Funds for this activity are included in the Library's fiscal year 1985 budget and it is anticipated that the Army Corps of Engineers will construct the building within the complex of army and research facilities at Fort Detrick. Both the House and Senate Appropriations Committees are cognizant of the need for this authorization as they consider the supplemental and regular appropriations measures for fiscal year 1985. The Army Corps of Engineers estimates that the building will cost $3.5 million; laboratory facilities and equipment, together with directly related costs, total $8 million. These capital costs will be included in the Library's fiscal year 1985 appropriations provisions. Deacidification costs in this mass facility are estimated to be $3 to $5 per book, an amount dramatically less expensive than the alternative cost of approximately $30 for microfilming each book.

Operating costs for this laboratory facility are expected to be between $2 to $3 million per year, including three or four new positions to staff the facility. Once appropriations are enacted, approximately 500,000 books will be deacidified each year using this revolutionary new technology. The Librarian of Congress will request these operating funds in his fiscal year 1986 budget request. With 80 million items in the Library's great collections, I would anticipate an indefinite need for such a facility.

Enactment of this bill, together with subsequent appropriations, will enable the Library of Congress to preserve a great national treasure, namely, three-quarters of the Library's vast collection of books, from rapid and total disintegration. It will also make it possible to preserve these books in their natural and original state, that magnificent product of the printer's and publisher's art, the hand-held book. Construction of this "first of a kind" laboratory facility will also provide a prototype for the library and scholarly community throughout the country, and, for that matter, throughout the world. I commend the Librarian of Congress for his outstanding leadership in this matter.

I am pleased to join in the sponsorship of this measure with the distinguished ranking minority member of the Rules and Administration Committee, Senator FORD, and by my fellow Senate Members of the Joint Committee on the Library, Senator HATFIELD, Senator WARNER, and Senator INOUYE. The Rules and Administration Committee will hold hearings on this bill at a date early enough in the session to complete final action on the measure prior to the enactment of the necessary appropriations bill.●

● Mr. WARNER. Mr. President, I am pleased to cosponsor with Senator MATHIAS this authorizing legislation to enable the Library of Congress to construct a mass book deacidification facility.

The Library of Congress is the world's greatest library, and we are faced with a situation where most of the books printed since 1850 are deteriorating at a sure and steady pace due to the use of wood pulp in the produc-

tion of paper, instead of linen or cotton rag.

We have been able to reduce the high cost associated with books prior to 1850, but the wood pulp paper is subject to chemical change which reduces its useful life.

The answer to this problem has been to begin microfilming the Library's collection at an approximate cost of $30 per book. This new facility will extend the life of books by 400 to 600 years at an amortized cost for the laboratory of $1 per book.

This program makes good economic sense, it will save the American taxpayer $1.7 billion over the life of the facility.

This project will also save our national treasures and help save the Treasury at the same time.

Mr. President, I urge my colleagues to support this legislation.●

By Mr. MATHIAS (for himself and Mr. SARBANES):

S. 2419. A bill to authorize the Secretary of the Interior to convey certain land located in the State of Maryland to the Maryland National Capital Park and Planning Commission; to the Committee on Energy and Natural Resources.

CONVEYING INTEREST IN CERTAIN LAND TO THE MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION

● Mr. MATHIAS. Mr. President, I am pleased today to introduce legislation that would authorize the transfer of a parcel of land in Prince Georges County, Md., from the Federal Government to the Maryland National Capital Park and Planning Commission (MNCPPC). The commission is a State-created organization that manages parks in Montgomery and Prince Georges County, Md.

I have been asked by both State and local officials from Maryland to initiate this measure, including the MNCPC and the Prince Georges County executive and county council. Moreover, it has the full support of the Maryland Department of Transportation. Representatives STENY HOYER and MARJORIE HOLT introduced similar legislation in the House of Representatives last year.

The 55 acres of land transferred by this bill are adjacent to the Maryland Capital Beltway and the Potomac River on a basin called Smoot Bay. The property was part of the land acquired by the then Federal Bureau of Roads from private property owners in the late fifties for the construction of the Capital Beltway, the I-295 interchange and the approaches to the Woodrow Wilson Bridge. Ultimately, this particular parcel of land was found not to be needed for such highway purposes.

It has remained in the hands of the Federal Government since then, as required by a 1956 act of Congress. But, no use has been found for it. Up until 1978, it was under the jurisdiction of the General Services Administration, the real estate agency for the Federal Government. Then it was transferred to the Department of the Interior with the condition that it be used for open space. The Department of the Interior, however, has never developed a plan for the property nor programed funds for developing it.

The Maryland National Capital Planning and Parks Commission is anxious to put the land to constructive use. It wants to use it for two purposes: First, to develop a waterfront park for the public and, second, to provide access to a proposed waterfront development.

The proposal for the development, a multimillion-dollar project, includes a marina, a trade center, a waterfront residential development, retail shops, and boutiques. It will be an economic boon to Prince Georges County and to the entire State of Maryland. It will enhance the economic base of Prince Georges County.

During the formative stages of the development of this bill, the National Capital Planning Commission (NCPC), the central planning agency for the Federal Government in the National Capital region, and the National Park Service raised valid concerns about the impact the proposed development activities could have on the Potomac River and its shoreline.

The Federal Government owns parkland on the north and the south of the area where the development activities will take place. It has an interest in preserving open space along the Potomac River. It is concerned about the views of the proposed development as seen from the Potomac River, from the Mount Vernon Memorial Highway on the opposite shore, and from the lawn of Mount Vernon itself. Moreover, the National Capital Planning Commission has recognized the general area "as environmentally sensitive" because it includes, among other things, a flood plain, a part of a coastal zone, and a scenic waterfront.

I share these concerns and have made every effort to address them in the legislation. It contains conditions that would safeguard the Federal interest in the area relating to parkland the Potomac River and its shoreline.

First, the legislation requires that the 55 acres of land being transferred to the Maryland National Park and Planning Commission can only be used for park and waterfront purposes. Second, it stipulates that the land-use plan prepared by the developer for the adjacent property be reviewed by the NCPC and approved by the Prince Georges County Council and provide that:

First, a linear strip of land along the shoreline of the property is accessible to the public at all times and reserved for open space.

Second, the heights of all buildings along the shoreline are limited.

Third, as many of the existing trees and other vegetation as possible be retained in order to preserve the natural character of the shoreline and hillsides.

Fourth, any nonmarina development over the water be clustered at limited locations and be limited in height.

If after having reviewed the respective plans—NMCPC's plan for the 55 acres and the land-use plan for the adjacent property—the Secretary of the Interior determines that any of these conditions are not met, then the property will revert to the Federal Government.

The transfer of this land will increase the public's access to the Potomac River and its shoreline and generate waterfront activity. I urge my colleagues to act on it as expeditiously as possible.●

● Mr. SARBANES. Mr. President, I am today joining my colleague from Maryland in introducing legislation to transfer certain Federal surplus property in Prince Georges County, Md., to the Maryland National Capital Park and Planning Commission. Similar legislation has been introduced in the House.

The property to be transferred by this bill includes some 55 acres of land now owned by the Department of the Interior. The land is adjacent to the Capital Beltway where it crosses the Potomac River at the Woodrow Wilson Bridge. The Bureau of Roads originally acquired the designated property to facilitate the construction of the Beltway, I-295, and the approaches to the Wilson Bridge. After the construction of these projects was completed, the land was turned over to GSA and, subsequently, to the Department of the Interior.

It was envisioned that the property would be used for the planned extension of the George Washington Memorial Parkway down the Maryland side of the Potomac. Plans for the parkway extension have, however, long since been discarded and no other use has been found for the property. In my view the time has come to make this land available for other uses as long as those other uses are compatible with the Federal interest in preserving the character of the Potomac shoreline in the vicinity of the Nation's Capital.

The Maryland National Capital Park and Planning Commission is a State-created agency charged with developing and maintaining parks and recreation activities in the Prince Georges and Montgomery County areas. The MNCPPC has come forward with a proposal to develop the property as open space with park facilities on the river. The agency has also proposed al-

lowing construction of a parkway through the property to provide access to the residential and commercial development now taking place in adjacent property along the Potomac.

There is no question that the creation of a waterfront park, complete with boat ramp and other facilities, would greatly facilitate enjoyment of the Potomac River by area residents and tourists. In this regard, the MNCPPC proposal represents an opportunity to turn a forgotten parcel of vacant property into a true public resource.

The transfer proposal also represents an opportunity to control to some extent the character of development downstream. I recognize the concerns raised by interested groups about the need to insure that any commercial or residential development does not significantly disrupt either the sensitive environmental balance or the scenic beauty of the waterfront: The Prince Georges County Council, in recognition of these concerns, attached conditions in adopting the zoning changes required for development. The legislation I am jointly sponsoring attempts to address the same concerns by laying out additional conditions for waterfront development on property adjacent to the land being transferred. If these conditions are not met to the satisfaction of the Secretary of the Interior, in consultation with the National Capital Park and Planning Commission, the transferred land will revert to the Federal Government.

In my view, the approach taken in this bill represents the only way to insure adequate attention to the legitimate Federal interests at stake in the adjacent development. Should this legislation not be enacted, I am convinced that the development would proceed regardless, although with some other means of access, and without any input from Federal agencies regarding the design and environmental impact of the project. This legislation is strongly supported by the Prince Georges County executive and county council and by various State agencies. It has been prepared with careful attention to and participation by the National Park Service and the Maryland National Capital Park and Planning Commission. The transfer of property as envisioned by the bill would serve both Federal and local interests and I urge my colleagues to help enact this legislation.●

By Mr. MATHIAS:

S. 2420. A bill to amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes; to the Committee on the Judiciary.

CRIMINAL JUSTICE ACT AMENDMENTS

● Mr. MATHIAS. Mr. President, many of the commands of our Constitution are not self-enforcing. They require positive action on the part of the Congress if they are to be realized. Today I introduce a bill to revitalize our commitment to the sixth amendment to the Constitution. This legislation updates the Criminal Justice Act of 1964, and makes needed changes to improve the delivery of legal services to indigent defendants in the Federal courts.

In 1963, the Supreme Court issued its landmark decision in Gideon against Wainwright and invigorated the sixth amendment guarantee that, "In all criminal prosecutions, the accused shall enjoy the right—to have the Assistance of counsel for his defense." In Gideon, the Court held that the sixth amendment requires the appointment of counsel for indigent defendants in most criminal cases. In response, local courts and bar associations across the country asked private attorneys to offer their services, not for compensation, but as a professional public duty. Private attorneys were thereby absorbing the costs for defendants who did not have the resources to obtain counsel.

Shortly after Gideon was handed down, Congress heard evidence that this lack of compensation discouraged more experienced attorneys from accepting court-appointed criminal cases in the Federal courts. Congress also became concerned that the unpaid attorneys might be less diligent or less thorough than retained counsel. Because the assistance of counsel was deemed to be essential to insure the fundamental right of fair trial, the Criminal Justice Act of 1964, or CJA, was enacted. The CJA established a program, administered by the Administrative Office of the U.S. Courts, providing for the appointment of counsel for indigents having contact with the Federal criminal justice system. Representation is provided either by court-appointed private attorneys, who are compensated for their work on an hourly basis, or by attorneys employed by a Federal public defender or community defender service.

Since 1965, the Criminal Justice Act has enabled over 700,000 indigent Americans to secure counsel committed to providing competent and effective assistance. It has thus allowed indigent defendants access to the substance, not just the form, of the sixth amendment guarantee. Unfortunately, it now appears that the CJA's effort to protect the legal rights of indigents is in jeopardy because the rates paid to CJA-appointed attorneys have not been raised since 1970. Remember that since that time the Consumer Price Index has more than doubled. This anachronistic rate schedule deters the great majority of experienced defense attorneys from accepting appointments to represent indigents. A study of law firm economics suggests that the low rates may inhibit attorneys from devoting sufficient time to their CJA cases, if they do not resign from CJA panels altogether. These facts demonstrate that we are facing the same dilemma that we did two decades ago. In order to meet our constitutional responsibility to indigent defendants, and to assure that the CJA continues to fulfill its important role in the Federal judicial system, we must respond with a program as effective as the initial legislation itself was.

I am, therefore, introducing a bill designed to correct the compensation rate deficiencies and to improve the delivery of legal services to indigents having contact with the Federal criminal justice system. This bill is identical to one introduced in the other body by Representative KASTENMEIER and cosponsored by every member of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The Administrative Office of the U.S. Courts, the body that administers the CJA, has been involved in drafting the bill and supports its passage. Other supporters include the American Bar Association, the Association of Former U.S. Attorneys, the Federal Public and Community Defenders, and the Judicial Conference. These organizations as well as the administration agree that an increase in CJA rates is long overdue.

Mr. President, the administration has indicated that it would like to see the CJA rate increase tied to limitations on court-appointed attorney's fees in civil suits. I believe that these two important issues should be considered separately. The policies underlying fee-shifting in certain types of civil suits are distinct from the imperative need for the CJA program. Any changes in the civil fee-shifting policies should have no impact on this Nation's commitment to its Bill of Rights, and our dedication to a criminal justice system which functions fairly and efficiently.

My bill updates the CJA rate schedule that has been in effect since 1970. Today, CJA attorneys can receive $30 per hour for in-court time and $20 per hour out-of-court time. The new schedule would raise the basic hourly rate to $50 per hour and allow the Judicial Conference to authorize higher rates of up to $75 in districts where such increases would be appropriate. It would also raise the per case maximum to a more appropriate level.

Another measure in the bill responds to Ferri against Ackerman, the 1979 Supreme Court decision that held that a court-appointed attorney could be sued for malpractice. That ruling concerns CJA administrators because while private attorneys appointed under the CJA usually carry malprac-

tice insurance as a result of their private practice, attorneys employed as Federal defenders do not. CJA administrators are concerned because attorneys who have to purchase professional liability insurance may be further discouraged from performing the important duties of Federal defenders. This bill would reduce this disincentive by empowering the Administrative Office of the U.S. Courts to provide needed insurance coverage for lawyers working for the Federal Defender Service.

The bill would also allow the Federal courts in the District of Columbia to establish defender organizations similar to those permitted in all other Federal jurisdictions. The provision that currently prohibits the establishment of such an organization in the District of Columbia is simply unnecessary in light of the 1970 District of Columbia court reorganization.

Mr. President, through the Criminal Justice Act of 1964, the Congress put in place a means to insure that the commands of the sixth amendment to the Constitution would be translated into reality. Our commitment to this goal requires that we periodically review this legislation to insure that it remains effective. The bill that I introduce today results from such a review. Its passage will reaffirm our determination to make sure that the Federal criminal justice system remains efficient, effective, and fair to all.

I ask unanimous consent that a brief summary of this bill's provisions appear in the RECORD at the conclusion of my remarks.

There being no objection, the summary was ordered to be printed in the RECORD, as follows:

SUMMARY OF THE PROPOSED CRIMINAL JUSTICE ACT AMENDMENTS

S. 2420 is designed to improve the delivery of legal services in the federal criminal justice system to those financially unable to obtain adequate representation. The services to be provided include legal counsel and investigative, expert, and other services necessary for adequate representation.

COMPENSATION RATE INCREASES

S. 2420 raises the maximum hourly rates paid to attorneys to a general maximum of $50.00 per hour with an absolute maximum of $75.00 per hour. The Judicial Conference, in consultation with the judicial councils of the circuits, is granted authority to vary the rate by district, considering such factors as the minimum range of prevailing rates for qualified attorneys in the district. Three years after the effective date of this Act, the hourly rates may be raised consistent with cost of living raises to Federal employees, but only after the Judicial Conference determines that the increase is appropriate for a certain district.

S. 2420 also raises the maximum per case compensation rate. The case maxima are increased to $5,000 for felonies, $1500 for misdemeanors, and $3,000 for appeals. Total cost of investigative, expert, and other services would not typically exceed $300.

MALPRACTICE INSURANCE FOR FEDERAL DEFENDERS

While private attorneys handling CJA cases generally have their own malpractice insurance, lawyers working for federal defenders generally do not. S. 2420 would authorize the Administrative Office of the United States Courts to provide liability insurance for officers and employees of defender organizations.

DISTRICT OF COLUMBIA DEFENDER ORGANIZATION

S. 2420 provides the District Court for the District of Columbia the option of establishing a public defender or community defender organization. The District of Columbia is currently the only district of its size to handle CJA cases entirely on an appointment basis.

EXPANDING THE CLASS OF ELIGIBLE DEFENDANTS

Under this bill, the court will have the discretion to appoint counsel in petty offenses if a sentence of confinement is authorized and there is a reasonable possibility or likelihood of confinement.

CONTINUING EDUCATION

This bill authorizes appropriations to the United States Courts for representation plans, including funds for the continuing education and training of persons providing representational services.●

By Mr. SPECTER (for himself and Mr. HEINZ):

S. 2421. A bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980—Superfund—to provide for cleanup authority and liability for petroleum releases and to regulate underground storage tanks used for the storage of hazardous substances; to the Committee on Environment and Public Works.

REGULATION OF UNDERGROUND STORAGE TANKS

● Mr. SPECTER. Mr. President, I am today introducing with my colleague from Pennsylvania, Senator HEINZ, a bill to amend to Comprehensive Environmental Response, Compensation, and Liability Act of 1980—Superfund—to provide for cleanup authority and liability for petroleum releases and to regulate underground storage tanks used for the storage of hazardous substances.

On February 11, 1984, I visited Cherryville, Pa., northwest of Allentown, with Congressman RITTER. The residents of Cherryville and Hanover Township, Northampton County, have been plagued with gas contaminated water for over 3 years, but have been unable to get cleanup help from the EPA because Superfund excludes cleanup of water contaminated by petroleum products. Since that time, we have learned of contaminated water supplies in Lebanon, Pa. But this is not a problem limited to Pennsylvania; it is clearly national in scope.

An article in the U.S. News & World Report, January 16, 1984, reveals that authorities in Lee, Maine had found that an estimated 10,000 gallons of gasoline had leaked from service station tanks. Estimates of the number of underground storage tanks—gasoline—in the Nation run from 1.4 to 2.5 million. EPA officials estimate that as many as 100,000 underground storage tanks are leaking 11 million gallons a year. Other sources indicate that as many as 420,000 tanks may be leaking now, and experts predict that 75 percent of all tanks will begin leaking over the next 5 to 10 years; 1 gallon of gasoline can ruin 750,000 gallons of water.

As Pennsylvania residents can tell you, and as I now know from personal experience, at low concentrations—several parts per billion—the presence of gasoline can be smelled or tasted, rendering the supply objectionable. But experts tell us gasoline vapors have caused kidney tumors in rats, and that benzene, a component of gasoline, is a known cause of cancer in humans.

The signficance of this problem becomes clear when you realize that ground water resources represent about 50 percent of the Nations drinking water supplies, as well as other water needs.

Leaking underground storage tanks have been identified by EPA and independent experts as one of the major sources of ground water contamination, yet storage tanks are not now regulated under Federal law.

This legislation I introduce today will give EPA authority and funds to clean up gasoline leaks from underground storage tanks. The authority available to EPA includes the ability to take actions necessary to prevent, minimize, or mitigate damage to public health or welfare, or to the environment, such as provision of alternate water supplies, and temporary evacuation and housing of threatened individuals.

The second aspect of this bill will require EPA to establish general standards applicable to new and existing underground storage tanks used for commercial and governmental purposes, and to evaluate residential tanks.

It will take a strong, comprehensive approach to resolve this crisis of ground water contamination from leaking underground storage tanks, and I believe that is what this legislation provides.●

● Mr. HEINZ. Mr. President, today I am introducing with my distinguished colleague from Pennsylvania, Senator SPECTER, legislation to address the very serious problem this Nation faces from leaking underground storage tanks. This initiative proposes to amend the Comprehensive Environmental Response Compensation and Liability Act of 1980—Superfund—to provide for cleanup authority and liability for petroleum releases, and to regulate underground storage tanks used for the storage of hazardous substances. In this effort, I join Hon. DON

RITTER of Pennsylvania in his efforts in the House of Representatives.

The scope of this problem is immense, the potential harm to this Nation's drinking water is alarming. It is estimated that there are currently as many as 1.4 million underground storage tanks in this country, 100,000 of which may at this moment be leaking gasoline and other liquid hydrocarbons. The problem is projected to escalate dramatically in the next few years, when the thousands of tanks installed in the fifties' suburban construction boom reach the age when these steel tanks typically corrode. The effects of such corrosion must be contained to prevent the pollution of ground water, on which half of the U.S. population depends for its drinking water.

We cannot therefore afford to wait any longer. We must put in place now a systematic program to deal with the serious problem today. This legislation does just this, with a two-pronged attack on the problem: The provision of funds to cleanup these destructive leaks, and regulatory standards to prevent similar leaks in the future. The money for the cleanup will come from the Superfund Trust Fund, which is supported by a tax on oil and chemical feedstocks.

I call on my colleagues in all parts of the country to support this effort to contain a problem whose potential impact cuts across all geographic and socioeconomic lines. We must act together and we must act now to protect our Nations valuable ground water.●

By Mr. BRADLEY (for himself and Mr. DODD):

S. 2422. A bill to provide a program of planning grants, demonstration grants, and formula grants to assist local educational agencies to improve the basic skills of economically disadvantaged secondary school students, and for other purposes; to the Committee on Labor and Human Resources.

SECONDARY SCHOOL BASIC SKILLS ACT

Mr. BRADLEY. Mr. President, for many years the number of students who dropped out of high school steadily declined. That trend has reversed itself; and the dropout rate is on the rise nationally. In my own State of New Jersey, 20,000 youth dropped out of schools last year. During the same year only 90,000 young people graduated from our public schools. In some urban schools in this country, the dropout rate is higher than 50 percent, and that does not count the many students who are officially enrolled in school, but attend irregularly.

The consequences of dropping out for the individual student, and the costs to this Nation, are well known. Nearly a third of the 16- to 24-year-olds in this country who have dropped out of high school are unemployed.

We could force young people to stay in school. But this is clearly not a good solution. First, it is only likely to increase truancy. Second, unwilling students do not learn, and they often disrupt the learning of others. We obviously need to go further, to examine the causes, and then to formulate public policy that goes to the source of the problem.

Mr. President, I am convinced that one of the reasons students drop out of high school is that they lack basic skills. They are—to use the current jargon—"functionally illiterate" and they cannot even get to first base with the high school academic curriculum. Considering the frustration, discouragement, and humiliation that many of these students must experience, it is not surprising that leaving school seems like an appealing alternative.

The problem of functional illiteracy is widespread. It is estimated that 23 million American adults and about 13 percent of all 17-year-olds have inadequate reading, writing, and comprehension skills for everyday functioning. Functional illiteracy among urban, largely minority youth may run as high as 40 percent. Thus, a fair proportion of our youth have trouble reading a newspaper, a recipe, instructions on a package of prepared food, or filling out a job application. Many lack the computational skills needed to balance a checkbook. Imagine how intimidating a tax form must be.

Even among students who go on to college, there are many who have not fully mastered basic skills. In New Jersey last year, of over 50,000 entering freshmen who took the New Jersey College Basic Skills Test, less than a third were proficient in verbal skills and basic math, and only 12 percent were proficient in elementary algebra.

So far, most of the important educational reforms that are being implemented across the country have not addressed directly the problems of the high school student who has not mastered basic skills. Many States, including my own State of New Jersey, have increased academic course requirements for graduation; and at last count, 39 States have developed minimum competency tests for purposes of remediation or promotion; and in 19 States, passage of a test is a requirement for graduation.

I strongly support setting high standards for our students. But I am also concerned that without sufficient support, the higher standards will discourage the educational involvement of some students, rather than inspire their greater effort. We could see an even greater rise in the number of students who drop out of schools, because they consider their prospects for meeting the standards too remote to keep trying.

Throughout the country, considerable efforts are being made to provide remedial instruction to high school students who are achieving at a low level. In New Jersey, for example, a group of teachers in Middlesex County developed a comprehensive basic skills program designed to help teachers manage classrooms, evaluate students' skill levels, and plan educational programs to meet individual student needs. Repeated evaluations of this program, Project Climb, show that it is successfully raising students' basic skill levels. The program is currently being disseminated to high schools in other States. But such efforts to develop and disseminate basic skills training are grossly underfunded at the secondary level. Less than 5 percent of Federal compensatory education funds are currently spent at the high school level.

The hard work has to be done in the schools themselves. But I believe that the Federal Government can and should support local efforts by making sure that schools have access to information about approaches that work, and by providing funds to enable schools to effectively implement these approaches.

Mr. President, our experience with chapter 1 has shown us that considerable achievement gains are made by disadvantaged children at the elementary school level when Federal funding is provided to assist schools in meeting these students' special needs. I am convinced that the same gains would result from an equivalent commitment to our Nation's high school students. I propose that we make that commitment.

My bill would provide funds to develop approaches to teaching basic skills at the high school level, and then to disseminate those techniques to all schools. In the first phase, for each of the next 2 years, $100 million would be made available on a competitive basis to secondary schools with large concentrations of low-income students to help them find the most effective means of teaching basic skills to high school students who have not mastered them. These programs would be carefully evaluated.

The techniques used in the most successful programs would be widely disseminated in the second phase. During the second phase, $800 million would be made available to State departments of education to distribute to schools with disadvantaged populations on a formula basis. This is approximately the amount of money that is needed to bring high schools up to the same level of Federal funding for basic skills that is currently provided in chapter 1 for elementary and junior high schools.

But I do not plan to provide the funds without some strings. Schools

will be required to demonstrate that they are making progress. Thus, continued funding after the first 2 years would be contingent upon an increase in the number of students passing a State-approved minimum competency test or a decrease in their dropout rate.

Some schools are doing a great job in making sure that all students master basic skills. They deserve our praise. Some schools have been less successful. They need to have access to the expertise others have developed, and they need financial support to implement programmatic changes that will result in improved academic skills. I believe that this legislation will help meet these needs.

Mr. President, I ask unanimous consent that a summary of the bill and the bill itself be printed in the RECORD at the close of my statement.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2422

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Secondary School Basic Skills Act".

STATEMENT OF PURPOSE

SEC. 2. It is the purpose of this Act to furnish financial assistance to local educational agencies having especially high concentrations of children from low income families to enable such agencies to provide more effective instruction in basic skills for economically disadvantaged secondary school students.

DEFINITIONS

SEC. 3. As used in this Act—

(1) the term "basic skills" includes reading, writing, mathematics computational proficiency as well as comprehension and reasoning;

(2) the term "economically disadvantaged secondary school students" means students, aged 14 to 17, inclusive, who are counted under section 111(c) of the Elementary and Secondary Education Act of 1965, as modified by chapter 1 of the Education Consolidation and Improvement Act of 1981;

(3) the term "institution of higher education" has the same meaning given that term under section 1201(a) of the Higher Education Act of 1965;

(4) the term "local educational agency" has the same meaning given that term under section 198(a)(10) of the Elementary and Secondary Education Act of 1965;

(5) the term "panel" means the national secondary school basic skills panel of the National Institute of Education of the Department of Education established under section 12;

(6) the term "secondary school" has the same meaning given that term under section 198(a)(7) of the Elementary and Secondary Education Act of 1965;

(7) the term "Secretary" means the Secretary of Education;

(8) the term "State" means each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands; and

(9) the term "State educational agency" has the same meaning given that term under section 198(a)(17) of the Elementary and Secondary Education Act of 1965.

AUTHORIZATION OF APPROPRIATIONS

SEC. 4. There are authorized to be appropriated to carry out the provisions of this Act—

(1) $100,000,000 for the fiscal year 1985 of which—

(A) $1,000,000 shall be available for the activities of the panel under section 12;

(B) $2,000,000 shall be available for planning grants described in section 7;

(C) $1,000,000 shall be available for the national assessment under section 13(a); and

(D) $96,000,000 shall be available for the demonstration grants under section 8;

(2) $100,000,000 for the fiscal year 1986 of which—

(A) $1,000,000 shall be available for activities of the panel under section 12;

(B) $1,000,000 shall be available for the national assessment under section 13(a); and

(C) $97,500,000 shall be available for demonstration grants under section 8;

(3) $800,000,000 for fiscal year 1987 of which—

(A) $1,000,000 shall be available for the national assessment under section 13(a);

(B) $10,000,000 shall be available for the dissemination activities described in section 13(b); and

(C) $789,000,000 shall be available for formula grants pursuant to section 9; and

(4) $800,000,000 for each of the fiscal years 1988, 1989, and 1990 of which—

(A) $10,000,000 shall be available for dissemination activities described in section 13(b); and

(B) $790,000,000 shall be available for formula grants under section 9.

ELIGIBILITY

SEC. 5. A secondary school is eligible to receive assistance under this Act for planning grants, for demonstration grants and for formula grants only if 20 percent or more children aged 14 to 17, inclusive, who are enrolled in such school and are counted under section 111(c) of the Elementary and Secondary Education Act of 1965, as modified by chapter 1 of the Education Consolidation and Improvement Act of 1981.

USES OF FUNDS

SEC. 6. Funds made available under this Act for planning grants, demonstration grants, and formula grants, shall be used for the planning for, the development of new approaches to, and for carrying out educational services and activities designed specifically to raise the basic skills of low achieving economically disadvantaged secondary school students.

PLANNING GRANTS

SEC. 7. (a)(1) From funds appropriated pursuant to section 4(1)(B) for fiscal year 1985 the Secretary is authorized, in accordance with the provisions of this section to make grants—

(A) to local educational agencies on behalf of eligible secondary schools, and

(B) to institutions of higher education and other public agencies and nonprofit private organizations on behalf of eligible secondary schools,

for the purpose of assisting eligible secondary schools to prepare proposals for demonstration grants.

(2) The Secretary shall carry out the functions of this section through the National Institute of Education.

(b) No planning grant may be made under this section unless—

(1) an application is submitted at such time, in such manner, and containing or accompanied by such information as the Secretary deems necessary; and

(2) each local educational agency, institution of higher education, public agency, or nonprofit private organization submits a separate application for each eligible secondary school.

(c) No grant made under this section may exceed $2,000.

(d) Any local educational agency, institution of higher education, public agency, or private nonprofit organization which receives a planning grant under this section and does not submit a demonstration proposal in accordance with section 8 shall within 60 days after the end of the fiscal year 1986 refund the amount received under this section to the Secretary.

DEMONSTRATION GRANTS

SEC. 8. (a)(1) From the amounts appropriated pursuant to section 4(1)(D) for fiscal year 1985, and section 4(2)(C) for fiscal year 1986, the Secretary is authorized, in accordance with the provisions of this section, to make demonstration grants to enable eligible secondary schools to develop new approaches to achieving improved basic skills instruction of low-achieving economically disadvantaged secondary school students.

(2) The Secretary shall carry out the functions of this section through the National Institute of Education.

(b) No grant may be made under this section unless—

(1) an application is submitted at such time, in such manner, and containing or accompanied by such information as the Secretary deems necessary;

(2) the application is made—

(A) by the local educational agency on behalf of an eligible secondary school, or

(B) by an institution of higher education, a public agency, or a private nonprofit organization on behalf of an eligible secondary school if the institution, agency, or organization will provide educational services or will conduct educational activities for educationally disadvantaged students subject to the proposal for which the assistance is sought;

(3) the application contains assurances that the applicant will participate in the national assessment required by section 13(a);

(4) the proposal described in the application was prepared with the participation of administrators and teachers in the eligible secondary school; and

(5) the application was submitted to the appropriate State educational agency for review and comment prior to submittal to the Secretary under this subsection.

(c) In approving applications under this section the Secretary shall assure that—

(1) at least one demonstration grant is made in each State in each fiscal year; and

(2) no demonstration grant made under this section exceeds $500,000 in any fiscal year.

FORMULA GRANTS; ALLOTMENTS

SEC. 9. (a) From amounts appropriated pursuant to sections 4(3)(C) and 4(4)(B), the Secretary shall, in accordance with the provisions of this Act, make formula grants to States to enable local educational agencies within the State to carry out educational programs and activities to improve the basic skills of low-achieving economically disadvantaged secondary school students in eligible secondary schools.

(b)(1) From the sums available for formula grants under this Act for each fiscal year, the Secretary shall reserve—

(A) not to exceed 1 percent for payments to Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands, and

(B) 0.5 percent for payments for children enrolled in Indian schools,

to be allotted in accordance with their respective needs.

(2) The remainder of the amount available under this Act for formula grants for each fiscal year, the Secretary shall allot to each State an amount which bears the same ratio to such percent as the number of the children aged 14 to 17, inclusive, who are counted for the purpose of section 111(c) of the Elementary and Secondary Education Act of 1965, as modified by chapter 1 of the Education Consolidation and Improvement Act of 1981, for the fiscal year preceding the fiscal year for which the determination is made in the State bears to the number of such children in all States.

(3) For the purpose of this subsection, the term "States" includes the fifty States, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) Each State educational agency shall allocate from the State allotment to local educational agencies and to institutions of higher education, public agencies, and private nonprofit organizations within the State having applications approved under section 11 on behalf of eligible secondary schools based upon the relative number of the children aged 14 to 17, inclusive, in such schools who were counted for the purpose of section 111(c) of the Elementary and Secondary Education Act of 1965, as modified by chapter 1 of the Education consolidation and Improvement Act of 1981.

STATE ASSURANCES

SEC. 10. Each State which desires to receive formula grants under this Act shall file with the Secretary an application containing assurances that—

(1) the State educational agency will be designated as the State agency responsible for the administration and supervision of programs assisted under this Act;

(2) the State will use formula grants made under this Act—

(A) so as to supplement the level of funds that would, in the absence of such grants, be made available from non-Federal sources for the purposes of the program for which assistance is sought; and

(B) in no case to supplant such funds from non-Federal sources; and

(3) the State educational agency will furnish technical assistance necessary to local education agencies, institutions of higher education, public agencies, and private nonprofit organizations applying on behalf of eligible secondary schools within the State to carry out their responsibilities under this Act;

(4) that the State will expend not more than 1 percent of the State's allotment for the purpose of administration, technical assistance, coordination, and planning;

(5) the State shall, subject to clause (6), distribute its allotment under section 9(b) of this Act to local educational agencies, institutions of higher education, public agencies, and private nonprofit organizations applying on behalf of eligible secondary schools within the State in accordance with the provisions of section 9(c);

(6) the State will not expend more than 10 percent of the allotment of the State to make payments to institutions of higher education, public agencies, and private nonprofit organizations submitting applications on behalf of eligible secondary schools; and

(7) the application of each local educational agency, institution of higher education, public agency, and private nonprofit organization applying on behalf of eligible secondary schools for funds under this Act will not be denied without notice and opportunity for a hearing before the State educational agency.

(b) The Secretary shall not disapprove the application filed by the State educational agency without affording notice and opportunity for a hearing.

LOCAL APPLICATIONS

SEC. 11. (a) Each local educational agency and each institution of higher education, public agency, and private nonprofit organization applying on behalf of an eligible secondary school may receive payments for any fiscal year in which it files with the State educational agency an application. Each such application shall—

(1) describe the eligible secondary schools and the programs to be conducted at the eligible secondary schools for carrying out the purposes of section 6;

(2) provide assurances that the program for which assistance is sought is of sufficient size, scope, and quality as to give reasonable promise of substantial progress toward improving the basic skills of low-achieving economically disadvantaged secondary school students;

(3) provide assurances that the program for which assistance is sought was designed and will be implemented in consultation with parents and teachers of the low-achieving economically disadvantaged secondary school students;

(4) describe, in the case of a local educational agency, the procedures which the local educational agency will follow with respect to subcontracting to any private nonprofit organization, any program or activity to be conducted in an eligible secondary school for low-achieving economically disadvantaged secondary school students if the agency determines that the alternative education program to be offered by such organization will best serve the interests of such students;

(5) provide assurances that the agency will cooperate with State efforts to evaluate the effectiveness of the programs assisted under this Act; and

(6) provide such other assurances as the State educational agency may require.

(b) An application filed under subsection (a) of this section may be amended annually as may be necessary to reflect changes without filing a new application.

NATIONAL SECONDARY SCHOOL BASIC SKILLS PANEL

SEC. 12. (a) There is established in the National Institute of Education of the Department of Education a national secondary school basic skills panel of 12 members appointed by the Secretary. The panel shall be composed of—

(1) a secondary school teacher,

(2) two individuals who serve as principals, guidance counselors, and similar personnel in secondary schools,

(3) one individual representative of the National Diffusion Network, and

(4) the remaining members shall be representative of educational researchers who have established reputations in the area of basic skills education of the secondary school level.

(b) The panel shall meet as soon as practicable after the appointment by the Secretary.

(c) Each State panel shall—

(1) identify specific models throughout the United States which show promise of being effective in teaching basic skills to low-achieving economically disadvantaged secondary school students and identify the individuals associated with the successful models identified under this clause;

(2) furnish requests for proposals directly to local educational agencies in which there is at least one eligible secondary school;

(3) review and advise the Secretary with respect to planning grants under section 7; and

(4) review proposals for demonstration grants under section 8 and advise the Secretary with respect to—

(A) the feasibility of the proposal;

(B) the promise for effectiveness in raising achievement levels of students lacking basic skills;

(C) the level of concentration of economically disadvantaged secondary school students;

(D) support from teachers and parents; and

(E) the cost effectiveness of the proposal.

(d) The provisions of part D of the General Education Provisions Act, relating to secretarial advisory councils, shall apply to the panel authorized by this section.

ADMINISTRATION

SEC. 13. (a) The Secretary shall, through the National Institute of Education, conduct a national assessment of the effectiveness and the implementation of the demonstration grants made under section 8.

(b) The Secretary shall disseminate to local educational agencies having eligible secondary schools the results of the assessment made under subsection (a) of this section.

(c) The Secretary, through the National Institute of Education, shall monitor grants made under this Act and shall carry out procedures for the coordination of activities assisted under this Act with other research activities conducted by the National Institute of Education and through the Office of Educational Research and Improvement in the Department.

PAYMENTS; RESTRICTIONS

SEC. 14. (a) The Secretary shall make payments under planning grants and distribution grants as expeditiously as possible after the approval of applications under section 7 and section 8.

(b)(1) No formula grant may be made with respect to any eligible secondary school for more than two fiscal years to any local educational agency or to any institution of higher education, public agency, or private nonprofit organization unless there is an improved performance of the economically disadvantaged secondary school students at the school on a State approved basic skills test or there is a decrease in the drop out rate at such a school.

(2) The Secretary shall prescribe regulations to carry out the provisions of paragraph (1) of this subsection.

SENATOR BILL BRADLEY'S SECONDARY SCHOOL BASIC SKILLS ACT

SUMMARY

Purpose

To provide additional assistance to local secondary education agencies with especially high concentrations of children from low-

income families so that they may provide more effective instruction in basic skills. (Basic skills includes reading, writing, and computational proficiency, as well as comprehension and reasoning.)

Use of funds

Funds would be used for efforts directed specifically at raising the basic skills of low-achieving students. Schools would identify specific changes or additions in the educational program brought about by these funds. Any use of the funds must be for the benefit of low-achieving, disadvantaged students. However, funding does not need to be targeted exclusively at specifically identified students. (Thus, for example, funding could be used to develop an in-service training program for all of the school's teachers to help them deal more effectively with low-achieving students, or to supplement teachers' salaries for providing after school or evening instruction to students in need of basic skills.)

Phase 1.—Demonstration grants (year 1 and 2; $100 million each year): Proposal planning grants.

Planning grants will be made available only during the first year of funding to assist schools in preparing demonstration grant proposals.

Planning grants, not to exceed $2,000, will be given to the first 1,000 eligible schools or other agencies or organizations requesting such grants.

Demonstration grants

School districts will submit a separate grant application on behalf of each eligible school within that district desiring to apply for a demonstration grant. Administrators and teachers in the school must participate in the preparation of the proposal.

Public agencies and private organizations are eligible to apply for demonstration grants if they provide educational services to a disadvantaged adolescent population.

Phase 2.—Formula grants (year 3; $800 million annually): Funding mechanism.

Funding will be channelled to local schools through State Departments of Education. State Departments of Education can receive no more than 1 percent of the state allocation for purposes of administration, technical assistance, coordination, and planning.

Up to 10 percent of the State's allocation can be used to support public agencies and nonprofit organizations providing basic skills training to disadvantaged adolescents.

Funding distribution

Funding will be distributed according to the same formula used by Chapter 1 (although limited to secondary schools and youths aged fourteen to seventeen, inclusive).

Requirement for continued funding

After the first two years of funding, continued funding will be contingent upon the school's improvement in the pass rate of a State-approved basic skills test, or a decrease in the school's drop-out rate. The Secretary of Education shall determine an appropriate level of improvement.

Subcontracting

Schools may subcontract with nonprofit organizations to provide educational programs for those students who are believed to be best served by an alternative education program.

National assessment

NIE will conduct a national assessment of the implementation and effectiveness of the demonstration programs.

By Mr. THURMOND (for himself, Mr. BIDEN, Mr. LAXALT, Mr. HEINZ, and Mr. GRASSLEY) (by request):

S. 2423. A bill to provide financial assistance to the States for the purpose of compensating and otherwise assisting victims of crime, and to provide funds for the prupose of assisting victims of Federal crime; to the Committee on the Judiciary.

VICTIMS OF CRIME ASSISTANCE ACT OF 1984

Mr. THURMOND. Mr. President, at the request of the administration, I am today introducing the Victims of Crime Assistance Act of 1984. Joining me as cosponsors of this important measure are the distinguished ranking member of the Judiciary Committee, Mr. BIDEN, the chairman of the Criminal Law Subcommittee, Senator PAUL LAXALT; the chairman of the Special Committee on Aging, Senator JOHN HEINZ, who sponsored the victims legislation enacted 2 years ago; and Senator CHARLES E. GRASSLEY.

Mr. President, our recent consideration of the crime package and related measures reminds all of us of the serious plight suffered by victims of crime in this country. Our system which aims at achieving criminal justice is sadly misdirected. While no one disputes that our Constitution demands due process for the perpetrator of any offense, no matter how heinous, our search for justice for the victim of a crime, or his survivors, must be equally rigorous.

We have stated repeatedly that the role of the National Government in the war against violent crime is somewhat limited under our Federal system. Aside from addressing constitutionally enumerated crimes, such as counterfeiting, and those with interstate or foreign elements, the Federal Government can only serve, first, as a model to the States, and, second, as a facilitator of State efforts. The Victims of Crime Assistance Act of 1984 fulfills both of these functions.

The act which I am introducing today contains five main features: Federal assistance to State victim compensation programs, Federal financial aid to State victim assistance programs, enhanced Federal victim assistance efforts, authority for the Federal courts to order "Son-of-Sam" forfeitures of literary and other profits stemming from crimes, and authority for victim statements at parole hearings.

The Victims of Crime Assistance Act would establish a crime victims' assistance fund in the U.S. Treasury comprised of all criminal fines paid to the United States, and certain profits stemming from literary, visual, or audio productions relating to Federal crimes. The latter deposits would be generated under new authority granted to Federal courts by the act to order the forfeiture of such profits. This is an equitable approach since the profits criminals garner from crime should be used to make victims whole.

Fifty percent of the funds deposited in the crime victims' assistance fund would be distributed to existing State victim compensation programs based on payments made to victims in the previous year, but not more than 10 percent of such payments; 30 percent of the funds will be distributed to the States on a population basis for financial aid to high-quality victim-assistance programs. Finally, 20 percent of the funds will finance Federal victim-assistance efforts under the direction of a Federal Victims of Crime Advisory Committee, chaired by the Attorney General, and a Federal victim Assistance Administrator.

Mr. President, one small, but important, provision included in this act is an amendment to section 4207 of title 18 of the United States Code to permit a victim to make a statement at a Parole Commission hearing concerning the physical, psychological, and financial impact of the crime on his life. In 1982, we made this information available to the judge in the presentence report. The Parole Commission must be given the same appreciation for the damage inflicted by an offender before it releases him prior to the expiration of his sentence.

Mr. President, the act which I am introducing today is the latest in a series of administration initiatives aimed at correcting the imbalance in our system in favor for the heinous offender, at the expense of the innocent victim. One of the Attorney General's first actions was to appoint a Task Force on Violent Crime. Its recommendations encouraged the President to establish, in turn, the virtually unprecedented Task Force on Victims of Crime. That task force made a series of valuable recommendations, many of which are included in this act and in the Comprehensive Crime Control Act of 1984. Currently, the Attorney General's Task Force on Domestic Violence is evaluating the testimony it received at public hearings on the Victimization of family members. A victims of crime management team in the Office of Justice Assistance, Research and Statistics, under the vigorous direction of Assistant Attorney General Lois Herrington, develops means of implementing the task force recommendations, including a National Resource Center for Victims. OJARS and the FBI have recently conducted a rape investigation seminar for State and local law enforcement personnel to facilitate the efficient prosecution of those difficult and sensitive cases. Finally, in the budget request for fiscal year 1985, the administration has included funds for victims coordinators in Federal judicial districts to supervise the implementation of the guidelines for fair

treatment of Federal crime victims and witnesses.

Mr. President, I am proud to introduce the Victims of Crime Assistance Act of 1984 today on behalf of an administration which shares my deep concern for the crime problem in this country and the sorrow that it generates for millions of Americans. The Judiciary Committee will give this bill careful consideration with a view toward reporting an effective and appropriate Federal response to the problems suffered by crime victims in the very near future.

Mr. President, I ask unanimous consent that a letter from the Attorney General, the text of the bill which I am introducing, a section-by-section analysis and summary prepared by the administration, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2423

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Victims of Crime Assistance Act of 1984."

FINDINGS AND PURPOSE

The Congress finds and declares that—

(1) many violent crimes result in serious financial losses and severe physical and psycholoical trauma to the victims of crime and their families;

(2) the Federal Government and the States are presently unable to adequately protect the victims of crime from its devastating physical financial, emotional, and psychological consequences;

(3) the Federal Government spends far more resources on rehabilitating and educating prisoners than it does on assisting victims;

(4) the public's respect for the law is seriously diminished if it perceives that only the perpetrators of violent crime, and not the victims, are entitled to justice and protection from their government;

(5) the successful operation of the criminal justice system depends on the willing, welcome participation of victims at all stages of the criminal justice process;

(6) assisting victims of crime is a joint responsibility of the States and Federal Government. The free movement of criminals, victims, and the implements of crime across State boundaries requires a strong Federal response. Although over two-thirds of the States now operate some form of victims' compensation program, there is no formal compensation of victims of Federal crime.

The Congress therefore declares that the purposes of this Act are to—

(1) establish a separate account in the United States Treasury to finance payments to the States and selected Federal agencies for compensation and other assistance to the victims of crime;

(2) encourage States to provide direct financial assistance to victims of crime within their borders, regardless of the victim's residence or jurisdiction of the crime;

(3) assist local units of government and private nonprofit organizations to provide direct services to victims of crime and to promote the development of comprehensive services to all victims of crime across the Nation;

(4) establish a safe, welcome environment for victims to participate in the criminal justice process; and

(5) improve the Federal Government's assistance to victims of Federal crime.

TITLE I—CRIME VICTIMS' ASSISTANCE FUND

PART A—ESTABLISHMENT OF THE FUND

SEC. 101. There is hereby established in the United States Treasury a separate account to be known as the Crime Victims' Assistance Fund ("Fund") in which shall be deposited:

(a) all criminal fines (as defined in section 401(a)(2) of this Act) collected by any officer of the Federal Government; and

(b) any money paid into the Fund pursuant to section 103(b) of this title.

SEC. 102. Title 18 of the United States Code is amended by adding a new rule 32.2 to the Federal Rules of Criminal Procedure to read as follows:

"Rule 32.2. Payment of Moneys Received From Sale of Rights Arising From Criminal Act

"(a) At any time after the filing of an indictment or information against a defendant, the court may order a person or organization with whom the defendant has contracted for the purpose of having his crime depicted in a movie, book, newspaper, magazine, radio, or television production, or live entertainment of any kind, or for the purpose of expressing his thoughts, opinions or emotions regarding such crime, to pay in to the clerk of the court any money which would otherwise, by terms of the contract, be paid to the defendant, his representative, or any other party.

"(b) Prior to entering such an order, the court shall conduct a hearing, after notice to the defendant, the person or organization with whom he has contracted, any other beneficiary of proceeds under the contract and the victim, if any, of the crime committed by the defendant, for the purpose of determining whether such an order is warranted in the interests of justice or to redress the injuries suffered by the victim. Each party notified shall be given an opportunity to speak to the court."

SEC. 103. (a) Any person who has been charged with, convicted of, pleaded guilty, or pleaded nolo contendere to a Federal crime (hereinafter referred to as "defendant") who contracts with a person for the purpose of having his crime or alleged crime depicted in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or for the purpose of expressing his thoughts, opinions or emotions regarding such crime, shall file a copy of such contract with the court adjudicating his guilt.

(b) If so ordered by the court after proceedings conducted pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure, the person with whom the defendant has contracted shall pay in to the clerk of the court any money which would otherwise, by terms of the contract, be paid to the defendant, his representative, or any other party. The clerk shall deposit such moneys in the Crime Victims' Assistance Fund for the benefit of and payable to any victim of crimes committed by such person.

(c) Moneys deposited in the Fund under Section 103(b) shall be used to satisfy any unsatisfied or partially satisfied judgment rendered in favor of a victim or his legal representative in any civil action brought by the victim that is filed within 5 years after the first deposit of such monies in the Fund, against a defendant or his representative for damages arising out of the crime committed by the defendant. If no such action has been filed within 5 years after the first deposit of such moneys, any money remaining in the account shall remain in the Fund for distribution pursuant to part B of this title, subject to section 103 (d) and (e).

(d) Moneys in the Fund shall be paid to the defendant upon an order of a United States district court judge for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings brought against the defendant. The total of all payments made from the Fund under this subsection shall not exceed one-fifth of the total moneys paid into the Fund with respect to the defendant.

(e) Upon dismissal of charges or acquittal of any defendant, the clerk shall immediately cause to have paid over to the defendant all moneys paid into the clerk with respect to the defendant under section 103(b).

(f) The clerk shall, once every 6 months for 2 years from the first date money is deposited in the Fund publish a notice in the Federal Register notifying victims that such moneys are available to satisfy judgments pursuant to this title.

SEC. 104. (a) Title 18 of the United States Code is amended by deleting the word "and" after subsection (4) of section 4207 and adding a new subsection (5) to section 4207, to read as follows:

"(5) statements of the victim, which the Commission shall solicit at the parole hearing, about the emotional, physical, psychological, and financial impact the prisoner's criminal conduct has had on his life. Such statements may be presented orally by the victim or a representative of the victim, or in writing, at the discretion of the victim; and"

(b) Title 18 of the United States Code is amended by redesignating present subsection "(5)" of section 4207 as subsection "(6)".

PART B—DISBURSEMENTS

SEC. 201. The Attorney General is authorized to make annual grants and other payments from the Fund to States for the purpose of compensating and providing other assistance to victims of crime. Amounts in the Fund shall be available to the Attorney General, who shall distribute the funds on the basis of the following criteria:

(a) 50 percent to be available for distribution among the States on the basis of the amount of money spent by the State in relation to all States, for the compensation of victims of crime, including victims of exclusively Federal crimes, during the preceding fiscal year, *Provided,* That no State shall receive more than 10 percent of the amount it spent for the compensation of victims of crime, including victims of exclusively Federal crimes, during the preceding fiscal year;

(b) 30 percent to be distributed among the States on the basis of State population in relation to the population of all States; and

(c) 20 percent for distribution by the Attorney General among Federal law enforcement agencies for the purposes enumerated in section 204.

(d) Distributions from the Fund shall be based on the amount credited to the Fund during the previous fiscal year.

SEC. 202. (a) Funds awarded under section 201(a) shall be expended by the State solely for the purpose of providing financial compensation to victims of crime, subject to the

provisions of 202(d). A State is eligible to receive funds under section 201(a) if——

(1) the chief executive of the State submits an application to the Attorney General, prior to the receipt of funds under this title, which:

(A) certifies the amount of money spent by the State in the preceding fiscal year to compensate victims of crime;

(B) certifies that the funds awarded under section 201(a) shall not be used to supplant available State funds, but to increase the amount of funds expended by the State to compensate victims of crime; and

(C) contains such other information and assurances related to the purposes of this title as the Attorney General may require;

(2) the State provides the same financial benefits to victims of crime who are nonresidents fo the State, as are provided to victims of crime who are residents of the State;

(3) the State provides the same financial benefits to individuals who are victims of Federal crimes committed in the State as are provided to individuals who are victims of State crimes; and

(4) the State provides compensation for mental health counseling that may be required by eligible individuals as a result of their victimization.

(b) No portion of the funds awarded under section 201(a) may be used by any State for payment of administrative expenses related to the operation of the State victim compensation program.

(c) Any funds which would be awarded to a State but for the 10 percent limitation imposed by section 201(a) of this title shall be deposited in the general fund of the Treasury.

(d) Any funds awarded under section 201(a) which remain unspent by the State in any fiscal year may be expended for the purpose of providing financial compensation to victims of crime at any time over the next 2 fiscal years. Any funds remaining unspent at the expiration of that time shall be returned by the State to the Fund for deposit in the general fund of the Treasury.

SEC. 203. (a) Funds awarded to the State under section 201(b) shall be expended by the State solely for the purposes of providing services, other nonfinancial assistance and limited emergency financial assistance to victims of crime, subject to the provisions of section 203(c). The chief executive of the State shall appoint or designate an official of a State executive agency as the State Victim Assistance Administrator ("State Administrator"). The State Administrator shall—

(1) award the money received from the Fund under section 201(b) of this title to eligible recipient organizations in the State. The Administrator shall award funds only to an eligible recipient organization which—

(A) demonstrates a record of quality assistance to victims consistent with the purposes of this statute and available resources;

(B) promotes the use of volunteers in its service delivery;

(C) demonstrates financial support from sources other than the Fund;

(D) demonstrates an established commitment from other locally available service providers to provide the services that it does not provide, to all victims of crime; and

(E) assures that it shall coordinate with other public agencies and private organizations for the purpose of providing services to victims of crime;

(2) obtain assurances from eligible recipient organizations of compliance with the requirements of this title; and

(3) administer, monitor, and evaluate the fiscal and programmatic performance of organizations receiving funds under this section.

(b) An eligible recipient organization is a nonprofit organization, an agency of a State or local unit of government, or a combination of such entities which provides one or more of the following services to victims of crime as a group or to any targeted category of crime victims—

(1) crisis intervention services;

(2) assistance to victims in determining the status of, and participating in criminal justice proceedings; and

(3) assistance in securing victim compensation benefits.

(c) All funds awarded to a State under section 201(b) of this title may be used only for the purpose of providing financial assistance to eligible recipient organizations for the provision of services and other assistance to victims of crime. Any funds awarded under subsection 201(b) which remain unspent by the State in any fiscal year may be expended for the purposes of this section at any time over the next 2 fiscal years, at the expiration of which time any remaining unspent funds shall revert to the Fund for redistribution to the States consistent with the purposes of this section.

SEC. 204. (a) Funds awarded under section 201(c) of this title shall be expended by the Attorney General solely for the purpose of providing services and other nonfinancial assistance to victims of Federal crimes, subject to the provisions of Section 204(e). The Attorney General shall appoint or designate an official of the Department of Justice to be the Federal Victim Assistance Administrator ("Federal Administrator") authorized to exercise the responsibilities in section 204(c).

(b)(1) The President is authorized to establish a Federal Victims of Crime Advisory Committee ("Committee") comprised of the Attorney General, the Secretary of the Treasury, the Secretary of the Interior, the Federal Administrator, such other Federal officials as he may deem appropriate, and no less than two members of the public who have special knowledge of the needs of victims. The Attorney General shall serve as Chairman of the Committee.

(2) The Committee shall advise the Federal Administrator about the victims assistance needs of the Federal government and recommend proposed uses of the funds received under section 201(c) to him. The Committee shall also periodically recommend to the President other actions to be taken by the Federal government for the improved treatment of victims of Federal crime. The Committee shall meet semiannually and at such other times as the Attorney General may designate.

(3) The members of the public appointed under subsection (b)(1) shall receive compensation for each day engaged in the actual performance of duties vested in the Committee at rates of pay not in excess of the daily equivalent of the highest rate of basic pay then payable under the General Schedule of section 5332(a) of Title 5, United States Code, and in addition shall be reimbursed for travel, subsistence and other necessary expenses.

(c) After consultation with the Committee, the Federal Administrator shall annually distribute the funds received under section 201(c) among the executive agencies of the Federal Government having criminal law enforcement responsibilities, for the purpose of improving assistance to the victims of Federal crime. The funds may be expended for activities such as:

(1) the establishment and maintenance of victims assistance positions or units;

(2) the establishment and maintenance of services such as crisis intervention counseling services, followup counseling services, information and referral services, and on-call systems for the victims of Federal crimes;

(3) the training of Federal law enforcement personnel (including court personnel) in the delivery of victims assistance services;

(4) dissemination of information about Federal victims assistance services; and

(5) such other related purposes as the Federal Administrator may deem appropriate.

The Federal Administrator shall seek to avoid duplicating assistance already effectively provided by local organizations.

(d) The Federal Administrator shall be responsible for overseeing Federal compliance with the Guidelines for Fair Treatment of Federal Crime Victims and Witnesses required by section 6(a) of the Victim and Witness Protection Act of 1982, Public Law 97-291. The Attorney General may direct the Federal Administrator to perform such other functions related to the purposes of this title as he may deem appropriate.

(e) Any funds awarded under Section 201(c) which remain unspent in any fiscal year may be expended for the purposes of this section at any time over the next two fiscal years, at the expiration of which time any remaining unspent funds shall revert to the Fund for redistribution pursuant to section 203.

PART C—ADMINISTRATIVE PROVISIONS

SEC. 301. Within 1 year from the enactment of this title, the Director of the Administrative Office of the United States Courts shall submit a report to the Attorney General setting forth the steps it has taken to (1) improve the accurate accounting of collections of criminal fines and (2) assure that all collected criminal fines are deposited in the Fund. The report may also set forth recommendations for future action by the Federal Government that would best assure collection of all criminal fines imposed by the courts.

SEC. 302. (a) Sections 701, 702, 703, 708; 709, and 710 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, are applicable to all recipients of funds disbursed under this title.

(b) The Attorney General is authorized to establish such rules, regulations, guidelines, and procedures as are necessary to the exercise of his functions under, and as are consistent with, the stated purposes of this title.

(c) No later than December 31, 1987, the Attorney General shall report to the President and to the Committees on the Judiciary of the Senate and House of Representatives on the amount of funds collected from each source listed in section 101 of this title, and on the effectiveness of the activities supported pursuant to sections 202, 203, and 204 of this title. The Attorney General shall also set forth recommendations for legislation to improve the ability of the Department of Justice to fulfill the purposes of this title.

(d) Deposits shall be made in the Fund pursuant to section 101 of this title until September 30, 1988. No deposits shall be made after that date without further authorization by Congress. Amounts remaining unobligated in the Fund after Septem-

ber 30, 1988, shall revert to the general fund of the Treasury.

SEC. 303. This Act does not modify or repeal the provisions contained in section 11 (d) of the Endangered Species Act of 1973 (16 U.S.C. 1540) or section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C. 3375).

PART D—DEFINITIONS

SEC. 401. (a) As used in this title—

(1) "crime" means a criminal offense as defined by Federal, State, or common law, or an act which would constitute such an offense but for the fact that the perpetrator of the act lacked capacity to commit the offense, but does not include an offense prosecuted in Indian tribal courts or Courts of Indian Offenses.

(2) "criminal fines" means all pecuniary punishments imposed by a Federal court upon a person, a corporation, or other entity convicted of a crime (including all fines imposed for criminal violation of motor vehicle and anti-trust laws) and all money derived from forfeited appearance bonds posted by Federal criminal defendants, but does not include criminal fines imposed by Indian tribal courts or Courts of Indian Offenses.

(3) "financial compensation" means payment of money to victims of crime for expenses and losses arising out of the criminal incident that are compensable under State law, including limited emergency financial assistance.

(4) "fiscal year" means the period beginning October 1 of one calendar year and ending September 30 of the next calendar year.

(5) "population" means total resident population based on data compiled by the United States Bureau of the Census and referable to the same point or period in time.

(6) "representative of the victim" means a parent or legal guardian of a victim who is a minor, or a parent, legal guardian, or spouse of a deceased victim.

(7) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., March 6, 1984.

The VICE PRESIDENT,
U.S. Senate, Washington, D.C.

DEAR MR. VICE PRESIDENT: Enclosed for your consideration and appropriate reference is the "Victims of Crime Assistance Act of 1984", a legislative proposal that would establish a Crime Victims' Assistance Fund in the Treasury for the purposes of providing Federal financial assistance to State victim compensation programs and improving the assistance offered by every level of government and the private sector to victims of crime.

The bill implements many of the recommendations made by President Reagan's Task Force on Victims of Crime. The Task Force presented three strong rationales for establishing a program of Federal assistance in this area. The first is that, at present, the States are shouldering the entire burden of compensating victims of crime. The Federal government, however, has a significant interest in compensating and otherwise assisting victims of crime. By helping the criminal justice system to actually work for the benefit of the innocent victim, the Federal government can assure greater cooperation between victims and the system to the substantial benefit of law enforcement nationally. Creation of the Fund will help the government restore public confidence in the efficiency and integrity of the criminal justice system.

Second, the States are frequently unable to adequately support their victim compensation programs with their own fund sources. Without Federal aid, State programs will be unable to reimburse many eligible victims and claim payments will continue to be delinquent. Finally, and perhaps most importantly, the risk that States will seek to alleviate their financial problems in this area by declining to compensate the victims of exclusively Federal crimes demands Federal involvement to protect that class of victims.

The trust of the legislation is to place the Federal government in a leadership role without creating an unnecessary bureaucracy to impose the Federal government's priorities on the States. Under the bill, the Federal government will provide money to the States to enable the States to effectively run their own programs. The States will continue to make their own policy choices concerning, for instance, types of crimes covered, award limits, and eligible beneficiaries. The legislation provides for only minimal Federal guidance in areas of substantial Federal interest that will not interfere with a State's discretion to run its own program as it sees fit.

Criminals—not innocent taxpayers—will provide the money for the Fund. The principal source of funding is the total of all criminal fines collected from convicted Federal defendants, including anti-trust fines. Criminal fines are also defined to include fines imposed for criminal violation of Federal motor vehicle laws, and forfeited appearance bonds posted by Federal criminal defendants. In this regard, the Director of the Administrative Office of the U.S. Courts will be required to report to the Attorney General within one year after the bill's enactment, informing him of the steps it has taken to improve the accounting of criminal fines.

The Fund will also receive the proceeds of any contract entered into by any Federal defendant for the sale of literary or other rights arising from his criminal act. This proposal, modeled after the "Son of Sam" laws enacted by 15 States, responds to the "Victim and Witness Protection Act of 1982" 's requirement that the Attorney General report to Congress regarding any Federal laws necessary to ensure that Federal felons do not profit from selling the story of their crimes.

Fifty percent of the money deposited in the Fund will be available for distribution annually to those States with operating victim compensation programs for the purpose of reimbursing them for 10 percent of their payouts under those programs. To be eligible for this funding, a State must provide the same compensation to nonresident victims as it does to residents, and the same compensation to victims of Federal crimes as it does to victims of State crimes. The States must also agree to compensate victims for mental health counseling required as a result of their victimization.

Thirty percent of the Fund will be distributed to the States (and the territories and commonwealths of the United States) on the basis of their population for the purpose of improving the assistance provided to victims of crime by State governments, local units of government, and nonprofit organizations. To be eligible to receive funding from this portion of the Fund, organizations must demonstrate a record of quality assistance to victims, promote the use of volunteers, demonstrate a commitment from other organizations to provide necessary services to all victims of crime, and assure coordination with other service providers.

The remaining 20 percent of the Fund will be distributed among Federal law enforcement agencies for the purpose of improving the assistance offered by the Federal government to victims of crime. This money could be spent for establishing victims assistance positions or units in Federal agencies, providing services to the victims of Federal crimes, training Federal law enforcement and court personnel in victims assistance, and disseminating information about Federal victims assistance services. A Federal Victims Assistance Administrator appointed by the Attorney General will administer this share of the Fund. The Administrator will be guided by a Federal Victims of Crime Advisory Committee to be appointed by the President.

In addition, our proposal provides the victim an opportunity to speak at a Federal parole hearing about the emotional, psychological, physical, and financial impact a prospective parolee's crime had on his or her life.

The legislation contains a sunset date of September 30, 1988 and incorporates administrative provisions of the Omnibus Crime Control and Safe Streets Act, as amended, concerning nondiscrimination, audit of fund recipients, and confidentiality of information.

Enclosed for your review is a section-by-section analysis of the proposal.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this legislation to the Congress and that its enactment would be in accord with the program of the President.

Sincerely,

WILLIAM FRENCH SMITH,
Attorney General.

Enclosure.

SUMMARY OF VICTIMS OF CRIME ASSISTANCE ACT OF 1984

(1) Creates a Crime Victims' Assistance Fund in the Treasury.

(2) Funds to come from the following sources:

All criminal fines collected from convicted Federal defendants, including criminal antitrust and motor vehicle violation fines, and forfeited appearance bonds.

All proceeds of any contract entered into by any Federal defendant for the sale of literary or other rights arising from his criminal act.

(3) A victim of crime shall have the right to speak at Federal parole hearings about the impact a defendant's crime has had on his or her life.

(4) 50 percent of Fund will be available to States for victims' compensation on basis of 10 percent of State's prior year compensation payout. 30 percent to States for other victims assistance on basis of State population. 20 percent to Federal Government for providing assistance to victims of Federal crime.

(5) Compensation (50 percent) Pool: No State can receive more than 10 percent of its prior year payout. To be eligible, State must provide same compensation to nonresident victims as residents and same compensation to victims of Federal crimes as State

crimes. State must also compensate mental health counseling required as result of victimization.

(6) Assistance (30 percent) Pool: State Victims Assistance Administrator shall award money to non-profits or public agencies which demonstrate a record of quality assistance to victims, promote the use of volunteers, demonstrate financial support from other sources, demonstrate a commitment from others to provide other necessary services, and assure coordination with other victim services providers.

(7) Federal Assistance (20 percent) Pool: Federal Victims Assistance Administrator in DOJ shall award money to Federal law enforcement agencies for establishing victims assistance positions, providing services to Federal victims, training Federal law enforcement personnel in victims assistance, and disseminating information about Federal victims assistance services. Administrator shall consult with Federal Victims of Crime Advisory Committee appointed by President.

(8) Director of Administrative Office of U.S. Courts shall report to AG In 1 year on improvements in accounting of criminal fines. Certain administrative provisions of Crime Control Act apply to this Act. AG has authority to promulgate necessary regulations. Sunset date of September 30, 1988.

VICTIMS OF CRIME ASSISTANCE ACT OF 1984

SECTION-BY-SECTION ANALYSIS

On April 23, 1982, President Reagan issued Executive Order No. 12360 establishing a Task Force on Victims of Crime. The Task Force heard formal testimony in six cities from over 200 witnesses, including Attorney General Smith, consulted approximately 1,000 other experts and victims, and ultimately made 68 recommendations to the President about specific actions that could be taken by each branch of the Federal government, the states, local units of government, and non-profit organizations.

One of the Task Force's major recommendations for Federal action was enactment of legislation that would provide funds to the States to assist them to both financially compensate and provide services to victims of crime.[1] The Victims Task Force gave several justifications for this recommendation. They pointed out that although 36 states, the District of Columbia, and the Virgin Islands have recently enacted some type of victims' compensation program, approximately half of these states have already experienced instances of insufficient funds to meet outstanding eligible claims.

The Task Force Report explained that Federal financial assistance to State compensation programs was sorely needed:

• • • [S]tate programs now share a common concern, the acquisition of adequate funding . . . Victim claims may have to wait months until sufficient fines have been collected or until a new fiscal year begins and the budgetary fund is replenished. Creditors are seldom patient. While waiting for funding that will eventually come, victims can be sued civilly, harassed continually, or forced to watch their credit rating vanish. Not only is compensation important, its payment also must be timely to save victims inconvenience, embarrassment and substantial, long-term financial hardship.

The availability of unencumbered emergency assistance is also critical to many victims of violence. Immediate needs for food, shelter, and medical assistance cannot be deferred for the weeks or months it may take to process paper work. Task Force Report, p. 39.

The most reliable available crime data bears out the Task Force's conclusions. The FBI's Uniform Crime Reports for 1981 shows that 1,083,184 incidents of violent crime (defined as murder, forcible rape, robbery, and aggravated assault) were reported in the 32 jurisdictions that then had operational victims compensation programs.[2] Yet only 17,054 victims of crime in those jurisdictions—less than 2 percent of the total number of victims—received compensation awards over a comparable period of time.[3]

Another compelling reason for Federal involvement given by the Task Force is the lack of coverage for victims of Federal crime. Currently, the States which have compensation programs make no distinction between Federal and State crimes. However, because of the financial problems summarized above, States may soon choose to stop compensating victims of Federal crimes. Without Federal assistance to relieve the financial burden that compensating Federal victims places on the States, Federal crime victims may not receive any compensation in some States, or receive compensation in others only when the State elects to prosecute a crime over which there is joint Federal-State jurisdiction.

The only other alternative that would assure compensation to Federal victims of crime is the creation of new Federal bureaucracy to provide such assistance directly. The duplicative and cost-ineffective nature of this alternative, however, makes it a politically and financially less attractive proposal. The Task Force rejected this cumbersome approach, favoring instead the approach taken in this legislation which does not call for new Federal bureaucracies, budgets, or regulations.

Other, non-financial, assistance to victims is often more critical than monetary compensation. Crisis intervention services and mental health counseling, for example, are often essential to the welfare of the victim. Other services, such as providing information to victims about the status of criminal proceedings and establishing secure waiting areas in courthouses are equally valuable to victims and prosecutors. All these services, however, are frequently not provided at all or inadequately provided because the agencies established to provide them are underfunded. The need for Federal aid to the providers of victim services was summarized by the Task Force as follows:

In spite of their good record of performance, victim/witness assistance units have recently encountered serious financial difficulties as governments across the nation have been forced to make budget cuts. • • •

From a fiscal standpoint, it is indeed unfortunate that the very existence of victim/witness assistance units is in doubt in many jurisdictions. A well-run unit can be extremely cost effective. It is expensive to arrest someone and prosecute him in court. When the case is dismissed because the witnesses were not notified or failed to appear out of frustration with the criminal justice system, that money is simply wasted. Meanwhile, the freed defendant may commit more crime. • • •

• • • The view of the Task Force is that although the federal government should not fully subsidize such units, their praiseworthy efforts must be encouraged, both by assisting units already in existence and by providing incentives for the initiation of new programs. There are many jurisidictions in this country in which victims of violent crime receive little or no help. This failure to assist those whom the system exists to serve and on whom it depends is unacceptable. Task Force Report, pp. 47-48.

The Task Force consequently proposed an outline of Federal legislation to address these needs. The attached bill is a response to the Task Force's recommendation for Federal legislative action in this important area. The legislation seeks to provide Federal assistance to the States without unduly interjecting the Federal Government into the working relationships now existing between the States, victim service providers, and victims. The bill is based on the premise that the Federal Government has two fundamental responsibilities in this area: to lead by example; and to assist the States in providing adequate benefits to the victims of crime.

Part A—Establishment of the crime victims' assistance fund

Section 101 of the bill establishes a special fund in the Treasury to be known as the Crime Victims' Assistance Fund ("Fund"). Money for the Fund would come exclusively from convicted criminals. The Fund would receive:

1. all criminal fines imposed in Federal cases (including fines imposed for criminal violation of motor vehicle and anti-trust laws) and forfeited appearance bonds posted by Federal criminal defendants; and

2. all royalties and other money paid to a convicted Federal defendant as a result of any contract to depict his crime in the media.

A brief analysis of these sources and their relation to other sections of part A follows:

(1) *Criminal Fines.*

All criminal fines imposed by a Federal court and collected by any officer of the Federal government would be deposited in the Fund. This includes fines imposed for criminal anti-trust and motor vehicle violations, as well as forfeited appearance bonds posted by defendants.

The best, most recent figures on criminal fines collected by the courts indicate that just under $72 million in fines was collected in fiscal year 1983. This figure, however, may be unreliable because it is derived from accounts maintained by the Administrative Office of the United States Courts that do not identify collected fines as civil or criminal. GAO is presently examining this issue and hopes to have a draft report available for the Department of Justice in the near future. Section 301 of the bill would require the Director of the Administrative Office of the United States Courts to report to the Attorney General within one year after the bill's enactment on what steps have been taken to improve the accounting of criminal fines and to assure the deposit of fines in the Fund. The report shall also make other

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[1] Victim compensation program typically compensate victims of violent crime for unreimbursed medical expenses and loss of wages. Some States also pay funeral expenses and loss of support for victims' dependents, as well as the cost of required prosthetic devices, certain non-medical care, and emergency aid such as the cost of a night's lodging.

[2] FBI Uniform Crime Reports, "Crime in the United States" (1981), pp. 46-57. No report was made for the Virgin Islands, one of the 37 jurisdictions.

[3] Abt Associates, Inc. "Compensating Victims of Crime: An Analysis of American Programs" (May 1983), pp. 193-195. This figure does not include Connecticut, which did not report the number of claims awarded for FY 1981.

recommendations for future Federal action to improve the collection of fines.

Absent reliable data on the amount of fines being collected now, it is not possible to definitely project how much money would be realized in the Fund from this source. It is our expectation, however, that with improved accounting techniques and the enactment of the collection procedures delineated in the Administration's "Comprehensive Crime Control Act of 1983", this source of funds would provide approximately $45-75 million for the Fund its first year.

(2) *Sale of Rights Arising From A Criminal Act.*

Sections 102 and 103 of the bill would establish a procedure under which any money due a criminal defendant under a contract entered into for the purpose of recounting or depicting his crime shall be paid into the Fund. These sections are based on the "Son of Sam" laws first enacted in New York and now in place in 15 States.

Section 102 would add a new Rule 32.2 to the Federal Rules of Criminal Procedure. The new rule would authorize a United States District Court judge, at any time after the filing of an indictment of information against a defendant, to order any person or organization with whom the defendant has contracted "for the purpose of having his crime or alleged crime depicted in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind or for the purpose of expressing his thoughts, opinions or emotions regarding such crime" to pay in to the clerk of the court any money which would otherwise be paid to the defendant, his representative, or a third party under the contract. Before entering the order, the court would be required to hold a hearing at which the defendant, the person or organization with whom he contracted, any third party beneficiary of the contract, and the victim would be permitted to speak. The purpose of the hearing is to permit the court to determine whether the order would be warranted in the interests of justice, or to redress the injuries of the victim. The defendant or any third party to the contract would have the opportunity to present any legal challenges to such an order at this hearing.

Under Section 103, any monies paid into the clerk would be deposited in the Fund for the benefit of any victim of the defendant's crimes. The victim could receive the funds only after securing judgment in a civil action brought against the defendant for damages arising out of the crime. If no action was filed within 5 years after the first deposit of money into the Fund, the money would become part of the Fund. The only other use to which the money could be put would be the payment of the defendant's legal defense fees. No more than 20 percent of the money put into the Fund with respect to the defendant could, however, be used for that purpose. Upon dismissal of the charges or acquittal of the defendant, the clerk would immediately pay over to the defendant all money paid into the Fund with respect to the defendant.

These sections may serve as a deterrent to any contract ever being entered between a defendant and another party for the purposes listed above. As a result, no funds may ever be deposited in the Fund from this source. New York's experience, however, has shown that funds may be forthcoming from contracts entered into prior to the law's enactment, and that some defendants still enter into such contracts in hope of getting better treatment on parole. No projection of anticipated funding from this source can, therefore, realistically be made at this time.

The bill would also provide victims the opportunity to appear at Federal parole hearings to inform the Parole Commission of the emotional, psychological, physical, and financial impact a prospective parolee's crime had on their lives. Sec. 104.

Part B—Disbursements

Section 201 of the bill authorizes the Attorney General to make annual grants from the Fund to the States for the purpose of compensating and providing services to victims of crime. 50 percent of the funds will be available for distribution to the States on the basis of their victims compensation payouts during the preceding fiscal year for the purpose of reimbursing each State for 10 percent of its prior year payout. 30 percent will be distributed to the States on the basis of their respective populations for the purpose of supporting victim services in the State. 20 percent will be spent by the Federal government for the purpose of providing services to the victims of Federal crime. Each of these funding pools will be discussed in turn below.

Victims' Compensation

As noted earlier, 38 jurisdictions now provide compensation to victims of crimes committed in their States. Only those 38 jurisdictions would, therefore, be presently entitled to share in the "victims compensation" pool. Under Section 202 of the bill, a State (defined to include territories and commonwealths) would be eligible to share in the pool if:

(1) Its chief executive certifies the amount of money spent by the State in the preceding year to compensate victims of crime;

(2) The chief executive certifies that the funds received will not be used to supplant available State funds, but to increase the amount of money spent by the State on victims compensation;

(3) The State provides the same financial benefits to victims who are nonresidents of the State as it does to resident victims;

(4) The State provides the same financial benefits to victims of Federal crimes committed in the State as it does to victims of State crimes; and

(5) The State provides compensation for mental health counseling required by individuals as a result of their victimization.

Money from the Fund could not be used to pay administrative expenses of the State's victims compensation program. Further, no one State could receive more than 10 per cent of its prior year spending for victims' compensation. Any money remaining in the pool after the States had received their allocations would be deposited in the General Fund of the Treasury.

Victims Assistance

Under Section 203 of the bill, funds received by the States from the 30% "victims assistance" pool would be used for the purpose of providing services, other non-financial assistance, and limited emergency financial assistance to victims of crime. The choice of grantees is a responsibility of the States. The bill imposes only those broad conditions of eligibility necessary to assure the delivery of quality assistance by responsible, experienced victims assistance organizations.

Each State would be obligated to appoint or designate a State official to be the State Victim Assistance Administrator. The Administrator would be responsible for awarding the funds to eligible recipient organizations in the State, administering the awards, and monitoring the fiscal and programmatic performance of fund recipients.

Recipient organizations eligible for victim assistance funding would be non-profit organizations, agencies of State or local governments (or combinations of such entities) which provide crisis intervention services, assistance to victims participating in criminal justice proceedings, or assistance in securing victim compensation benefits.

An eligible recipient organization could be considered for funding only if it further: demonstrates a record of quality assistance to victims; promotes the use of volunteers in its service delivery; demonstrates financial support from sources other than the Fund; demonstrates an established commitment from other locally available service providers to provide the services it does not provide, to all victims of crime; and assures that it will coordinate with other public agencies and private organizations for the purpose of providing services to victims of crime. Sec. 203(a)(2).

The State could expend victims assistance money received from the Fund at any time over 3 fiscal years, at the expiration of which time any unexpended money would revert to the Fund.

Federal Victims Assistance

Section 204(a) directs the Attorney General to appoint or designate a Department of Justice official to be the Federal Victim Assistance Administrator. The Federal Administrator would be responsible for the distribution of the 20 per cent "Federal victim assistance" funding pool among Federal law enforcement agencies for the broad purpose of "improving assistance to the victims of Federal crime." Sec. 204(c). The legislation identifies the following activities as appropriate areas for funding: establishment and maintenance of victims assistance positions or units; establishment and maintenance of services such as crisis intervention counseling, following counseling, information and referral services, and on-call systems; training of Federal law enforcement personnel (including court personnel) in the delivery of victims assistance services; and dissemination of information about Federal victims assistance services.

The Federal Administrator must seek to avoid funding activities that duplicate assistance already effectively provided by local organizations. The Administrator would also be responsible for overseeing Federal compliance with the "Guidelines for Fair Treatment of Federal Crime Victims and Witnesses" enacted pursuant to the Victim and Witness Protection Act of 1982, Pub. L. 97-291, 18 U.S.C. 1512 (note).

Prior to expending any funds, the Federal Administrator would be required to consult with a Federal Victims of Crime Advisory Committee established by the President. The Committee would be chaired by the Attorney General, and would include the Secretary of the Treasury (to represent, among others, the Secret Service), the Secretary of the Interior (to represent, among others, the Park Police and the Indian Police), the Federal Administrator, such other Federal officials as the President may appoint, and at least two members of the public who have special knowledge of the needs of victims. The Committee would also make periodic recommendations to the President about other actions the Federal government could take to improve treatment of the victims of Federal crime.

The Federal Administrator could expend funds received under the Act at any time over 3 fiscal years, at the end of which time the money would revert to the Fund and be redistributed for the purpose of improving State and local victims assistance services pursuant to section 203.

Part C—Administrative provisions

As noted earlier, section 301 of the Act would require the Director of the Administrative Office of the United States Courts to submit a report to the Attorney General within one year of the bill's enactment, explaining the steps it has taken to (1) improve the accounting of the amounts collected, and (2) assure that all such money collected will be deposited in the Fund. The report may also make recommendations for future Federal action to improve the collection of fines.

Section 302(a) of the Act would apply certain administrative requirements of the Omnibus Crime Control and Safe Streets Act, Pub. L. 90-351, 42 U.S.C. 3701, as amended, to the funds awarded under the Act. These requirements are the hearing and appeal procedures available to terminated grantees, nondiscrimination provisions, audit requirements, and confidentiality of information provisions. This section also authorizes the Attorney General to promulgate such regulations as are necessary to the exercise of his functions under the Act.

Section 302(d) imposes a "sunset" date of September 30, 1988 on the Fund. The Attorney General would be required to report to the President and the House and Senate Judiciary Committees no later than December 31, 1987 on the effectiveness of the legislation.

Section 303 authorizes the Secretary of the Treasury to continue to pay rewards and make other statutorily authorized payments out of criminal fines collected for violations of the Endangered Species Act and the Lacey Act.

Part D—Definitions

"Crime" is defined by section 401(a)(1) of the Act to mean "a criminal offense as defined by Federal, State, or common law, or an act which would constitute such a crime but for the fact that the perpetrator of the act lacked capacity to commit the crime." The definition expressly excludes offenses prosecuted in Indian tribal courts or Courts of Indian Offenses.

"Criminal fines" is defined to mean all pecuniary punishments imposed by a Federal court on a convicted defendant (including all fines imposed for criminal violation of motor vehicle and anti-trust laws) and all forfeited appearance bonds posted by criminal defendants, but to exclude all criminal fines imposed by Indian tribal courts or Courts of Indian Offenses.

"Financial compensation" is defined by section 401(a)(3) of the bill to mean "payment of money to victims of crime for expenses and losses arising out of the criminal incident that are compensable under State law, including limited emergency financial assistance." It is the intent of the legislation to defer to the individual State's judgment concerning which injuries and losses are compensable, rather than to impose a national Federal standard. For the same reason, the term "victim" is left undefined in this Act.

The terms "fiscal year", "population", "representative of the victim", and "State" are also defined in section 401.

● Mr. HEINZ. Mr. President, I am pleased today to join my distinguished colleagues Senator THURMOND, and Senator LAXALT, in introducing S. 2423, the Victims of Crime Assistance Act of 1984. This bill will provide Federal funding to assist State crime victim compensation programs, State crime victim assistance programs, and Federal victims assistance programs.

This legislation will implement recommendations of the President's Task Force on Victims of Crime which concluded that the treatment of victims by our criminal justice system has been careless and shameful. In words of the task force, "Innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended."

I introduced legislation to begin to address this problem in 1982, with my distinguished colleague and friend, the Senator from Nevada (Mr. LAXALT), and 25 cosponsors. I am pleased to note that this legislation—the Omnibus Victims Protection Act of 1982—was passed by Congress and signed into law on October 12, 1982. In March 1982, with my distinguished colleague from Iowa, Senator GRASSLEY, I introduced legislation designed to more fully address the needs of the millions of Americans who are victimized by crime each year. The elements of this legislation, S. 704, the Federal Crime Victims Compensation Act, were based upon key recommendations of the President's task force. I am pleased to see that the bill we are introducing today is quite similar to S. 704.

Before I describe the bill, I would like to illustrate, in human terms, the problem it addresses. In September 1981, the Senate Committee on Aging, which I chair, held a hearing on older Americans and their fear of crime. One of the witnesses at that hearing was Mrs. Harriet Cunningham of Chester, Pa. Mrs. Cunningham was 77 years old at that time. She was a victim of a robber who snatched her shoulder bag and threw her to the ground. As a result of her fall, her shoulder blade and upper arm were shattered. Mrs. Cunningham's assailant was caught and convicted. He received a sentence of 2 to 4 years of incarceration, did his time and was released. One might say he paid his debt to society and was allowed to get on with his life. But what about Mrs. Cunningham? What about his debt to her?

Well, in December 1982, Mrs. Cunningham died. Pat Johnstone, the director of the senior safety project of Delaware County, Pa., informed me that the robbery and its repercussions were substantial contributing factors to Mrs. Cunningham's death. Mrs. Cunningham never knew a day free from pain after her assault. She had extensive surgery on her shoulder. She was hospitalized for 49 days and had outpatient therapy twice a week for more than 11 months. She was treated by several doctors but never regained the use of her hand. Because of the cost of these medical procedures, she had to give up her house and relocate.

Mrs. Cunningham was 1 of the more than 40 million Americans who are victimized each year. She is one of the many whose lives are shattered and fundamentally altered by random acts of violence and other crimes. Do you know how much restitution went to Mrs. Cunningham? The attacker was ordered to pay restitution in the grand total of $126. Perhaps the court was correct in judging this to be reasonable, based on the criminal's ability to pay. I do not know all of the facts. But this sum does not begin to reflect the financial impact of this crime on this Mrs. Cunningham or the other millions of Mrs. Cunninghams in this country each year. Her medical bills alone were 100 times greater than the restitution ordered. They were more than $12,000.

Mr. President, I wish I could say that Mrs. Cunningham's story was an isolated instance. There are thousands upon thousands of Americans who are running up huge medical bills and whose lives are being ruined by virtue of their status as victims. They do not chose that status. For reasons that are best understood by those most familiar with the intricacies of our criminal justice system, we are making a totally insufficient attempt to address these problems. We are not asking the Federal Government to compensate these victims for pain and suffering, but to compensate them to the extent of their real and out-of-pocket losses.

The bill we are introducing today will create a crime victims assistance fund. It does so, however, without any increase in the Federal budget deficit because it would not require any appropriation of Federal funds. In fact, the funding elements would generate funds sufficient to accomplish the purposes of the act and a potential surplus. Funds shall be collected from: First, all criminal fines collected from convicted Federal defendents including criminal antitrust and motor vehicle violation fines, and forfeited appearance bonds, and from second, all proceeds of any contract entered into by any Federal defendant for the sale of literary or other rights arising from his criminal act. It is estimated that these funding elements will generate from $45 million to $75 million a year. In addition, this bill gives a victim of crime the right to speak at Federal parole hearings about the impact a defendant's crime has had on his or her life.

Under the provisions of this bill, half of the total collected will be made available to States for victim compensation but no State can receive more

than 10 percent of its prior year compensation expenditures. Thirty percent of the fund would also be available to States to support their victim assistance programs. They shall award these moneys to nonprofit or public agencies which demonstrate a record of quality assistance to vicitms, promote the use of volunteers, demonstrate financial support from other sources, demonstrate a commitment from others to provide other necessary services, and assure coordination with other victim services providers. The remaining 20 percent of the fund would support Federal law enforcement agencies in establishing vicitms assistance positions, providing services to Federal victims, training of Federal law enforcement personnel, and disseminating information about Federal victims assistance serevices. Funds generated in excess of the needs of these compensation and victim assistance programs would be transfered out of the crime assistance fund and into general revenues.

We must not be deaf to the pleas of those who have been victimized. Without the cooperation of victims, the criminal justice system would collapse. We must not forget it was their interest which the criminal justice system was organized to protect; 2 years ago, we began to recognize their needs. This legislation would extend the purpose we embraced in enacting the Omnibus Victims Protection Act and more fully protect the rights and needs of those who have been victimized.●

By Mr. KENNEDY (for himself, Mr. PELL, Mr. RIEGLE, and Mr. CRANSTON):

S. 2424. A bill to provide for the solvency of the medicare program and to reform the health care financing system; referred jointly to the Committees on Labor and Human Resources and Finance, by unanimous consent.

MEDICARE SOLVENCY AND HEALTH CARE FINANCING REFORM ACT OF 1984

● Mr. KENNEDY. Mr. President, today, I am introducing the Medicare Solvency and Health Care Financing Reform Act of 1984, along with Senators PELL, RIEGLE, and CRANSTON. My colleague, Congressman RICHARD GEPHARDT of Missouri, who worked long and hard with me on the development of this bill, is introducing the bill in the House with a number of cosponsors.

This legislation has one very simple purpose—to prove to Congress and the country that there is a better way than the Reagan way to deal with the coming crisis over medicare.

Our alternative has already gained significant grassroots support around the Nation. Coalitions of senior citizens, workers, and low-income persons have already met to pledge their commitment and organize for action. These coalitions will lead a campaign to enact this legislation and make it the preeminent health issue of 1984.

When I came to the Senate in 1963, Congress was in the final stage of the long and successful battle to insure elderly Americans against the intolerable financial burden of serious illness. President Kennedy was proud of his role as the first President to propose medicare; he called it the unfinished business of social security, and he worked for it and fought for it as Senator and as President.

From the day it was signed into law 19 years ago, medicare has stood as a solemn promise by Congress and the Federal Government, under both Republican and Democratic administrations, that the miracles of modern medicine will not be denied to our senior citizens and that their golden years will be free from the fear of financial ruin because of illness.

Now, President Reagan has proposed to break that promise. His prescription for medicare is the bitter pill of steeper taxes on workers and fewer benefits and higher costs for the elderly.

The medicare solvency and health care financing reform bill will keep the promise of medicare. We can save medicare—and we can do so without raising taxes and without cutting benefits. We can end the present crisis—not by rationing health care for the elderly, but by restraining the soaring cost of health.

According to the latest estimate, the medicare trust fund will run out of money to pay its bills in 1990; by 1995, the accumulated deficit will reach $144 billion; and by the year 2005, it will exceed $1 trillion.

Medicare is teetering on the brink of bankruptcy today, not because benefits are too high or taxes are too low, but because the raging inflation in the cost of health is fueled by the current system. In the 20 years between 1960 and 1980, health care costs per capita have risen more than 1,000 percent, or four times as fast as the consumer price index. This inflation is not only a problem for medicare; it is a terrible drain on the Federal budget, threatens to price health care out of the reach of the American consumer, and burdens American business and labor as they struggle to compete in world markets. This disastrous inflation has been ignored by Government and welcomed by doctors and hospitals—and patients and citizens are powerless to prevent it.

It is the elderly who endure the heaviest burden. Because of surging costs and shrinking benefits, medicare now pays only 44 percent of total health care costs for senior citizens. In 1977, each elderly American paid an average of $700 for health care. This year, the figure will be $1,500, and by the year 2000, it will be $5,000. In 1984, the elderly will have to pay, on average, $1 in every $7 of their limited incomes for needed health care. Once again, as in the dark ages before medicare, the cost of illness is becoming the highest price that Americans have to pay for growing old.

You do not need a stethoscope to diagnose the cause of health care cost inflation. The system lacks any incentives for efficient, cost-effective provision of care. Hospitals and doctors charge too much; voluntary efforts for restraint have never worked; and Congress has always lacked the will to confront the powerful health lobby that feeds on this excess.

President Reagan has offered a harsh program of proposed and enacted benefit cuts that could take $1,000 from each senior citizen over a 5-year period, and do nothing to resolve the medicare crisis.

And that may be only the first wave of the Reagan assault. The administration's Advisory Council on Social Security has proposed to raise the age of medicare eligibility to 67; they want larger copayments and higher premiums for health care, a tax on health insurance benefits, new excise taxes, and a greater shift of costs to the private sector.

The legislation we are proposing will deal with the problem in a fairer and more effective way, though comprehensive reform of the wasteful way we pay for health care.

First and most important, we put strict limits on rising costs for hospital bills. Last year, Congress went partway by adopting a prospective payment system for medicare. But a medicare-only approach is doomed to fail. As long as hospitals and physicians remain free to charge other patients whatever the traffic will bear, inflation will continue out of control and the cost of medicare will continue to go up.

Our plan also establishes incentives for outpatient treatment in the many cases where hospital care is wasteful, unnecessary—and often unhealthy. We will reform the way doctors are reimbursed for services in the hospital, by consolidating physician and hospital charges into a single payment for each admission. Our plan also prohibits doctors from charging patients more than medicare permits. When an elderly citizen who is sick opens his door, he ought to find a doctor making a house call, not a bill collector charging him for what medicare does not pay.

Finally, our plan includes a number of features to promote competition in health care and to encourage States to design their own plans under broad Federal guidelines.

Enactment of this bill will put medicare on a sound financial footing. Instead of a worsening trillion-dollar deficit in the year 2005, the trust fund

will have a prospering $165 billion surplus. Our plan will save the private sector over $70 billion over the next 5 years and will reduce the Federal deficit approximately $30 billion during the same period.

President Kennedy worked long and hard for medicare. The stakes are just as high today as they were then, and the struggle to save medicare from the shameful Reagan attack will be no less arduous. The key is to put real limits on what doctors and hospitals can charge, and to put real competition back into the system.

I hope my colleagues in the Congress will work as hard to save medicare now as the Members did to enact it 20 years ago. The 30 million Americans who depend on medicare deserve to know that medicare truly is dependable.

Mr. President, I ask unanimous consent that the bill text and materials describing the health care cost inflation problem, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2424

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND TABLE OF CONTENTS OF ACT

SECTION 1. This Act may be cited as the "Medicare Solvency and Health Care Financing Reform Act of 1984".

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Sec. 7. Studies.

PROGRAMS FOR REFORMING THE HEALTH CARE FINANCING SYSTEM

SEC. 3. The Public Health Service Act is amended by adding at the end thereof the following new title:

"TITLE XXI—PROGRAMS FOR REFORMING THE HEALTH CARE FINANCING SYSTEM

PART A—STATE HEALTH CARE PROGRAMS

"INCREASED FEDERAL MEDICAL ASSISTANCE PERCENTAGE AND TEMPORARY EXEMPTION FROM FEDERAL LIMITS FOR STATES INDICATING AN INTENTION TO SUBMIT A STATE HEALTH CARE PLAN

"SEC. 2101. (a) If the chief executive officer of a State transmits to the Secretary, not later than one year after the date of the enactment of this title, a statement indicating that the State intends to submit a State health care plan described in section 2102, for purposes of making payments to such a State under section 1903 of the Social Security Act (and notwithstanding any other provision of title XIX of such Act) the Federal medical assistance percentage shall be 102 per centum of the Federal medical assistance percentage otherwise determined under section 1905(b) of such Act for that State for up to four calendar quarters beginning with calendar quarters after the date such notice is provided.

"(b) The Secretary shall exempt hospitals in a State from the prospective payment limits established under subpart I of part B for portions of accounting periods occuring during the first year of the transition period (as defined in section 2141(7)) if—

"(1) the chief executive officer of the State requests such treatment,

"(2) such officer indicates an intention to have implemented (not later than the end of the first year of the transition period) a State plan under this part, which will provide for a recoupment of any revenues received in excess of the amounts permitted under this part, and

"(3) the officer has agreed, with respect to such hospitals, that if a State plan under this part is not implemented by the end of the first year of the transition period, then the Secretary shall provide for such adjustment in the prospective payment limits under subpart I of part B as will provide for recoupment in the subsequent year of any revenues received in excess of the amounts permitted under that part.

"STATE HEALTH CARE PLANS

"SEC. 2102. (a)(1) The chief executive officer of any State may apply to the Secretary for the approval of a health care plan for that State for an initial period of up to thirty-six months, subject to disapproval under subsection (d). The officer may apply for an extension of such initial period for up to an additional twenty-four months in accordance with subsection (d)(3)(B).

"(2) The Secretary, upon request of the chief executive officer of a State, may provide technical assistance to the State in the preparation of a health care plan for approval under this part.

"(b)(1) The Secretary shall approve an application for a plan if the Secretary determines that the plan meets the applicable requirements of section 2103. The Secretary shall approve or disapprove the application within sixty days after the date the application is submitted.

"(2) If the Secretary does not approve a plan, the Secretary shall provide the State with a notice of the reasons why the plan may not be approved and an opportunity for a hearing on such disapproval.

"(c) In the case of any State with a plan approved under subsection (a) for any twelve-month period—

"(1) the provisions of subpart I of part B of this title shall not apply to accounting periods (or portions thereof) to which such plan applies;

"(2) the Secretary shall waive requirements for reimbursement (other than those relating to beneficiary cost sharing) under title XVIII of the Social Security Act for services furnished in such a State and covered under the plan during the twelve-month period; and

"(3) for purposes of making payments to such a State under section 1903 of the Social Security Act (and notwithstanding any other provision of title XIX of such Act) the Federal medical assistance percentage for that State shall—

"(A) for each calendar quarter ending in the first twelve-month period in which the plan is in effect, be 103 per centum (or 104 per centum in the case of an unrestricted medicaid plan) of the amount of the Federal medical assistance percentage otherwise determined under section 1905(b) of such Act, and

"(B) for each calendar quarter ending in any subsequent twelve-month period (except any extension period under subsection (d)(3)(B)), be 102 per centum (or 103 per centum in the case of an unrestricted medicaid plan) of the amount of the Federal medical assistance percentage otherwise determined.

For purposes of paragraph (3), the term 'unrestricted medicaid plan' means a State plan under title XIX of the Social Security Act which does not impose any limitation on the scope or duration of inpatient hospital services other than requiring that such services be medically necessary. Any increased Federal medical assistance percentage provided under paragraph (3) of this subsection for a calendar quarter shall be instead of any increased percentage permitted with respect to that calendar quarter under section 2101.

"(d)(1) The Secretary shall annually review the compliance of each plan approved under this part with the requirement of section 2103(b).

"(2) If the Secretary determines that the State has not complied with the requirement for the previous twelve-month period, the Secretary shall continue approval of the plan for the following twelve-month period if the chief executive officer of the State certifies to the Secretary that the plan will be in compliance with such requirement for the twenty-four-month period beginning with that previous twelve-month period.

"(3)(A) If the Secretary determines that a State has not complied with the requirement for two consecutive twelve-month periods, the Secretary may, at the Secretary's discretion, continue approval of the plan for the following twelve-month period only if

the chief executive officer of the State presents a credible plan for assuring that the State will be in compliance with such requirement for the thirty-six-month period beginning with the two previous consecutive twelve-month periods.

"(B) The Secretary may, at the Secretary's discretion, extend such thirty-six-month period for up to an additional twenty-four months but only if the Secretary finds that there has been established a trend such that the State will be in compliance with the requirement for the sixty-month period beginning with the first date in which the plan is in effect. During any such extension period, there shall be no increase in the Federal medical assistance percentage for the State under subsection (c)(3)(B).

"(4) In the case of a State which has failed to meet such requirement for two consecutive twelve-month periods (or, in the case of a State described in paragraph (3), thirty-six-month or longer period), the Secretary shall establish a Federal program under section 2131 with respect to hospitals in that State in a manner that assures that by the end of the first twelve-month period of such Federal program the revenues for hospital inpatient services will be at a level consistent with that required under section 2103(b) if the State had been in compliance with that level in all previous periods.

"REQUIREMENTS OF STATE HEALTH CARE PLANS

"SEC. 2103. (a)(1) In order to be approved under this part, a State health care plan must meet the general requirements for all such plans described in subsections (b) and (c) and, if applicable, the requirements of subsection (d) (relating to rate-setting plans). In meeting the requirements of subsections (b) and (c), a plan may be designed in a manner that meets such requirements through a rate-setting system, a voluntary system, or through the use of competitive mechanisms described in subsection (e). A plan may be designed so as to meet the requirements through different systems or mechanisms for different areas or hospitals within a State.

"(b)(1)(A) Except as provided in paragraph (3), the plan must be designed in a manner so as to provide, to the satisfaction of the Secretary, that—

"(i) the amount of the total revenues per discharge for inpatient hospital services for all hospitals in the State for each twelve-month period (beginning before 1987) in which the plan under this part is in effect may not exceed the base general hospital revenues per discharge (described in subparagraph (B)(i)) increased by the sum of (I) the compounded sum of the percentage limits computed under subparagraph (C) for that period and previous twelve-month periods for which the State plan under this part was in effect, and (II) the population-discharge factor described in subparagraph (D); and

"(ii) the amount of the total revenues per discharge for all services furnished to hospital inpatients for all hospitals in the State for each twelve-month period (beginning after 1986) in which the plan under this part is in effect may not exceed the sum of—

"(I) the base general hospital revenues per discharge (described in subparagraph (B)(i)) increased by the sum of the compounded sum of the percentage limits computed under subparagraph (C) for that period and previous twelve-month periods for which the State plan under this part was in effect, and the population-discharge factor described in subparagraph (D), and

"(II) the base physician-related hospital revenues per discharge (described in subparagraph (B)(ii)) increased by the sum of the compounded sum of—

"(a) the percentage limits computed under subparagraph (C) for that period and previous twelve-month periods for which the State plan under this part was in effect and provided for a limitation under this clause (ii) (instead of under clause (i)) and

"(b) the population-discharge factor described in subparagraph (D);

except that a State may, at its option, apply the test specified in clause (ii) instead of the test specified in clause (i) with twelve-month periods beginning before 1986.

"(B) For purposes of subparagraph (A):

"(i) The 'base general hospital revenues per discharge' for a State is the average limitation on the amount of the revenues per discharge for inpatient hospital services which was established for discharges of hospitals in the State under part B during the twelve-month period immediately preceding the first twelve-month period for which the plan is in effect, taking into account exceptions provided under section 2123, or, if such part was not in effect during that preceding twelve-month period, the average amount of the revenues per discharge for inpatient hospital services in the State during 1983 updated by the national average percentage increase in community hospital costs per discharge during the period between July 1, 1983 and the first day of the first twelve-month period for which the plan is in effect.

"(ii) The 'base physician-related hospital revenues per discharge' for a State is the average of the revenues per discharge of hospitals in the State for hospital inpatients (other than revenues attributable to inpatient hospital services taken into account under clause (i)) for the first year of the transition period, increased (for each year (or portion thereof) after such year and before the first twelve-month period in which the plan is in effect and provides for a limitation based on the test described in subparagraph (A)(ii)) by the percentage limit described in subparagraph (C).

"(C) For purposes of subparagraph (A), the 'percentage limit' is equal to such limit as established in accordance with the methodology established by the panel under subsection (c)(3)(B), but in no case may such limit exceed for a twelve-month period the applicable percentage limit described in subsection (b)(3)(B) of section 1886 of the Social Security Act (without regard to subsections (d) and (e) of that section) for that period.

"(D) For purposes of subparagraph (A), the 'population-discharge factor' for a State for a twelve-month period is the sum of—

"(i) the percentage increase or decrease in the population of individuals under sixty-five years of age in such State from the twelve-month period before the first twelve-month period in which the plan under this part is in effect in the State (or, in the case of the limitation described in subparagraph (A)(ii)(II), from the first twelve-month period before the first twelve-month period in which such limitation applies in the State to the twelve-month period before the twelve-month period involved, and

"(ii) one-half of the percentage by which the percentage increase (if any) in the number of hospital discharges of individuals under sixty-five years of age in such State during the period described in clause (i) exceeds the percentage increase or decrease described in such clause for that period.

The Secretary may adjust the percentage change described in clause (i) to take into account the net impact in hospital utilization in a State resulting from the use of hospital services in that State by individuals residing outside the State or resulting from a shift in hospital utilization by individuals residing in the State from utilization of hospitals outside the State to utilization of hospitals within the State, but only if, in making such adjustment, there is a corresponding adjustment made in the percentage change for the State in which such individuals reside.

"(2)(A) For purposes of this section—

"(i) in determining the revenues for inpatient hospital services of a hospital or the revenues for other services furnished to an inpatient of a hospital, except as provided in clauses (ii) and (iii) there shall be included all revenues (whether received by or through the hospital or any other entity) paid respecting the provision of inpatient hospital services or of other services, respectively, to the inpatient of the hospital;

"(ii) there shall be excluded from revenues for inpatient hospital services amounts paid in philanthropy or under research grants and contracts;

"(iii) except as provided in section 2143(c), there shall be excluded from revenues and discharges relating to services in a hospital amounts for such services paid by, and discharges attributable to, eligible organizations (as defined in section 2141(1));

"(iv) in establishing the base from which revenues are computed under a State system under this part for the first twelve-month period in which it is in effect, there shall be taken into account any reductions which would have otherwise been effected under section 2122(e)(1)(A) for portions of accounting periods of hospitals occurring during that period.

"(B) The plan may, with the approval of the Secretary, exempt revenues of hospitals and other persons from limits under the plan if—

"(i) the exemption is necessary to facilitate an experiment or demonstration entered into under section 402 of the Social Security Amendments of 1967 or section 1115 of the Social Security Act; and

"(ii) the experiment or demonstration is not inconsistent with the purposes of this title.

"(C) The plan must provide for such reports to the Secretary as the Secretary may require in order to monitor properly assurances provided under this section and the operation of the plan.

"(3) A plan under this subsection may, instead of meeting the requirements of paragraph (1), meet such other alternative test of constraint of health care costs as the Secretary determines will result in no greater expenditures of funds under title XVIII of the Social Security Act and by private payers than would have been made if the plan met the requirements of such paragraph.

"(4)(A) The plan must be designed in a manner so as to provide, to the satisfaction of the Secretary, that the amount of revenues for inpatient hospital services and physicians' services to hospital inpatients provided to individuals entitled to benefits under parts A and B of title XVIII of the Social Security Act, may not exceed the amount which would otherwise be payable (including copayments and deductibles) for

such services under the provisions of such title.

"(B) A plan (other than a plan providing for the establishment of rates of hospital reimbursement for hospital inpatient services) may provide that payment under title XVIII of the Social Security Act for inpatient hospital services and for other services furnished to hospital inpatients shall continue to be made in the amounts and in the manner otherwise provided under such title.

"(c)(1)(A) The unreimbursed costs incurred by hospitals in providing services to patients (other than medicare or medicaid patients) who are of low income and are uninsured or underinsured (as defined by the Secretary) shall be paid pursuant to the plan in the amount described in subparagraph (B) through distribution of funds pooled at the statewide level, through a higher payment rate, or through another method approved by the Secretary. If the plan provides for the determination of rates under a system described in subsection (d), payment of amounts to hospitals in a State under the previous sentence must be allocated among payors for inpatient hospital services in a manner that reflects the relative proportion of the payments for such services that are made by that payor (or class of payor), and shall be allocated among hospitals in proportion to the share of unreimbursed care provided by the hospital, except that—

"(i) the proportion of such amounts paid pursuant to title XVIII of the Social Security Act may not be greater than the proportion paid during the fiscal year before the first twelve-month period in which the plan is in effect (except to take into account any increase in the proportion of total revenues which are attributable to such title) and

"(ii) the proportion of such amounts paid pursuant to State plans approved under title XIX of such Act need not be greater than the proportion paid during the first year before the first twelve-month period in which the plan is in effect.

"(B) The amount provided to cover such unreimbursed costs (after reasonable efforts to collect debts) must, in the aggregate, be the same proportion of total revenues (including revenues from philanthropic payments and other sources of revenues other than revenues relating to research grants and contracts) as such unreimbursed costs are of total costs of patients who are neither medicare nor medicaid patients.

"(2)(A) The plan must have a mechanism for providing fair hearings for hospitals and any other entities aggrieved by determinations made under the plan.

"(B)(i) The plan must provide that any health planning or certificate of need law in the State (described in section 1527 of the Public Health Service Act) must provide for the exemption from the operation of such law of projects by or on behalf of health care facilities owned or controlled by, or serving predominantly individuals who are members of, eligible organizations (as defined in section 2141(1)).

"(ii) The plan may not provide for any limitation on the number of admissions or discharges which are attributable to members of eligible organizations.

"(C) The plan must assure that hospitals continue to meet Federal and State certification standards for quality of care.

"(D) The plan must provide for a method of assuring that hospitals do not engage in admissions practices prohibited during the transition period under section 2125.

"(3)(A) The chief executive officer of the State shall provide for the appointment of a panel, consisting of members with expertise in health care economics and service delivery consistent with subparagraph (C).

"(B) The panel shall advise in the development and implementation of the plan, periodically review and propose modifications to the plan, and establish the methodology for establishing a percentage increase to be used under subsection (b)(1)(C) under the plan. Such methodology shall include the use of appropriate external price indicators, the use of data from major collective-bargaining agreements for nonsupervisory hospital employees, and other appropriate indicators of wage costs. The Secretary shall approve the methodology and the percentage increase established by the panel under this subparagraph for goods and services other than the wages of nonsupervisory hospital employees unless the Secretary determines that the percentage increase exceeds, for any twelve-month period, the applicable percentage increase described in subsection (b)(3)(B) of section 1886 of the Social Security Act (without regard to subsections (d) and (e) of that section) for that period insofar as such increase is determined for goods and services other than wages of nonsupervisory hospital employees. The Secretary shall approve the methodology and the percentage increase established by the panel under this subparagraph with respect to the wages of nonsupervisory hospital employees unless the Secretary determines that the methodology is arbitrary and capricious. Whenever the percentage increase established by the panel for the wages of nonsupervisory hospital employees for a twelve-month period deviates substantially from appropriately weighted indicators of actual changes in such wages for that period, the Secretary shall instruct the panel to adjust the methodology and percentage increase appropriately for the following twelve-month period.

"(C) The panel shall include at least—

"(i) one member selected from a list of qualified individuals submitted by unions that represent health care workers and another member selected from a list of qualified individuals submitted by unions that represent other workers;

"(ii) one member who represents employers who provide health coverage for their employees;

"(iii) one member who is a consumer of health care services and is not affiliated with the health care industry;

"(iv) one member who is a representative of third-party payors for health care services;

"(v) one member who is a representative from a hospital;

"(vi) one member who is a physician and another member who is a registered nurse;

"(vii) one member who is an independent public member and who shall serve as chairman; and

"(viii) one member who represents the interests of senior citizens or senior-citizen organizations.

"(d) To the extent that the plan provides for meeting the requirements of subsections (b) and (c) through a system which provides for the establishment of rates for hospital reimbursement for hospital inpatient services by an entity other than the hospital, the plan must meet the following additional requirements:

"(1) Except as provided in paragraph (2), the plan must be designed and administered in a manner that provides equitable treatment under the plan of all entities that pay for health services covered under the plan, of employees of hospitals, and of patients receiving such services.

"(2)(A) If the plan is established under State law, the plan must take into account (whether on a per diem, per discharge, or other basis) the proportion of costs associated with, and services covered by, the different payors, including the medicare and medicaid programs, and may not permit undue shifting of proportions of costs among the different payors. Where there are large disparities among private payors in the amounts paid, the plan may provide for a phasing-out of the differences in payment amounts among such payors.

"(B) The plan may not make available any discount in price to any purchaser unless—

"(i) the discount is in an amount which accurately reflects identifiable and measurable economic benefits to that hospital resulting from a service or reimbursement arrangement with that purchaser, and

"(ii) the discount is made available to all other purchasers who can satisfy such service or reimbursement arrangement.

"(3) The plan must provide a procedure whereby, upon the request of a hospital, an adjustment can be considered to the rate limitation applicable under the plan to that hospital to reflect—

"(A) a significant change in the capacity or character of the inpatient hospital services available in the hospital or a major renovation or replacement of physical plant which has been approved by the State health planning and development agency or the State planning agency designated for purposes of section 1122(b) of the Social Security Act, if either such agency exists;

"(B) funds necessary to provide for the efficient operation of the hospital if the hospital (i) is a sole community hospital or provides a disproportionate percentage of its services, in comparison with facilities of similar size and urban or rural location, to low-income patients, (ii) would otherwise be insolvent, and (iii) should be maintained in the judgment of the State health planning and development agency (or other appropriate State agency);

"(C) higher expenses associated with the special needs and circumstances (including greater intensity of care) of the hospital because it is a regional tertiary care institution, teaching hospital, or children's hospital; and

"(D) increased costs for compensation of employees, including collectively bargained increases, adjustments to remedy shortage of personnel, or other adjustments necessary to maintain a qualified staff,

but only if any change due to which the adjustment is sought is not inconsistent with any applicable State health plan approved by the State health planning and development agency.

"(e) If the plan provides for control of hospital inpatient costs in whole or in part through a competitive mechanism, the Secretary shall, in reviewing the plan, take into account the degree to which the plan provides for the following or other measures to improve price competition among providers:

"(1) The plan provides for the establishment of one or more open enrollment periods permitting eligible individuals to elect to enroll, disenroll, or change the type of enrollment with private or public health benefits plans (whether providing prepaid care or otherwise).

"(2) The plan provides for the dissemination of such information concerning different health benefits plans (including benefit

structure and premiums) to individuals eligible to enroll with the health benefits plans as may encourage informed decisionmaking and competition in price among the plans.

"(3) The plan encourages innovation and public incentives to new forms of health care delivery and financing.

"(4) There are negotiated prices and risk-sharing between insurers and health care providers.

"(5) The laws of the State do not impose legal barriers to competition in negotiated and other arrangements among insurers and health care providers.

"PART B—RESIDUAL FEDERAL PROGRAM

"Subpart I—Transition Period

"PROSPECTIVE PAYMENT FOR PRIVATE PAYORS

"SEC. 2121. (a) Subject to the provisions of this subpart, for any accounting period of a hospital subject to this subpart the total revenues for inpatient hospital services may not exceed the total of such revenues that are permitted on the basis of prospective payment limits which are established under this subpart for the hospital's discharges (as classified by diagnosis-related groups).

"(b)(1) Each hospital subject to a limitation on revenues under this subpart shall provide for the publication of a price list which establishes the price per discharge (classified in accordance with diagnosis-related groups) which any payor may pay for inpatient hospital services. Such price list may include an outlier policy to provide for variations in the prices with respect to particular discharges classified within a diagnosis-related group to reflect differences in the lengths of stay or other costs associated with those discharges.

"(2) A hospital may provide from time to time for revision and republication of such price list.

"(3) Each such hospital shall provide for transmittal to the Secretary of each price list published under this section.

"(4) Nothing in this subpart shall be construed as preventing a hospital from taking into account, in its establishment of such a price list, bad debts and charity care related to inpatient care.

"ESTABLISHMENT OF PROSPECTIVE PAYMENT LIMITS FOR DISCHARGES CLASSIFIED BY DIAGNOSIS-RELATED GROUPS

"SEC. 2122. (a) The Secretary of Health and Human Services shall determine (for any accounting period of each hospital subject to this subpart) a prospective payment limit for inpatient hospital services for discharges classified by diagnosis-related groups established under subsection (b)(1). Subject to the remaining provisions of this subpart, the limit shall be determined for each hospital for discharges as follows:

"(1) DETERMINATION OF REVENUE PER DISCHARGE BASE.—The Secretary shall determine for the hospital—

"(A) the ratio of (i) the total revenues for inpatient hospital services to (ii) the number of discharges, for the most recent accounting period ending before January 1, 1984, for which adequate data are available (hereinafter in this subsection referred to as the 'base accounting period'), and

"(B) the classification and weighting factors for such discharges according to diagnosis-related groups established under subsection (b).

"(2) STANDARDIZATION OF DRG-SPECIFIC BASE AMOUNTS.—The Secretary shall determine for the hospital a standardized average revenues for inpatient hospital services per discharge for the base accounting period by adjusting the ratio described in paragraph (1)(A) to eliminate any effect attributable to the differing weighting factors determined under paragraph (1)(B) for discharges in the base accounting period.

"(3) UPDATING AMOUNTS.—The Secretary shall update each amount determined under paragraph (2) by—

"(A) updating to the transition period by the national average percentage increase in community hospital costs per discharge during the period between the midpoint of the base accounting period used under paragraph (1) and the first day of the transition period, and

"(B) increasing to the accounting period involved by the compounded sum of the percentage limits (specified in subsection (d)(1)) for that accounting period and previous accounting periods of the hospital to which this subpart applies.

"(4) COMPUTATION OF DRG-SPECIFIC MAXIMUM AVERAGE REIMBURSEMENT LIMITS.—For each hospital discharge classified within a diagnosis-related group, the Secretary shall compute a prospective payment limit equal to the product of—

"(A) the updated amount established under paragraph (3), and

"(B) the weighting factor (determined under subsection (b)(2)) for that diagnosis-related group.

"(5) ADJUSTMENT FOR CHANGES IN NUMBER OF DISCHARGES.—The Secretary shall adjust the hospital's prospective payment limits computed under paragraph (4) to take into account, in the manner described in subsection (e), a change in the number of discharges in the previous accounting period over a base number of discharges.

The Secretary shall notify each hospital of the prospective payment limits established under this section for each accounting period (or portion thereof) subject to the limits of this subpart and of the base number of discharges (established under subsection (e)(2)) for that hospital. Such notice shall, in the case of accounting periods beginning during the transition period, be in advance of the beginning of that accounting period.

"(b) For purposes of this title the Secretary shall, taking into account classifications and weighting factors established under section 1886(d)(4) of the Social Security Act—

"(1) establish a classification of inpatient hospital discharges by diagnosis-related groups and a methodology for classifying specific hospital discharges within these groups, and

"(2) assign, to each such group, an appropriate weighting factor which reflects the relative hospital resources used with respect to discharges classified within that group compared to discharges classified within other groups.

The Secretary may, from time to time, adjust such classifications and weighting factors to reflect changes in treatment patterns, technology, and other factors which may change the relative use of hospital resources.

"(c)(1)(A) This subpart shall not apply to accounting periods of a hospital ending before the first day of the transition period (as defined in section 2141(7)) or beginning after the date on which the hospital becomes subject to a program under part A.

"(B) In the case of an accounting period of a hospital that begins before the date on which the hospital becomes subject to a program under part A and ends after such date, the Secretary shall provide that the limits established under this subpart shall apply in a manner so as to reflect the portion of the accounting period subject to this subpart.

"(2) For purposes of this subpart in determining the revenues for inpatient hospital services of a hospital, there shall be included all revenues (whether or not received by or through the hospital or any other entity) paid (whether to the hospital or to other entities) respecting the provision of inpatient hospital services to an inpatient of the hospital.

"(3) In computing revenues and discharges under this subpart for a hospital's accounting period (including the base accounting period), in establishing the national average percentage increase in community hospital costs per discharge under subsection (a)(3)(A), and in determining the national average percentage increase in discharges to community hospitals under subsection (e)(2), there shall not be included revenues and discharges attributable to inpatients who, on the date of their admission, were entitled to benefits under part A of title XVIII of the Social Security Act or medical assistance under a State plan approved under title XIX of such Act and there shall not be included revenues attributable to philanthropy or to research grants and contracts.

"(4) The Secretary may provide for an adjustment to the prospective payment limits established under this subpart to the extent that the Secretary determines that—

"(A) the adjustment is necessary to facilitate an experiment or demonstration entered into under section 402 of the Social Security Amendments of 1967 or section 1115 of the Social Security Act; and

"(B) the experiment or demonstration is not inconsistent with the purposes of this title.

"(d)(1) The percentage limit referred to in subsection (a)(3)(B) for a hospital's accounting period is equal to the sum of—

"(A) the product of (i) the fraction of the accounting period that occurred before the first day of the transition period, and (ii) the national average percentage increase in community hospital costs per discharge (described in subsection (a)(3)(A)) from the midpoint of the base accounting period to the first day of the transition period; and

"(B) the product of (i) the fraction of the accounting period that occurred after the first day of the transition period, and (ii) the sum of (I) the percent increase in the labor-related expenses of the hospital (as defined in paragraph (2)(A)) for the accounting period, and (II) the percent increase in the nonwage marketbasket of the hospital (as defined in paragraph (2)(B)) for the accounting period.

"(2) As used in paragraph (1):

"(A) The term 'percent increase in labor-related expenses' means, for a hospital for an accounting period (or portion thereof), the product of—

"(i) the average percentage increase in the labor-related expenses paid by that hospital in the period over the labor-related expenses paid by the hospital in the preceding period per employee per hour to employees (other than to supervisors (as defined in section 2(12) of the National Labor Relations Act)) of the hospital; and

"(ii) the average fraction (as computed by the Secretary from time to time) of that hospital's expenses attributable to such labor-related expenses.

In order to provide hospitals with an estimate of the prospective payment limits es-

tablished under this subpart in advance of each accounting period (or portion thereof) subject to such limits, the Secretary, in estimating the average percentage increase in labor-related costs referred to in clause (i), shall, at the election of each hospital, either use the hospital's estimate of the average percentage increase in such costs that the hospital anticipates will occur or use the Secretary's estimate of the average percentage increase in such labor-related costs that will occur for the average hospital nationwide during the hospital's accounting period.

"(B) The term 'percent increase in the nonwage marketbasket' means, for an accounting period for a hospital, the sum of the products of—

"(i) the average percentage increase in the United States in the price of each appropriate class (as estimated by the Secretary prospectively before the beginning of the accounting period or, if greater and at the option of the hospital, as determined by the Secretary retrospectively at the end of the accounting period) of goods and services (other than those for services related to labor-related expenses described in subparagraph (A)(i)) in the period over the price of the class in the preceding accounting period; and

"(ii) the average fraction (as computed by the Secretary from time to time) of that hospital's expenses attributable to that class of goods and services.

The Secretary shall compute the fractions described in clause (ii) in a manner such that the sum of such fractions and the average fraction described in subparagraph (A)(ii) is equal to one.

"(e)(1)(A) If for a hospital's accounting period subject to this subpart the number of discharges exceeds the base number of discharges described in paragraph (2), then the prospective payment limits for discharges in the hospital in the subsequent accounting period shall be reduced by such amounts as may be necessary to provide that, in the aggregate for all discharges, the total revenues otherwise permitted under this subpart for the hospital will be reduced, in the aggregate, by 60 per centum of the product of (i) the prospective payment limit established under this subpart for discharges in that previous accounting period classified within the diagnosis-related group with the median weighting factor, and (ii) the number of such excess discharges for that previous accounting period.

"(B) If for a hospital's accounting period subject to this subpart the number of discharges is less than the base number of discharges described in paragraph (2), then the Secretary may, at the request of the hospital, provide that the prospective payment limits for discharges in the hospital in the subsequent accounting period shall be increased by such amounts as may be necessary to assure the hospital receipt of revenues sufficient to reasonably cover overhead costs.

"(2) For purposes of paragraph (1), the base number of discharges for a hospital is equal to the number of discharges in such hospital for the hospital's base accounting period (or, if higher, the average annual number of admissions to such hospital for the hospital's three accounting periods ending with such base accounting period), increased by a percentage equal to the estimated national average percentage increase in discharges to community hospitals during the period between the end of the hospital's base accounting period and the first day of the transition period.

"(3) An adjustment shall not be made under paragraph (1)(A) to the extent that a hospital can demonstrate that a net increase in discharges is attributable to inpatients who, on the date of admission, are entitled to benefits under title XVIII of the Social Security Act or to medical assistance under a State plan approved under title XIX of such Act.

"(4) The Secretary may by regulation provide for a lower percentage than the 60 per centum specified in paragraph (1)(A) in those cases where the Secretary determines that the increase in the number of discharges in a hospital—

"(A)(i) is extraordinary and is due to circumstances beyond the hospital's control, or (ii) is required to improve access to care; and

"(B) results in a ratio of revenues to costs per excess discharge which is greater than 40 per centum of the ratio of revenues to costs for discharges in the base accounting period.

"EXCEPTIONS

"SEC. 2123. (a) The Secretary, at the request of a hospital and at the Secretary's discretion, may increase the allowable revenues for an accounting period or provide for an increase in the base number of discharges otherwise permitted under this subpart to allow for higher revenues than would otherwise be permitted under the following conditions, pursuant to regulations established by the Secretary:

"(1) A major renovation or replacement of physical plant or significant change in the capacity of the hospital has occurred, which renovation, replacement or change either (A) has been approved by the State health planning and development agency (or other appropriate agency of the State) or (B) is exempt from such approval under law consistent with title XV of the Public Health Service Act, but only to the extent that this renovation or replacement increases capital costs more than the otherwise allowable percentage increase and to the extent that, and for such reasonable period as, these changes increase per discharge operating costs as a result of temporarily underutilized capacity.

"(2) The hospital is a sole community provider or provides a disproportionate percentage of its services (in comparison with facilities of similar size and urban or rural location) to low income or medicare patients, the hospital would otherwise be insolvent, and the State health planning and development agency (or other appropriate State agency) for the hospital has determined that the hospital should be maintained, but only to the extent that the revenues permitted are below the cost of efficiently operating the hospital.

"(3) A larger revenue increase is needed as a result of the special needs and circumstances of the hospital because it is a regional tertiary care institution, teaching hospital, or children's hospital.

"(4) Taking into account the outlier policy established under clauses (i) and (ii) of section 1886(d)(5)(A) of the Social Security Act and the relative severity of cases within classifications of diagnosis-related groups, there has been a significant change in the characteristics of the hospital's mix of patients classified within one or more diagnosis-related groups from those characteristics for patients in the hospital's base accounting period.

"(b) The Secretary may not increase the allowable revenues per discharge under the circumstances described in subsection (a) unless the circumstances justifying the exemption have been reviewed by the local Health Systems Agency (where one exists) and approved by the State health planning and development agency (or other appropriate agency of the State) as being consistent with the health plan for the area in which the hospital is located or unless such review or approval is not required consistent with title XV of the Public Health Service Act. In applying such exceptions to individual hospitals, the Secretary shall take into account the ability of the hospital to meet its costs through its own resources.

"(c) The Secretary may include in revenues for inpatient hospital services revenues from outpatient hospital services which were customarily rendered on an inpatient basis by the hospital during the base accounting period if the patient receiving such outpatient services was an inpatient during the period immediately preceding or following the rendering of such outpatient services, or may provide for such adjustment of the weighting factors established under section 2122(b)(2) for discharges classified in diagnosis-related groups affected by such a shifting as may be appropriate. A reduction effected under this paragraph shall be made on a pro rata basis in cases where the discontinued services are no longer furnished for a part of an accounting period.

"CIVIL PENALTY

"SEC. 2124. (a)(1) If the Secretary determines that—

"(A) the total inpatient revenues of a hospital for an accounting period exceed the applicable limit for the hospital for the accounting period under this subpart; and

"(B) subject to paragraph (2)(B), the hospital fails to deposit an amount equal to the amount of such excess revenues in an escrow account (established and maintained pursuant to paragraph (3)) and fails to withdraw the amount before the end of the succeeding accounting period pursuant to paragraph (3)(B),

the hospital is subject to a civil penalty of 150 per centum of the difference between (i) the amount of the excess described in subparagraph (A), and (ii) subject to paragraph (2)(B), the amount deposited with respect to such excess in the escrow account and withdrawn pursuant to paragraph (3)(B).

"(2)(A) A hospital which has established an escrow account pursuant to paragraph (3) and withdraws an amount from such account in a manner not permitted under paragraph (3)(B), is subject to a civil penalty in an amount equal to 150 per centum of the amount so withdrawn.

"(B) A hospital which has established an escrow account pursuant to paragraph (3) and has a balance in such account after the end of its last accounting period to which either part A or this part (or both) applies, is subject to a civil penalty in an amount equal to the amount remaining in such account.

"(3)(A) In order to avoid liability for a civil penalty under paragraph (1), a hospital which has total inpatient revenues for an accounting period in excess of its applicable limit under this title may establish, in a manner prescribed by the Secretary, an escrow account for the deposit of amounts with respect to one or more of the hospital's accounting periods for which the hospital has excess inpatient revenues.

"(B) If the Secretary certifies that the total inpatient revenues of a hospital for an accounting period subject to a limit fall

below the applicable limit established under this title for that accounting period, the hospital may withdraw from any escrow account (described in subparagraph (A)) previously established an amount determined by the Secretary to be equal to the amount by which the inpatient revenues of the hospital for that accounting period could be increased without causing the hospital's total inpatient revenues for that accounting period to exceed the applicable limit established under this title for that accounting period.

"(b) If the Secretary determines that a physician or other person or entity (other than a hospital) has charged any person or entity for a service provided to a hospital inpatient, which service is required by law to be billed to a hospital, such physician or other person or entity shall be charged a civil money penalty of 150 per centum of the amount billed.

"(c)(1) The civil penalties provided under subsection (a) or (b) shall be assessed by the Secretary only after the hospital, person, or other entity has been provided written notice and opportunity for a hearing on the record at which the hospital, person, or other entity is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the hospital, person, or other entity.

"(2)(A) A hospital, person, or other entity adversely affected by an assessment by the Secretary under subsection (a) or (b) may obtain a review of such assessment in the United States court of appeals for the circuit in which the involved hospital, person, or entity is located by filing in such court, within sixty days following the date the hospital, person, or other entity is notified of the Secretary's determination as to the assessment, a written petition requesting that the assessment be modified or set aside. A copy of the petition shall be transmitted by the clerk of the court to the Secretary, and the Secretary shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined in such proceeding, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such records a decree affirming, modifying, remanding for further consideration, or setting aside, in whole or in part, the assessment of the Secretary and enforcing the assessment to the extent that such order is affirmed or modified.

"(B) No objection that was not raised before the Secretary shall be considered by the court, unless the failure or neglect to raise such objection is excused by the court because of extraordinary circumstances.

"(C) The findings of the Secretary with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

"(D) If any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be made a part of the record. The Secretary may modify previous findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and the Secretary shall file such modified or new findings, and the Secretary's recommendations, if any, for the modification or setting aside of the original order. Any such modified or new findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code.

"(3)(A) Civil penalties and assessments imposed under this section may be compromised by the Secretary and may be recovered in a civil action in the name of the United States brought in the United States district court for the district in which the involved hospital is located. Amounts recovered shall be deposited as miscellaneous receipts of the Treasury of the United States. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sum then or later owing by the United States to the hospital, person, or other entity against which the penalty has been assessed.

"(B) Except as provided in subsection (d), a determination by the Secretary to assess a penalty under this section shall be final upon the expiration of the sixty-day period referred to in paragraph (2)(A) unless the hospital, person, or other entity against which the penalty has been assessed files for a review of such assessment as provided in subsection (d). Matters that were raised or that could have been raised in a hearing before the Secretary or in an appeal pursuant to paragraph (2) may not be raised as a defense to a civil action by the United States to collect a penalty assessed under this section.

"(d)(1) Any hospital dissatisfied with a determination made on behalf of the Secretary under this section may obtain a hearing before the Provider Reimbursement Review Board (established under section 1878(h) of the Social Security Act and hereinafter in this subsection referred to as the 'Board') if the amount in controversy is $10,000 or more and the request for such hearing is filed within one hundred and eighty days after the date the notice of the determination was provided.

"(2)(A) The provisions of subsections (c), (d), (e), (f), and (i) of section 1878 of the Social Security Act shall apply to hearings provided under paragraph (1). In addition, the Board shall have the power to affirm or reverse any final determination (described in paragraph (1)) of a fiscal intermediary or another entity acting on behalf of the Secretary.

"(B) After completing a hearing provided under paragraph (1) with respect to a determination, the Board shall render its decision on the determination not later than sixty days after the last day of the hearing.

"(3) In addition to the members appointed under section 1878(h) of the Social Security Act, the Secretary shall appoint four additional members to the Board, each of whom shall be a member of the general public and a representative of consumers of inpatient hospital services. Those provisions of section 1878(h) of such Act which relate to compensation and terms of office of members of the Board shall also apply to members appointed under this paragraph.

"IMPROPER ADMISSIONS PRACTICES

"SEC. 2125. (a) A hospital may not engage in an admission practice that results in—

"(1) a refusal to admit a patient because the patient is unable to pay for inpatient hospital services provided by the hospital or with respect to whom payment is (or is likely to be) less than the anticipated charges for or costs of services provided to the patient;

"(2) the refusal to admit a patient who would be expected to require unusually costly or prolonged treatment for reasons other than those related to the appropriateness of the care available at the hospital; or

"(3) the refusal to provide emergency services to any person who is in need of emergency services if the hospital provides such services.

"(b) The Secretary shall monitor, on a periodic basis, the extent of each hospital's compliance with subsection (a).

"(c)(1) Upon written complaint by any hospital or upon receiving such volume of written complaints or such reasonable documentation from any persons (as the Secretary finds sufficient) that a hospital's admission practice violates subsection (a), the Secretary shall investigate the complaint and, upon a finding by him that the complaint is justified, the Secretary may—

"(A) exclude the hospital from participation in any or all of the programs established by title XVIII or XIX of the Social Security Act; or

"(B) reduce the total amounts otherwise reimbursable to the hospital under title XVIII or XIX of the Social Security Act in an amount equal to $3,000 for each of the number of persons who were not admitted as patients or provided services.

"(2) In addition, the Secretary may take any other action authorized by law (including an action to enjoin such a violation brought by the Attorney General upon request of the Secretary) which will restrain or compensate for a violation of subsection (a).

"(d) Any hospital aggrieved by a determination of the Secretary under subsection (c) shall, upon timely request, be entitled to a hearing on the record on such determination (in accordance with section 554 of title 5, United States Code), and no reduction in reimbursement may be made under subsection (c)(1)(B) with respect to a hospital until the hospital has had the opportunity for such a hearing and judicial review (under chapter 7 of such title) on the determination after the hearing.

"(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any other statute or at common law to seek enforcement of this Act or to seek any other relief.

"(f) This section shall apply to individuals admitted, or seeking admission, to a hospital on or after the beginning of the transition period (as defined in section 2141(7)).

"ADMINISTRATION OF SUBPART

"SEC. 2126. The Secretary shall, to the extent the Secretary deems it practicable, provide for administration of this subpart through fiscal intermediaries with contracts under section 1817 of the Social Security Act.

"Subpart II—Post-Transition Period

"FEDERAL OPERATION OF STATE HEALTH CARE PLANS

"SEC. 2131. In the case of any State which does not have a State plan approved under section 2102 and in effect for any period beginning after the transition period, the Secretary shall establish and implement a health care plan for such State for such period which meets the requirements of subsections (b), (c), and (d) of section 2103;

except that, in implementing a plan under this section—

"(1) for the purpose of determining the definition of 'percentage limit' referred to in subsection (b)(1)(C), and limited in subsection (c)(3)(B), of such section, '1 percentage point plus' shall be deemed to have been stricken from section 1886(b)(3)(B) of the Social Security Act;

"(2) '40 per centum' shall be substituted for 'one-half' in subsection (b)(1)(D)(i) of such section;

"(3) the Secretary shall provide for a method of hospital revenue limits that meets the requirements of subsection (d) of such section; and

"(4) the Secretary shall provide for such hospital inpatient revenue levels as may be required under section 2102(d)(4).

"PART C—DEFINITIONS AND COMPETITIVE PROVISIONS

"DEFINITIONS

"SEC. 2141. For purposes of this title:

"(1) The term 'eligible organization' has the meaning given such term in section 1876(b) of the Social Security Act.

"(2) The term 'hospital' means, with respect to any period, an institution that satisfied paragraphs (1) and (7) of section 1861(e) of the Social Security Act during all of the period, but does not include any such institution if it—

"(A) does not impose charges or accept payments for services provided to patients,

"(B) is a Federal institution during any part of the period,

"(C) derived 75 per centum or more of its inpatient care revenues from one or more eligible organizations during the preceding twelve months, or

"(D) is a psychiatric hospital (as described in section 1861(f)(1) of such Act) or a rehabilitation hospital (as defined for purposes of section 1886(d)(1)(B)(ii) of such Act).

"(3) The term 'inpatient hospital services' has the meaning given such term in section 1861(b) of the Social Security Act.

"(4) The terms 'health systems agency' and 'State health planning and development agency' mean, for a hospital, such agencies as designated under sections 1515 and 1521, respectively, of this Act for the area or State, respectively, in which the hospital is located.

"(5)(A) The terms 'medicaid' and 'medicaid program' refer to the plans of States approved, or the program, under title XIX of the Social Security Act and the terms 'medicare' and 'medicare program' refer to the program under title XVIII of such Act.

"(B) The terms 'medicare patient' and 'medicaid patient' refer to a patient who is entitled to benefits under part A of the medicare program or to medical assistance under the medicaid program, respectively.

"(6) The term 'physicians' services' has the meaning given such term in section 1861(q) of the Social Security Act.

"(7) The term 'transition period' means the twenty-four month period beginning January 1985.

"(8) The term 'wage-related expenses' means wages (as such term is used under the Fair Labor Standards Act of 1938) and includes overtime wages and shift differentials, taxes imposed by section 1401, 3101, or 3111 of the Internal Revenue Code of 1954 (relating to the Federal Insurance Contributions Act taxes), and expenses relating to unemployment compensation, workmen's compensation, and fringe benefits (including pensions and health benefits) as established by the Secretary by regulation.

"REVIEW OF TECHNOLOGIES AND PROCEDURES

"SEC. 2142. (a)(1) There is hereby established an Advisory Committee on Health Care Technologies and Procedures (hereinafter in this section referred to as the 'Advisory Committee'), to be composed of fifteen individuals, including individuals who are distinguished in the fields of medicine, engineering, or science (including social science), representatives of business entities engaged in the development or production of health care technology, physicians, individuals distinguished in the fields of economics, law, and bioethics, and individuals who are members of the general public who represent the interests of consumers of health care.

"(2) The Secretary shall request the Institute of Medicine of the National Academy of Sciences to appoint members to the Advisory Committee and to supervise the administrative operations of the Advisory Committee under an arrangement under which the actual expenses incurred by the Institute in assisting the Advisory Committee will be paid by the Secretary as an administrative cost of the operations of title XVIII of the Social Security Act. If the Institute is unwilling to enter into such an arrangement, the Secretary shall appoint the members and provide for the supervision of the administrative operations of the Advisory Committee.

"(3) Members shall first be appointed to the Advisory Committee not later than one hundred and twenty days after the date of the enactment of this title.

"(b)(1) The Advisory Committee shall examine the appropriateness of the various interventions and the conditions under which they are needed, the safety and efficacy of alternative therapeutic and preventive regimens, and the standards for availability and utilization of various technologies, and shall publicly report on whether or not payments should be made for such services and, if so, under what conditions and frequency of service.

"(2) In carrying out its responsibilities, the Advisory Committee shall give priority to expensive interventions and to approaches which may constitute ways of reducing the use of expensive interventions and which hold promise of preventing disease and promoting health.

"(c)(1) Members of the Advisory Committee who are not officers or employees of the United States shall receive for each day they are engaged in the performance of the functions of the Advisory Committee compensation at rates not to exceed the daily equivalent of the annual rate in effect for grade GS-18 of the General Schedule, including traveltime; and all members, while so serving away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as such expenses are authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

"(2) If the Advisory Committee is not operated through an arrangement with the Institute of Medicine, the Secretary shall make available to the Advisory Committee such staff, information, and other assistance as it may require to carry out its functions.

"(d) The Advisory Committee shall be subject to the Federal Advisory Committee Act, except that the Advisory Committee shall terminate twenty-seven months after the month in which this title is enacted.

"EXCEPTIONS FOR HEALTH MAINTENANCE ORGANIZATIONS AND COMPETITIVE MEDICAL PLANS

"SEC. 2143. (a) The limits established under this title on revenues and discharge of a hospital (including any rates established under State plans under part A) shall not apply to revenues and discharges attributable to individuals enrolled in the organization if—

"(1) the organization elects such treatment, or

"(2) the organization pays in a calendar year for more than 20 per centum of the number of bed-days of care with respect to that hospital.

"(b)(1) Nothing in this title shall be construed as limiting or restricting the right of an eligible organization to negotiate rates of payment with hospitals or physicians furnishing physicians' services to inpatients of hospitals, except that a State must require eligible organizations which make payment for services furnished to inpatients of a hospital to pay a proportional share of unreimbursed costs of providing care to hospital inpatients.

"(2) In the case of a State at least 50 per centum of the population of which is enrolled with an eligible organization, clause (iii) of section 2103(b)(2)(A) shall not apply and there shall be included (in computing revenues per discharge under State health care plans) the revenues paid by, and discharges attributable to, eligible organizations.".

HEALTH MAINTENANCE ORGANIZATION AND COMPETITIVE MEDICAL PLAN PROVISIONS

SEC. 3. (a) Section 1310(a) of the Public Health Service Act (42 U.S.C. 300e-9(a)) is amended by adding at the end the following new paragraphs:

"(3)(A) Except as provided in subparagraphs (B) and (C), any employer or State or political subdivision thereof described in paragraph (1) shall provide that if—

"(i) the employer, State, or political subdivision makes a contribution with respect to the costs of a health benefits plan with respect to an individual, and

"(ii) the employer offers the option of membership in a qualified health maintenance organization or with an eligible organization described in section 1876(b) of the Social Security Act, which membership provides benefits at least actuarially equivalent to those provided under the other health benefits plan,

the employer, State, or political subdivision (I) shall provide for payment of a contribution toward the membership with such organization in a dollar amount equal to at least the maximum amount of the employer's, State's, or subdivision's dollar contribution with respect to the other health benefits plan, (II) shall provide, if the dollar contribution with respect to any other health benefits plan exceeds the cost of membership with the organization, the employer, State, or subdivision, for a cash rebate equal to not less than 50 per centum of the dollar amount of such excess, and (III) shall provide information to employees that reasonably compares the different benefits and costs associated with the different plans offered the employees. This paragraph shall not require that the amount of the contribution of an employer, State, or political subdivision with respect to different individuals be the same or that the amount of the contribution with respect to health benefits plans providing for coverage only of individuals (and not of family members) be the

same as the contribution for coverage of individuals and family members.

"(B) On the request of an employer, employee, health benefits or competitive medical plan, a collective bargaining representative or other employee representative referred to in paragraph (2), or other interested party, the Secretary shall provide a formula to adjust prospectively the amount of the cash rebate made with respect to membership in an organization to the extent to which it is determined that the individuals enrolled with such organizations in the prior year are not substantially representative of the individuals covered under the other health benefits plans offered. To the extent practicable, such adjustment shall be made so as to take into account the average per capita cost (adjusted to as to reflect actuarial equivalence or experience as described in section 1876(a) of the Social Security Act) of providing health care benefits to the different classes of enrollees. This subparagraph shall not require entities employing in a calendar quarter an average of fewer than one thousand employees in a health service area to provide for such an adjustment.

"(C) Subparagraph (A) shall not apply with respect to employees of a employer, State, or political subdivision who are represented by a collective bargaining representative or other employee representative designated or selected under any law.

"(4) In the case of an entity employing in a calendar quarter an average of one thousand or more employees in a health service area and required to offer the option of enrollment in health maintenance organizations under paragraph (1), the entity shall (notwithstanding subsection (b) and except as provided in paragraph (2)) make available such option with respect to all qualified health maintenance organizations which have indicated (in a manner specified by the Secretary) a desire to be made available with respect to employees of such an entity, except that an employer shall not be obligated under this paragraph to make such option available with respect to more than six qualified health maintenance organizations.".

(b) The amendments made by this section shall apply to calendar quarters beginning on or after January 1, 1985.

MEDICARE PAYMENT PROVISIONS

SEC. 4. (a)(1) Section 1833(a) of the Social Security Act (42 U.S.C. 1395l(a)) is amended, in the matter before paragraph (1), by striking out "section 1876" and inserting in lieu thereof "sections 1876 and 1886(h)".

(2)(A) Section 1876(a)(1)(C) of such Act (42 U.S.C. 1395mm(a)(1)(C)) is amended by inserting "(or, in the case of individuals enrolled with an eligible organization in a State, or geographic area in a State, in which at least 30 per centum of the individuals eligible to be enrolled with such an organization are so enrolled, 100 per centum)" after "95 per centum".

(B) Section 1876(f) of such Act (42 U.S.C. 1395mm(f)) is amended—

(i) by striking out "or under a State plan approved under title XIX" in paragraph (1), and

(ii) by adding at the end the following new paragraph:

"(3) The requirement of paragraph (1) shall not apply to eligible organizations which are public entities or which are offered by a State where the State has established a structured program under which information on competing eligible organizations offering enrollment in the State is provided to individuals eligible to enroll with the organizations.".

(C) Section 1903(m)(2) of such Act (42 U.S.C. 1396b(m)(2)) is amended—

(i) by striking out "(I)" and all that follows through "or (II)" in subparagraph (A)(ii), and

(ii) by amending subparagraph (D) to read as follows:

"(D) Subparagraph (A)(ii) shall not apply with respect to a health maintenance organization which is a public entity.".

(b)(1) Subsection (c) of section 1886 of such Act (42 U.S.C. 1395ww) is amended to read as follows:

"(c) The Secretary shall provide that in the case of a State health care plan approved under section 2103 of the Public Health Service Act, payments with respect to services covered under such plan in the State—

"(1) may, at the option of the State, or

"(2) in the case of such a plan which provides for control of hospital costs through a ratesetting mechanism established under State law and described in section 2103(d) of such Act, shall

be made in accordance with such plan rather than in accordance with the other provisions of this title.".

(2) The amendment made by paragraph (1) shall not apply, in the case of plans approved under section 1886(c) of the Social Security Act as of January 1, 1985, for payments to hospitals until January 1, 1986.

(c)(1) Subsection (d)(5) of such section is amended by adding at the end the following new subparagraphs:

"(E) MARGINAL COST ADJUSTMENT FOR INCREASED ADMISSIONS.—(i) The Secretary shall make such adjustment in the payments under paragraph (1) as may be necessary to provide that, to the extent that the number of admissions for an accounting period exceed the base number of admissions described in clause (ii), the payments per discharge shall be equal to 40 per centum (or 50 per centum, with respect to discharges from hospitals subject to a State plan approved under part B of title XXI of the Public Health Service Act) of the payments per discharge otherwise provided under this subsection (other than under this subparagraph). The Secretary may, in the Secretary's discretion, provide for an appropriate adjustment in the payments per discharge otherwise provided under this subsection, in the case of a decrease in the number of admissions below the base number of admissions described in clause (ii), in order to assure the hospital receipt of revenues sufficient to reasonably cover overhead costs.

"(ii) For purposes of clause (i), the 'base number of admissions' for a hospital is equal to the number of admissions to such hospital for the hospital's accounting period ending in calendar year 1983 (or, if higher, the average annual number of admissions to such hospitals for the hospital's three accounting periods ending with such accounting period), increased by a percentage equal to the estimated national average percentage increase in admissions to community hospitals during the period between the end of such accounting period and the first day of the transition period (as defined in section 2141(7) of the Public Health Service Act).

"(iii) An adjustment shall not be made under the first sentence of clause (i) to the extent that a hospital can demonstrate that a net increase in admissions is attributable to inpatients who, on the date of admission, are not entitled to benefits under title XVIII of the Social Security Act or to medical assistance under a State plan approved under title XIX of such Act.

"(iv) The Secretary may by regulation provide for a higher percentage than the percentage specified in clause (i) in those cases where the Secretary determines that the increase in the number of admissions to a hospital—

"(I) is extraordinary and is due to circumstances beyond the hospital's control, or is required to improve access to care; and

"(II) results in a ratio of revenues to costs per excess admission which is greater than percentage specified in clause (i) of the ratio of revenues to costs for admissions in the base period.

"(F) The Secretary also may provide for such adjustments to the payment for subsection (d) hospitals as may be appropriate to take into account exceptional circumstances described in section 2103 of the Public Health Service Act under the conditions described in that section.".

(2)(A) The amendment made by paragraph (1) shall apply to discharges occurring on or after January 1, 1985.

(B) In the case of a hospital reporting period which begins before January 1, 1985, and ends after such date, the Secretary of Health and Human Services shall provide that the amendment made by paragraph (1) shall apply to such a period in such a prorated manner as to be consistent with subparagraph (A).

(e) Subsection (e)(1) of such section is amended—

(1) by inserting "and shall not take into account any adjustment made under subsection (d)(5)(E)" before the period at the end of subparagraph (A), and

(2) by striking out the period at the end of subparagraph (B) and inserting in lieu thereof a semicolon and the following:

"except that the adjustment made under this subparagraph shall not take into account any adjustment made under subsection (d)(5)(E).".

(f)(1) Subsection (a)(4) of such section is amended by striking out ", with respect to costs incurred in cost reporting periods beginning prior to October 1, 1986,".

(2) Subsection (b)(3)(B) of such section is amended by striking out "but excluding nonoperating costs" and inserting in lieu thereof "and including capital costs".

(3) Subsection (g) of such section is amended to read as follows:

"(g) CAPITAL REIMBURSEMENT.—(1)(A) Notwithstanding section 1814(b) but subject to the provisions of section 1813, the amount of the payment with respect to the capital-related costs of inpatient hospital services of a subsection (d) hospital (as defined in subsection (d)(1)(B)) for inpatient hospital discharges in a cost reporting period beginning on or after January 1, 1985, is equal to the regionally adjusted capital-related prospective payment rate determined under paragraph (2) for such discharges.

"(2) The Secretary shall determine a regionally adjusted capital-related prospective payment rate, for each inpatient hospital discharge involving inpatient hospital services of a subsection (d) hospital located in a region of the United States, as follows:

"(A) DETERMINATION OF BASE.—The Secretary shall determine the weighted average payment made, per discharge, for capital-related costs for inpatient hospital services in subsection (d) hospitals during the five

fiscal-year period ending with fiscal year 1983.

"(B) UPDATING THE AMOUNT.—The Secretary shall update the amount determined under subparagraph (A) by the compounded sum of the applicable percentage increase (as defined in subsection (b)(3)(B)) for each fiscal year after fiscal year 1983 and before the fiscal year concerned.

"(C) COMPUTING DRG-SPECIFIC RATES.—For each discharge classified within a diagnosis-related group, the Secretary shall establish a capital-related payment rate equal to the product of—

"(i) the updated amount (computed under subparagraph (B)), and

"(ii) the capital-related weighting factor (determined under paragraph (3)(A)) for that diagnosis-related group.

"(D) ADJUSTING FOR DIFFERENT REGIONAL CONSTRUCTION COSTS.—The Secretary shall adjust the proportion (as estimated by the Secretary from time to time), of hospitals' capital-related costs which are attributable to construction and construction-related costs, of the rate determined under subparagraph (C) for hospitals located in each region (as defined for purposes of subsection (d)) for regional differences in construction and construction-related costs by a factor (established by the Secretary) reflecting the relative costs of construction in the geographic region compared to the national average costs of construction. Such adjustment shall be made in a manner that does not result in any net increase or decrease in the amount of payments otherwise made under this subsection.

"(E) ADJUSTMENT FOR CHANGES IN NUMBERS OF DISCHARGES.—The Secretary also shall provide for an adjustment to reflect a change in the number of discharges in each hospital in the same manner as such adjustment is made to payments under subsection (d) pursuant to paragraph (5)(D) thereof.

"(3)(A) For each diagnosis-related group established under subsection (d)(4)(A) the Secretary, taking into account data on State experience with capital-related reimbursement systems, shall assign an appropriate capital-related weighting factor which reflects the relative capital-related hospital resources used with respect to discharges classified within that group compared to discharges classified within other groups.

"(B) The Secretary shall adjust the weighting factors established under subparagraph (A) at least every four fiscal years to reflect changes in the classifications established under subsection (d)(4)(A) and to reflect changes in which factors which may change the relative use of capital-related hospital resources.

"(C) The Commission (established under subsection (e)(2)) shall consult with and make recommendations to the Secretary with respect to the need for adjustments under subparagraph (B), based on its evaluation of scientific evidence with respect to new practices and new technology. The Commission shall report to the Congress with respect to its evaluation of any adjustments made by the Secretary under subparagraph (B).

"(4)(A) If a subsection (d) hospital can demonstrate to the Secretary that the amount of payment otherwise made for capital-related costs for inpatient hospital services under this subsection is significantly less than the amount needed to pay interest, principal, and lease obligations with respect to a capital project either for which obligations were entered into before January 1, 1985, or for which a certificate of need (filed before February 9, 1984) has been approved, the Secretary shall provide for an additional payment as follows:

"(i) For a period of five accounting periods, the additional payment shall be an amount which, in addition to the amount of payment otherwise made under this subsection, would equal the total cash needs with respect to the interest, principal, and lease payment obligations during that period.

"(ii) For a subsequent period, the Secretary may provide additional payments to the hospital not to exceed, in addition to the amount of payment otherwise made under this subsection, the total cash needs with respect to the interest, principal, and lease payment obligations for that period, but only if the hospital agrees that there will be a reduction in the amount of the payments otherwise made under this subsection for subsequent years such that over the total length of the period there will be no net additional payments under paragraph.

In determining the cash needs of a hospital with respect to a capital expenditure, the Secretary shall take into account the utilization and occupancy level with respect to the facility constructed or improved with the capital expenditure.

"(B) The Secretary shall require, as a condition for the making of additional payments or adjustments in the payment schedule under subparagraph (A), that—

"(i) a hospital must refinance loans related to capital expenditures, if such financing is reasonably available, and

"(ii) if the hospital was acquired after February 1, 1984, the hospital must seek any additional payment under this paragraph on the basis of the capital-expenditure base (less interest and depreciation) in effect at the time of such acquisition.

"(5)(A) No amounts shall be allowed, under this section or as reasonable costs of providing any item or service under this title, for a return on equity capital for services furnished by or under arrangements with a hospital.

"(B) The Secretary shall provide that in determining the amount which is allowable, with respect to reasonable costs of services furnished by providers of services (other than of inpatient hospital services furnished by hospitals) for which payment may be made under this title, for a return on equity capital for such providers for cost reporting periods beginning on or after January 1, 1985, the rate of return which may be recognized shall not exceed the average of the rates of interest, for each of the months any part of which is included in the reporting period, on obligations issued for purchase by the Federal Hospital Insurance Trust Fund.".

(4) Subsection (d)(3)(B) of such section is amended—

(A) by inserting "and certain additional capital payments" after "outlier payments",

(B) by inserting before the period at the end the following: "and shall further reduce the amounts by a proportional amount necessary to offset the amount of the additional payments described in clauses (i) and (ii) of subsection (g)(4)(A)".

(5) Subsection (e)(1)(B)(i) of such section is amended by inserting "and not taking into account any reduction under subsection (d)(3)(C) to reflect additional payment amounts under subsection (g)(4)(A)" after "section 1866(a)(1)(F)".

(6) The amendments made by this subsection apply to payments for discharges occurring on or after the first day of the transition period (as defined in section 2141(7) of the Public Health Service Act).

(f) Such section is further amended—

(A) by inserting "and for medical and other health services furnished to hospital inpatients" at the end of the heading, and

(B) by adding at the end the following new subsection:

"(h) PHYSICIAN REIMBURSEMENT.—(1) For each diagnosis-related group established under subsection (d)(4), the Secretary shall estimate the average per discharge amount of the charges recognized under part B attributable to items and services furnished to inpatients classified within such group during 1983. Such average shall be determined separately—

"(A) for hospitals in each carrier-charge area established for purposes of section 1842, and

"(B) for all hospitals in the United States.

"(2)(A)(i) Subject to the part B deductible described in section 1833(b) and subject to the succeeding provisions of this subsection, with respect to each individual who is entitled to benefits under part A and enrolled under part B, who is an inpatient of a hospital, and whose discharge from the hospital in a State is classified within a diagnosis-related group established under subsection (d)(4), the Secretary shall provide, in lieu of payments otherwise made under part B for services furnished to the individual as an inpatient of the hospital, for payment to the hospital (or to others, including multispecialty physicians groups, under arrangements with the hospital) of an amount equal to 80 per centum of the amount described in clause (ii).

"(ii) The amount referred to in clause (i) is the applicable combined rate (described in paragraph (3)) determined with respect to such diagnosis-related group under paragraph (1), increased by the applicable percentage increase (described in paragraph (4)) for the State in which the hospital (in which the services were provided) is located and adjusted for variations in certain local costs under paragraph (5).

"(B) With respect to services for which the payment amount is provided under this subsection, instead of the charges which may otherwise be imposed under section 1866(a)(2)(A) with respect to such services, the hospital (or others under arrangements made with the hospital) may charge an individual or other person (consistent with the provider agreement under section 1866) (i) an amount equal to the amount of the deduction imposed with respect to the services under section 1833(b) and (ii) an amount equal to up to 20 per centum of the amount described in subparagraph (A)(ii) or, in accordance with guidelines issued by the Secretary, such other copayment or other coinsurance amount which provides for a more equitable distribution of coinsurance costs on a per diem or other basis and which, in the aggregate, does not provide for coinsurance in excess of the amounts otherwise provided under this subparagraph.

"(3) For purposes of paragraph (2)(A)(ii), the 'applicable combined rate' is—

"(A) for discharges occurring during the first year of the transition period, 100 per centum of the average described in paragraph (1)(A), for the charge area established under section 1842(b) for the area in which the hospital is located;

"(B) for discharges occurring during the second year of such period, 66⅔ per centum of the average described in paragraph (1)(A), for such charge area, and 33⅓ per

centum of the average described in paragraph (1)(B);

"(C) for discharges occurring during the first year after such period, 33⅓ percent of the average described in paragraph (1)(A), for such charge area, and 66⅔ percent of the average described in paragraph (1)(B); and

"(D) for discharges occurring after the first year after such period, 100 percent of the average described in paragraph (1)(B).

"(4) For purposes of paragraph (2), the 'applicable percentage increase' for any period for services furnished in a State shall be equal to one percentage point plus the percentage, estimated by the Secretary before the beginning of the period, by which the cost of the mix of goods and services (including personnel costs but excluding nonoperating costs) comprising inpatient hospital services and medical and other health services furnished to inpatients of a hospital in that State (or, if adequate data are not available with respect to that State, in the region in which the State is located or in the United States), based on an index of appropriately weighted indicators of changes in wages and prices which are representative of the mix of goods and services included in such services, for the period exceed the cost of such mix of goods and services in the corresponding area for 1983.

"(5)(A) The Secretary shall adjust the amounts otherwise determined under paragraph (2)(A)(ii) so as to take into account area differences relating to wages, utility rates, and other exogenous cost factors.

"(B) The Secretary may provide for an additional payment amount for subsection (d) hospitals with indirect costs of medical education, in the manner described in subsection (d)(5)(B).

"(6)(A) The Secretary shall provide for such exceptions in the payment amounts provided under this subsection as are provided under section 2123(a) of the Public Health Service Act, under the conditions described in that section.

"(B) The Secretary shall provide for an adjustment in the payment amounts provided under this subsection to take into account variations in the number of admissions to the hospital in the same manner as such adjustment is made under subsection (d)(5)(E) for payments amounts under subsection (d)(1).".

(c) The amendments made by subsection (b)(4) shall not apply to discharges of individuals admitted to hospitals before the first date of the transition period (as defined in section 2141(7) of the Public Health Service Act). Requiring payments for health care services furnished to inpatients to be made to or through a hospital as a condition of the hospital's participation in the medicare program.

SEC. 5. (a) Section 1866(a) of the Social Security Act (42 U.S.C. 1395cc(a)) is amended—

(1) by striking out "Any provider" in paragraph (1) and inserting in lieu thereof "Subject to paragraph (4), any provider", and

(2) by inserting at the end the following new paragraph:

"(4) A hospital shall be qualified to participate under this title and shall be eligible for payments under this title only if it provides (in the agreement filed with the Secretary under paragraph (1) and in a manner satisfactory to the Secretary) that any health care service (including medical and other health services) furnished to a hospital inpatient (whether or not the inpatient is entitled to have payment made with respect to the services under this title) shall be billed only by or through the hospital and payment for such services may only be made to the hospital or to an entity under arrangements (or, with respect to individuals not entitled to benefits under parts A and B of this title, comparable conditions to the arrangements described in section 1861(w)(1)) with the hospital.".

(b) Section 1128A of such Act (42 U.S.C. 1320a-7a) is amended by adding at the end the following new subsection:

"(i) Each physician who furnishes services to an individual for which the individual is otherwise entitled to have payment made under title XVIII is deemed, for purposes of this section, to have agreed not to impose any charge for the service except on the basis of the terms of an assignment to have accepted an assignment under section 1842(b)(3)(B)(ii).".

(c) Section 1866(b)(2) of such Act (42 U.S.C. 1395cc(b)(2)) is amended by inserting before the period at the end thereof the following: ", or (H) that such provider (in the case of a hospital) is not complying with the provisions of subsection (a)(4)".

(d)(1) Section 1842(b)(3)(B) of such Act (42 U.S.C. 1395u(b)(3)(B)) is amended by striking out "be made—

"(i) on the basis of an itemized bill; or

"(ii) on the basis of an assignment"

and inserting in lieu thereof "be made only on the basis of an assignment".

(2) Section 1870(f) of such Act (42 U.S.C. 1395gg(f)) is amended by striking out "payment for such services has not been made" and all that follows through the end and inserting in lieu thereof "payment for such services has not been made, payment for such services shall be made only if the person or persons who furnished the services agree that the reasonable charge is the full charge for the services and only in such amount and subject to such conditions as would be applicable if the individual who received the services had not died.".

(e)(1) The amendments made by this section shall apply to health care services furnished on or after the first day of the transition period (as defined in section 2141(7) of the Public Health Service Act).

(2) The Secretary of Health and Human Services shall provide for notice to the public and, in particular, to individuals enrolled (or enrolling) under the supplementary medical insurance program under part B of title XVIII of the Social Security Act, of the requirements of section 1866(a)(4) of such Act and of the amendments made by subsections (b) and (d) of this section.

PAYMENTS FROM MEDICARE TRUST FUNDS

SEC. 6. (a) Section 1817 of the Social Security Act (42 U.S.C. 1395i) is amended—

(1) by striking out "prior to January 1988" in subsection (j)(1);

(2) by inserting "and certifies that such Trust Fund can repay within ten years of the date of such borrowing the principal and interest on any amounts so borrowed" in subsection (j)(1) after "Trust Fund" the first place it appears;

(3) by striking out subparagraph (C) of subsection (j)(3); and

(4) by adding at the end thereof the following new subsection:

"(k)(1) All payments made to hospitals for medical and other health services provided to hospital inpatients, as determined in accordance with section 1886(h), shall be made from the Federal Hospital Insurance Trust Fund.

"(2)(A) There shall be transferred periodically to the Federal Hospital Insurance Trust Fund from the Federal Supplementary Medical Insurance Trust Fund, amounts which the Secretary of Health and Human Services determines to be equal to the fraction of the total revenues of the Federal Supplementary Medical Insurance Trust Fund for each fiscal year determined under subparagraph (B).

"(B) The fraction for each fiscal year for purposes of subparagraph (A) is a fraction the numerator of which is the amount paid from the Federal Supplementary Medical Insurance Trust Fund in calendar year 1983 for medical and other health services provided to hospital inpatients, and the denominator of which is the total amount paid from the Federal Supplementary Medical Insurance Trust Fund in calendar year 1983.".

(b) Section 1839 of such Act (42 U.S.C. 1395r) is amended by adding at the end thereof the following new subsection:

"(f) In determining the monthly actuarial rates for purposes of this section, the Secretary shall make such determination on the basis of the payments which would have been made from the Federal Supplementary Medical Insurance Trust Fund if the amendments to this title made by the Medicare Solvency and Health Care Financing Reform Act of 1984 had not been enacted.".

(c) Section 1841(g) of such Act (42 U.S.C. 1395t) is amended by inserting ", excluding payments for medical and other health services provided to hospital inpatients" after "payments provided for by this part".

(d) Section 1841 of such Act is further amended by adding at the end thereof the following new subsection:

"(j) There shall be transferred periodically to the Federal Hospital Insurance Trust Fund the amounts required under section 1817(k).".

STUDIES

SEC. 7. (a) The Secretary of Health and Human Services shall provide for the following studies, and shall promptly report to the Congress on the results of such studies:

(1) How the changing demographic composition of the population of the United States affects the utilization and cost of providing health care services.

(2) How to maintain a high quality of health care services while constraining the rate of increase of costs for those services.

(3) How the amendments made by this Act have affected the delivery, and cost of providing, health care services.

(4) The success of the different State health care plans approved under part B of such title, with particular attention to comparing the relative success and potential for long-term success of plans which are based on mandatory prospective rate regulation, voluntary rate regulation, or competitive models.

(5) The impact of equalizing hospital inpatient revenues per discharge among the States.

(6) The impact and success of the marginal cost adjustment and other incentives provided in this Act to decrease the number of unnecessary admissions to hospitals.

(7) The impact of the amendments made by this Act on medical education, medical research, and technological innovation in the health care sector.

(b) The studies described in subsection (a) shall be conducted, and the reports thereon submitted, in such manner as to provide the Congress with the results of the studies not later than January 1, 1990.

THE HEALTH CARE COST INFLATION PROBLEM

Excessive health cost inflation is pushing Medicare into bankruptcy, burdening the elderly, imperiling the economic health of American business and labor, and contributing to disastrous deficits in the Federal budget.

Medicare actuaries project bankruptcy by 1990 as the result of excessive health cost inflation. The cumulative deficit by the year 2005 will be $1 trillion. Eliminating this deficit by reducing benefits would require benefit reductions of one-third or Medicare payroll tax increases of one-half. The only realistic method to eliminate the deficit is to reduce excessive health care cost inflation.

The Reagan Administration is already using the excuse of Medicare bankruptcy to reduce the Federal deficit by cutting Medicare benefits and raising taxes. The 1985 Reagan budget alone proposes $17 billion in reduced benefits and increased taxes over the next five years.

President Reagan has already forced $7 billion in benefit reductions through Congress.

The 1984 Reagan budget proposed an additional $7 billion in benefit reductions, to be achieved by higher co-payments; this proposal was dropped from the 1985 budget, it will almost certainly be proposed again after the election.

Overall, the Reagan Medicare record shows proposed or enacted cuts totaling $31 billion in Medicare benefits, a thousand dollars in cuts for every Medicare beneficiary.

The Administation's Medicare Advisory Commission has been even more extreme. Its recommendations include: making 65–67 year olds ineligible for Medicare; increased premiums for beneficiaries; and higher cost-sharing for hospitalized beneficiaries.

The Kennedy-Gephardt Medicare Rescue and Health Care Financing Reform Act of 1984 demonstrates there is a better way to solve the Medicare problem.

Kennedy-Gephardt establishes a comprehensive, system-wide approach to limiting increases in health care costs. States will be encouraged to develop their own programs under broad Federal guidelines setting overall limits on the rate of increase in hospital revenues; a residual Federal hospital reimbursement program will be established where States fail to act. Kennedy-Gephardt incorporates both regulatory and competitive mechanisms, recognizing that both have a contribution to make to the cost control effort.

By slowing inflation in the entire health care system, Kennedy-Gephardt solves the Medicare crisis and helps all consumers of health care without reducing benefits or increasing taxes.

STATISTICS ON HEALTH CARE COST INFLATION

National health costs more than doubled in the 1950's, almost tripled in the 1960's, and more than tripled in the 1970's. Without a change in national policies, they are projected to more than triple again in the 1980's.

	1950	1960	1970	1980	1985 (est.)	1990 (est.)
Billions	$12.7	$26.9	$74.7	$249	$456.4	$755.6
Gross National Product (percent)	4.4	5.3	7.5	9.5	10.8	12.0

The projected increase in annual spending from 1985 to 1990 (more than $300 billion) will be greater than the entire increase from 1950 to 1980.

In per capita terms, national health costs rose by $212 in the 1960's and $717 in the 1970's. They are projected to increase by over $1,900 per person in the 1980's. Between 1960 and 1990, per capita costs will increase by over 2000 percent or four times faster than the C.P.I.

1960	$146
1970	358
1980	1,075
1985 est.	1,882
1990	2,982

In 1983 alone, hospital costs increased three times as fast as the C.P.I.

HEALTH CARE COST INFLATION BURDENS THE ELDERLY

Medicare covers only 44 percent of the elderly's health care costs. Average medical expenses paid by the elderly, out of their own pockets, are out of control. Under current law, these expenses will grow from $698 in 1977 to almost $5,000 by the year 2000.

1977	$698
1984	1,550
1989	2,208
1993	1,892
2000	4,637

In 1984, the elderly will spend, on average, 15 percent of their limited incomes—more than one dollar out of every seven—to pay for medical care. By the year 2000, this expense will have risen to 19 percent, almost one dollar in every five.

The Medicare hospital deductible—equivalent to average cost of one day in the hospital will continue to rise even without any benefit cuts to fund the Medicare deficit: 1970, $52; 1975, $92; 1980, $180; 1984, $356; 1990, $560; 1995, $800.

HEALTH CARE COST INFLATION IMPERILS THE ECONOMIC HEALTH OF AMERICAN BUSINESS AND LABOR

Employer-paid health insurance premiums are the fastest-growing component of business costs.

Total private health insurance premiums—the great bulk paid by business—were $82.1 billion in 1982.

The business share of payroll taxes paid to finance the Medicare program was $15.3 billion in 1982; workers paid another $15.3 billion.

The combination of employer-paid health insurance premiums and the business share of Medicare taxes was 96 percent of the total profits earned by all American business in 1982.

The Medicare reforms recently enacted by the Congress will shift about $20 billion in Federal costs to private payers over the five year period 1984 to 1988.

Inflation in private health insurance costs between 1984 and 1990 will increase costs $163 billion cumulatively. These costs will increase more than twice as fast as the C.P.I.

In order to generate enough profits just to finance the inflation in private health insurance costs in excess of the C.P.I. over these five years, plus the Medicare cost shift already legislated, business will have to invest about $270 billion annually. This is 77 percent of total 1982 investment.

HEALTH CARE COST INFLATION CONTRIBUTES TO DISASTROUS BUDGET DEFICITS

Under current law, Medicare/Medicaid spending will total $89 billion in 1984 and will grow to $151 billion by 1989.

Medicare/Medicaid will spend $698 billion, 1984–1989. This is more than has been spent in the entire nineteen years of the two programs' history to date.

Medicare-Medicaid account for 10.4 percent of the total budget in 1984 and will account for 16 percent of the total budget growth—almost one dollar in every six, even with the savage cuts proposed by the Reagan Administration.

SAVINGS UNDER THE KENNEDY-GEPHARDT BILL

A. Medicare savings

	Billions
Cumulative medicare deficit (1985 to 2005)	−$1,018
Medicare Savings Under the Medicare Solvency and Health Financing Reform Act: [1]	
I. Comprehensive prospective payment system for hospitals [2]	+426
II. Incentives to reduce unnecessary hospital admissions	+210
III. Prospective payment system for in-hospital physician services	+548
Total saving	+1,184
Net surplus under Kennedy-Gephardt plan	[3]166

[1] Savings estimates by Georgetown University Center for Health Policy Studies using II B baseline Medicare Trustees' Report assumptions

[2] Institution of a comprehensive prospective payment system reduces hospital aggregate demand and lowers the hospital market basket, which is used to determine per admission rates of increase under current law and under Kennedy-Gephardt

[3] Total does not add as a result of rounding.

B. Private sector savings

[In billions of dollars]

	1985	1986	1987	1988	1989	Total
Hospital	2.9	6.4	10.4	15.1	20.4	55.2
Physician	1.0	2.3	3.8	5.2	6.7	19.0
Total	3.9	8.7	14.2	20.3	27.1	74.2

C. Federal deficit reductions

	Billions [1]
1985	1.5
1986	3.0
1987	5.3
1988	8.4
1989	12.0
Total	30.2

[1] Preliminary estimates.●

● Mr. RIEGLE. Mr. President, I am pleased to join Senator KENNEDY as an original cosponsor to his new bill designed to secure the financial solvency of the medicare program while making important improvements in our Nation's health care delivery system.

Today we are faced with a major crisis in the delivery of health care. In the private sector, the cost of providing care has risen so rapidly that we are beginning to reach the limits of our economic system to pay for such care. In the public arena, both State and Federal governments are contributing an increasingly burdensome share of their resources to pay for health care services. The percentage of our Nation's GNP devoted to health care has more than doubled since 1969 and continued increases are projected far into the future.

Medicare, the Federal program designed to insure adequate health care for our elderly and disabled citizens, may teeter on the brink of insolvency at the end of this decade. One attempt to address this critical problem was our recent enactment of the prospective payment system being phased in over several years. While the prospective payment system may prove to be a significant cost-saving innovation, legitimate concerns have developed regarding the possible creation of a two-class health care system, with elderly citizens only receiving minimal care, while private payers continue to receive the best care that is available. Simultaneously, while the quality and availability of health care for our senior citizens might be on the decline, they will be asked to pay out of their pockets an increasing percentage of their resources for health care services.

Mr. President, there needs to be a national strategy to cope with the growing cost crisis in our Nation's health care system. This proposal being offered today is a comprehensive approach which confronts all of the significant difficulties we face in the field. Kennedy-Gephardt is a system-wide approach to controlling increases in health care while moving toward universal access and equal treatment in our health care system. Rather than offering a dogmatic or doctrinaire approach to these critical problems, this legislation blends elements of regulation, competition, and voluntary effort in an attempt to solve these difficulties when previous efforts have failed. As such, the Kennedy-Gephardt bill serves as a significant starting point for the many discussions and analyses that must follow as we deal with these complicated issues. I am cosponsoring this legislation as an endorsement of its overall objectives and as a sign of my commitment to work vigilantly with Senator KENNEDY and others to fashion a final version of a comprehensive health care package that will assure the availability of the highest quality health care for all Americans, today and far into our future.●

By Mr. BIDEN:

S.J. Res. 258. Joint resolution to designate the week of June 24 through June 30, 1984 as "National Safety in the Workplace Week"; to the Committee on the Judiciary.

NATIONAL SAFETY IN THE WORKPLACE WEEK

● Mr. BIDEN. Mr. President, today I am introducing a joint resolution that would designate June 24 through June 30, 1984, as "National Safety in the Workplace Week."

Current industry figures show that approximately 11,000 people are killed and 2.1 million are injured in workplace accidents that cost American business more than $31 billion annually.

This year the American Society of Safety Engineers, one of the largest safety organizations in this country representing safety professionals from virtually every major corporation, has enlisted the support of the National Safety Council and the National Society for the Prevention of Blindness in providing a broader forum in which to promote safety programs. Working with management, they hope to increase awareness of safety programs, presenting the employer and employee with the risks and hazards in their workplace thereby reducing accidents, increasing job effectiveness and ultimately increasing their financial benefits.

I applaud the efforts of the private sector in promoting the economic health of the Nation through effective safety programs.

Mr. President, I would ask unanimous consent that the text of the joint resolution be printed in the CONGRESSIONAL RECORD.

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

S.J. RES. 258

Whereas the National Safety Council statistics indicate that workplace accidents accounted for eleven thousand employee deaths and one million nine hundred thousand employee injuries during 1982;

Whereas such accidents caused immeasurable pain and suffering to victims and their families;

Whereas the cost of occupational accidents amounted to over $31,000,000,000 in losses to American industry during 1982;

Whereas the American Society of Safety Engineers and other safety and health organizations continue to promote occupational safety in all industries; and

Whereas this endeavor is worthy of support and cooperation so that the toll of workplace injuries and deaths will be reduced: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the week of June 24, through June 30, 1984 is designated as "National Safety in the Workplace Week," and the President is authorized and requested to issue a proclamation commemorating the efforts of organizations which promote safety and health for the American worker and calling upon all government agencies and the people of the United States to observe the week with appropriate programs, ceremonies, and activities.●

ADDITIONAL COSPONSORS

S. 627

At the request of Mr. PACKWOOD, the names of the Senator from West Virginia (Mr. RANDOLPH), the Senator from New Hampshire (Mr. RUDMAN), the Senator from Nebraska (Mr. EXON), and the Senator from Rhode Island (Mr. CHAFEE) were added as cosponsors of S. 627, a bill to authorize the establishment of a National Scenic Area to assure the protection, development, conservation, and enhancement of the scenic, natural, cultural, and other resource values of the Columbia River Gorge in the States of Oregon and Washington, to establish national policies to assist in the futherance of its objective, and for other purposes.

S. 764

At the request of Mr. WARNER, the names of the Senator from Georgia (Mr. NUNN), and the Senator from Maine (Mr. COHEN) were added as cosponsors of S. 764, a bill to assure the continued protection of the traveling public in the marketing of air transportation, and for other purposes.

S. 816

At the request of Mr. BRADLEY, the name of the Senator from Pennsylvania (Mr. SPECTER) was added as a cosponsor of S. 816, a bill to extend the Superfund legislation for five additional years, and for other purposes.

S. 986

At the request of Mr. PRESSLER, the name of the Senator from Wisconsin (Mr. KASTEN) was added as a cosponsor of S. 986, a bill to repeal employer reporting requirements with respect to tips.

S. 1113

At the request of Mr. D'AMATO, the name of the Senator from California (Mr. CRANSTON) was added as a cosponsor of S. 1113, a bill to amend the Internal Revenue Code of 1954 to provide that tax-exempt interest shall not be taken into account in determining the amount of social security benefits to be taxed.

S. 1300

At the request of Mr. HUDDLESTON, the name of the Senator from North Dakota (Mr. BURDICK) was added as a cosponsor of S. 1300, a bill to amend the Rural Electrification Act of 1936 to insure the continued financial integrity of the rural electrification and telephone revolving fund, and for other purposes.

S. 1806

At the request of Mr. BRADLEY, the names of the Senator from Indiana (Mr. LUGAR), and the Senator from Nebraska (Mr. ZORINSKY) were added as cosponsors of S. 1806, a bill to recognize the organization known as the Jewish War Veterans of the United States of America, Inc.

S. 1842

At the request of Mr. ARMSTRONG, the names of the Senator from New Mexico (Mr. BINGAMAN), and the Senator from Arizona (Mr. DECONCINI) were added as cosponsors of S. 1842, a bill to amend the Colorado River Basin Salinity Control Act to authorize the Secretary of Agriculture to develop and implement a coordinated agricultural program in the Colorado River Basin.

S. 2014

At the request of Mr. SPECTER, the name of the Senator from New York (Mr. D'AMATO) was added as a cosponsor of S. 2014, a bill to amend the Juvenile Justice and Delinquency Prevention Act of 1974 to provide for assistance in locating missing children.

S. 2031

At the request of Mr. MOYNIHAN, the names of the Senator from Alabama (Mr. HEFLIN), the Senator from Iowa (Mr. GRASSLEY), the Senator from Indiana (Mr. QUAYLE), and the Senator from California (Mr. WILSON) were added as cosponsors of S. 2031, a bill relating to the residence of the American Ambassador to Israel.

S. 2069

At the request of Mr. PRESSLER, the name of the Senator from Wisconsin (Mr. KASTEN) was added as a cosponsor of S. 2069, a bill to amend the Small Business Act.

S. 2127

At the request of Mr. NICKLES, the name of the Senator from Colorado (Mr. ARMSTRONG) was added as a cosponsor of S. 2127, a bill entitled "Federal Advisory Committee Act Amendments of 1983."

S. 2224

At the request of Mr. MITCHELL, the name of the Senator from Maryland (Mr. MATHIAS) was added as a cosponsor of S. 2224, a bill to repeal section 140 of Public Law 97-92, 95 Stat. 1200, and for other purposes.

S. 2258

At the request of Mr. MOYNIHAN, the names of the Senator from Hawaii (Mr. INOUYE), the Senator from Michigan (Mr. LEVIN), and the Senator from Massachusetts (Mr. TSONGAS) were added as cosponsors of S. 2258, a bill to grant a Federal charter to the 369th Veterans' Association.

S. 2266

At the request of Mr. CRANSTON, the names of the Senator from Vermont (Mr. LEAHY), the Senator from New York (Mr. MOYNIHAN), and the Senator from Florida (Mrs. HAWKINS) were added as cosponsors of S. 2266, a bill to grant a Federal charter to Vietnam Veterans of America, Inc.

S. 2295

At the request of Mr. QUAYLE, the name of the Senator from Michigan (Mr. RIEGLE) was added as a cosponsor of S. 2295, a bill to amend title 23, United States Code, to provide that for purposes of determining the minimum allocation paid to any State, the amount of taxes treated as paid into the highway trust fund with respect to gasohol and certain methanol and ethanol fuels shall be determined as if such fuels were taxed as gasoline.

S. 2299

At the request of Mr. DOLE, the names of the Senator from New Mexico (Mr. DOMENICI), the Senator from Utah (Mr. GARN), and the Senator from Kentucky (Mr. HUDDLESTON) were added as cosponsors of S. 2299, a bill entitled the "Anti-fraudulent Adoption Practices Act of 1984."

S. 2307

At the request of Mr. BOSCHWITZ, the names of the Senator from Arkansas (Mr. BUMPERS), and the Senator from Massachusetts (Mr. KENNEDY) were added as cosponsors of S. 2307, a bill making a supplemental appropriation to carry out title II of Public Law 480.

S. 2309

At the request of Mr. MOYNIHAN, the names of the Senator from Maine (Mr. COHEN), and the Senator from Vermont (Mr. LEAHY) were added as cosponsors of S. 2309, a bill to authorize the offer and payment of rewards for information and services concerning terrorist activities.

S. 2384

At the request of Mr. BRADLEY, the name of the Senator from Hawaii (Mr. MATSUNAGA) was added as a cosponsor of S. 2384, a bill to require rapid fill of the strategic petroleum reserve, to authorize early use of te strategic petroleum reserve, to authorize emergency block grants to assist low-income Americans during an oil supply disruption, and for other purposes.

S. 2413

At the request of Mr. DENTON, the names of the Senator from Utah (Mr. GARN), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Kansas (Mrs. KASSEBAUM), and the Senator from Georgia (Mr. MATTINGLY) were added as cosponsors of S. 2413, a bill to recognize the organization known as the American Gold Star Mothers, Inc.

SENATE JOINT RESOLUTION 129

At the request of Mr. PRESSLER, the names of the Senator from Hawaii (Mr. MATSUNAGA), and the Senator from Massachusetts (Mr. KENNEDY) were added as cosponsors of Senate Joint Resolution 129, a joint resolution calling upon the President to seek a mutual and verifiable ban on weapons in space and on weapons designed to attack objects in space.

SENATE JOINT RESOLUTION 143

At the request of Mr. MELCHER, the names of the Senator from Montana (Mr. BAUCUS), the Senator from Iowa (Mr. GRASSLEY), the Senator from Georgia (Mr. NUNN), and the Senator from North Dakota (Mr. BURDICK) were added as cosponsors of Senate Joint Resolution 143, a joint resolution to authorize and request the President to issue a proclamation designating the calendar week beginning with Sunday, June 3, 1984, as "National Garden Week."

SENATE JOINT RESOLUTION 165

At the request of Mr. MATHIAS, the names of the Senator from Tennessee (Mr. BAKER), and the Senator from North Carolina (Mr. EAST) were added as cosponsors of Senate Joint Resolution 165, a joint resolution to commemorate the bicentennial anniversary of the constitutional foundation for patent and copyright laws.

SENATE JOINT RESOLUTION 216

At the request of Mr. MOYNIHAN, the names of the Senator from Hawaii (Mr. INOUYE), and the Senator from Vermont (Mr. LEAHY) were added as cosponsors of Senate Joint Resolution 216, a joint resolution to affirm the policy of the United States to advance human rights in El Salvador by taking all measures that may be necessary or appropriate to assure that those responsible for the murders of four American churchwomen and other U.S. citizens are brought to justice; and for other purposes.

SENATE JOINT RESOLUTION 224

At the request of Mr. BOREN, the name of the Senator from South Dakota (Mr. PRESSLER), was added as a cosponsor of Senate Joint Resolution 224, a joint resolution to designate the week of April 1, 1984, as "National Amateur Wrestling Week."

SENATE JOINT RESOLUTION 236

At the request of Mr. MATSUNAGA, the name of the Senator from Massachusetts (Mr. TSONGAS) was added as a cosponsor of Senate Joint Resolution 236, a joint resolution relating to cooperative East-West ventures in space as an alternative to a space arms race.

SENATE JOINT RESOLUTION 237

At the request of Mr. HATCH, the name of the Senator from Alabama (Mr. HEFLIN) was added as a cosponsor of Senate Joint Resolution 237, a joint resolution to designate the week of November 25, 1984, throught December 1, 1984, as "National Home Care Week."

SENATE JOINT RESOLUTION 243

At the request of Mr. MOYNIHAN, the names of the Senator from West Virginia (Mr. RANDOLPH), the Senator from New Mexico (Mr. BINGAMAN), and the Senator from Arizona (Mr. DECONCINI) were added as cosponsors of Senate Joint Resolution 243, a joint resolution designating the week preceding October 28, 1984, as "National Immigration Week."

SENATE JOINT RESOLUTION 245

At the request of Mr. GORTON, the names of the Senator from Alabama (Mr. HEFLIN), the Senator from Kentucky (Mr. FORD), and the Senator from California (Mr. CRANSTON) were added as cosponsors of Senate Joint Resolution 245, a joint resolution to designate the week of April 15 through April 21, 1984, as "National Recreational Sports Week."

SENATE JOINT RESOLUTION 247

At the request of Mr. D'AMATO, his name was added as a cosponsor of Senate Joint Resolution 247, a joint resolution to designate March 25,

1984, as "Greek Independence Day: A National Day of Celebration of Greek and American Democracy."

At the request of Mr. HUMPHREY, the names of the Senator from Indiana (Mr. QUAYLE), the Senator from North Dakota (Mr. BURDICK), the Senator from Rhode Island (Mr. PELL), and the Senator from Utah (Mr. HATCH) were added as cosponsors of Senate Joint Resolution 247, supra.

SENATE JOINT RESOLUTION 250

At the request of Mr. BAKER, the names of the Senator from Arizona (Mr. GOLDWATER), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Montana (Mr. MELCHER), the Senator from Indiana (Mr. LUGAR), and the Senator from Kansas (Mr. DOLE) were added as cosponsors of Senate Joint Resolution 250, a joint resolution declaring the week of May 7 through 13, 1984, as "National Photo Week."

SENATE JOINT RESOLUTION 251

At the request of Mr. ARMSTRONG, the name of the Senator from Minnesota (Mr. BOSCHWITZ) was added as a cosponsor of Senate Joint Resolution 251, a joint resolution providing for the convening, whenever the legislatures of two additional States pass a resolution to hold such a convention, of a constitutional convention for the purpose of proposing an amendment relating to the balancing of the Federal budget.

SENATE JOINT RESOLUTION 254

At the request of Mr. LUGAR, the names of the Senator from California (Mr. CRANSTON), and the Senator from South Carolina (Mr. HOLLINGS) were added as cosponsors of Senate Joint Resolution 254, a joint resolution to designate the month of October 1984 as "National Down's Syndrome Month."

SENATE JOINT RESOLUTION 256

At the request of Mr. THURMOND, the names of the Senator from Connecticut (Mr. DODD), the Senator from Indiana (Mr. LUGAR) the Senator from Arkansas (Mr. BUMPERS), the Senator from North Carolina (Mr. EAST), the Senator from New Jersey (Mr. LAUTENBERG), and the Senator from Georgia (Mr. NUNN) were added as cosponsors of Senate Joint Resolution 256, a joint resolution to designate March 21, 1984, as "National Single Parent Day."

SENATE CONCURRENT RESOLUTION 86

At the request of Mr. HEINZ, the names of the Senator from Wyoming (Mr. SIMPSON), and the Senator from Indiana (Mr. LUGAR) were added as cosponsors of Senate Concurrent Resolution 86, a concurrent resolution expressing the sense of the Congress regarding the persecution of members of the Baha'i religion in Iran by the Government of Iran.

SENATE CONCURRENT RESOLUTION 94

At the request of Mr. MOYNIHAN, the name of the Senator from Illinois (Mr. PERCY), was added as a cosponsor of Senate Concurrent Resolution 94, a concurrent resolution expressing the sense of Congress that the President of Syria should permit Jewish emigration.

SENATE RESOLUTION 312

At the request of Mr. HUMPHREY, the names of the Senator from Minnesota (Mr. BOSCHWITZ), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Arkansas (Mr. PRYOR), the Senator from Arkansas (Mr. BUMPERS), the Senator from Michigan (Mr. LEVIN), the Senator from Utah (Mr. HATCH), the Senator from Vermont (Mr. LEAHY), and the Senator from Illinois (Mr. DIXON) were added as cosponsors of Senate Resolution 312, a resolution to honor Commander Alphonse Desjardins, founder of La Caisse Populaire de Ste-Marie, Manchester, N.H.

NOTICES OF HEARINGS

SUBCOMMITTEE ON EMPLOYMENT AND PRODUCTIVITY

Mr. QUAYLE. Mr. President, the Subcommittee on Employment and Productivity will hold hearings on Employment and Productivity and the Future of the Steel Industry, Thursday, March 22, at 9:30 a.m., in SD-628 of the Dirksen Senate Office Building.

Those scheduled to testify include Hon. JOHN HEINZ, U.S. Senator from Pennsylvania; Malcolm Baldrige, Secretary of the Department of Commerce; Dr. Robert Crandall of the Brookings Institution; Dr. Joel Hirschhorn of the Office of Technology Assessment; Dr. Donald Barnett of the World Bank; Hon. Thomas McDermott, mayor of Hammond, Ind.; and representatives from the American Iron and Steel Institute and the United Steelworkers of America. Others invited include J. Paul McGrath, Assistant Attorney General, Justice Department, and U.S. Trade Representative William E. Brock.

Those wishing to submit written statements for the hearing record should write to the Subcommittee on Employment and Productivity, Committee on Labor and Human Resources, SH-607, Hart Senate Office Building, Washington, D.C. 20510. For further information, please contact either Barbara McLennan or Bonnie Heineman at 224-5623.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON FINANCE

Mr. BAKER. Mr. President, I ask unanimous consent that the Committee on Finance be authorized to meet during the session of the Senate on Tuesday, March 13, in order to mark up the deficit reduction package.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUBCOMMITTEE ON TACTICAL WARFARE

Mr. BAKER. Mr. President, I ask unanimous consent that the Subcommittee on Tactical Warfare, of the Committee on Armed Services, be authorized to meet during the session of the Senate on Tuesday, March 13, at 2 p.m., to receive testimony on JSTARS and JTACMS programs.

The PRESIDING OFFICER. Without objection, it is so ordered.

SELECT COMMITTEE ON INTELLIGENCE

Mr. BAKER. Mr. President, I ask unanimous consent that the Select Committee on Intelligence be authorized to meet during the session of the Senate on Tuesday, March 13, at 2 p.m., to hold a closed hearing to review the fiscal year 1985 Intelligence budget.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAKER. Mr. President, I ask unanimous consent that the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs be authorized to meet during the session of the Senate on Tuesday, March 13, in order to hold a hearing on S. 2300, the Civilian Agency Multi-Year Contracting Act of 1984.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAKER. Mr. President, I ask unanimous consent that the Select Committee on Intelligence be authorized to meet during the session of the Senate on Tuesday, March 13, in closed session to receive a briefing on intelligence matters.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUBCOMMITTEE ON STRATEGIC AND THEATER NUCLEAR FORCES

Mr. BAKER. Mr. President, I ask unanimous consent that the Subcommittee on Strategic and Theater Nuclear Forces of the Committee on Armed Services, be authorized to meet during the session of the Senate on Tuesday, March 13, to hold an open hearing to be followed by a closed hearing on sea-based deterrent.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

CHIEF JUSTICE BURGER'S ANNUAL MESSAGE ON THE ADMINISTRATION OF JUSTICE

● Mr. HATFIELD. Mr. President, our adversarial system of justice necessarily involves competition. It involves two advocates arguing in the best interests of their clients with a judge who presides over the parties and who renders a judgment. Whether the disputed issue involves a civil or criminal issue, a citizen of this country can expect an adjudication of the equities through

established court procedures and a result based on the findings of fact and law.

Unfortunately, our system of justice does not guarantee true justice. Often a litigant prevails because of superior representation by an attorney or a team of attorneys. Often a jury will reach a verdict which appears to belie the evidence presented in the case, and will reach such a verdict because of the persuasive powers of a skilled orator. Put simply, the outcome in any litigation can depend as much on the performance of attorneys as it can on the actual equities involved.

Judging from opinion polls which indicate that the legal profession is not held in high esteem, attorneys seem to bear a great share of the blame for the present standing of our system of justice. Frivolous lawsuits, extended appeals, and outrageous trial outcomes are commonly attributed to this Nation's pool of 650,000 attorneys.

Such a finding of fault, I believe, is not fair. It is easy to forget that we, as a society, are using the courts as a "first resort" means to resolve disputes, and that we have become progressively litigious and confrontational. Behind every lawsuit are groups of people or corporations who expect their lawyers to win at virtually all costs. So when one is affixing the blame for the low regard in which our judicial system is held, one would be well-advised to look in each community, each household, each corporate office, and determine whether blame can properly rest in those quarters.

Nonetheless, as sworn officers of the court, attorneys are called to an ethical conduct which preserves the integrity of our system of justice. Chief Justice Warren E. Burger recently addressed members of the American Bar Association at their midyear meeting on the subject of ethical conduct, and his message to the legal community on the administration of justice is one worthy of careful consideration. Rather than paraphrase Chief Justice Burger's insightful observations, I ask that the text of his address be printed in the RECORD. I commend this remarkable speech to the attention of my colleagues.

The speech follows:

ANNUAL MESSAGE ON THE ADMINISTRATION OF JUSTICE

(From Warren E. Burger, Chief Justice of the United States, at the Midyear Meeting, American Bar Association, February 12, 1984)

The response of this Association in our time to the needs of the courts and the American people is in considerable contrast to the response of this Association to a speech given 78 years ago by Roscoe Pound, a young man from Nebraska, who later became one of the great Deans of the Harvard Law School. At the meeting of this Association in 1906, he addressed "The Causes of Popular Dissatisfaction with the Administration of Justice." At that time, this Association was hardly representative of the legal profession in America. It had only 2,600 members as compared with over 300,000 today. It was an establishment-oriented organization quite satisfied with the status quo. The leaders of the Association rejected Pound's criticism to the point that the Association initially refused to publish his speech. And it was not published until sometime later. Now we know it as a classic—so much so that eight years ago, our Association joined the Conference of Chief Justices of the States and the Judicial Conference of the United States to sponsor one of the more significant legal meetings in recent times. By design, that Conference, which came to be known as the Pound Conference, was held in St. Paul, Minnesota, and was convened in the very room of the State House of Representatives, and at the very lectern where Pound made his 1906 speech.

The response of the Association to that 1976 re-examination of Pound's criticism was immediate, and you are familiar with the various programs it generated. One very important program was aimed at developing alternative methods for resolving disputes which now inundate all the courts of this country. Another was directed at delays in litigation and abuse of the discovery process, and I will return to those subjects in a few minutes. Today, the American Bar Association is the most powerful and effective instrument for the improvement of justice in our country and this is shown by the development of such institutions as the National Judicial College, the Institute for Court Management, the National Center for State Courts, the National Institute for Trial Advocacy and the monumental study on Standards of Criminal Justice, to name only a few.

We are living in a period of dramatic, spectacular and rapid change. This is especially true in the world of science, for we are told—incredible as it seems—that in some fields of science there has been more development since World War II than in the previous 500 years. Not only is the world of science undergoing momentous changes, but as we learn every day, indeed twice a day, on the morning and evening news, this is also true in the political world and in business and industry.

These changes have an impact on all of us, as well as on the participants and the victims, and many of these changes—scientific, economic and political—have an impact on the administration of justice. Change, of course, is the law of life, but the pace of change we now witness is staggering.

CHANGE IN PROFESSION

Some startling changes have taken place in our profession in the last two decades. One very desirable change was introduced by the profession itself—the growth in the use of paralegals to reduce the costs of services to clients. Another change is the growth of large law firms and the large increase in branch offices of law firms. We are told that the number of American lawyers approaches, if it has not already exceeded, 650,000! It has been reported that about two-thirds of all the lawyers in the world are in the United States and of those, one-third have come into practice in the past five years.

We are also told that in the past ten years, the legal profession has experienced a sharp decline in public confidence as measured by opinion polls.

Is there a connection between this sharp decline in public confidence in lawyers and the doubling of the numbers of lawyers in the last 20-odd years?

Does this decline in the standing of lawyers relate in some way to the high cost of legal services and the slow pace of justice?

Does it come from a growing public opinion that our profession is lax in dealing with the incompetent lawyer or the errant and dishonest lawyer?

Is the public perception of lawyers influenced sometimes, and to some extent, by absurd lawsuits which we have not yet found a way to restrain—a father suing the school board to raise little Johnny's grade in English from C to B? Or the football fan who sues to revise a referee's ruling on a forward pass or a fumble?

If, as some assert, there are too many lawyers, that should mean greater competition, and we Americans have always thought competition brings the highest quality of goods and services at the lowest cost. In our free society, we believe in competition, but is competition in a profession the same as competition in the marketplace? Given the article of faith that competition reduces costs, should we not inquire as to the reasons why—after this enormous growth in the number of lawyers—there is a widespread hue and cry, which increases steadily, about lawyers' fees and litigation costs?

The criticism of our profession is not casual or irresponsible. Many of our own leaders have addressed it. Just last year, a distinguished lawyer and educator, Derek Bok, formerly Harvard's Law Dean and now its President, made some strong observations on the subject. He said this:

"The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world. . . ."

Many of the activities and studies of our Association acknowledge our own appraisal that all is not well, that our legal system is not as efficient as it should be.

Lawyers have never been loved, before or since Shakespeare had his revolutionary character propose to "kill all the lawyers." Perhaps this is because, in part, our most visible colleagues, the litigators, can hardly please all of the observers. Even the winning client often disapproves when he considers the stress of litigation, the net results of the courtroom battle and pays his legal fees and costs. Added to that, the behavior of some of the more visible advocates is not such as to reflect credit on our profession.

Increasingly in the past few years, critics have warned that lawyers must be careful not to price themselves out of the market. We know what happens when that occurs in any field of activity: the consumers of the services or goods find other sources of supply. We saw that when the quality and price of the automobiles made in this country were found unacceptable. The consequences were very painful for our economy—and for our pride.

ADVERTISING

We lawyers have always been fond of quoting the French and English legal philosophers to make a point, and, today, I will call on Edmund Burke, one of the great 18th century legal thinkers most admired by lawyers. He said this:

"People are qualified for civil liberty in exact proportion to their disposition to put moral chains on their appetites."

Other philosophers have echoed this, saying that the preservation of a civilized society depends upon the willingness of its members to forego some of their freedoms.

If this is true of society generally, it is even more so in a profession like law or medicine. That is what sets the professions apart from the marketplace of barter and trade.

In the past, the professional standards and traditions of the Bar served to restrain members of the profession from practices and customs common and acceptable in the rough-and-tumble of the marketplace. Historically, honorable lawyers complied with traditions of the Bar and refrained from doing all that the laws or the Constitution allowed them to do. Specifically, they did not advertise, they did not solicit, they kept careful separate accounts of clients' property, they considered our profession as one dedicated to public service. We still pay homage to the idea that lawyers are "officers of the courts"—or is that just lip service?

Along with the decline of public esteem of our profession, we have witnessed the decline in the public confidence in the media. Some responsible journalists attribute this decline to an insistence of some of their clan in exercising their First Amendment rights to the outer limits or beyond. Some journalists acknowledge that this is an abuse of their First Amendment rights. Others disagree.

Does our profession's low public standing derive, in part at least, from the insistence of some lawyers on exercising their First Amendment rights to the utmost? In current polls, lawyers and journalists rank roughly near the "bottom of the barrel." Perhaps neither likes the company they find themselves in!

One recent development may shed some light on the public perception of our profession. When the Supreme Court declared that the First Amendment allows advertising by lawyers, it placed lawyers in much the same posture, with respect to advertising, as all other occupations. But to those who still regard the practice of law as a profession of service—with high public obligations, rather than a trade in the marketplace—the professional standards against advertising are still widely observed. One study made by the Association estimates that as many as 10 to 13 percent of the lawyers engage in some form of advertising. But some of this small segment treat this freedom as a release from all professional restraints and use it as a license. We see some lawyers using the same modes of advertising as other commodities from mustard, cosmetics, and laxatives, to used cars. A hypothetical case will make my point.

Imagine a day when thousands of eyes are focused on a football game. An ad comes on the TV, perhaps during the halftime. The scene is much like the contest the viewers have just been observing—a spectacular 90-yard touchdown run in which the star eludes all tacklers. The scene then changes. A fine-looking fellow comes on the screen in business clothes, and it turns out he is a popular football star. He says something like this: "If you have a legal problem or case—and if you want to score—go to my friends, Quirk, Gammon & Snapp."

At that point, one by one, three, well-dressed fellows come on stage, perhaps against the background of the *United States Code Annotated* or the *United States Reports*. The speaker goes on:

"If you really want to make a touchdown against your opponents, go to Quirk, Gammon & Snapp. For an appointment call (800) 777-1111. They are the best!

"There will be no charge for the first conference on your problems. They have a special rate on uncontested divorces during the holidays. Don't wait."

There are some variations of this unseemly practice, such as house-to-house distribution of coupons giving a $15- or $25-credit on the first conference with a lawyer identified in the coupon.

This is happening in a profession that once condemned champerty and maintenance and drove ambulance chasers out of the profession.

Having said this, however, we must be careful to recognize that not all the developments in higher lawyer visibility and advertising are undesirable or unprofessional. Some of them, for example, store-front, street-level offices of so-called legal clinics that publish dignified announcements of their availability have helped bring low-cost legal services to lower-income people long denied access to legal assistance.

TRIAL COURT ADVOCACY

Ten years ago, I suggested that up to one-third or one-half of the lawyers coming into our courts were not really qualified to render fully adequate representation, and that this contributed to the large cost and the delays in the courts. We know that a poorly trained, poorly prepared lawyer often takes a week to try a one- or two-day case. My purpose was to stimulate debate, and some of you, very appropriately, challenged my statements. Later on, in the debate that followed, the President of our Association said that my figure was too high and that the correct figures was not more than 25 percent. Our distinguished colleague Griffin Bell, then Attorney General of the United States, made an estimate of 30 percent. I responded to this in 1979 on an occasion such as we have today. I accepted the estimates of the President of our Association and the Attorney General. Then I asked for a show of hands of the audience as to how many thought a figure of 25 to 30 percent of courtroom incompetents was tolerable. Not a single hand was raised. Of course it was not tolerable.

When surveys and studies were made by the Association and other responsible bodies, it developed that even my estimate of below-standard courtroom performance was too low!

Our Association and its component State and local associations and committees moved swiftly. And the law schools, including Harvard's two and one-half million-dollar project on trial advocacy, developed broad scale programs on trial advocacy and related subjects. In the past decade, a majority of our law schools have followed the lead of the early pioneer schools in focusing attention on the elements of trial advocacy, the techniques of negotiation and of arbitration.

In 1976, the Judicial Conference of the United States launched a study of the quality of advocacy in Federal courts, and in 1979 the so-called Devitt Committee Report recommended experiments with special standards for admission to the Federal courts. The Judicial Conference then established an implementation program which is now proceeding in 13 pilot Federal Districts under the chairmanship of Judge Lawrence King of Florida.

I recall these developments to you because they show that the leadership of this Association has never failed in modern times to respond to the needs of our profession and the interests of the public.

LAWYER DISCIPLINE [1]

In a country as large as ours, with our system of Federalism, regulation of the Bar cannot be centered entirely in one place as it is in England and some other common-law countries. Fourteen years ago Justice Tom Clark chaired the Association's committee on disciplinary enforcement by the Bar. That Committee's Report said this:

"After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors."

That Report stimulated action by some State Bar Associations, but any fair-minded examination of the whole picture today will reveal that what we have done falls short of what is needed. There are an increasing number of good State programs on discipline, financed by annual assessments on practitioners. The public interest first, and the long-range interest of our profession, require a comprehensive re-examination of the mechanisms we now have to deal with dishonest and unethical practices. The alternative is that State legislatures may move independently if our profession does not act. The 1970 Clark Report on lawyer discipline must be brought up to date because more vigorous programs are imperative if we are to have the confidence of the public.

DISCOVERY ABUSE

I now turn to another matter internal to the profession and in the courts, and of significance and importance to the public. We remember that in the 1930s, by rules, new procedures for pretrial discovery were introduced in the Federal system, but they did not come into full bloom for some years. The Association's committees have long been concerned about the growing problem of discovery abuses which are damaging not only in terms of costs to clients but to the perception of the profession. In 1983, these discovery Rules were amended in response to the rising demand to curb widespread abuses of discovery. These amended Rules give trial judges important pretrial management and oversight responsibilities, and direct the judges to impose sanctions directly on attorneys who abuse the court's processes.

Recently, I invited a group of 24 representative members of our profession to Washington to focus attention on these amended discovery Rules. This task force

[1] What follows should not be interpreted as criticism of the ABA; attorney discipline largely is the responsibility of State courts and the local and State Bar Associations. The ABA in fact has been active since 1970 in coordinating the efforts of local and State Associations by providing a clearinghouse of statistics on attorney discipline and providing a resource pool for information through the American Center for Professional Discipline. This year the Center's budget is $1,200,000, and will be even higher next year, which reflects the substantial level of support the ABA is providing. Further, the ABA has been instrumental in helping Federal District courts and Federal agencies promulgate disciplinary rules for attorneys appearing before them. In spite of these massive efforts, much remains to be done.

included practicing lawyers, judges and law teachers. Two of the practicing lawyers were formerly Federal judges. At the conclusion of these sessions, I invited them to give me their views. One distinguished member of the group wrote that we may have a "breakdown in the professional standards of the entire profession."

He went on to focus on the abuses of discovery by lawyers saying, "We have allowed discovery to take on a life of its own."

Another member expressed the view that some lawyers have exploited pretrial discovery with at least an excess of adversary zeal and, at worst, something approaching its use as a tool of extortion. Another, with long experience as a practitioner, lamented the practice which he described as "filing a complaint based almost on rumors and then embarking on months of extensive pretrial discovery to find out if his client had a case."

One of the responses provided an apt summary of the whole problem:

"Some basic institutional reform in the legal profession is what is needed—lawyers have got to stop using the court system as a means of enriching themselves at the expense of their clients. And the courts have got to stop allowing the lawyers to do it."

These are hard—even harsh—appraisals but they come from responsible, thoughtful lawyers and judges.

What this means is that, under the 1983 Rule changes, judges must not remain aloof from what is going on in a case simply because the parties have not presented themselves in the four walls of the courtroom to begin a trial. The 1983 Amendments require that judges take a more active role in overseeing pretrial proceedings. Judges in some State courts and in Federal courts have exercised their discretionary authority to impose sanctions both on attorneys and their clients for filing frivolous cases for abuse of discovery processes. In one state case, a trial judge held that the plaintiff's case was based on totally frivolous allegations and ordered the payment of nearly two million dollars in fees and expenses. Another judge imposed heavy costs against both the plaintiff and the attorney based on the State's new Civil Code of Procedures that authorized trial judges to impose sanctions on parties and attorneys who litigate in bad faith. In the Federal courts, the amended Rules now authorize sanctions on lawyers for abuse of the privilege. A few, carefully considered, well-placed $5,000- or $10,000-penalties will help focus attention on the consequence of abuses by lawyers.

COST SHIFTING

Another important development is under study. We are exploring the possible strengthening of Rule 68 of the Civil Rules to allow either party to offer a settlement. If the offer is refused, and the case goes to trial and results in a judgement less favorable to the "refusing party" than the offer it rejected, that party would, in the descretion of the court, be subject to payment of all costs the opposing party incurred after rejection of the offer, including attorneys' fees. Cost shifting, subject to court approval, has long been a part of the administration of justice in other common-law countries and we must study their experiences.

I suspect some of my judicial colleagues will respond that heavily overburdened judges—and they are overworked—should not be further burdened. But the day has long since passed when we can simply "let-the-lawyers-run-it." Although pretrial proceedings are not open as a trial is open, litigation becomes a matter of the court's responsibilitly as soon as judicial power is invoked. The dangers in leaving everything to the lawyers outweight the logic of the situation. Some of our ablest judges have developed ways to keep in touch with the cases during the pretrial stage to make sure that that process is not being abused. This is the essence of sound judicial administration.

At the March meeting of the Judicial Conference of the United States, I will request the Conference to consider a program in each Federal Circuit and District to deal with this problem, particularly to promote wider understanding and use of the 1983 Amendments to the Civil Rules. After one recent conference on the new Rules, the very next court day, one judge levied costs on a litigant for the burden imposed on the other litigant by duplicative motions. I urge the Association, the State Bar and local Bar leaders to cooperate with these programs. The Discovery Tast Force that I referred to earlier will provide a helpful blueprint which can be adapted to the needs of each District. Now if it seems to you that I am unduly hard on lawyers today, let me close this subject by acknowledging that, at times, we judges are part of the problem. Corrective action is a joint responsibility of the bench and Bar. Lawyers, judges and law enforcement officers make up the system of justice. Together, we are responsible for insuring the rule of law. To retain the respect of the people, we must deserve their respect.

We know, of course, that the Association has long been aware of some of the problems I have been discussing and programs are under way to deal with some of them. But are they enough? What we need is a comprehensive and coordinated re-examination of all of these areas.

The story of justice, like the story of freedom, is a story that never ends. What seems unrealistic, visionary, and unreachable today must be the target even if we cannot reach it soon or even in our time. If we ever begin to think we have achieved our goals, that will mean our sights were set too low or that we had lost concern for our profession or the public interest.

This Association has long advocated the great ideals that distinguish our profession from the actors in the marketplace. We Americans are a competitive people and that spirit has brought us to near greatness. But that competitive spirit gives rise to conflicts and tensions. Our distant forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of revolving conflicting claims is a mistake that must be corrected. No other nation allows the adversary system to dominate relationships to the extent we do.

We lawyers are creatures—even slaves—of precedent which is habit. We tend to do things in a certain way "because we have always done it that way." But when we must constantly witness spectacular expansions of court dockets, requiring more and more judges, something is wrong. When we see costs of justice rising, when we see our standing in public esteem falling, something is wrong.

If we ask the question: "Who is responsible?", the answer must be, "We are. I am. Your are."

The entire legal profession—lawyers, judges, law teachers—have become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?

There are other problems that deserve our attention, but those I have discussed today seem to me the most urgent, and at the same time, they have long-range implications.

In closing, Mr. President, I propose to you and our fellow members of the Association, that we create a study group of representative leaders of our profession to examine these problems and report to the Association. It might well be useful to include leaders from other disciplines as we take a careful look at ourselves.

Nearly 50 years ago, one of my most distinguished predecessors, Chief Justice Hughes, said this to our profession:

"In the midst of a task so great as this, there may come a time of discouraging reflection upon the immense needs of the administration of justice and the extreme difficulty of finding ways by which [we] can solve the prolems. . . . [W]e cannot afford to take a defeatist attitude. . . . The most important lesson of the past is to strive and never be disheartened because of the immensity of the task. The ultimate goal may seem to recede as we advance, but we must press on."

This Association has repeatedly shown that it is the most powerful, the most influential force in this country for improving the system of justice, and I am confident the Association will always act in the public interest.

Mr. President—in that spirit—I pledge my full cooperation should you elect to act on these problems to help us prepare for the years ahead.●

THE MISSING CHILDREN'S DAY RESOLUTION AND MISSING CHILDREN'S ASSISTANCE ACT

● Mr. D'AMATO. Mr. President, I rise today to cosponsor two important legislative initiatives addressing the national tragedy of missing children. I commend both Senator HAWKINS and Senator SPECTER for their leadership and their tireless efforts to fashion a meaningful and effective program to locate and help missing children.

I am proud to be a cosponsor of Senate Joint Resolution 252, introduced by Senator HAWKINS, which calls upon the President to issue a proclamation designating May 25 as "Missing Children's Day." This legislation has special meaning to me as a Senator from New York. On May 25, 1979, 6-year-old Etan Patz disappeared on his way to school in New York City; 5 years later, Etan Patz is still missing. He is one among 150,000 children who disappear every year. Police estimate that there are 20,000 runaways 15

years of age or younger on the streets of New York. They, too, are among the missing.

In preparing this statement, I contacted the office of Child Find, a national nonprofit organization based in New Paltz, N.Y., whose sole purpose is to locate missing children. The Etan Patz case is one of a growing number of cases from every State in the Nation registered with Child Find.

The American Bar Association is another national institution which recognizes the growing dimensions of this tragedy. The ABA estimates that every year 100,000 children become the victims of illegal parental kidnaping—usually as part of a dispute over child custody in divorce cases.

Covenant House and other sanctuaries for young people have demonstrated the urgent necessity of addressing yet another aspect of the problem; namely, the related, and very ugly, epidemics of drug abuse by, and sexual abuse of, children. Missing children are particularly vulnerable to such exploitation. As Father Bruce Ritter, the founder of Covenant House, has said:

> They are offered every kind of drug imaginable, every type of perversion conceivable.

Local police departments around the country are establishing missing person's squads and runaway units. The efforts of the police are to be commended enthusiastically. In 1982, for example, all 176 children under the age of 10 reported to the New York City Police Department were returned to their homes.

By increasing national awareness of the dimensions of the tragedy, a Missing Children's Day 1984 will contribute greatly to our national effort to combat this problem. I urge all of my colleagues to support this resolution. Missing Children's Day will focus national attention both on the plight of missing children and on the heroic efforts to locate and protect them.

Clearly, however, more than 1 day of recognition is required. On October 12, 1982, President Reagan signed into law the Missing Children Act, which, as Public Law 97-292, provides for national clearinghouse of information on missing children. I was happy to be 1 of the more than 70 Senators cosponsoring that legislation. Under the Missing Children Act, the FBI is authorized to collect information directly from local police, as well as from the parent, legal guardian, or next of kin of a missing child when local officials do not contact the FBI. These reports are then filed in the National Crime Information Center (NCIC) computers. Access to the NCIC computer files has been of enormous benefit to the effort of local law enforcement agencies in locating missing children.

Excellent as are the efforts to date, however, the size of the problem is such that we need to do more. For this reason, I am cosponsoring the Missing Children's Assistance Act, S. 2014. This bill amends the Juvenile Justice and Delinquency Prevention Act of 1974 to require the Administrator of the Office of Juvenile Justice and Delinquency Prevention to establish a toll-free telephone line to enable people to provide information about the location of missing children.

S. 2014 also authorizes the Administrator to make grants for research and demonstration projects designed to improve our ability to prevent the abduction of children. A national clearinghouse to provide technical assistance to, and coordinate the efforts of, State and local governments and agencies and individuals is another important aspect of S. 2014.

In recognition of the necessary role of the Office of Juvenile Justice and Delinquency Prevention, S. 2014 extends the authorization of the Juvenile Justice and Delinquency Prevention Act and the Runaway and Homeless Youth Act through 1988. The Missing Children's Assistance Act will provide a coordinated and comprehensive program to address the national tragedy on which we will focus special national attention every May 25.●

HARD TIMES IN URANIUM ENRICHMENT

● Mr. HUMPHREY. Mr. President, enriching uranium for use in the world's nuclear powerplants is a big, and potentially very lucrative business. Until 10 years ago, our Government was the only free world supplier of this fuel. Today, because of blundering decisionmaking in an increasingly competitive environment, our uranium enrichment program is in serious trouble. Presently, our share of total world sales has slipped to 35 percent and threatens to decline even further.

What are the reasons for this decline, and what is the Department of Energy (DOE), which runs this program for the Government, doing to address it? A good analysis of these issues can be found in "Hard Times in Uranium Enrichment," a piece by Colin Norman which appeared in the March 9 issue of Science Magazine.

As Mr. Norman reports, officials at DOE have recently overhauled the enrichment program to make it more competitive. DOE has come up with a new contract that is designed to help retain the customers that it now has under contract. But the price of DOE's enrichment service under the new contract will be $135 per unit, while our European competitors are selling their product for $100. Meanwhile, enrichment units on the so-called secondary market composed of large private stockpiles which are being unloaded on the market at bargain prices, have been reported as low as $80.

What continues to concern me and others is that DOE could take immediate steps to significantly reduce its per unit price. For instance, DOE insists on continuing to charge ahead with its Portsmouth, Ohio, gas centrifuge plant (GCEP). For several years, critics have argued and studies have confirmed that the technology to be used in the Portsmouth plant will be uneconomic and outmoded the day it comes on line. Yet, DOE persists in commiting hundreds of millions of dollars to the project.

Further, as the Science article notes, next year DOE will pay $339 million to another Government agency, the Tennessee Valley Authority (TVA) for electricity that will neither be produced nor used. DOE thus far has been reluctant to aggressively pursue means for seeking relief from these excessive charges.

Congress should take action to insure that the uranium enrichment program is set on the right course for the future. If not, the program could very well be on the road to bankruptcy, a disaster that could cost this Government and this Nation billions. I would strongly recommend colleagues to read "Hard Times in Uranium Enrichment."

Mr. President, I ask that the article by Mr. Norman be printed in the RECORD.

The article follows:

HARD TIMES IN URANIUM ENRICHMENT

(By Colin Norman)

The federal government's $2-billion-a-year business enriching uranium for reactor fuel is in such dire straits that the Department of Energy (DOE) will soon be forced to drop one of two major programs aimed at developing an advanced enrichment technology. In mid-1985, it will choose between developing a new generation of gas centrifuges or a process based on lasers to replace the aging facilities that are currently in operation. The losing project will be virtually closed down.

Billions of dollars will ride on the choice. At stake is the future of a massive gas centrifuge plant under construction in Portsmouth, Ohio. Known as the Gas Centrifuge Enrichment Plant, or GCEP (pronounced gee-sep), it has already soaked up some $2 billion in construction funds. If the development of advanced centrifuges is shut off, the plant would be at best marginally economic and may have to be abandoned. On the other hand, if DOE closes out the laser enrichment program, it risks turning its back on a promising technology on which it has already spent several hundred million dollars.

The department had originally wanted to make the selection around 1988, but has decided it can no longer afford to support two $100-million-a-year R&D programs. It will thus be forced to choose before either technology is fully demonstrated.

The accelerated decision is part of a radical overhaul of the enrichment program designed to pull it back from the brink of disaster. Last year, DOE belatedly realized that its customers for enriched uranium were deserting it just as the enrichment

program was committed to spending billions of dollars on construction (Science, 19 August 1983, p. 730). "I can't overemphasize the criticality of what we were facing in 1983. We were in a death spiral. It was a problem as big and as bad as Chrysler," says Shelby Brewer, head of nuclear programs at DOE.

At the root of the problem is the worldwide slump in the nuclear power industry. In the early 1970's, utilities had placed so many orders for future deliveries of enriched uranium that DOE—which then had a worldwide monopoly—closed its order books because it believed its production capacity would soon be exceeded. A $1.5-billion program was launched to expand output from DOE's three existing plants, and in 1977 the go-ahead was given to build GCEP. The Europeans also entered the enrichment business in the 1970's with the construction of two new plants.

Then the bottom fell out of the market for reactor fuel as utilities around the world began to scale back their nuclear construction. DOE found itself with contracts that were "just a handful of paper," as Brewer puts it. It was also locked into long-term contracts with utilities for electricity to operate its enrichment plants, and is now paying huge penalties for power it ordered but no longer needs. Next year alone, DOE will fork over $339 million in penalties to the Tennessee Valley Authority (TVA).

DOE calculates that worldwide production capacity currently exceeds demand by a factor of 2. To make matters worse, many utilities are holding a huge stockpile of enriched uranium that they have been forced to accept under strict take-or-pay contracts, and they are unloading it to other utilities at a substantial discount. There is enough material slopping around in this so-called secondary market to meet current demand for about 3 years.

Some two-thirds of this surplus is of European origin, and the devaluation of European currencies against the dollar has made this cut-price fuel doubly attractive to U.S. utilities. About 18 months ago, DOE was jolted when some of its customers started canceling contracts and going to the secondary market. It received another blow when some utilites also began negotiating contracts with European producers, which are now undercutting DOE's prices in part because of those huge penalties DOE is paying to TVA.

Suddenly, DOE was faced with the prospect of a rapidly dwindling market just when it was building all that new capacity. Brewer says he was "horrified" when he looked into the program and realized the dimensions of the problem. Some radical surgery was in order.

To try to prevent further erosion of its market share, DOE has recently dropped its prices (although they are still above those of its European competitors) and offered its customers a more flexible contract that permits them to obtain a specified fraction of their requirements from the secondary market. Existing contract-holders have until October to convert to the new contract; DOE will then have a firm estimate of its revenues over the next few years.

Initial response to the new contract has been favorable. In the first month after it was unveiled, Duke Power signed on with others worth more than $2 billion over the next 30 years, and almost half DOE's customers expressed their intent to convert. But even so, DOE projects that its revenues will drop from $2.1 billion this year to $1.675 billion in fiscal year 1985.

Even under the most favorable assumptions, the revenues are unlikely to cover the cost of the ambitious construction and R&D program that DOE laid out in the 1970's. GCEP alone would have cost nearly $10 billion by the time it was finished in the late 1980's. DOE officials were therefore faced with two alternatives: either scale the program back drastically or try to persuade the Office of Management and Budget (OMB) and Congress to approve an operating deficit for a few years. There was little chance OMB would go along and even less that Congress would agree, so the knives were sharpened.

But more than simple cuts are being considered. When it was first approved, GCEP was envisaged as a massive complex of eight process buildings, each housing thousands of centrifuges. By the early 1980's, it was recognized that the original justification for building GCEP had vanished because DOE's three existing enrichment plants have more than enough capacity to meet projected demand until the end of the century. But construction continued because DOE changed the justification. In essence, it argued that because gas centrifuge technology is much less energy-intensive than the gaseous diffusion process employed in the existing plants, GCEP was needed to replace some of its aging facilities and hold down costs in future years.

Two of GCEP's process buildings and most of the central control and fuel-handling facilities have already been completed, and late last year the first centrifuges were installed. But DOE has now thrown the project into a lower gear. Plans for constructing the remaining six process buildings have been deferred, and DOE is committed to filling only half the first building with current-generation centrifuges. What happens next will depend to a large extent on whether DOE chooses to develop either advanced centrifuges or an entirely different technology based on lasers.

In the early 1980's, DOE began to pour money into the development of an advanced centrifuge with three times the efficiency of the machines now being installed. It also stepped up work on a potentially more efficient process using lasers that had been under development at the Lawrence Livermore Laboratory. DOE was planning to spend about $190 million on the two programs this year, with a full-scale demonstration of both of them expected in the late 1980's.

Funding for both technologies is being reduced, however, and the projects are now being revamped so that a choice can be made in the summer of 1985. If DOE chooses to continue with the advanced centrifuge, the new machines will probably be installed in the two completed process buildings of GCEP. According to DOE estimates, a two-building GCEP equipped with advanced centrifuges would be cheaper to operate than the existing gaseous diffusion plants. But with current-generation machines, such a plant would provide little or no cost savings. Thus, if the laser process is chosen, the future of GCEP would be in doubt.

In view of the fact that some $2 billion has already been invested in GCEP, DOE's technological choice would seem to be heavily skewed toward the advanced centrifuge. "Yes, that will be a factor," says Brewer. "That's life; you have to live with past dicisions." But John Longenecker, the head of the enrichment program, points out that the capital cost of building a new laser plant would be roughly equal to the additional cost of completing a two-building GCEP with advanced centrifuges. Thus the money sunk into GCEP has in effect put the two technologies on a roughly equal footing.

Longenecker says that the choice will be made not only on the expected capital and operating costs of the two technologies but also on their relative attractiveness to private investors. DOE is hoping to get some private capital into the enrichment program as a first step toward turning the enterprise over to private industry. Exactly how the transition would be accomplished, however, is not clear.

In any case, the real key to attracting any investment into enrichment, whether public or private, will be how successful DOE is in hanging on to its customers, and how long the depression endures in the nuclear industry. From now on, claims Brewer, investment decisions in the enrichment program will depend on the market—an elementary business strategy that, he admits, DOE has not followed in the past.●

DR. SAMUEL K. LEVY'S 90TH BIRTHDAY

● Mr. D'AMATO. Mr. President, I rise today to pay homage to a unique person from my hometown of Island Park, N.Y., who will celebrate his 90th birthday on March 31. Dr. Samuel K. Levy has been one of the community's most active members.

Dr. Levy was born in New York City. He has been a resident of Island Park for 47 years and a practicing pediatrician associated with Maimonides Hospital for 67 years. He was recently presented with an award by the hospital for serving on its staff longer than anyone else in the history of the hospital.

Dr. Levy spent his honeymoon and did his postgraduate studies of pediatrics in Vienna, where his great-grandfather practiced medicine. Dr. Levy's European travels were not exclusively for pleasure or education. He was called to duty in World War I and served as a first lieutenant in the Medical Reserve Corps. He was honored in recent times as the National Surgeon General of the National Association of the Sixth Division of the U.S. Army. He is also the National Surgeon General of the Veterans of Foreign Wars (VFW). The VFW has also had the pleasure of Dr. Levy's leadership in several county, State, and national offices. The long list of Dr. Levy's achievements also includes service as president of the pediatric section of Kings County Medical Society and the American Medical Association Recognition Award for continuous medical education.

His professionalism and dedication to pediatrics drew him to one of the most unique hobbies. Dr. Levy is a noted cochlearologist: he collects tablespoons. One of the most common form of measurement for a pediatrician, of course, is the tablespoon. In 1929, Dr. Levy noticed that one patient's tablespoon was different from

another's. He began to collect them and documented the wide variants of size for medical reference. Today, Dr. Levy has over 700 different tablespoons, including a spoon last used by George Washington and a gold spoon of Paul Revere. He received this tablespoon for saving the life of a young girl. His other hobbies include riding bicycles and collecting stethoscopes.

Dr. Levy continues to be an active member of the medical community. He is a member of the Editors and Authors Association and is a medical book reviewer for the New York State Medical Society. At 90 years of age, Dr. Levy has no plans of slowing down.

The gratitude I feel to this physician, lecturer, community servant, teacher, and hobbyist is, I am sure, shared by my neighbors in Island Park and by all who know Dr. Levy. Mr. President, I am proud to honor this worthy man.●

YEAR OF EXCELLENCE IN EDUCATION

● Mr. KASTEN. Mr. President, I am pleased to see that the Senate yesterday overwhelmingly passed Senate Joint Resolution 210, the legislation which designates 1984 as the "Year of Excellence in Education."

Since the release of the report by the National Commission on Excellence in Education last spring, there has been a renewed national interest in improving education. Public opinion polls consistently show that concern about the quality of American education is one of the dominant issues in this country.

Numerous education reports have followed "A Nation at Risk," and while they differ in content and perspective, they all tend to make the same point: it is imperative that we act to improve the quality of our education system in the United States.

There have been several proposals put forth in Congress to address various education problems. No doubt, there are many different approaches being discussed and many of us here would differ on the best way to foster improvements. But in my view we should not focus on these differences. Rather, we should be participating in constructive discussion and providing Federal leadership in the education arena. I believe that Senate Joint Resolution 210 has given us a vehicle to accomplish just that.

As chairman of the Senate Republican Task Force on Initiatives to Strengthen Schools, I have an active interest in addressing the deficiencies of our education system. It is encouraging to know that my colleagues in the Senate share this interest and are willing to support efforts which underscore the Federal commitment to improving education.●

GREEK INDEPENDENCE DAY

● Mr. D'AMATO. Mr. President, I rise today to voice my support for Senate Joint Resolution 247, proclaiming March 25 as "Greek Independence Day."

This date marks the 163d anniversary of the initiation of Greek independence by Archbishop Gernanos. For 9 years Greek patriots fought their Ottoman oppressors for independence. The valiant efforts of those Greek freedom fighters served as a catalyst for the nationalist movement throughout the Balkans. The continued commitment of the Greek citizenry to the ideals of independence and democracy can serve as a source of inspiration to all of us.

The accomplishments of the more than 600,000 Americans of Greek origin have been no less impressive. Dedicated to self-improvement and achievement, Greek Americans have been active in all aspects of American life, education, the arts, government, and commerce. The achievements of Greek Americans in fields of shipping, banking, food services, and entertainment have been particularly noteworthy. The Greek word "philotimo" best expresses what is considered by Greeks of both Grecian and American citizenry to be their primary virtue: a sense of honor and self-respect.

In light of the achievements of the Greek people, I am pleased to join as a cosponsor of Senate Joint Resolution 247, proclaiming March 25 "Greek Independence Day."●

OVERRIDING THE VETO OF S. 684

● Mr. MOYNIHAN. Mr. President, last year, I was pleased to join the Senator from South Dakota (Mr. ABDNOR) as a cosponsor of S. 684, the Water Resources Research Act of 1983. This bill passed both Houses of Congress without dissent and was then vetoed by the President on February 21.

Whether or not S. 684 is enacted, scientists, engineers, and economists will continue to pursue water resources research. They simply must do so, for we have not yet solved all our water problems. The bill, however, provides a responsible, cost-effective program for joint Federal and State funding of this important research.

Senator ABDNOR and 19 of his Republican colleagues recently circulated a letter asking for support of an override of the veto. On behalf of the Democrats who have signed another letter urging an override, I ask all Members of the Senate to vote to enact S. 684.

Mr. President, I ask that a copy of the letter be printed in the RECORD.

The letter follows:

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, D.C., March 2, 1984.

DEAR COLLEAGUE: We would like to enlist your support in an effort to override the President's veto of S. 684, the Water Resources Research Act of 1983. This legislation would bring great benefits to the nation for a small investment. The bill would give new direction in a fiscally responsible manner to scientific research on water resources funded by the Federal government.

S. 684 authorizes matching grants to the 54 state water resources research institutes. These institutes conduct basic scientific research on a myriad of topics ranging from groundwater pollution to water conservation. Under the bill the proportionate non-Federal contribution would gradually increase, until each Federal dollar is matched by two non-Federal dollars. S. 684 also provides grants on a competitive basis to other universities and organizations for research on national and regional water problems.

The authorized funding levels—$36 million annually—would be significantly lower than the $53.5 million authorized in the most recent fiscal year of the existing program. The higher proportions of non-Federal cost sharing would ensure efficient utilization of the limited funds.

Unlike President Reagan, we believe in the value of a partnership between the Federal government and the states in pursuing new solutions to the nation's water problems. We urge you to join us in voting to enact S. 684.

Sincerely,

Daniel Patrick Moynihan, Max Baucus, George J. Mitchell, Jeff Bingaman, Lawton Chiles, Gary Hart, Walter Huddleston, Tom Eagleton, Lloyd Bentsen, Jennings Randolph, Quentin N. Burdick, Dennis DeConcini, Paul E. Tsongas, John Glenn, Frank R. Lautenberg, Wendell Ford, John C. Stennis.●

PROPOSED ARMS SALES

● Mr. PERCY. Mr. President, section 36(b) of the Arms Export Control Act requires that Congress receive prior notification of proposed arms sales under that act in excess of $50 million or, in the case of major defense equipment as defined in the act, those in excess of $14 million. Upon such notification, the Congress has 30 calendar days during which the sale may be reviewed. The provision stipulates that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Foreign Relations Committee.

In keeping with the committee's intention to see that such information is available to the full Senate, I ask to have printed in the RECORD at this point the notifications which have been received. The classified annexes referred to in several of the covering letters are available to Senators in the office of the Foreign Relations Committee, room SD-423.

The notifications follow:

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, D.C., March 12, 1984.

Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 84-29 and under separate cover the classified annex thereto. This Transmittal concerns the Department of the Navy's proposed Letter of Offer to Greece for defense articles and services estimated to cost $30 million. Shortly after this letter is delivered to your office, we plan to notify the news media of the unclassified portion of this Transmittal.

You will also find attached a certification as required by Section 620C(d) of the Foreign Assistance Act of 1961, as amended, that this action is consistent with Section 620C(b) of that statute.

Sincerely,

PHILIP C. GAST,
Director.

TRANSMITTAL No. 84-29

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b) of the Arms Export Control Act

(i) Prospective purchaser: Greece.

(ii) Total estimated value:

	Millions
Major defense equipment [1]	$23
Other	7
Total	30

[1] As defined in Section 47(6) of the Arms Export Control Act.

(iii) Description of articles or services offered: A quantity of 300 AIM-9L SIDEWINDER Missiles with support equipment, spare and repair parts, publications, provisioning, staging, and training.

(iv) Military department: Navy (AKB).

(v) Sales commission, fee, etc., paid, offered, or agreed to be paid: None.

(vi) Sensitivity of technology contained in the defense articles or defense services proposed to be sold: See annex under separate cover.

(vii) Section 28 report: included in report for quarter ending 31 December 1983.

(viii) Date report delivered to Congress: 12 March 1984.

POLICY JUSTIFICATION

GREECE—AIM-9L SIDEWINDER MISSILES AND RELATED SUPPORT

The Government of Greece has requested the purchase of a quantity of 300 AIM-9L Sidewinder missiles with support equipment, spare and repair parts, publications, provisioning, staging, and training at an estimated cost of $30 million.

This proposed sale will contribute to the foreign policy and national security objectives of the United States by improving the military capabilities of Greece in fulfillment of its NATO obligations; furthering NATO rationalization, standardization, and interoperability; and enhancing the defenses of the Western Alliance.

These AIM-9L Sidewinder missiles will provide the Hellenic Air Force (HAF) with a more modern interceptor capability since they are planned to be used with the HAF A-7 aircraft. The HAF will be able to absorb the Sidewinder missiles with little effort since Greece has previously purchased these missiles from the United States under Foreign Military Sales. The Sidewinder missiles will be provided in accordance with and subject to the limitations on use and transfer provided for under the Arms Export Control Act as embodied in the terms of sale. This sale will not adversely affect either the military balance in the region or U.S. efforts to encourage a negotiated settlement of the Cyprus question.

The principal contractors will be the Raytheon Company of Lowell, Mass., and Aeronutronic Ford of Newport Beach, Calif.

Implementation of this sale will not require the assignment of any additional U.S. Government personnel or contractor representatives of Greece.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

U.S. DEPARTMENT OF STATE, UNDER SECRETARY OF STATE FOR SECURITY ASSISTANCE, SCIENCE AND TECHNOLOGY,
Washington, D.C., March 9, 1984.

Pursuant to section 620C(d) of the Foreign Assistance Act of 1961, as amended (the Act), and the authority vested in me by Department of State Delegation of Authority No. 145, I hereby certify that the provision to Greece of 300 AIM-9L Sidewinder missiles at an estimated cost of $30 million is consistent with principles contained in section 620C(b) of the Act.

This certification will be made part of the certification to the Congress under section 36(b) of the Arms Export Control Act regarding the proposed sale of the abovenamed articles and is based on the justification accompanying said certification, and of which such justification constitutes a full explanation.

WILLIAM SCHNEIDER, Jr.

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, D.C., March 12, 1984.

Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 84-37 and under separate cover the classified annex thereto. This Transmittal concerns the Department of the Army's proposed letter of Offer to Greece for defense articles and services estimated to cost $19 million. Shortly after this letter is delivered to your office, we plan to notify the news media of the unclassified portion of this Transmittal.

Sincerely,

PHILIP C. GAST,
Director.

TRANSMITTAL No. 84-37

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b) of the Arms Export Control Act

(i) Prospective purchaser: Greece.

(ii) Total estimated value:

	Millions
Major defense equipment [1]	$15
Other	4
Total	19

[1] As defined in Section 47(6) of the Arms Export Control Act.

(iii) Description of articles or services offered: A quantity of 1,097 I-TOW surface attack guided missiles and 54 tubular launchers with ancillary equipment and contractor technical assistance.

(iv) Military department: Army (WSV).

(v) Sales commission, fee, etc., paid, offered, or agreed to be paid: None.

(vi) Sensitivity of technology contained in the defense articles or defense services proposed to be sold: See annex under separate cover.

(vii) Section 28 report: Case not included in section 28 report.

(viii) Date report delivered to Congress: March 12, 1984.

POLICY JUSTIFICATION

GREECE—I-TOW MISSILES AND LAUNCHERS

The Government of Greece has requested the purchase of a quantity of 1,097 I-TOW surface attack guided missiles and 54 tubular launchers with ancillary equipment and contractor technical assistance at an estimated cost of $19 million.

This sale will contribute to the foreign policy and national security objectives of the United States by improving the military capabilities of Greece in fulfillment of its NATO obligations; furthering NATO rationalization, standardization, and interoperability; and enhancing the defenses of the Western Alliance.

These I-TOW surface attack guided missiles will further upgrade the anti-tank capabilities of the Hellenic Army (HA). The HA will be able to absorb these missiles which will be provided in accordance with, and subject to the limitations on use and transfer provided for under the Arms Export Control Act, as embodied in the terms of sale. This sale will not adversely affect either the military balance in the region or U.S. efforts to encourage a negotiated settlement of the Cyprus question.

The prime contractor will be the Hughes Aircraft Company of Tucson, Arizona.

Implementation of this sale will require the assignment of one additional U.S. contractor representative to Greece for 12 months.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

U.S. DEPARTMENT OF STATE, UNDER SECRETARY OF STATE FOR SECURITY ASSISTANCE, SCIENCE AND TECHNOLOGY,
Washington, D.C., March 9, 1984.

Pursuant to section 620C(a) of the Foreign Assistance Act of 1961, as amended (the Act), and the authority vested in me by Department of State Delegation of Authority No. 145, I hereby certify that the provision to Greece of 1,097 I-TOW surface attack guided missiles and 54 tubular launchers at an estimated cost of $19 million is consistent with principles contained in section 620C(b) of the Act.

This certification will be made part of the certification to the Congress under section 36(b) of the Arms Export Control Act regarding the proposed sale of the abovenamed articles and is based on the justification accompanying said certification, and of which such justification constitutes a full explanation.

WILLIAM SCHNEIDER, Jr.●

PENNSYLVANIA ERA REQUIRES ABORTION FUNDING

● Mr. GARN. Mr. President, a Pennsylvania judge has provided another piece of evidence showing that ERA means abortion. The ERA-abortion connection has concerned me for years, and I know it troubles many Senators. The ERA-abortion connec-

tion is certainly one of the chief reasons for ERA's failure in the House last fall.

I am an opponent of the equal rights amendment (ERA), and one of the reasons for my opposition is my conviction that ERA will mean certain very specific things that I oppose—and which I believe most Americans oppose. For example, I oppose taxpayers paying for abortions unless the mother's life is endangered. At the national level, Congress has been restricting abortion funding to only those cases in which the mother's life is at stake. We are all familiar with the periodic legislative battles over these abortion funding restrictions which are commonly known as the Hyde amendment. One of the reasons for my opposition to the equal rights amendment is my firm belief that ERA spells the end of the Hyde amendment. My position on ERA and abortion has been given in some detail here on the Senate floor and in testimony to the Subcommittee on the Constitution of the Senate Judiciary Committee.

I oppose tax-funded abortions, Congress opposes them, and the legislature of the State of Pennsylvania opposes them. Judge John A. MacPhail of the Commonwealth Court of Pennsylvania, however, has just ruled that the State's equal rights amendment requires the State to pay for medically necessary abortions. In a decision filed just days ago (March 9, 1984), Judge MacPhail held that the equal protection provisions and the equal rights amendment of the Pennsylvania State Constitution both forbid what amounted to the Pennsylvania version of the Hyde amendment.

The Commonwealth Court is not Pennsylvania's highest court, and the State may appeal this decision. Perhaps we have not heard the last of this case. Nevertheless, in *Fischer* v. *Department of Public Welfare*, No. 283 C.D. 1981, we have another piece of the abortion-ERA puzzle.

I ask that a portion of the Pennsylvania opinion be printed in the RECORD following my remarks. I have included only pages 15 through 21 of the court's typewritten opinion. For the convenience of readers, I have added two subtitles to the opinion, namely "[The Equal Protection claims]" and "[The Equal Rights Amendment claims]."

The excerpt follows:

EXCERPT

2. Constitutionality of statutory language limiting funding for abortions for indigent women to instances where such abortions are necessary to avert the death or preserve the life of the mother.

[The Equal Protection claims]

In large part, the Commonwealth's case rests upon the decision of the United States Supreme Court in *Harris* v. *McRae*, 448 U.S. 297 (1980) where the Court upheld the Hyde Amendment which limited the use of any federal funds for reimbursement of the cost of abortions under the Medicaid Program to situations where the life of the mother would be endangered if the fetus were carried to term or where the mother was a victim of rape or incest which had been promptly reported to a law enforcement agency or public health service. In making its decision, the United States Supreme Court specifically rejected due process, equal protection and establishment clause challenges under the Constitution of the United States. Inasmuch as the statutory language in the legislation at issue here is virtually identical to the Hyde Amendment and the equal protection clauses of the State and Federal Constitutions have been construed in like fashion, the Commonwealth would have us conclude that the issue is settled. We must respectfully disagree.

Our State Supreme Court has held that where the provisions of our state constitution are being construed, including the equal protection clause, the state courts are not bound by decisions of the United States Supreme Court but should be guided by the same principles as are employed by that Court. *Kroger Co.* v. *O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978). In such cases, the opinions of the United States Supreme Court are entitled to whatever weight their reasoning and intellectual persuasiveness warrant. *Commonwealth* v. *DeJohn*, 486 Pa. 32. 403 A.2d 1283 (1979), *cert. denied*, 444 U.S. 1032 (1980). Our own Court has held that even when the state and federal constitutions are similarly or identically phrased, we are free to consider the merits of a state based constitutional challenge independent of the United States Supreme Court. *Danson* v. *Casey*, 33 Pa. Commonwealth Ct. 614, 382 A.2d 1238 (1978), *aff'd*, 484 Pa. 415, 399 A.2d 360 (1979). We conclude that Harris is not binding upon us. As indicated by our own Supreme Court in *Fischer* v. *Department of Public Welfare*, several of our sister states have considered state legislation similar to the Hyde Amendment and found such legislation to be violative of state constitutional guarantees notwithstanding the United States Supreme Court decisions in Harris and Maher. *Planned Parenthood Association* v. *Department of Human Resources*, ——— Or. Ct. App. ———, 667 P.2d 384 (1983); *Right to Choose* v. *Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *Committee to Defend Reproductive Rights* v. *Myers*, 29 Cal.3d 252, 625 P.2d 779 (1981) and *Moe* v. *Secretary of Administration and Finance*. 382 Mass. 629, 417 N.E.2d 387 (1981).

Our own analysis of the legislation now before us leads us to conclude that the funding restriction imposes an undue burden upon the fundamental right of indigent women to have a medically necessary abortion. That conclusion is based upon our understanding that *Roe* v. *Wade*, 410 U.S. 113 (1973) has determined that a woman has a constitutionally protected fundamental right to her own decision of whether or not to terminate her pregnancy. This constitutional right was found to exist as a part of a citizen's right to privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution. Although the right is not absolute, it is fundamental. Where fundamental constitutional rights are involved they may be disturbed only upon a finding of a compelling state interest. *Fabio* v. *Civil Service Commission*, 489 Pa. 309, 414 A.2d 82 (1980). *Roe* v. *Wade* also held that a state's interest in potential life may never outweigh the superior state interest in the life and health of the mother; this is true even though the state has two separate and distinct interests—the health of the mother and the potentiality of human life.

In the instant case, the burden upon indigent pregnant women readily appears from the stipulated facts. Of the 12,000 women per year who would otherwise receive a medically necessary but not life threatening abortion in Pennsylvania, 4,000 will be compelled to carry their pregnancy to term because they will have no alternative. As we have noted, while the state's interest in potential life is recognized, it cannot, under present law, be regarded as such a compelling interest as to overcome the constitutionally protected right of the mother. By denying funding for medically necessary abortions, the Commonwealth has attempted to elevate the right of potential life over the health of the mother. This it may not do. By singling out persons who have need of a medically necessary abortion from all other persons entitled to general medically necessary services, the Commonwealth has allocated benefits on criteria which discriminatorily burden the exercise of an indigent pregnant woman's fundamental constitutional right. This it may not do.

Fully recognizing the heavy burden upon Petitioners to overcome the presumed constitutional validity of the statutes before us, we nevertheless conclude that that burden has been met in the instant case.

THE EQUAL RIGHTS AMENDMENT CLAIMS

Although we have now decided that the statutes before us do offend the equal protection clauses of our state constitution, we deem it necessary to briefly consider the constitutional challenge based upon Pennsylvania's Equal Rights Amendment (ERA), because we believe that on appellate review it may be helpful for the reviewing court to have our opinion with respect to each of the constitutional challenges before us.

Our Supreme Court has categorically stated that the purpose of the ERA is to eliminate sex as a "classifying tool." *Snider* v. *Thornburgh*, 496 Pa. 159, 176, 436 A.2d 593, 601 (1981).

Petitioners contend, of course, that the statutes now before us do make a discriminatory distinction based solely upon sex. The Commonwealth is equally insistent that statutes based upon the unique physical characteristics of one sex do not constitute sex discrimination under the ERA. The Commonwealth relies upon case law such as *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) which holds that where legislation related to pregnancies is involved, the classification is not between men and women but between pregnant women and non-pregnant persons and, therefore, is not gender-based.

We believe Pennsylvania case law is to the contrary. In *Anderson* v. *Upper Bucks County Area Vocational Technical School*, 30 Pa. Commonwealth Ct. 103, 110, 373, A2d. 126, 130 (1977), this Court held that "since pregnancy is unique to women, a disability plan which expressly denies benefits for disability arising out of pregnancy is one which discriminates against women employees because of their sex." In *Cerra* v. *East Stroudsburg Area School District*, 450 Pa. 207, 213, 299 A.2d 277, 280 (1973), our Supreme Court held that a discharge from employment because of a physical condition peculiar to women, *i.e.* pregnancy, is "sex discrimination pure and simple." Again, in *Henderson* v. *Henderson*, 458 Pa. 97, 101, 327

A.2d 60, 62 (1974), our Supreme Court held that our law "will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman."

Further, as this Court has noted, our Supreme Court has recognized that the ERA "is not confined to the matter of individual 'rights' in the sense of entitlements, but equally extends to elimination of discriminations with respect to burdens and obligations 'under the law.'" *Hartford Accident and Indemnity Co.* v. *Insurance Commissioner*, 65 Pa. Commonwealth Ct. 249, 255, 442, A.2d 382, 385 (1982). Thus, while the Pennsylvania courts are willing to discuss the possible justifications for discrimination, they have, at the same time, given weight to the unqualified language of the ERA.

The Commonwealth argues to us that the indigent women in need of medically necessary abortions would be in equally bad circumstances if there were no Medical Assistance program. That argument misses the mark. There is a Medical Assistance program and once the legislature has decided to grant financial assistance to the medically needy, it cannot exclude persons from that grant on the basis of sex. In *Commonwealth* v. *Pennsylvania Interscholastic Athletic Association*, 18 Pa. Commonwealth Ct. 45, 334 A.2d 839 (1975), this Court sustained a constitutional challenge brought under the ERA to rule-making by the Pennsylvania Interscholastic Athletic Association, which we held to be state action, which would have prohibited girls from competing against boys in interscholastic sports. Judge Blatt wrote for the majority, that "[t]here is no fundamental right to engage in interscholastic sports, but once the state decides to permit such participation, it must do so on a basis which does not discriminate in violation of the constitution." Id. at 51, 334 A.2d at 842.

We are of the opinion that while Petitioners' argument under the ERA is not as strong as their equal protection argument, it is meritorious and sufficient in and of itself to invalidate the statutes before us in that those statutes do unlawfully discriminate against women with respect to a physical condition unique to women.

In summary we hold that the state may not constitutionally deny Medical Assistance funds to indigent pregnant women who seek medically necessary abortions.●

NATIONAL SINGLE PARENT DAY

● Mr. D'AMATO. Mr. President, I am happy to join today as a cosponsor of Senate Joint Resolution 256, which would designate March 21, 1984, as National Single Parent Day. I commend the very distinguished chairman of the Judiciary Committee, Senator THURMOND, for introducing this resolution. I urge my colleagues to cosponsor and support Senate Joint Resolution 256 in order to honor the more than 14 million single parents living in our country today.

Mr. President, a National Single Parent Day will demonstrate our appreciation for the extraordinary strength and courage of single parents. The current debate over family issues, including child support and visitation rights enforcement, missing and runaway children, day care, and youth drug abuse gives very vivid testimony concerning the problems facing single parents. These parents head nearly a quarter of all families in the United States with children under the age of 18. They certainly deserve our encouragement and appreciation for their efforts.

I would like to take this opportunity to recognize and commend the organization Parents Without Partners, and particularly Isaac Rodriguez of Parents Without Partners in New York, for all the dedication and hard work that has gone into making National Single Parent Day a reality. I would note that New York, as it is for so many worthy organizations, is the birthplace of Parents Without Partners. Founded in 1957, Parents Without Partners has grown into an organization with more than 200,000 members, 18,000 of whom are New Yorkers.

Mr. President, I understand that the House version of this resolution, House Joint Resolution 200, is expected to be approved by the House of Representatives. I urge my colleagues in the Senate to give Senate Joint Resolution 256 an equal measure of support.●

ADVANCE NOTIFICATION—PROPOSED ARMS SALES

● Mr. PERCY. Mr. President, section 36(b) of the Arms Export Control Act requires that Congress receive advance notification of proposed arms sales under that act in excess of $50 million or, in the case of major defense equipment as defined in the act, those in excess of $14 million. Upon receipt of such notification, the Congress has 30 calendar days during which the sale may be reviewed. The provision stipulates that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Foreign Relations Committee.

Pursuant to an informal understanding, the Department of Defense has agreed to provide the committee with a preliminary notification 20 days before transmittal of the official notification. The official notification will be printed in the RECORD in accordance with previous practice.

I wish to inform Members of the Senate that such a notification has been received.

Interested Senators may inquire as to the details of this advance notification at the office of the Committee on Foreign Relations, room SD-440.

The notification follows:

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, D.C., March 8, 1984.

In reply refer to: I-20057/84ct.

DR. HANS BINNENDIJK,
Professional Staff Member, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR DR. BINNENDIJK: By letter dated 18 February 1976, the Director, Defense Security Assistance Agency, indicated that you would be advised of possible transmittals to Congress of information as required by Section 36(b) of the Arms Export Control Act. At the instruction of the Department of State, I wish to provide the following advance notification.

The Department of State is considering an offer to an East Asian recipient tentatively estimated to cost in excess of $50 million.

Sincerely,

GLENN A. RUDD,
Deputy Director.●

THE EXECUTIVE CALENDAR

Mr. BAKER. Mr. President, I am advised by the minority leader that the Executive Calendar for today is cleared for action by unanimous consent. May I say in that respect that ours is cleared too, with the exception of one category of items on page 6, which is Nominations Placed on the Secretary's Desk in the Foreign Service.

Mr. BYRD. Mr. President, the distinguished majority leader may proceed as he wishes.

Mr. BAKER. I thank the minority leader.

EXECUTIVE SESSION

Mr. BAKER. Mr. President, I ask unanimous consent that the Senate now proceed into executive session for the purpose of considering the nominations on the entire calendar with the exception of the Nominations Placed on the Secretary's Desk in the Foreign Service.

There being no objection, the Senate proceeded to the consideration of executive business.

The PRESIDING OFFICER. The nominations will be stated.

THE JUDICIARY

The assistant legislative clerk read the nomination of Sarah Evans Barker, of Indiana, to be U.S. district judge for the southern district of Indiana.

Mr. QUAYLE. Mr. President, it is an honor to speak today on this truly historic occasion for my home State of Indiana. The confirmation of Sarah Evans Barker to the office of U.S. district judge for the southern district of Indiana is historic for two reasons. Mrs. Barker will be the first woman ever appointed to a Federal judgeship in Indiana. For this, I applaud the work of the Merit Advisory Committee, appointed by Senator LUGAR and myself, for their excellent work in recommending Mrs. Barker. Her candidacy stood out among the many well-qualified individuals from which they had to choose. This appointment is especially noteworthy, not only because Mrs. Barker is the first woman, but also because she will be the youngest member to serve on the Federal bench

in Indiana. Sarah Evans Barker's appointment marks the beginning of a new generation of guidance and direction from the bench which may span into the next century. Sarah is eminently qualified to fill this important role.

Some of you may know Sarah from her days in Washington. Having spent several years here while she attended the American University Law School and worked as a legislative assistant to Senator CHARLES PERCY, Sarah is well known and respected on Capitol Hill. Those who remember Sarah from her years in Washington know of her outstanding abilities and dedication.

For those who may not have met Sarah, I consider it a privilege to have an opportunity to bring her record and abilities to your attention. After her stay in Washington, Sarah returned to Indiana, where she excelled in the U.S. attorney's office. She was appointed as the U.S. attorney for the southern district of Indiana by the President in July of 1981. During her tenure in this office, Sarah has once again proven herself as an extremely capable manager and a highly dedicated individual. She has supervised an office of 15 lawyers and a full staff of 31. She has been singled out for several commendations, including one by the U.S. Department of Justice which designated her the "Outstanding Attorney" for 1975 for the southern district of Indiana. She was given a special commendation by the U.S. Drug Enforcement Administration for prosecutive support in 1976 and twice was appointed to serve as a member of the seventh circuit judicial nominating commission.

Sarah is a member of the bar association of Indianapolis; Johnson County, Ind.; the seventh circuit court of appeals; and the District of Columbia; as well as the Federal Bar and the American Bar Association. She has been elected to numerous positions in these associations, including the vice presidency of the seventh circuit and the secretary for the Federal Bar. She is currently a member of the house of delegates to the Indiana State Bar Association. Sarah also serves on the Attorney General's Advisory Committee of U.S. Attorneys and chairs the Southern Institute of Indiana's Law Enforcement Coordinating Committee.

Along with her work within the legal profession, Sarah Barker has lent her talents to many other groups. She is the director of the New Hope Foundation of Indiana and a member of the board for United Cerebral Palsy of Central Indiana. The Governor of Indiana appointed Sarah to the State's criminal law study commission and to the Indiana Juvenile Justice Division.

Sarah Evans Barker exemplifies the highest judicial principles of our legal system. I have no doubt that she will be a credit to the State of Indiana and an asset to the entire legal community. I look forward with grcat hope to the long and outstanding tenure of Mrs. Barker on the Federal bench. I urge all my colleagues to support her nomination and accelerate the start of what promises to be a long and important judicial career in the service of the people of Indiana and the Nation.

The PRESIDING OFFICER. The nomination is considered and confirmed.

Mr. BAKER. I move to reconsider the vote by which the nomination was considered and confirmed.

Mr. BYRD. I move to lay that nomination on the table.

The motion to lay on the table was agreed to.

The assistant legislative clerk read the nomination of Edward J. Garcia, of California, to be U.S. district judge for the eastern district of California.

The PRESIDING OFFICER. The nomination is considered and confirmed.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the nomination was considered and confirmed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

ARMY

The assistant legislative clerk proceeded to read sundry nominations in the Army.

The PRESIDING OFFICER. The nominations are considered and confirmed.

The nominations in the Army considered and confirmed are as follows:

IN THE ARMY

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. Ernest D. Peixotto.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility.

To be lieutenant general

Maj. Gen. Max W. Noah.

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. James H. Merryman.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility.

To be lieutenant general

Maj. Gen. Louis C. Wagner, Jr.

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. Donald E. Rosenblum.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility.

To be lieutenant general

Maj. Gen. Charles D. Franklin.

The following-named officer under the provisions of title 10, United States Code, section 601, to be reassigned to a position of importance and responsibility.

To be lieutenant general

Lt. Gen. Robert L. Wetzel.

The following-named officer under the provisions of title 10, United States Code, section 601, to be reassigned to a position of importance and responsibility.

To be lieutenant general

Lt. Gen. Paul S. Williams, Jr.

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. Sinclair L. Melner.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility.

To be lieutenant general

Maj. Gen. Thomas D. Ayers.

Mr. BAKER. I move to reconsider the vote by which the nominations were considered and confirmed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

MARINE CORPS

The assistant legislative clerk proceedes to read nominations in the Marine Corps as follows:

The following named brigadier general of the Marine Corps Reserve for promotion to the permanent grade of major general:

Ronald K. Nelson.

The following named colonel of the Marine Corps Reserve for promotion to the permanent grade of brigadier general:

Jerome G. Cooper.

The PRESIDING OFFICER. The nominations are considered and confirmed.

Mr. BAKER. I move to reconsider the vote by which the nominations were considered and confirmed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

EXPORT-IMPORT BANK OF THE UNITED STATES

The assistant legislative clerk read the nomination of John A. Bohn, Jr., of California, to be First Vice President of the Export-Import Bank of the United States.

The PRESIDING OFFICER. The nomination is considered and confirmed.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the nomination was considered and confirmed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

NOAA AND MISSISSIPPI RIVER COMMISSION

The assistant legislative clerk read the nomination of Capt. John D. Bossler, National Oceanic and Atmospheric Administration, as Director of the Charting and Geodetic Services, National Ocean Service.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the nomination was considered and confirmed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

DEPARTMENT OF COMMERCE

The assistant legislative clerk read the nomination of Sidney Lewis Jones, of Maryland, to be Under Secretary of Commerce for Economic Affairs.

The PRESIDING OFFICER. The nomination is considered and confirmed.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the nomination was considered and confirmed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

NOMINATIONS PLACED ON THE SECRETARY'S DESK

The assistant legislative clerk proceeded to read sundry nominations placed on the Secretary's desk in the Air Force, Army, Coast Guard, and Navy.

The PRESIDING OFFICER. The nominations are considered and confirmed.

The nominations considered and confirmed are as follows:

NOMINATIONS PLACED ON THE SECRETARY'S DESK IN THE AIR FORCE, ARMY, COAST GUARD, NAVY

Air Force nominations beginning Charles W. Beadling, and ending Douglas C. Warren, which nominations were received by the Senate and appeared in the Congressional Record of February 28, 1984.

Army nominations beginning Robert W. Thompson, and ending Rose A. Pumphrey, which nominations were received by the Senate and appeared in the Congressional Record of February 28, 1984.

Army nomination of Lt. Col. Robert L. Stewart, which was received by the Senate and appeared in the Congressional Record of March 1, 1984.

Coast Guard nominations beginning William G. Boyce, and ending Harold F. Wilson, which nominations were received by the Senate and appeared in the Congressional Record of February 28, 1984.

Navy nominations beginning Ray S. Consunji, and ending Vincent L. Wilde, which nominations were received by the Senate and appeared in the Congressional Record of February 22, 1984.

Navy nominations beginning Russell L. Robinson, and ending David A. Ingrum, which nominations were received by the Senate and appeared in the Congressional Record of February 28, 1984.

Navy nominations beginning Lloyd Edward Allen, Jr., and ending Ronald Charles Tipper, which nominations were received by the Senate and appeared in the Congressional Record of February 28, 1984.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the nominations were considered and confirmed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BAKER. Mr. President, I ask unanimous consent that the President be immediately notified that the Senate has given its consent to the nominations.

The PRESIDING OFFICER. Without objection, it is so ordered.

LEGISLATIVE SESSION

Mr. BAKER. Mr. President, I ask unanimous consent that the Senate return to the consideration of legislative business.

The PRESIDING OFFICER. Without objection, it is so ordered.

JOINT REFERRAL—S. 2424

Mr. BAKER. Mr. President, I ask unanimous consent that the bill introduced today by Senator KENNEDY entitled "Medicare Solvency and Health Care Financing Reform Act of 1984" be jointly referred to the Committee on Labor and Human Resources and the Committee on Finance.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDERS FOR WEDNESDAY

ORDER FOR RECESS UNTIL 11 A.M.

Mr. BAKER. Mr. President, I ask unanimous consent that when the Senate completes its business today it stand in recess until the hour of 11 a.m. tomorrow.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR THE RECOGNITION OF SENATOR PROXMIRE

Mr. BAKER. Mr. President, I ask unanimous consent that after the recognition of the two leaders under the standing order, the distinguished Senator from Wisconsin (Mr. PROXMIRE) be recognized under a special order for not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER DESIGNATING PERIOD FOR THE TRANSACTION OF ROUTINE MORNING BUSINESS AND RESUMING CONSIDERATION OF SENATE JOINT RESOLUTION 73

Mr. BAKER. Mr. President, I further ask unanimous consent that after the execution of the special order, there be a period for the transaction of routine morning business to run not later than 11:45 a.m., during which Senators may speak for not more than 5 minutes each, and that at 11:45 a.m. the Senate resume consideration of Senate Joint Resolution 73.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECESS UNTIL TOMORROW AT 11 A.M.

Mr. BAKER. Mr. President, I see no Senator seeking recognition. I therefore move, in accordance with the order previously entered, that the Senate stand in recess until the hour of 11 a.m. tomorrow morning.

The motion was agreed to and the Senate, at 6:32 p.m., recessed until Wednesday, March 14, 1984, at 11 a.m.

CONFIRMATIONS

Executive nominations confirmed by the Senate, March 13, 1984:

EXPORT-IMPORT BANK OF THE UNITED STATES

John A. Bohn, Jr., of California, to be First Vice President of the Export-Import Bank of the United States for a term expiring January 20, 1985.

NOAA AND MISSISSIPPI RIVER COMMISSION

Capt. John D. Bossler, National Oceanic and Atmospheric Administration, as Director of the Charting and Geodetic Services, National Ocean Service, National Oceanic and Atmospheric Administration, in the grade of rear admiral (upper half), and as a member of the Mississippi River Commission.

DEPARTMENT OF COMMERCE

Sidney Lewis Jones, of Maryland, to be Under Secretary of Commerce for Economic Affairs.

The above nominations were approved subject to the nominees' commitments to respond to requests to appear and testify before any duly constituted committee of the Senate.

THE JUDICIARY

Sarah Evans Barker, of Indiana, to be U.S. district judge for the southern district of Indiana.

Edward J. Garcia, of California, to be U.S. district judge for the eastern district of California.

IN THE ARMY

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. Ernest D. Peixotto, [redacted], (age 54), U.S. Army.

The following-named officer under the provision of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by

the President under title 10, United States Code, section 601:

To be lieutenant general

Maj. Gen. Max W. Noah, [redacted], U.S. Army.

The following-named officer to be placed on the retired list in grade indicated under the provision of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. James H. Merryman (age 54), [redacted], U.S. Army.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Maj. Gen. Louis C. Wagner, Jr., [redacted], U.S. Army.

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. Donald E. Rosenblum, [redacted] (age 54), U.S. Army.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Maj. Gen. Charles D. Franklin, [redacted], U.S. Army.

The following-named officer under the provisions of title 10, United States Code, section 601, to be reassigned to a position of importance and responsibility designated by the President under title 10, United States Code, sectidon 601:

To be lieutenant general

Lt. Gen. Robert L. Wetzel, [redacted], U.S. Army.

The following-named officer under the provisions of title 10, United States Code, section 601, to be reassigned to a position of importance and reponsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Lt. Gen. Paul S. Williams, Jr., [redacted], U.S. Army.

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. Sinclair L. Melner, [redacted] (age 55), U.S. Army.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Maj. Gen. Thomas D. Ayers, [redacted], U.S. Army.

IN THE MARINE CORPS

The following-named brigadier general of the Marine Corps Reserve for promotion to the permanent grade of major general, pursuant to title 10, United States Code, sections 5902 and 5912:

Ronald K. Nelson.

The following-named colonel of the Marine Corps Reserve for promotion to the permanent grade of brigadier general, pursuant to title 10, United States Code, sections 5902 and 5912:

Jerome G. Cooper.

IN THE AIR FORCE

Air Force nominations beginning Charles W. Beadling, and ending Douglas C. Warren, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of February 28, 1984.

IN THE ARMY

Army nominations beginning Robert W. Thompson, and ending Rose A. Pumphrey, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of February 28, 1984.

Army nomination of Lt. Col. Robert L. Stewart, which was received by the Senate and appeared in the CONGRESSIONAL RECORD of March 1, 1984.

IN THE COAST GUARD

Coast Guard nominations beginning William G. Boyce, and ending Harold F. Watson, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of February 28, 1984.

IN THE NAVY

Navy nominations beginning Ray S. Consunji, and ending Vincent L. Wilde, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of February 22, 1984.

Navy nominations beginning Russell L. Robinson, and ending David A. Ingrum, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of February 28, 1984.

Navy nominations beginning Lloyd Edward Allen, Jr., and ending Ronald Charles Tipper, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of February 28, 1984.