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RELIGIOUS FREEDOM LEGISLATION IN THE 2013 VIRGINIA GENERAL ASSEMBLY

Ellis M. West*

If there is any Virginia law that deserves to be called "iconic," it is Section 16 of the Virginia Bill of Rights, which combines the religious freedom provision in Virginia's first Declaration of Rights (1776) with portions of Thomas Jefferson's Statute for Religious Liberty (1785).[1] These two documents also inspired the religion clauses of the First Amendment[2] and are world famous.

Some of Section Sixteen's more important provisions are as follows:

> [A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience; . . . . No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall . . . suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not . . . confer any peculiar privileges or advantages on any sect or denomination . . . .[3]

In other words, Section 16 guarantees both free exercise of religion and no establishment of religion in the Commonwealth. More precisely, it ensures the free exercise of religion by prohibiting the government from "meddling" in matters of religion. It reflects James Madison's position that government should take no "cognizance" of religion,[4] and it has served Virginia well for more than two centuries.

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1 Compare VA. CONST. art. I, § 16, with The Virginia Declaration of Rights (1776) reprinted in THE GEORGE MASON LECTURES 20, 20–21 (1976), and VA. CODE ANN. § 57-1 (1950).

2 See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

3 VA. CONST. art. 1, § 16.

4 See JAMES MADISON, TO THE HONORABLE THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA. A MEMORIAL AND REMONSTRANCE (1785), reprinted in THE CONSTITUTION & RELIGION: LEADING SUPREME COURT CASES ON CHURCH AND STATE 29, 30 (Robert S. Alley ed., 1999) ("We

Apparently, however, some Virginians and their legislators believe that Section 16 does not adequately protect religious liberty, because a bill — Senate Joint Resolution 287 — that would add a paragraph to Section 16 was introduced in the 2013 session of the Virginia General Assembly.[5] Co-sponsored by Senator William M. Stanley, Jr., Republican, from Moneta; by Senator Charles W. Carrico, Sr., Republican, from Galax; and Delegate Mark L. Cole, Republican, from Fredericksburg,[6] Senate Joint Resolution 287 was approved by the Senate Committee on Privileges and Elections. The vote was entirely along party lines: Republicans voted for and Democrats voted against the measure.[7] (This raises the question: since when and for what reason did protection of religious liberty become a partisan matter?) The proposed amendment was not able to garner enough votes to pass the Senate, but it was remanded to committee, where it will be considered again next year.[8] Its patron, Senator Stanley, has stated that he will vigorously champion the measure again next year.[9] His efforts should not be taken lightly: in August 2012, Missouri added an almost identically worded amendment to its constitution.[10] That fact suggests either that Senator Stanley simply copied the Missouri law or that there is a concerted, organized effort to get such an amendment added to the constitutions of various states.

Intended primarily to prevent the Commonwealth from suppressing the religious expression of any person, including students, elected officials, and state employees,[11] the proposed amendment is so long, with nine provisions, that if it were adopted, it would dwarf and detract from Virginia's historic Section 16. It is also redundant, confusing, and raises as many questions about its meaning as it answers. These features by

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maintain . . . that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."); see also Vincent Phillip Munoz, James *Madison's Principles of Religious Liber*ty, 97 AM. POL. SCI. REV. 17, 17 (2003) (discussing Madison's principle of "non-cognizance").

[5] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (as introduced Jan. 9, 2013).

[6] Id.

[7] Jim Nolan, Electoral Vote Change Shelved; Prayer Amendment Backed, RICH. TIMES-DISPATCH, Jan. 30, 2013, http://www.timesdispatch.com/news/latest-news/electoral-vote-change-shelved-prayer-amendment-backed/article_0945ff50-6aef-11e2-b14e-0019bb30f31a.html.

[8] See K.A. Wagoner, Prayer Protection Amendment Stalls for Now, FRANKLIN NEWS-POST, Feb. 8, 2013, http://www.thefranklinnewspost.com/article.cfm?ID=24132.

[9] Id.

[10] MO. CONST. art, 1. § 5; see also Kellie Kotraba, Missouri Prayer Amendment Passes, USA TODAY (Aug. 8, 2012, 5:08 PM) http://usatoday30.usatoday.com/news/religion/story/2012-08-08/missouri-prayer-amendment/56882182/1 (last visited April 21, 2013).

[11] See S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (containing provisions affecting students, elected officials, and state employees).

themselves would be a sufficient reason to reject it. Nevertheless, Senate Joint Resolution 287 does attempt to address some legitimate concerns and its supporters might choose to rewrite it in such a way as to make it reasonably clear and concise. For those reasons, it deserves a careful and extended analysis.

This article consists of the following sections: Section one presents the content of the proposed amendment and explains the ways in which it is unclear, redundant, and otherwise poorly written. Section two addresses the issue of whether the provisions intended to protect religious expression, including prayer, are necessary and can solve the problems they are intended to solve. It also identifies the crucial challenge in cases involving religious expression — namely, determining correctly whether it is the government or a private individual or group that is expressing or promoting a religious belief or practice. This determination must be made because religious expression or advocacy by the government, but not by private individuals or groups, is prohibited by the First Amendment and Section 16 of the Virginia Bill of Rights. Section three examines whether Senate Joint Resolution 287 represents an attempt to challenge and change the U.S. Supreme Court's interpretation of the religion clauses. It focuses in particular on a provision that seeks to authorize prayers before or during meetings of legislative bodies, such as county boards of supervisors. Section four discusses the necessity for and the constitutionality of one of the provisions in the proposed amendment that is unrelated to religious expression, namely, one that exempts students from having to participate in academic work to which they have religious objections. The fifth and final section concludes that Senate Joint Resolution 287, even if written well, should be rejected because most of its provisions are unnecessary and some are either unconstitutional or will encourage state agencies, officials, or employees to take actions that will be declared unconstitutional by federal or state courts.

I. THE CONTENT AND MEANING OF SENATE JOINT RESOLUTION 287.

Five of Senate Joint Resolution 287's provisions have the purpose of allowing or enabling certain kinds of religious expressions, including prayer said aloud. Provision two[12] (but the first one relating to the protection of such expression) requires the Commonwealth to "accommodate the right of any person to pray individually or corporately on public property so long as such prayer does not result in disturbance of the peace or disruption of a

[12] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (as proposed Jan. 29, 2013 by the Senate Committee on Privileges and Elections).

public meeting or assembly or other public business."[13] Provision three gives "citizens as well as elected officials and employees of the Commonwealth and its political subdivisions . . . the right to pray on government premises and public property so long as such prayers abide within the same parameters placed upon any other free speech under similar circumstances."[14] Provision four allows "the General Assembly and the governing bodies of political subdivisions" to "extend to ministers, clergypersons, and other individuals the privilege to offer invocations or other prayers" at the meetings of their organizations.[15] Provision five allows "students in public schools" to "express their beliefs about religion in written and oral assignments free from discrimination based on the religious content of their work."[16] Finally, provision seven (the fifth and final one relating to the protection of religious expression) requires the Commonwealth to "ensure public school students their right to free exercise of religious expression without interference, as long as such prayer or other expression is private and voluntary, whether individually or corporately, and in a manner that is not disruptive and as long as such prayers or expressions abide within the same parameters placed upon any other free speech under similar circumstances."[17]

Although most of the provisions quoted above limit the extent of the protection they afford to religious expression, Senate Joint Resolution 287 contains an additional, separate limitation on such expression. The last substantive provision in the document says that "this section shall not be construed to excuse acts of licentiousness or justify practices inconsistent with the good order, peace, or safety of the Commonwealth or with the rights of others."[18]

Two of Senate Joint Resolution 287's provisions prohibit the Commonwealth from requiring certain kinds of expression or activity. The very first provision of the Amendment states that "the Commonwealth shall not coerce any person to participate in any prayer or other religious activity."[19] Provision six says that "no student in public schools shall be

[13] Id.
[14] Id.
[15] Id.
[16] Id.
[17] Id.
[18] Id.
[19] Id.

compelled to perform or participate in academic assignments or educational presentations that violate his religious beliefs."[20]

The remaining provision, the eighth one, requires "all free public schools receiving state appropriations" to "display, in a conspicuous and legible manner, the text of the Bill of Rights of the Constitution of the United States."[21] The one thing that all the provisions have in common is that they refer to an activity that takes place on public property.

What is one to make of this proposed amendment to Section 16? This is an especially appropriate question to ask because the bill is so poorly drafted. In addition to containing specific writing errors,[22] it is redundant and possibly inconsistent in some ways. The most obvious redundancy results from having provisions two, three, and possibly seven, depending on how they are interpreted. Two and three both attempt to protect prayer, but two refers to the prayers of "any person," whereas three refers to the prayers of "citizens as well as elected officials and employees of the Commonwealth."[23] Because "any person" includes a citizen, elected official, and state employee, why have a separate provision covering the latter persons? Even if the intention was to make sure that the latter persons are covered, that could easily be done by combining the two provisions. Of course, the two provisions state different limitations on the protection afforded prayer,[24] but surely the drafter(s) of these provisions did not intend for the prayers of persons on the one hand and those of citizens, elected officials, and state employees on the other hand to be protected in different degrees. If both of the stated limitations should apply to all the above categories of persons, then they should be combined in one provision applying to all those persons.

Given provision two, provision seven is also unnecessary. Although it refers to "public school students,"[25] they are obviously "persons" covered in provision two. Again, even if the intention was to make sure that students

[20] Id.

[21] Id.

[22] For example, the second provision refers to "any person" praying "individually or corporately." The third one refers to "citizens as well as elected officials and employees" as if the latter were not citizens. Provision six refers to "his", instead of his/her, religious beliefs. Sometimes the document says "so long as"; other times it says "as long as." Provision seven refers to "such prayer", but there is no prayer referred to earlier in the provision see id..

[23] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (as proposed Jan. 29, 2013 by the Senate Committee on Privileges and Elections).

[24] The limitation in provision two is that the protected prayer should "not result in disturbance of the peace or disruption of a public meeting or assembly or other public business," whereas the limitation in provision three is that the prayer should "abide within the same parameters placed upon any other free speech under similar circumstances." Id.

[25] Id.

are protected by the proposed amendment, that could easily be done in one provision by mentioning them along with citizens, elected officials, and government employees. There is, of course, a difference between what is protected in provision two and in provision seven. The former protects only prayer, whereas the latter protects "religious expression," including prayer.[26] Was this difference intended or simply the result of oversight? Most persons would assume that it is the latter, because there is no reason to limit what is protected in provisions two and three (applicable to persons, citizens, etc.) to prayer as opposed to religious expression in general and yet in provision seven (applicable to students) to protect all kinds of religious expression and not just prayer. Why not in one provision protect the religious expression, including prayer, of all persons?[27]

As for inconsistencies, there are at least two worth noting. The first is in the way religious expression can be limited by the Commonwealth. Provision two says that prayer can be prohibited if it results "in disturbance of the peace or disruption of a public meeting or assembly or other public business."[28] The third provision says that prayer can be limited by "the same parameters placed upon any other free speech under similar circumstances."[29] Are these two limitations intended to be two different ways of saying the same thing? If so, the intention is wrong, because speech or expression in general can be limited for reasons other than the fact that it is likely to disturb the peace or disrupt a public meeting or public business.[30] This raises the question as to whether Senate Joint Resolution 287 is intended to provide more protection for (impose fewer limitations on) religious expression than is provided for other kinds of expression.

Complicating matters even more are two other provisions. Provision seven protects religious expressions only if they are "not disruptive" (of what?) and if they "abide within the same parameters placed upon any other free speech under similar circumstances."[31] Then provision nine states that

[26] Id.
[27] There are other minor redundancies: Provision two refers to both "meeting or assembly." Provision three refers to both "government premises and public property." That this is a redundancy is suggested by the fact that provision two refers only to public property. Provision four refers to "ministers, clergypersons, and other individuals," to "invocations or other prayers", and to "meetings or sessions." In the last provision, there is no need to have both "excuse acts" and "justify practices." See id.
[28] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (as introduced Jan. 29, 2013 by the Senate Committee on Privileges and Elections).
[29] Id.
[30] See text accompanying notes 81-85, infra; Henry Cohen, Freedom of Speech and Press: Exceptions to the First Amendment, CONGRESSIONAL RESEARCH SERVICE, at 1, available at http://www.fas.o-rg/sgp/crs/misc/95-815.pdf.
[31] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (as introduced Jan. 29, 2013 by the

the document "shall not be construed to excuse acts of licentiousness or justify practices inconsistent with the good order, peace, or safety of the Commonwealth or with the rights of others."[32] It is not clear, however, whether the "acts" and "practices" refer to expressions themselves, to the effects of the expressions, or to both, nor is it clear what is meant by the "rights of others." Regardless of how these questions are answered, the limitation in this provision is much broader than the limitations in provisions two, three, and seven, so much so that it would allow religious expression to be curtailed much more, not less, than other kinds of expression can be curtailed. If this is what provision nine means, if challenged in court, it is very likely to be struck down. The Supreme Court has never said that expressions can be prohibited or restricted on the grounds that they either are or cause "acts of licentiousness" or "practices inconsistent with the good order, peace, or safety of the Commonwealth or with the rights of others." This is simply too vague a criterion for determining when expression can be prohibited or regulated.[33]

A second area of inconsistency relates to what the Commonwealth must do or not do with respect to religious expression. Provision three says that certain persons have the "right" to pray, which implies that the Commonwealth has a duty simply to allow them to pray or not prevent them from praying. Provision two requires the Commonwealth to "accommodate" the right of persons to pray. Does "accommodate" here mean the same as "allow," or does it require the Commonwealth to do more than just "allow" prayer?[34] Then provision seven requires the Commonwealth to "ensure public school students their right to free exercise of religious expression without interference."[35] Does "ensure" mean something other than what "allow" or "accommodate" means? Are provisions two and/or seven intended to require the public schools to organize or arrange for occasions when or places where students can pray or otherwise express their faith?

Senate Committee on Privileges and Elections).

[32] Id.

[33] It is not clear that the Court has ever enunciated a general criterion to distinguish between protected and unprotected speech. For some categorical exclusions, see, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[I]t has been well observed that [the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words] are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[34] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (as introduced Jan. 29, 2013 by the Senate Committee on Privileges and Elections);WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 49 (Merriam-Webster Inc., 9th ed. 1983) (defining "accommodate" as "3: to provide with something desired, needed, or suited (as a helpful service, a loan, or lodgings)").

[35] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013) (as introduced Jan. 29, 2013 by the Senate Committee on Privileges and Elections).

Finally, the meaning of some other words and phrases in Senate Joint Resolution 287 is unclear. Provision four states that "governing bodies of political subdivisions" may invite ministers to pray at their meetings.[36] What is meant by "governing bodies?" Presumably this refers only to legislative bodies like city councils and county boards of supervisors, and not to other government agencies; if it means the latter, then the provision would apply only to agencies of "political subdivisions" and not to state agencies. There is no logical reason for making such a distinction.

Provision seven, which ensures the right of public school students to personal religious expression, is conditioned on the expression being "private."[37] Does this mean that no one else besides the students doing the expressing should hear the expression, or that the expression must not be written, sponsored, promoted, etc., by the school or any of its employees? Hopefully, it means the latter. Finally, provision eight says that "all free public schools receiving state appropriations"[38] must display the Bill of Rights. This implies that some public schools are not "free" and do not "receive state appropriations." Is this true? Even if it is, why should such schools not be required to display the Bill of Rights?

In short, Senate Joint Resolution 287 is not well written. A teacher of English composition might label it "a first draft." That an almost identical provision was added to the Missouri Constitution in 2012[39] does not change that fact, but reflects poorly on the legislators and voters of that state. On the other hand, if a good case could be made for adding something like the proposed amendment to the Virginia Bill of Rights, then perhaps there is no need to be overly concerned about how well it is currently written. After all, it could be rewritten at next year's Virginia General Assembly. Can, however, a good case be made for Senate Joint Resolution 287?

II. IS SENATE JOINT RESOLUTION 287 NECESSARY OR USEFUL?

The sponsors and proponents of Senate Joint Resolution 287 apparently believe that religious expression is not adequately protected in Virginia. More specifically, they assume that the protections for religious expression mandated by the bill do not already exist and that, as a result, the Commonwealth is discriminating against religious expression to a

[36] Id.
[37] Id.
[38] Id.
[39] MO. CONST. art. I, § 5.

significant extent. Here is Senator Stanley's explanation of why his proposed constitutional amendment is needed:

> Over the years, our right to worship has been under constant attack by various organizations . . . . Additionally, the doctrine of separation of church and state has been misconstrued by the courts and the government . . ., which has steadily removed God from the public forum, contributing to the moral decay of this country. We must reverse these trends. Religious freedom does not constitute freedom to worship just on Sunday, but also includes the freedom to express one's faith publicly as he or she sees fit.[40]

This explanation is to be expected. Various persons and groups within the Religious Right have alleged for several years now that freedom of religion and religious expression are under attack by anti-religious persons and groups. According to these parties, these rights are often far too limited by state and local governments, especially schools and courts. A common complaint is that religious expression has been removed from the "public square."[41]

With one possible exception, however, most of the religious expressions Senate Joint Resolution 287 would protect are already under protection through other laws. The Supreme Court, on the basis of the First Amendment[42] or the Equal Access Act,[43] a federal statute, has consistently held that religious expression, including prayers said aloud, must be protected just as much as other kinds of expression—provided the expression is not coerced, sponsored, promoted, or endorsed by any agency or person acting on behalf of the government.[44] For example, the Court has held that if a public university allows secular groups to meet in its rooms, it cannot prohibit religious groups from meeting in its rooms, even if their meetings involve worship;[45] that if a public university funds different kinds

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[40] Wagoner, supra note 8.

[41] See MARK A. BELILES & STEPHEN K. MCDOWELL, AMERICA'S PROVIDENTIAL HISTORY 179–84 (Providence Found., 3d ed. 2010); DAVID C. GIBBS, JR., ONE NATION UNDER GOD: TEN THINGS EVERY CHRISTIAN SHOULD KNOW ABOUT THE FOUNDING OF AMERICA 19, 50, 69, 79, 155 (Christian Law Assoc., 2d ed. 2005); Liberty Inst., The Survey of Religious Hostility in America, LIBERTY INST. (2012), www.religioushostility.org (portraying Liberty Institute's explicit dedication to restoring "religious liberty in America.") (emphasis added).

[42] U.S. CONST. amend. I (mandating "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ., or abridging the freedom of speech, or of the press . . . .").

[43] 20 U.S.C. §4071(a) (2006) (making it "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.").

[44] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.") (emphasis added).

[45] Widmar v. Vincent, 454 U.S. 263, 267–68 (1981).

of student publications, it cannot exclude religious publications from receiving that funding;[46] that if a public school allows secular organizations to use its facilities after school hours, it cannot prevent religiously-oriented organizations from also using them;[47] and that a group cannot be prevented from erecting a cross for a limited time on the grounds around a state capitol if other groups can use it for public speeches, gatherings, and displays.[48]

In all these Supreme Court cases, the government involved argued that if it were to aid the religious groups and their expressive activities, even if it were no more than the aid given to secular groups/activities, it would violate the establishment clause of the First Amendment.[49] The Court, however, rejected that argument and held that the establishment clause could not be used to justify government discrimination against nongovernmental religious expression.[50]

Especially noteworthy is the amount of protection given to the religious expression of students in public schools, even though it is not as much as that given to the religious expression of persons outside the school environment.[51] The leading Supreme Court decision on students' freedom of expression is Tinker v. Des Moines School District,[52] which held that student expression, even if it leads to "controversy," may not be prohibited unless it can be shown that it would "materially and substantially" disrupt the work of the school, cause disorder, or invade the rights of other students.[53] Later decisions added that the expression may be prohibited if it is vulgar, lewd or offensive[54] or can be reasonably viewed as promoting an illegal act.[55]

On the basis of these precedents, lower federal courts have held that, absent the conditions for limiting their expression, students may wear

[46] Rosenberger v. Univ. of Va., 515 U.S. 819, 831-37 (1995).
[47] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 110 (2001).
[48] Pinette, 515 U.S. at 762.
[49] Widmar, 454 U.S. at 272; Rosenberger, 515 U.S. at 845; *Lamb's Chapel*, 508 U.S. at 395; Good News Club, 533 U.S. at 112; Pinette, 515 U.S. at 762.
[50] Widmar, 454 U.S. at 273; Rosenberger, 515 U.S. at 845; *Lamb's Chapel*,508 U.S. at 394–95; Good News Club, 533 U.S. at 112; Pinette, 515 U.S. at 763.
[51] Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W.VA. L. REV. 187, 190-91, 219 (2007).
[52] 393 U.S. 503, 506 (1969).
[53] Id. at 509–10, 513.
[54] Bethel County Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[55] Morse v. Frederick, 551 U.S. 393, 403 (2007).

rosaries and other religious jewelry[56] and outside of classrooms may distribute candy canes with religious messages.[57] Most lower courts have even held that religion-based messages on t-shirts that condemn homosexuality, abortion, and the Muslim religion may not be prohibited, even when some of these messages could be said to violate the rights of others.[58] In addition, one federal court has stated that "[i]ndividual student expression that articulates a particular [religious] view but that comes in response to a class assignment or activity would appear to be protected."[59]

In all the cases referenced so far in this section, the issue of whether the religious expression could be prohibited arose only because the expression took place in or on government property, e.g., public schools. When religious expression is completely unrelated to government property, programs, or funding, restrictions on it because of its content are seldom, if ever, attempted. Moreover, given the absence of government involvement, the times when and places where religious and other kinds of expression can occur without its content's being restricted are so numerous as to be almost unlimited. No attempt, therefore, will be made here to list all of them. Some examples should suffice: door-to-door evangelism; presentation of religious ideas in books, magazines, newspapers, radio/television, and the internet; religious messages on church or residential property; and the display of religious messages and symbols in stores and businesses.

In addition, contrary to what is often alleged, the Supreme Court has never said that the establishment clause or the principle of separation of

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[56] Chalifoux v. New Cany Ind. Sch. Dist., 976 F.Supp. 659, 667 (S.D. Tex. 1997).

[57] Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 9 (D. Mass.2003). In another, but unnamed case, a federal court recently held that if fifth-graders can hand out invitations to birthday and Valentines Parties and to off-school events sponsored by secular organizations, they have a right to hand out invitations to a Christmas party at a church. "US appeals court OKs church invites at Pa. school," posted by Associated Press, March 14, 2013.

[58] Zamecnik v. Indian Prairie Sch. Dist. 204, 636 F.3d 874, 875, 879–80 (7th Cir. 2011) (allowing "Be Happy, Not Gay," but implying that "homosexuals go to Hell" could be prohibited as "fighting words"); Nixon v. Northern Local Sch. Dist. Bd. of Educ., 383 F.Supp.2d 965, 971 (S.D. Ohio 2005) (allowing "Homosexuality is a sin!/Islam is a lie!/Abortion is murder!/Some issues are just black and white!"); K.D. ex rel. Dibble v. Fillmore Cent. Sch. Dist., No. 05-CV-0336(E), 2005 WL 2175166, at *7 (W.D.N.Y. Sept. 6, 2005) (allowing "ABORTION IS HOMICIDE," "You will not mock my God," and "Rock for Life!"); Saxe ex rel. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) (finding that the school could not prohibit saying that homosexuality is a sin on grounds that it constitutes harassment); Chambers v. Babbitt, 145 F. Supp.2d 1068, 1074 (D. Minn.2001) (finding that prohibition of "Straight Pride" sweatshirt as offensive was an actionable First Amendment violation). Compare Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th. Cir. 2006), cert. granted, judgment vacated, case remanded with instructions to dismiss as moot, 549 U.S. 1262 (2007) ("BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED. HOMOSEXUALITY IS SHAMEFUL" not allowed on grounds it violates rights of gays).

[59] Walz v. Egg Harbor Township Board of Education, 342 F.3d 271, 279 (3d Cir. 2003).

church and state prevents religious individuals and organizations from participating in public discussions of issues pertaining to our political and civic life. In fact, it has said, "Adherents of particular faiths and individual churches" have just as much a right to "take strong positions on public issues" as secular persons and bodies do.[60] The Court also has not said that publicly expressed positions of religious organizations on issues of public policy cannot be based on or justified by religious beliefs or authorities, such as the Bible. In fact, it has said, "[t]hat the Judeo-Christian religions oppose stealing does not mean that [the government] . . . may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[61] There is one simple and obvious reason for these facts: the First Amendment limits only what the government ("Congress" and, because of the Fourteenth Amendment, states[62]) may do. It does not limit what private individuals/groups may do.

On the other hand, because of the Internal Revenue Code and not the establishment clause, churches and other religious organizations that wish to be classified as tax-exempt and to have donations to them be tax-deductible to the donor must abide by two limitations. They must not engage in campaigning for or against candidates for elective office, and they must not devote a "substantial" part of their work to influencing law-making (lobbying).[63] If they do, then the revocation of their tax-exempt status does not violate their freedom of religion or expression.[64] These limitations, however, apply not just to religious organizations but to all non-

[60] Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). Also see Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976)("[R]egulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."), Texas v. Johnson, 491 U.S. 397, 414 (1989)("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."), and Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994).

[61] Harris v. McRae, 448 U.S. 297, 319-20 (1980); see also Clayton v. Place, 884 F.2d 376, 379 (8th Cir. 1989) ("We . . . find no support for the proposition that a rule, which otherwise conforms with Lemon, becomes unconstitutional due only to its harmony with the religious preferences of constituents . . . We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable . . . ."); cf. Webster v. Reproductive Health Services, 492 U.S. 490, 566-67 (1989) (J. Stevens, dissenting) (arguing that legislative declarations that life begins at conception are suspect as in line with some Christian beliefs and no secular purposes).

[62] U.S. CONST. amend I; U.S. CONST. amend XIV, § I.

[63] See 26 U.S.C. § 501(a) (2012); 26 U.S.C. § 501(c)(3) (2012); 26 U.S.C. § 170(a) (2013). The Internal Revenue Service has not defined "substantial," but tax experts have said that "lobbying activities that exceed the roughly 16 to 20 percent range of total activities . . . are generally considered substantial." For example see Judith E. Kindell & John F. Reilly, P. Lobbying Issues, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TEXT, 1997, at 280.

[64] Regan v. Taxation with Representation, 461 U.S. 540, 545 (1982); Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D. C. Cir. 2000).

profit organizations that wish to be tax-exempt under Section 501(c)(3) of the Internal Revenue Code, and an organization can always avoid both limitations by giving up its tax-exempt status and can avoid the limitation on lobbying by creating under § 501(c)(4) a separate but affiliated lobbying organization, contributions to which could not be tax-deductible.[65] Moreover, these restrictions do not apply to leaders of churches or religious organizations when they are speaking for themselves as individuals, nor do they prevent religious organizations from discussing issues and problems of public importance, even during political campaigns.[66]

Although this is not the time or place to explain fully how the Supreme Court now interprets the free speech and press clauses, the decisions protecting religious expressions cited above were based on what most scholars consider to be the bedrock principle of those clauses, namely, that the government may not suppress a particular expression or communication because of the idea or viewpoint it contains.[67] Stated positively, the First Amendment requires the government to maintain neutrality toward viewpoints expressed by private persons and groups. Thus, the Court has held that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[68] Even categories of expression that can constitutionally be banned entirely, such as fighting words, may not be selectively banned on the basis of viewpoint. Thus, all fighting words must be outlawed, or else none.[69] It is because of the principle of viewpoint neutrality that the government cannot discriminate against religious expression, i.e., prohibit (or allow) it when in the same circumstances other kinds of expression are allowed (or not allowed), even

[65] See I.R.C. § 501(c)(3) (2012); See also I.R.C. § 501(c)(4) (2012).

[66] See MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 699-704 (2nd ed. 2006), for a discussion of whether these alternatives or exceptions adequately protect the freedom of churches and other religious organizations.

[67] See RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 17 (1992).

[68] Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972). See also Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976) ("[R]egulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest on this ideal.").

[69] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed."). See also id. at 383-84, 391-92.

when the professed reason for such discrimination is that it is required by the establishment clause of the First Amendment.[70]

On the other hand, there is one major difference between the law relating to religious expression and that relating to secular expression. Regarding the latter, although the First Amendment's speech/press clauses have been interpreted as prohibiting government from restricting private (nongovernmental) expression on the basis of its viewpoint, they have not been interpreted as prohibiting the government from expressing its own ideas or views on secular issues.[71] Thus, in public schools, the mass media, and elsewhere, government may and does attempt to influence the secular beliefs of its citizens.[72] In contrast, the religion clauses of the First Amendment have been interpreted as prohibiting the government from expressing its own ideas or views on religious issues or questions. The fundamental goal of the religion clauses was to deprive the government of all jurisdiction over religious matters.[73] Government, therefore, may not pass any law or take any other action whose primary purpose or effect is to advance or harm religion in general, any particular religious belief or practice, or any persons or groups because of their religious beliefs/practices. It must "maintain strict neutrality, neither aiding nor opposing religion."[74]

The Supreme Court has explained the difference between laws relating to secular expressions/ideas and to religious expressions/ideas as follows:

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[70] One could, of course, challenge the decisions upholding this principle, cited in fns 47-52, on the grounds that prohibiting religious groups from using public facilities because it is required by the establishment clause is not the same as doing so because of hostility toward those religious groups and, thus, does not violate the principle of viewpoint neutrality. This raises the question of whether in order to be violated, the principle of viewpoint neutrality requires a finding of hostility, antagonism, or opposition toward whatever expression is prohibited or requires only a finding of unequal treatment which cannot be justified by some compelling state interest.

[71] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005). See also Daniel W. Park, Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values, 45 GONZ. L. REV. 113, 145 (2009-10) ("The only clear limit on government speech is the Establishment Clause of the U.S. Constitution.").

[72] See Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions"); Fraser, 478 U.S. at 681 ("[Public schools] must inculcate… fundamental values necessary to the maintenance of a democratic system.") (internal citation omitted).

[73] See ELLIS M. WEST, THE RELIGION CLAUSES OF THE FIRST AMENDMENT: GUARANTEES OF STATES' RIGHTS? 75-76, 167, 183-84. (2011).

[74] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963); see also id. at 222; Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

> The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant . . . . The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.[75]

Moreover, the religion clauses deny the government jurisdiction over religious affairs not because early Americans were hostile toward religion or any particular religion, but because they wanted to protect religious freedom and ultimately the religious experience itself. Most of them believed that government involvement in religious matters necessarily undermines or corrupts the integrity or authenticity of religion.[76] They, therefore, prohibited all laws "respecting an establishment of religion," that is, laws that favor (or disfavor) certain religions or religious beliefs and practices over others. Again, the Supreme Court has explained this point well:

> . . . [T]he Framers deemed religious establishment antithetical to the freedom of all. . . . The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.[77]

Nevertheless, even though the establishment clause prohibits the government from expressing its opinion of religion in general, a particular religion, or a particular religious belief or practice, that in no way negates the fact that religious expression by private (nongovernmental) individuals and groups is rigorously protected from government regulation by other provisions in the First Amendment. As the Court has said, the crucial distinction is between "government speech endorsing religion, which the

[75] Lee v. Weisman, 505 U.S. 577, 591 (1992) (internal citations omitted).

[76] Engel v. Vitale, 370 U.S. 421, 431-32 (1962) ("The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion'."); see, e.g., James Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in RALPH KETCHAM, SELECTED WRITINGS OF JAMES MADISON 24 (2006) (". . . [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.").

[77] Weisman, 505 U.S. at 591–92.

Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[78] For this reason, although the Supreme Court has never ruled on the matter, one justice noted for his tenacity in upholding the establishment clause has said that it does not prohibit public officials from delivering public speeches with religious content, because "we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal view of the speaker as an individual member of the polity."[79]

This, of course, does not mean that freedom of expression, whether religious or secular, is absolute or unlimited. Depending on their content, time, place, and manner, expressions can be restricted by the government in many ways. Certain kinds of expression, e.g., inciting and conspiring to commit crimes including the overthrow of the government, fighting words, obscenity, and defamation of private persons, are, according to the Supreme Court, "beyond the pale," i.e., afforded almost no protection by the First Amendment.[80] Beyond these kinds of expressions, what the government may prohibit or regulate depends on whether the expression takes place on government property. If it does not, then whether the government may prohibit an expression depends on whether it is because of the expression's viewpoint (message) or because of its time, place, or manner (medium). A regulation of expression on the basis of its viewpoint is permissible only if the law can pass the "strict scrutiny test" — it can be justified by a "compelling" state interest that is narrowly drawn to serve that end.[81] In contrast, a viewpoint neutral regulation of the time, place, and manner of expressions need be justified only by a "significant" governmental interest. It must also leave open ample alternative ways of communicating the regulated expression—a much easier test to pass.[82]

When, however, expressions occur on government property or come from government employees, then the First Amendment law becomes somewhat more complicated and provides the expressions less protection.

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[78] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (quoting Bd. of Ed. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990)).

[79] Van Orden v. Perry, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting).

[80] SUE DAVIS, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 268-274 (Thomson Wadsworth ed., 17th ed. 2008).

[81] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987) (quoting Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1987)); see generally Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2418–25 (1996).

[82] DAVIS, supra note 81, at 276.

After all, government property, generally speaking, "belongs" to the government and like private property can be protected from others who want to use it for their own purposes, which may conflict with those of the government. Like private companies, the government also has work to do, business to conduct, and laws to administer and enforce, and the First Amendment does not require it to allow expression that interferes with its effective functioning.[83] Thus, although the Supreme Court has said that public school students have some degree of freedom of expression, it added that they cannot use that freedom if it "materially" and "substantially" disrupts a school's educational program.[84] Similarly the expressions of public employees made in pursuance of their professional duties, as distinguished from their public statements made as citizens on matters of public concern outside the scope of their official duties, are not protected by the First Amendment.[85] For this reason, public school teachers can be fired if, in the classroom and against instructions, they offer their personal opinion on a political issue.[86] Finally, as noted above, the religion clauses of the First Amendment prohibit speech by government employees that either endorses or disparages religion in general, any particular religion, or any religious belief/practice, when the speech would appear to a reasonable observer to be government speech.[87]

On the other hand, on certain kinds of government property non-governmental expression is not only allowed, but protected to a very high degree. First, there is the "traditional public forum" or "open forum" — government property, such as sidewalks, streets, courthouse squares, and public parks, that has historically been used by persons/groups as places where they could express their ideas.[88] Viewpoint-based restrictions on expressions in that forum are forbidden unless they can pass the strict scrutiny test.[89] The second kind of government property that might be open

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[83] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its actions will not be subjected to the heightened review to which its actions as a lawmaker may be subject.").

[84] Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 508–09, 511, 513 (1969); see also Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 277–78 (3d Cir. 2003) ("...[W]here an elementary school's purpose in restricting student speech...is reasonably directed towards preserving its educational goals, we will ordinarily defer to the school's judgment.").

[85] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). See Lindsey v. City of Orrick, 491 F. 3d 892, 898 (8th Cir. 2007), for an example of expression by a government employee that is protected by the First Amendment.

[86] Mayer v. Monroe Cnty. Cmty. Sch., 474 F.3d 477, 480 (7th Cir. 2007) ("[T]he first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.").

[87] See supra text accompanying notes 74-78.

[88] Hague v. CIO, 307 U.S. 496, 515 (1939).

[89] HENRY COHEN, CONG. RESEARCH SERV., RL 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS

to private individuals/groups is called a "designated" or "limited" public forum. This is property that the government uses to conduct its business, but that it chooses to make available at certain times to private individuals/groups as a place for them to express their ideas.[90] When doing this, however, it must not discriminate among such individuals or groups on the basis of the views they express.[91] On the other hand, the government may limit the forum to certain groups, e.g., students,[92] or to certain subjects, e.g., items relevant to a school board meeting,[93] provided the limits are not viewpoint-based. Of course, reasonable time/place/manner restrictions in these two kinds of forums are also permissible.[94]

Although the preceding summary of the law dealing with freedom of expression is incomplete and fails to discuss some of its complexities, hopefully it suffices to show the extent to which religious expression by private individuals/groups is already protected, not only in Virginia but the nation as a whole. The main conclusion to be drawn from it is that religious expression, provided a reasonable person would not attribute it to the government, is protected as much as secular expression is protected. If that is the case, then there is no need to amend Section Sixteen of the Virginia Bill of Rights to protect religious expression.

Senator Stanley, Senate Joint Resolution 287's main patron, disagrees. In his opinion, students, public officials, and state employees are too often prevented from praying or expressing their religious beliefs even when they are speaking for themselves and not the government. In a conversation with the author,[95] he cited a decision by high school authorities reprimanding a football coach for participating in a team-initiated prayer before a game even though all the coach did was to be near the team and bow his head.[96]

TO THE FIRST AMENDMENT 1, 34-35 (2009).

[90] Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–47 (1983).

[91] If the government, for example, charges a fee for the use of its property, it must charge the same fee for religious and secular groups. Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd., 17 F.3d 703, 706–07 (4th Cir. 1994).

[92] See Widmar, 454 U.S. at 267.

[93] Madison Joint Sch. Dist. v. Wisconsin Pub. Emp't Relations Comm'n, 429 U.S. 167, 175 n.8 (1976).

[94] See COHEN, supra note 90, at 16.

[95] Interview with William Stanley, Senator, Virginia's 20th Senate District, in Richmond Va. (Jan. 23, 2013).

[96] At our meeting, it was not clear to what incident Senator Stanley was referring. He may, however, have been referring to one in Westmoreland, Tennessee, that occurred in the fall of 2011, when the coaches of the football team bowed their heads during a team-led prayer, and later were reprimanded by their superiors for having done so. When the school authorities were criticized by members of the community for what they did, they defended their action on the grounds that the praying "can in no way appear like it's endorsed by Summer County Schools personnel." See Josh Devine, Public School Coaches Told not to Participate in Prayer, WSMV NEWS, Sept. 23, 2011, http://www.wsmv.com/st-

Moreover, Stanley's concern is not necessarily or entirely unwarranted. There have been times when students and state employees have been prohibited from exercising or expressing their religious faith even though many reasonable persons would not construe them as speaking for the government.[97]

Even if this is a problem to some degree, can a generally worded constitutional provision or statute prevent these kinds of questionable restrictions on religious expression? In other words, does it justify amending Section 16 of the Virginia Bill of Rights? The answer to this question depends on why unwarranted restrictions on religious expression might sometimes be imposed by governments and upheld by the courts. There are three explanations that deserve mentioning.

First, as Senator Stanley himself has noted,[98] there are some organizations in America today that appear to be opposed to any manifestations or expressions of religion on government property or by government employees and that aggressively respond to them by threatening to sue the government agency that allows them. They engage in what some might call "legal bullying." For the most part, these groups believe that the establishment clause of the First Amendment requires as much "separation of church and state" as possible. As a result, they reject the Supreme Court's position that the religious speech of persons/groups speaking only for themselves and not the government must be protected just as much as their secular speech is.[99] Given the nature and commitment of these organizations, however, it is hard to see how passing Senate Joint Resolution 287 or any other such law would change their thinking or deter them from attempting to remove religion "from the public square." So long as they think that the First Amendment, which trumps any law that a state

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ory/15538258/public-school-coaches-told-not-to-participate-in-prayer (stating that praying "can in no way appear like it's endorsed by Sumner County Schools personnel"). For cases in which coaches were prohibited from initiating, leading, and/or joining in team prayers, see Doe v. Duncanville School District, 70 F.3d 402, 406 (5th Cir. 1995), and Borden v. School District of Township of East Brunswick, 523 F.3d 153, 174 (3d Cir. 2008).

[97] See Roberts v. Madigan, 921 F.2d 1047, 1059 (10th Cir. 1990) (holding that a teacher was not allowed to keep a Bible on his desk and read it while students were taking a test or engaged in other silent activity); Adler v. Duval Cnty. Sch. Bd., 250 F.3d 1330, 1342 (11th Cir. 2001) (holding that students elected by their classmates to speak as they please at their graduation ceremony may not include prayers or religious exhortation).

[98] See Wagoner, supra note 8.

[99] Perhaps the best known of these groups is the Freedom from Religion Foundation, an organization of "freethinkers" (atheists, agnostics and skeptics) located in Madison, Wisconsin. FREEDOM FROM RELIGION FOUND. (APRIL 12, 2013), http://ffrf.org/faq/item/14999-what-is-the-foundations-purpose? (stating that its purpose is "to promote the constitutional principle of separation of church and state, and to educate the public on matters relating to nontheism"). As its name implies, Americans United for Separation of Church and State is another organization that continues to argue that the religion clauses require as much separation of government and religion as possible.

might pass, requires something like complete separation of church and state, they will continue to challenge religious expressions that violate that principle.

A second reason religious expression has sometimes been wrongly denied is simply misunderstanding of the law on the part of government officials, including school administrators and teachers. This problem, of course, is perfectly understandable because First Amendment law is complicated, to say the least, and has changed over time. The mass media is especially to blame for this problem because it continues to say all too often that the religion clauses of the First Amendment require "separation of church and state,"[100] even though those words are not in the First Amendment and the Supreme Court long ago abandoned that language as the best way of explaining the meaning of the religion clauses.[101] Instead, in 1963, it said that those clauses command "that the Government maintain strict neutrality, neither aiding nor opposing religion."[102] Today, it is still the principle of neutrality, and not that of church-state separation, that the Court uses to decide most cases arising under the religion clauses. Thus, one scholar writes, ". . . [I]f there is a single premise that has animated the Supreme Court's approach over the past fifty years—it would be the neutrality principle. Government must be neutral toward religion, and cannot endorse it over potential alternatives."[103]

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[100] For example, the Public Broadcasting News Hour, in announcing that the Indiana Supreme Court had upheld a voucher system for funding the education of students in the state, stated that the U.S. Supreme Court had held that such a system does not violate the principle of "separation of church and state"—thereby implying that the principle was mandated by the First Amendment and subscribed to by the Court. PBS News Hour: Should Public Money be Used for Private Schools? (PBS television broadcast, Apr. 1, 2013).

[101] See Lynch v. Donnelly, 465 U.S. 668, 673 (1984). For at least three other reasons, "separation of church and state" is a problematic term for explaining the meaning of the religion clauses: (1) The clauses pertain to religion and not just churches. (2) "Separation" implies a two-way separation, but the clauses require only a one-way separation; in other words, they require religion to be separate from government, but not government to be separate from religion. (3) "Separation," especially "wall of separation," implies that a complete separation of church (or religion) and state is required, but that is simply not possible. A line, therefore, has to be drawn between what is and is not allowed, and interpreting the religion clauses is essentially a matter of determining what or where that line is.

[102] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963); accord Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."); see also Ellis M. West, Everson v. Board of Education, 330 U.S. 1 (1947), in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 549, 550 (Paul Finkelman ed., 2006).

[103] Christopher C. Lund, Legislative Prayer and the Secret Costs of Religious Endorsements, 94 MINN. L. REV. 972, 973 (2010); see also Andrew Koppelman, *And I Don't Care What It Is: Religious* Neutrality in American Law, 39 PEPP. L. REV. (SPECIAL ISSUE) 1115, 1121 (2013); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 1, 1-14 (2013).

That persons generally and in government specifically do not understand how the Supreme Court has interpreted the religion clauses of the First Amendment is regrettable, but, again, this problem cannot be solved by the Virginia General Assembly's passing another law. Even if Senate Joint Resolution 287 made clear the extent to which religious expression is already protected, which it does not, do that does not mean that it would be read and understood by those persons in Virginia who need to do so. To solve this problem of misunderstanding, the Commonwealth must educate state employees in schools and other agencies about the basics of First Amendment Law, including the rule that religious expression must be protected no less than are other forms of expression. It should require them to read one of several existing publications that do an excellent job of explaining First Amendment law.[104]

The third reason that religious expression is sometimes wrongly suppressed, even by judges, is that it is often difficult to determine if a particular expression is private (and allowed) or public (and not allowed). Persons responsible for upholding the First Amendment must determine if a particular expression is one that is encouraged, sponsored, or endorsed by the government. Such a determination is often difficult to make, and even judges may sometimes "get it wrong."[105] Likewise, decisions by schools administrators and judges about whether student's expressions, religious and otherwise, are sufficiently disruptive or in violation of the rights of others to be prohibited are very fact-specific, often difficult to make, and "becoming notoriously unpredictable."[106] Again, however, passing a constitutional amendment or statute will not make these kinds of determinations easier to make or prevent bad decisions from being made. Making these kinds of decisions, and sometimes getting them wrong, is inherent in the application of any law, especially one that is generally worded.

[104] See generally Ctr. for Religion and Public Affairs Wake Forest Univ. Sch. of Divinity, Religious Expression in American Public Life: A Joint Statement of Current Law (Jan. 2010), available at http://divinity.wfu.edu/religion-and-public-affairs/joint-statement; American Jewish Congress Religion and the Public Schools: A Summary of the Law (Aug. 2009), available at http://www.ajcongress.org/site/DocSer ver/2009_RPS_-_August_09_Revision.pdf?docID=3621; Charles C. Haynes, *A Teacher's Guide to Religion in the Public Schools* in Finding Common Ground: A First Amendment Guide to Religion and Public Schools, First Amendment Center (2007), available at http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FCGcomplete.pdf.

[105] In the Westmoreland, Tennessee, situation involving coaches bowing their heads, the spokesperson for the Sumner County Schools was asked if "bowing one's head qualified as endorsing," and he replied, "It depends on what it looks like. That's where you kind of get into the gray area that we're having to deal with." See Devine, supra note 97.

[106] Bowman, supra note 53, at 189, 204–05, 222.

In summary, Senate Joint Resolution 287 is unnecessary because First Amendment law already adequately protects religious expression, and although that law is not always adhered to, adding an amendment to the Virginia Bill of Rights will not solve that problem, because it is caused by something other than the absence of a good law. The interpretation and application of even the best of laws will always to some extent involve disputes and mistakes.

III. IS SENATE JOINT RESOLUTION 287 AN ATTEMPT TO CHALLENGE AND CHANGE THE SUPREME COURT'S INTERPRETATION OF THE RELIGION CLAUSES?

Given the conclusions reached above, namely, that Senate Joint Resolution 287 is both unnecessary and unavailing, some persons might reasonably suspect that its purpose is not to protect or increase the religious freedom of private individuals or groups, but rather to allow religious expression by the government itself, at least more so than the Supreme Court currently allows. There are, moreover, three other aspects of the bill that make such a suspicion fairly credible.[107]

First, although Senate Joint Resolution 287 does not say that the Commonwealth (or its agents) should be able to promote, encourage, or endorse religious beliefs/practices of one sort or another, neither does it say that it should not do so. It only says that the Commonwealth "shall not coerce any person to participate in any prayer or other religious activity."[108] If, however, it mentions one thing that the government may not do, why does it not mention all the things it may not do? By not doing so, the bill clearly implies that the Commonwealth may promote, encourage, or endorse religion provided it does not use coercion. Of course, Senate Joint Resolution 287 goes on to say that religious expression may be restricted for other reasons, such as to avoid disturbing the peace or disrupting a public meeting,[109] but these kinds of restrictions apply to secular as well as religious expressions. The Supreme Court, however, has said that in addition to being restricted in these ways, religious expression by the government is prohibited even if it does not entail any coercion. This was one of the main points made in its opinion in School District of Abington Township v. Schempp, which struck down school-sponsored prayer and

[107] There is also the different wording of provisions two, three, and seven discussed earlier. See supra text accompanying note 37.
[108] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013).
[109] Id.

Bible-reading in the public schools even though it was alleged that students were free not to participate in those religious exercises.[110] In short, the wording of Senate Joint Resolution 287 clearly suggests that one of its intended purposes is to allow school-sponsored religious expression, such as prayer and Bible reading, in the public schools of the Commonwealth.

A second reason for thinking that Senate Joint Resolution 287 is an attempt to challenge and change the Supreme Court's interpretation of the religion clauses is the phrase, "as long as such prayers or expressions abide within the same parameters placed upon any other free speech under similar circumstances," which (or a variant of it) appears twice in the bill—in the third provision that gives citizens, elected officials, and state employees the right to pray on government property and in the seventh provision that gives public school students the right to express their religion.[111] In both cases, the phrase appears to limit the religious expression allowed by the bill, but only to the same extent and in the same way that secular expression is already limited by the First Amendment as interpreted by the courts. It must "abide within the same parameters placed upon any other free speech under similar circumstances."[112] At first glance, one might not construe this language as allowing the government itself to engage in prayer or other types of religious expression, but simply as granting the same protection to religious expression by private individuals or groups that is provided to their secular expression.

Such an interpretation, however, would be correct only as it pertains to the religious expression of "citizens" and "public school students"—nongovernmental actors. But what does the "same parameters" phrase mean as applied to the prayers (and other religious expressions) of elected officials and state employees? If by "elected officials and employees of the Commonwealth"[113] the bill is referring to such persons when they are not speaking or praying on behalf of the government, as its representatives or agents, then no problem is created by the "same parameters" phrase. Unfortunately, Senate Joint Resolution 287 does not make it clear that when it refers to "elected officials and employees of the Commonwealth,"[114] it is talking only about such persons when speaking or praying for themselves as private individuals.

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[110] 374 U.S. 203, 223 (1963) (". . . [A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.").

[111] S.J. Res. 287, 2013 Va. Gen. Assemb. Reg. Sess. (Va. 2013).

[112] Id.

[113] Id.

[114] Id.

This omission is unfortunate because if the bill is interpreted as referring to public officials and state employees even when they are acting for or on behalf of the government, then the "same parameters" phrase would indeed be a way of allowing the government itself to promote a particular religion through its prayers and other types of religious expression. How so? Recall the major difference between the limits ("parameters") placed by the First Amendment on government in relation to secular ideas and the limits placed on it in relation to religious ideas. Although the government may neither approve or disapprove of religious ideas ("viewpoints"), when it comes to secular ideas the government is prevented only from prohibiting them from being expressed. It is not prevented from endorsing and promoting certain secular ideas, e.g., democracy, capitalism, equality, and environmentalism.[115] In short, Senate Joint Resolution 287's requirement that prayers and other kinds of religious expression must "abide within the same parameters placed upon any other free speech under similar circumstances"[116] would allow public officials and state employees to pray and express certain religious viewpoints, even when a reasonable person would think that they were acting as agents or on behalf of the government. The reason: those parameters do not prevent them from favoring certain secular viewpoints, and Senate Joint Resolution 287 appears to be saying that religious viewpoints should be treated no differently.

The third way in which Senate Joint Resolution 287 appears to challenge current law is its provision relating to prayers at meetings of legislative bodies, such as city councils, county boards of supervisors, and school boards. The provision allows such bodies to "extend to ministers, clergypersons, and other individuals the privilege to offer invocations or other prayers"[117] at their meetings. Upon reading this, one might think this is yet another provision in the bill that is not needed, because current First Amendment law already allows legislative bodies to invite persons to offer prayers at their meeting. This description of the current law, however, is not entirely accurate. The law does allow persons to pray at meetings of legislative bodies, but only if the prayers are non-sectarian, which means they cannot be Christian prayers.

This rule is the result of the Supreme Court's 1983 decision in Marsh v. Chambers,[118] which upheld the Nebraska legislature's practice of opening each session with a prayer offered by a chaplain selected by the legislators

[115] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005).
[116] S.J. Res. 287, 2013 Va. Gen. Assemb., Reg. Sess. (Va. 2013).
[117] Id.
[118] 463 U.S. 783, 795 (1983).

and paid with public money. Uncharacteristically, the Court did not decide the case by applying its established rule of law requiring the government to be neutral with respect to religion. Instead, it upheld the practice of having prayers at meetings of the legislature on the grounds that because such prayers had been offered since the beginning of our nation, it must have been the case that they were never thought to violate the religion clauses.[119] In its opinion, however, although it did not state that such prayers must be non-sectarian, the Court spoke approvingly of the fact that the prayers were non-sectarian and were not used "to proselytize or advance any one, or to disparage any other, faith or belief."[120] Then in 1989 the Court made its position clearer; it said, "not even the unique history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief."[121] Since then, various lower federal courts, including the Fourth Circuit Court of Appeals whose jurisdiction includes Virginia, have ruled that the religion clauses require that legislative prayers be non-sectarian in nature.[122]

Given the current law's prohibition of government-sponsored sectarian prayers at meetings of legislative bodies and the failure of Senate Joint Resolution 287's provision allowing legislative prayers to make it clear that they must be non-sectarian, it seems only logical to conclude that the purpose of the provision is to allow sectarian, i.e., Christian, prayers at meetings of legislative bodies. The fact that Senator Stanley is the attorney for Pittsylvania County Board of Supervisors in a lawsuit brought against it by the ACLU to eliminate Christian prayers by invited clergy at its meetings[123] simply reinforces the conclusion that Senate Joint Resolution

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[119] Id., at 791–92; see generally Lund, supra note 104, at 980–90.

[120] Marsh, 463 U.S. at 794–95; see also Lund, supra note 104, 994-97.

[121] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) (citation omitted).

[122] See, e.g., Joyner v. Forsyth Cnty., 653 F.3d 341, 349 (4th Cir. 2011); Wynne v. Town of Great Falls, 376 F.3d 292, 299 (4th Cir. 2004); Mullin v. Sussex Cnty., 861 F.Supp. 2d 411, 426 (D. Del. 2012); cf. Pelphrey v. Cobb Cnty., 547 F.3d 1263, 1281 (11th Cir. 2008). Galloway v. Town of Greece, 681 F.3d 20 (2nd Cir. 2012), held that having mostly Christian prayers before a town council constituted an unconstitutional endorsement of one religion, but it did not require or approve of having only non-sectarian prayers. It suggested instead that having a diversity of prayers, none of which were endorsed by the council, would be unconstitutional. Invited prayers at school board meetings have been disallowed on grounds that school boards are different from legislative bodies. See Doe v. Indian River Sch. Dist., 653 F.3d 256, 290 (3d Cir. 2011); Coles v. Cleveland Bd. Of Educ., 171 F.3d 369, 385 (6th Cir. 1999).

[123] See John R. Crane, Judge Sides with ACLU on Pittsylvania Prayer Issue, RICHMOND TIMES-DISPATCH, Mar. 28, 2013, B8, available at http://www.timesdispatch.com/news/state-regional/judge-sides-with-aclu-on-pittsylvania-prayer-issue/article_af7bc81b-dc8d-567f-ae99-470c2e52884b.html. It is ironic that the Pittsylvania County supervisors want to have Christian prayers at their meetings when Jesus condemned such prayers as insincere and hypocritical. See Ellis M. West, Prayers at Meetings of Lawmakers: What Would Jesus Think?, 185 RELIGIOUS HERALD 21 (2012), available at http://www.religiousherald.org/index.php?option=com_content&task=vie w&id=6154&Itemid=9.

287 is an attempt to legalize such prayers, even in the face of opposing U. S. constitutional law.

In response, Senator Stanley might very well say, yes, that is indeed the purpose of the provision in question and then proceed to defend it. He might ask, is it possible to distinguish between sectarian and non-sectarian prayers?[124] If the latter are permissible, why should not the former also be permissible? If the rationale for prohibiting sectarian prayers is that the government must not identify itself with any one "specific faith or belief" at the expense of others, why would that rationale also not prohibit non-sectarian prayers, which, after all, identify the government with religion in general and thereby disparage non-religious persons? On the other hand, if non-sectarian prayers are constitutionally justified on the basis of their long-standing practice, then why should not Christian prayers also be justified on that basis?[125]

Such an argument, however, can also work in reverse and against Senator Stanley: if sectarian prayers at meetings of legislative bodies are unacceptable in spite of their historic practice, then why should non-sectarian prayers be acceptable just because of their historic practice? Clearly the Supreme Court's principle of neutrality toward religion does not allow government to discriminate against non-religious persons, whether they are called atheists, agnostics, or "nones."[126] One might argue, therefore, that if Senator Stanley were really interested in protecting the religious freedom of all Virginians, he should submit a bill that would prohibit all officially sponsored prayers, both sectarian and non-sectarian, at meetings of legislative bodies. The reason for doing so has been well explained as follows:

> When the government speaks religiously, it becomes committed to making a continual set of discretionary religious choices. This invites conflict; in the context of legislative prayer, it means battles over who will have the right to pray and what they will get to say. Government now must decide fundamental issues of religious truth—it must decide the proper type of religious message and the proper type of person to deliver it. . . . [and] someone will have to be rejected.[127]

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[124] See generally Lund, supra note 104, at 1001-13 (analyzing the difficulty of distinguishing, both in theory and practice, between sectarian and non-sectarian prayer).

[125] See Lund, supra note 104, at 1022; see, e.g., Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 COLUM. L. REV. 2083, 2104 (1996) (summarizing the long-standing and widespread practice of Christian prayers at meetings of legislatures).

[126] Lund, supra note 104, at 978, 981-82.

[127] Lund, supra note 104, at 978, 1002–04 (explaining that if a government chooses to use the Lord's Prayer or display the Ten Commandments, it has to decide which version to use or display).

This last argument, however, assumes that the prayers at meetings of legislative bodies are governmental in nature. Is that a valid assumption? This is the crucial issue that the courts have not addressed and yet need to address – not whether the prayers are sectarian or have been practiced since the beginning of our country. Given that the Supreme Court has interpreted the religion clauses as requiring government neutrality toward religion, these latter issues are irrelevant, but what is clearly relevant is whether such prayers are government-sponsored or not. Why is this in doubt? Consider the following: if during a meeting of a legislative body at which citizens were allowed to speak one of them publically uttered a prayer as part of her/his remarks, or indeed if an individual legislator publically uttered a prayer as part of his/her remarks, it is very doubtful if a court would say that such a prayer violates the religion clauses, for it would appear to be a case of an individual's expressing her or his own beliefs as opposed to speaking on behalf of the government.

A body of legislators could also argue that when it invites a clergyperson to say a prayer, it does so not because it wants to make a statement about the importance of religion versus non-religion or in any way to influence the beliefs/practices of those present at the meeting, but rather because its members want divine guidance on their deliberations and decision-making. If the legislators were to meet voluntarily and privately for prayer immediately before the beginning of their public meeting, surely no court would hold that they could not do that. Is the fact that their prayers are said at a public meeting enough to transform them from being private (and allowed) to being governmental (and not allowed by the religion clauses of the First Amendment)? On the other hand, if lawmakers are truly interested in praying (or having someone pray) for divine help, why does it need to be done in public? Their praying in public suggests that what they are most interested in doing is sending a message to their constituents about the importance of religion or Christianity (or perhaps about their own religiosity).

One other possibility would be for the legislative body to create a designated public forum at some point during its meetings and allow anyone to speak on any topic that might be germane to the work of the body.[128] Then if Christian clergy or laypersons, on their own without being asked, wanted to say a Christian prayer asking for divine guidance or even for intervention on behalf of a certain bill, they could do so during the public forum. Of course, persons of other faiths as well as atheists and

[128] See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

skeptics would also have the opportunity to "pray" or express their views on matters. One scholar who has examined such an arrangement concludes that it would be constitutional, but speculates that it would not be appealing to most legislative bodies because it would allow and even encourage the expression of prayers and viewpoints to which they would be opposed.[129] This assessment, however, is likely to hold only for areas of the country that are religiously pluralistic; in the mostly Christian communities in Southside Virginia this arrangement might be quite appealing.

This, in turn, raises the question of whether a designated public forum that is officially open to all viewpoints, religious and otherwise, but is dominated by the viewpoint or expressions of one religion violates the principle of neutrality dictated by the religion clauses. The Supreme Court has not ruled on this question, but has implied that such a forum would be unconstitutional. For example, in Widmar v. Vincent, which allowed student religious groups along with other student groups to use the facilities of the University of Missouri, the Court noted approvingly that under that arrangement there was "a broad class of nonreligious as well as religious speakers" on campus and no "empirical evidence that religious groups . . . dominate[d]" that forum.[130] Certain individual justices have also suggested that a forum dominated by one religious group should not be allowed.[131] To the extent that this position is or might become the law, it, in turn, raises the difficult question of what constitutes "domination" of a public forum. Finally, whatever the answer to that question might be, as a way of helping to ensure that whatever is said is not understood as government endorsed or sponsored, a government entity such as a legislative body could explicitly disassociate itself from all expressions in the public forum.

Unfortunately the questions and possibilities just discussed have yet to be addressed by the Supreme Court, the only court that can do so in a definitive way. It now, however, has the opportunity to do just that, for the Court has agreed to review a Second Circuit Court of Appeals decision striking down the practice of having mostly Christian prayers at the beginning of town council meetings.[132] Regardless of how the Court will

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[129] Lund, supra note 104, at 1029-35.

[130] 454 U.S. 263, 274–75 (1981).

[131] See, e.g., Pinette, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment) ("At some point, . . . a religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."). Contra Good News Club, 533 U.S. at 119–20, n. 9 (stating that when the government creates a designated forum open to groups of any viewpoint, the establishment clause would not be violated "simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.").

[132] Galloway v. Town of Greece, 681 F.3d 20 (2nd Cir. 2012), appeal docketed, No.12-696 (2013).

rule in that case, amending the Virginia Bill of Rights to allow sectarian prayers at meetings of lawmakers will have no effect on its decision, and certainly will not trump a decision disallowing sectarian prayers.

IV. SHOULD PUBLIC SCHOOL STUDENTS HAVE A RIGHT TO BE EXCUSED FROM ACTIVITIES TO WHICH THEY HAVE RELIGIOUS OBJECTIONS?

The final provision in Senate Joint Resolution 287 that deserves analysis is the one that says that "no student in public schools shall be compelled to perform or participate in academic assignments or educational presentations that violate his [or her?] religious beliefs."[133] Unlike the previous provisions analyzed in this article, this provision has some merit and is worth considering—for three reasons.

First, public school students are sometimes required to take courses that teach or at least present ideas that conflict with what their religion teaches them to believe.[134] Examples are biology courses that teach the theory of evolution and health courses that teach methods of contraception or imply that pre-marital sex is not immoral. The idea of evolution is especially objectionable to religious parents and students if it is taught to mean that the creation of the world and evolution of species are entirely "natural," i.e., can in no way be attributed to God or some transcendent source of being. Taught in that way, it is an "anti-religious" doctrine.[135]

Second, if it is a problem that needs to be addressed, the law as it currently stands may not afford enough protection to students who feel that their religion is being threatened by their having to take certain subjects in school. For example, the free exercise clause of the First Amendment, both as originally understood[136] and as currently interpreted by the Supreme Court,[137] does not entail a right of persons to be exempt from obeying valid, secular laws that conflict with what their religion requires them to do

[133] S.J. Res. 287, 2013 Va. Gen. Assemb., Reg. Sess. (Va. 2013).
[134] See, e.g., George W. Dent, Religious Children, Secular Schools, 61 S. CAL. L. REV. 863, 864 (1987–88). See generally id. (examining the constitutional claims of religious parents and children offended by public education).
[135] Moreover, there are many scientists who argue that science should be taught in that way. See RICHARD DAWKINS, THE GREATEST SHOW ON EARTH: THE EVIDENCE FOR EVOLUTION 4, 436 (2009) (arguing that the fear of offending religious students threatens the truthful teaching of science).
[136] See Ellis M. West, The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription, 10 JRNL OF LAW AND RELIGION 367-401 (1993-94); Gerard V. Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 HOFSTRA L. REV. 245-319 (1991); and Philip Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 GEORGE WASHINGTON L. REV. 915-48 (1992).
[137] Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990)

or not do.[138] Although the Court did hold in one case, Wisconsin v. Yoder, that Amish children have a right to be exempt from a law requiring them to attend public high schools[139] and that decision has not been overruled, it relied heavily on considerations peculiar to Amish faith and life,[140] and it has not been used to justify the kind of religion-based exemption called for in Senate Joint Resolution 287.[141] Moreover, the most important lower federal court decision that did address this issue ruled against the parents who for religious reasons did not want their elementary school children to be exposed to certain literature that they considered to be anti-religious, and the Supreme Court declined to hear it on appeal.[142] Because of this decision and subsequent one in lower federal courts, current law suggests that parents who object on religious grounds to the contents of the curriculum or to assignments will not be able to obtain exemptions for their children on the basis of the free exercise clause.[143]

Third, the provision in Senate Joint Resolution 287 intended to protect the religious faith of students is not objectionable on the grounds that it violates the establishment clause as interpreted by the Court. Although one could argue that religion-based exemptions from valid, secular laws do violate that clause and its requirement of government neutrality toward and equal treatment of all religions and persons regardless of their religion or lack thereof,[144] the Court has never taken such a position. To the contrary, it has said that although such exemptions are not required by the free exercise clause, they may be granted by legislative bodies without violating the establishment clause, and it has upheld certain ones of them.[145]

[138] See, e.g., Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 537–39 (1st Cir. 1995) (dismissing plaintiffs' claim under the Free Exercise Clause that a mandatory school assembly "imping[ed] on their sincerely held religious values regarding chastity and morality").
[139] Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972).
[140] Id. at 235–36.
[141] See, e.g., Eric A. DeGroff, Parental Rights and Public School Curricula: Revisiting Mozert after 20 Years, 38 J.L. & EDUC. 83, 105 (2009) ("In light of the decisions described above [including Wisconsin v. Yoder and subsequent lower court decisions], the state of the law concerning both the nature and scope of parental rights remains largely unclear. . . . Further guidance from the Supreme Court would bring much-needed clarity.").
[142] Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987); Mozert v. Hawkins Cnty. Bd. of Educ., 484 U.S. 1066 (1988).
[143] DeGroff, supra note 140, at 88-94; see also THOMAS C. BERG, THE STATE AND RELIGION 195–96 (2nd ed. 2004).
[144] See Steven G. Gey, Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U.PITT L. Rev. 75, 77 (1990); Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accomodation of Religion, 140 U.PA. L.REV. 555, 556 (1991); Ira C. Lupu, The Trouble with Accommodation, 60 GEO. WASH. L. REV. 743, 749-754 (1992).
[145] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990); see also Cutter v. Wilkinson, 544 U.S. 709, 719-20

To conclude from this, however, that the Virginia Bill of Rights needs to be amended in order to protect the religious liberty of students would be premature, for the preceding analysis is based solely on the Supreme Court's interpretation of the religion clauses of the First Amendment; it fails to take into account Virginia law. When that is taken into account, it becomes less clear that the provision in question is needed—for two reasons. First, Virginia already has a law that allows students, for religious reasons, to be exempt from having to attend any school, public or private, to be home-schooled, or to be educated in any way . It says, "A school board shall excuse from attendance at school: 1. Any pupil who, together with his parents, by reason of bona fide religious training or belief is conscientiously opposed to attendance at school."[146] In fact, Virginia is the only state in the nation with such a law.[147] The vast majority of states (forty-six)[148] do not provide religion-based exemptions from compulsory attendance laws, but do allow parents who are opposed to sending their children to public schools to send them to private schools or to home-school them. The three other states that do provide religion-based exemptions require that the exempted children receive some kind of education.[149] Regarding the Virginia law, one study says, ". . . when it comes to religious [sic] exemptions from public school attendance, Virginia is unusually permissive and deferential to the views of parents seeking exemptions, and, at least by the terms of the statute, uniquely unconcerned about the educational futures of those children receiving religious [sic] exemptions."[150]

The existence of this statute, however, does not necessarily mean that it authorizes religion-based exemptions from specific courses, sections of courses, or other "academic assignments or educational presentations."[151] It appears to have been written with attendance in general in mind, but given its actual wording, it could certainly be interpreted and used to allow absences from specific, limited parts of a school's educational program. Why, therefore, amend the Virginia Bill of Rights until this existing law has

(2005); Arlan's Dep't Store v. Kentucky, 371 U.S. 218 (1962) (dismissing an appeal of Kentucky retail store owners convicted under a Kentucky law forbidding operation of stores on Sunday); cf. Texas Monthly v. Bullock, 489 U.S. 1, 2 (1989).

[146] VA. CODE ANN. § 22.1-254(B)(1) (1950).

[147] Christine Tschiderer et al., 7,000 Children and Counting: An Analysis of Religious Exemptions from Compulsory School Attendance in Virginia, CHILD ADVOCACY CLINIC OF UNIV. OF VIRGINIA SCHOOL OF LAW 10 (2012), available at, http://www.law.virginia.edu/pdf/news/religious_exemption_report.pdf.

[148] Id. at 11.

[149] Id. at 10.

[150] Id.

[151] S.J. Res. 287, 2013 Va. Gen. Assemb., Reg. Sess. (Va. 2013).

been tried as the means of obtaining relief to students religiously opposed to certain aspects of their public school education?

Even if Virginia's law granting religion-based exemptions from attendance at school would for some reason not work to exempt students from participating in specific assignments or presentations, there is yet another Virginia law that probably would—at least some of the time. It is entitled "Religious freedom preserved . . ." and includes the following provision: "No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest."[152] On its face, this provision could certainly be used to protect students from some educational material or assignments to which they had religious objections.

There is, however, one important difference between this provision and the one in Senate Joint Resolution 287. The latter provides automatic exemptions from objectionable assignments or presentations; under the amendment all a student has to do to obtain an exemption is to assert, presumably sincerely, that a particular assignment or presentation violates his/her religious beliefs. No matter how important educationally the assignment or presentation or how insubstantial the threat to her or his beliefs might be, a student could, on the basis of this provision, obtain an exemption. In contrast, the law entitled "Religious freedom preserved" does not authorize automatic exemptions. To obtain one, students have to show that without it their exercise of religion would be substantially burdened and that the requirement from which they sought an exemption was not the least restrictive means of furthering a compelling governmental interest.[153] Whether they could do that would vary from situation to situation. For example, it would probably be much more difficult to obtain a religion-based exemption from being exposed to the facts about sexual intercourse and contraceptives than it would be to obtain one from a biology course in which creation, life, and evolution are taught as being entirely and necessarily "Godless."

Which of these two provisions would be the best way of protecting the religious liberty of public school students? The former has the advantage of being easy to administer, but the disadvantage of allowing exemptions for

[152] VA. CODE ANN. § 57-2.02(B) (1950).
[153] Id.

frivolous reasons. The latter has the advantage of already being a law, and it prevents frivolous claims. Its disadvantage is that it is difficult to administer. It could lead to an "endless" number of court cases in which judges, perhaps arbitrarily, decide whether the threat to religious freedom outweighs the benefits of the educational activity.[154] In any case, how one answers the preceding question will likely determine whether she or he thinks the provision in Senate Joint Resolution 287 to provide religion-based exemptions to public school students is needed.

V. CONCLUSION.

Senate Joint Resolution 287 is a proposed addition to the historic Section 16 of the Virginia Bill of Rights. Its proponents say that it is needed to protect the religious freedom of the citizens of the Commonwealth of Virginia,[155] which implies that Section 16 does not adequately do that, even though it has been "on the books" for over two hundred years and universally admired for the protection it has afforded religious freedom.[156]

This article has examined and analyzed all of the substantive provisions of Senate Joint Resolution 287. It has done so on the basis of three criteria: whether the provisions are clearly and concisely worded, whether they are needed to protect religious freedom, and whether they are consistent with the religion clauses of the First Amendment as interpreted by the Supreme Court and other federal courts. Hopefully, it has shown that Senate Joint Resolution 287 is so poorly worded that it is confusing and, if adopted, will be difficult to interpret and apply; that with one possible exception (the provision intended to protect students from objectionable educational assignments), the provisions are not needed to protect the religious freedom of non-governmental agents (individuals or groups); and that at least three of the provisions are intended or could be interpreted as intending to justify and encourage violations of the religion clauses of the First Amendment.

In regard to this last point, the crux of the problem is that Senate Joint Resolution 287 fails to accept and observe the distinction between non-governmental (private) and governmental (public) religious expression and the rule that the latter is forbidden by the religion clauses. Although it is sometimes difficult to know under which category a particular religious

[154] Ellis West, The Case Against a Right to Religion-Based Exemptions, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 604-11 (1990) (providing a detailed account of the problems that could be caused by using such a law).

[155] R. Retta, Virginia Has the Opportunity to Put God Back Into the Public Forum, FRANKLIN COUNTY VA PATRIOTS (Jan. 18,2013), http://franklincountyvapatriots.com/2013/01/18/virginia-has-the-opportunity-to-put-god-back-into-the-public-forum/.

[156] VA. CONST., § 16.

expression falls, and mistakes in that regard may have been made, that is hardly a reason to reject the rule that the government should not pass laws or take actions that have as their primary purpose or effect the advancing or harming of religion, any particular religion, or any person/group because of his/her/its religion.[157]

Given these conclusions, the question necessarily arises: why would anyone propose or vote for a law, whether a constitutional amendment or statute, most of whose provisions are unnecessary and some of which are very likely to be declared in violation of the First Amendment of the U. S. Constitution? One possible answer is that the proponents of Senate Joint Resolution 287 may believe that, if adopted, when its provisions are struck down by lower federal courts, the Supreme Court will be willing to hear them on appeal, will then modify its current interpretation of the religion clauses, and will hold that Senate Joint Resolution 287's provisions are constitutional. That such a strategy, and justification for proposing and adopting Senate Joint Resolution 287, is not all that far-fetched or unrealistic is suggested by the fact that a similar strategy appears to underway as a means of getting Roe v. Wade[158] overturned.[159] Of course, there are far fewer reasons for thinking that the Court will reverse or even modify such decisions as Abington School District v. Schempp[160] than there are for thinking that it will overturn Roe v. Wade.

The more likely explanation for Senate Joint Resolution 287 is simply politics. These days it is often said by observers of and commentators on lawmaking in this country that legislators now take actions and make decisions much more on the basis of how they will affect their individual or their party's chances for success at the polls than on the basis of whether they will be in the best interest of the people or are consistent with the Constitution, state or federal.[161] If this thesis is applicable to Senate Joint

[157] Even if Senate Joint Resolution 287 had no deficiencies, there is still the question of why an ordinary statute would not work just as well as a constitutional amendment to accomplish its objectives.
[158] 410 U.S. 113 (1973).
[159] See AP, North Dakota governor approves 6-week abortion ban: Legal Fight Looms as State Tests Limits of Roe v. Wade, RICHMOND TIMES-DISPATCH, Mar. 27, 2013, at A2.
[160] 374 U.S. 203 (1963).
[161] Whether true or not, Republicans are often accused of voting against any legislation favored by President Obama not for substantive reasons, but simply to prevent him from having any legislative victories that might enhance his political standing. Recently, for example, one of their own, Senator Pat Toomey of Pennsylvania, stated that his Republican colleagues in the Senate who voted against expanding background checks for gun sales did so because they did not want to be seen as helping Obama. Amanda Terkel, *Pat Tommey: Background Checks Died Because GOP Didn't Want To Help* Obama, HUFFINGTON POST (May 1, 2013), http://www.huffingtonpost.com/2013/05/01/pat-toomey-background-checks_n_3192690.html.

Resolution 287, it would mean that its supporters have championed it not necessarily because they actually agree with its provisions or believe it has a decent chance of being accepted either by the General Assembly or the courts, but because doing so will garner them and their party campaign contributions and votes come election time. In some sections of the Commonwealth a majority of the citizens has probably not yet accepted the fact that school-sponsored prayer and Bible-reading cannot take place within the public schools or that boards of supervisors and school boards cannot begin their meetings with Christian prayers. From a political perspective, therefore, it would make perfectly good sense for representatives or would-be representatives from those sections to take positions on such issues that are consistent with those of their constituents.

Hopefully, in next year's Virginia General Assembly, when Senate Joint Resolution 287 is likely to be considered again, the number of representatives from areas of the Commonwealth who object to the Supreme Court's interpretation of the First Amendment will be far less than the number of representatives from areas whose citizens approve of it and believe, as did Thomas Jefferson and James Madison, that religious freedom depends on separating religion from government.