

A Prayer for Relief: Assessing the Constitutionality of Missouri's Right to Pray Amendment

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INTRODUCTION

On August 7, 2012, the state of Missouri passed by popular vote the Religious Freedom in Public Places amendment.¹ Many have called the amendment the “Right to Pray” amendment,² although its official title is “Religious Freedom in Public Places.”³ The summary that appeared on the ballot in August asserted the amendment would ensure Missourians’ right to express their religious beliefs and mandate all public schools display the Bill of Rights of the United States Constitution.⁴

The full text of the amendment, however, is quite distinct from the more innocuous language that appeared on the ballot.⁵ The amendment actually provides that government officials may “pray individually or corporately in a private or public setting,” including on government property.⁶ It also allows students to express their religious beliefs in school assignments, and it gives students leave to

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1. Chris Good, *Missouri Passes Right-to-Pray Amendment, Re-stating Freedoms*, ABC NEWS (Aug. 8, 2012, 7:29 AM), <http://abcnews.go.com/blogs/politics/2012/08/missouri-passes-right-to-pray-amendment-re-stating-freedoms/>. The amendment passed with 83 percent of the vote in the Missouri Primary election on August 7, 2012. *Id.*

2. *Id.*

3. H.R.J. Res. 2, 96th Gen. Assemb., Reg. Sess. (Mo. 2011).

4. 2012 *Ballot Measures*, MO. SEC’Y OF ST., <http://www.sos.mo.gov/elections/2012ballot/>.

5. Compare MO. CONST. art. I, § 5, with 2012 *Ballot Measures*, *supra* note 4.

6. MO. CONST. art. I, § 5.

refuse to participate in school assignments that violate their religious beliefs.⁷

The discrepancy between the ballot language and the substance of the amendment immediately sparked litigation.⁸ In *Coburn v. Mayer*, the plaintiffs, backed by the American Civil Liberties Union, challenged the summary statement of the amendment on the ballot as insufficient and unfair.⁹ They asserted the summary statement “deceive[d] and misle[d] voters about the purpose and effects of the proposed amendment.”¹⁰ The trial court found the statement “sufficient and fair,” and granted summary judgment in favor of the defendants.¹¹ The Missouri Court of Appeals for the Western District upheld the trial court’s grant of summary judgment in favor of the defendants, and the summary statement remained on the ballot as originally written.¹²

Part I of this Note reviews the history of the Religious Freedom in Public Places amendment, including the legislative history of the amendment and the controversy that has met its passage. Part I also examines relevant constitutional provisions and prior court decisions addressing religion and the government. Part II analyzes Missouri’s Religious Freedom in Public Places amendment and considers whom it protects and whom it is likely to hurt. Part III argues the amendment is unconstitutional, and Part IV considers the legal responses available for challenging it, including legislative and litigation-based strategies. This Note proposes that the amendment

7. *Id.*

8. *Coburn v. Mayer*, 368 S.W.3d 320 (Mo. Ct. App. 2012).

9. *Id.*

10. *Id.* at 323. “Plaintiffs argue that the Missouri Constitution already provides for the right to express religious beliefs without infringement and, therefore, the summary statement misleads voters into thinking that such a right is a change that would be effected by the passage of the proposed amendment.” *Id.* at 324.

11. *Id.* at 323.

12. *Id.* at 322. The court held the word “ensure” in the text made clear that the purpose of the amendment was to safeguard and protect religious freedoms, even if those freedoms already existed in the former text of the Missouri constitution. *Id.* at 324. The court also held that the text of the amendment did not repeal prisoners’ rights to religious freedom, but merely made their rights consistent with federal law. *Id.* at 325. Finally, the court held that the language in the summary statement was broad enough to cover the provision of the amendment which gives students the right to refrain from participating in educational activities that they believe violate their religious beliefs, despite the fact that the summary statement did not actually mention this provision. *Id.* at 326.

should be invalidated in federal court under either the Establishment Clause or the Free Exercise Clause of the First Amendment to the United States Constitution.

I. HISTORY

Republican State Representative Mike McGhee was the lead sponsor of the Religious Freedom in Public Places amendment; for two years, he sponsored legislation that eventually led to the amendment's passage in the 2011 Regular Legislative Session of the Missouri House of Representatives.¹³ McGhee and the amendment's other supporters asserted the amendment was needed "to make the state constitution match the U.S. Constitution and protect Christianity," which he argued was "under attack."¹⁴

McGhee cited two incidents to demonstrate the need for this amendment. One, in 2006, involved a Christian student at Missouri State University who was asked, as part of a class project, to write and sign a letter supporting adoption rights for gay couples.¹⁵ The second incident involved a teacher who reportedly stopped a kindergartener from singing "Jesus Loves Me" on the playground and suggested that he sing "Mommy Loves Me" instead.¹⁶

The Conference Committee in the Missouri House apparently agreed with McGhee that these incidents called for an amendment to the Missouri Constitution. The summary of the committee version of the bill explained the bill was "important because of recent litigation."¹⁷ It stated, "It is important to delineate our rights. There is

13. Tim Townsend, *Missouri's Proposed Amendment 2 on Prayer Gets Mixed Reviews*, ST. LOUIS POST-DISP., July 30, 2012, available at http://www.stltoday.com/lifestyles/faith-and-values/missouri-s-proposed-amendment-on-prayer-gets-mixed-reviews/article_8b188463-9973-532c-92d9-223235cad84a.html [hereinafter Townsend, *Mixed Reviews*].

14. *Missouri Votes to Fortify Public Prayer with Amendment that Critics Call Unnecessary*, FOX NEWS (Aug. 8, 2012), <http://www.foxnews.com/politics/2012/08/07/missouri-votes-tuesday-on-amendment-to-fortify-public-prayer/> [hereinafter *Missouri Votes to Fortify Public Prayer*].

15. *Id.*

16. *Id.*

17. Summary of the Committee Version of the Bill, Religious Freedom in Public Places, H.R.J. Res. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011), available at <http://house.mo.gov/content.aspx?info=/bills/111/bilsum/commit/sHJR2C.htm> [hereinafter Summary of the Bill].

more systemic and societal ignorance about the expression of religion today than ever before.”¹⁸

There was much support for the amendment from Christian organizations in Missouri, including the Missouri Family Network,¹⁹ which supports conservative Christian political goals.²⁰ Some religious leaders also supported the amendment, including four Roman Catholic bishops.²¹

A. *The Amendment*

The text of the “Right to Pray” amendment begins with a declaration of religious freedom, including that the state cannot establish an official religion.²² It goes on to require that no one be prevented from participating in individual or corporate prayer, as long as the prayer does not result in a disturbance of the peace.²³ This includes prayer on government property or in government meetings.²⁴ The amendment then turns to school students, and prohibits schools from requiring students to participate in assignments that they say

18. *Id.*

19. See also Dave Helling, *Missouri Voters OK ‘Right to Pray’ Amendment*, MIAMI HERALD, Aug. 8, 2012, available at <http://www.miamiherald.com/2012/08/08/2939291/missouri-voters-ok-right-to-pray.html>. Kerry Messer, president of the Missouri Family Network, stated Missourians supported the amendment because “[t]he public feels like the Supreme Court took [religious liberty] away from them over 50 years ago’ with a ruling against mandatory school prayer.” *Id.* He referred to the 1962 Supreme Court decision *Engel v. Vitale*, in which the Court decided that mandatory school prayer was a violation of the United States Constitution. 370 U.S. 421 (1962). But see Simon Brown, *Missouri’s Deceptive Amendment 2 Passes: Will Lawsuits Follow?*, AMS. UNITED (Aug. 8, 2012), <http://www.au.org/blogs/wall-of-separation/missouri-s-deceptive-amendment-2-passes-will-lawsuits-follow> (“In reality, Amendment 2 is not so benign. It opens the door for coercive prayer and proselytizing in public schools, allows students to skip homework if it offends their religious beliefs and infringes on the religious liberty rights of prisoners.”).

20. See *Defending Traditional Families*, MO. FAMILY NETWORK (Feb. 10, 2013), <http://missourifamilynetwork.net/>.

21. *Mo. Voters Decide on Religious-Freedom Amendment*, FIRST AMEND. CTR. (Aug. 3, 2012), <http://www.firstamendmentcenter.org/mo-voters-to-decide-on-religious-freedom-amendment>. In statements supporting the amendment, the bishops wrote, “People of faith need assurance that they remain free to exercise and express their religious beliefs in public, provided just order be observed, without threat of external pressure to conform to changing societal ‘norms.’” *Id.*

22. MO. CONST. art. I, § 5.

23. *Id.*

24. *Id.*

violate their religious beliefs.²⁵ Students must also be able to express their religious beliefs in school in accordance with existing free speech rights.²⁶ Finally, the amendment requires public schools display the Bill of Rights.²⁷

B. Criticism of the Amendment

The amendment sparked controversy from the moment it was proposed, and disagreements over its implications did not end with its passage. Many civil rights groups opposed the amendment, including the American Civil Liberties Union of Eastern Missouri, NARAL Pro-Choice Missouri, Americans United for the Separation of Church and State, and the Anti-Defamation League.²⁸ Religious organizations, especially those from non-Christian faiths, such as the Jewish Community Relations Council and the Islamic Foundation of St. Louis, spoke out against the amendment.²⁹ Notably, criticism was not limited to non-Christians, and Christian leader Bishop Wayne Smith of the Episcopal Archdiocese of Missouri also criticized the amendment.³⁰

25. *Id.*

26. *Id.* The official ballot title of the amendment specified that this means students “have the right to pray and acknowledge God voluntarily in their schools.” *2012 Ballot Measures*, *supra* note 4.

27. MO. CONST. art. I, § 5.

28. Summary of the Bill, *supra* note 17 (“Testifying against the bill were the American Civil Liberties Union—Eastern Missouri; and NARAL Pro-Choice Missouri.”); *see also* Townsend, *Mixed Reviews*, *supra* note 13 (“Groups such as . . . Americans United for the Separation of Church and State have questioned [the bill]. . . . Leaders of non-Christian faith groups such as the Anti-Defamation League . . . recently began to organize under the name Missouri Coalition to Keep Politics Out of Religion.”).

29. Townsend, *Mixed Reviews*, *supra* note 13 (“Les Sterman, domestic issues advocacy chair for the Jewish Community Relations Council, said the amendment ‘sanctioned religious activity in public places’ and would have ‘the net effect of sanctioning certain religions that tend to dominate in certain areas, and we find that alarming.’ Ghazala Hayat of the Islamic Foundation of St. Louis called the amendment ‘redundant’ and said that if it passed it would mean that ‘the majority faith is sending a message to Americans of minority faiths’ that ‘you’re not part of us.’”).

30. *Id.* (“[P]rayer in public schools ‘becomes the vehicle for a sectarian agenda, typically Christian and typically Protestant, in violation of the no-establishment clause of the U.S. Constitution’s First Amendment.’”).

Many of these opponents fear the Right to Pray amendment will violate religious freedoms of minorities.³¹ Opponents also assert the United States Constitution and the former text of the Missouri Constitution adequately protect religious freedoms, so this new amendment is redundant.³² Scholars and opponents have suggested the amendment will be challenged in federal courts, and believe the courts will strike it down because of its redundancy and the ambiguity in the text.³³ Another problem critics cite is the possibility students may try to use the provision as permission to evangelize or proselytize to their fellow students or teachers.³⁴

One of the most controversial aspects of the Right to Pray amendment is a provision that allows students to refrain from participating in educational activities they contend violate their religious beliefs.³⁵ Opponents worry students, citing this provision, will opt to refrain from taking classes or learning about subjects that are important to their future educational pursuits.³⁶ Challengers also point out that students may refrain from participating in sex education classes or learning about contraceptives, which could have detrimental long-term effects.³⁷

31. Brown, *Missouri's Deceptive Amendment 2 Passes*, *supra* note 19. Simon Brown of Americans United, an organization dedicated to preserving the separation of church and state, wrote, "In reality, Amendment 2 is not so benign. It opens the door for coercive prayer and proselytizing in public schools, allows students to skip homework if it offends their religious beliefs and infringes on the religious liberty rights of prisoners." *Id.*; *Our Mission*, AMS. UNITED, <https://www.au.org/about/our-mission> (last visited Feb. 8, 2014).

32. *Mo. Voters Decide on Religious-Freedom Amendment*, *supra* note 21. Karen Aroesty, regional director of the Anti-Defamation League, stated, "The amendment is redundant. Missouri law and constitutional law already protect from the concerns that appear to be raised by the folks who support it. . . . The language is vague and ambiguous. It's going to result in a fair amount of litigation." *Id.*

33. *Id.*; Townsend, *Mixed Reviews*, *supra* note 13. Charles Haynes of the First Amendment Center stated, "This is the beginning of what will be endless litigation going over the same ground we've been over before." *Id.*

34. *Id.*

35. *Missouri Votes to Fortify Public Prayer*, *supra* note 14; see H.R.J. Res. 2, 96th Gen. Assemb., Reg. Sess. (Mo. 2011). The resolution specifies, "[N]o student shall be compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs." *Id.*

36. Townsend, *Mixed Reviews*, *supra* note 13. Michael McKay of the nonprofit Skeptical Society of St. Louis stated, "[I]f the amendment passes, students could graduate from school without having taken an important science class, avoid learning about evolution." *Id.*

37. *Id.* "[B]ecause the Catholic church teaches that contraception is immoral, a Catholic student in public school might opt out of a class 'to avoid putting condoms on bananas.'" *Id.*

C. Prior Cases and Scholarship about Religion and Education

Federal questions relating to freedom of religious expression are governed by the First Amendment of the United States Constitution³⁸ and are interpreted by the Supreme Court within its power to hear cases arising under the Constitution.³⁹ The Supreme Court and other federal courts have encountered the tension between church and state on numerous occasions.⁴⁰

The Supreme Court has established standards for determining whether a state practice violates the Establishment Clause and the Free Exercise Clause of the First Amendment. The controlling case dealing with the Establishment Clause is *Lemon v. Kurtzman*,⁴¹ in which the Court laid out a test regarding the Establishment Clause. To be a valid statute, “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”⁴² Although this test has been debated by the Supreme Court, it remains the primary means for finding an Establishment Clause violation.⁴³

38. The First Amendment begins, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. This is understood as containing two clauses: the Establishment Clause and the Free Exercise Clause. See generally Jesse H. Choper, *A Century of Religious Freedom*, 88 CALIF. L. REV. 1709 (2000).

39. U.S. CONST. art. III, §§ 1, 2.

40. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding a state practice using tax-raised funds to pay for buses for parochial school students did not violate the First Amendment where the practice was part of a general program that paid the fares of students attending public and other schools); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding a violation of the First Amendment where the state’s public school buildings were used for religious teaching during the school day); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding a state law prohibiting evolution from being taught in public schools violated the First Amendment); *Larson v. Valente*, 456 U.S. 228 (1982) (holding a state statute imposing certain requirements only on religious organizations that solicit more than 50 percent of their funds from nonmembers discriminates against those organizations in violation of the First Amendment); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (upholding a preliminary injunction requiring the removal of a display of the Ten Commandments at courthouses, where the display’s purpose was to celebrate the religious message in the Ten Commandments, in violation of the First Amendment).

41. 403 U.S. 602 (1971).

42. *Id.* at 612–13 (citations omitted).

43. See Choper, *supra* note 38, at 1737–38.

In recent years, the Court has also implicitly—although not formally—accepted Justice O’Connor’s endorsement test, laid out in her concurrence in *Lynch v. Donnelly*.⁴⁴ That test clarified the *Lemon* test for determining whether a government practice serves to endorse religion.⁴⁵ O’Connor explained:

The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.⁴⁶

One of the most important cases dealing with the Free Exercise Clause is *Church of the Lukumi Babalu Aye v. City of Hialeah*.⁴⁷ In that case, a Santeria church was in the process of opening when the city counsel of Hialeah enacted a series of ordinances prohibiting ritual animal slaughtering, a Santeria practice.⁴⁸ While the text of the laws at issue was not explicitly discriminatory, the Court found the laws neither neutral nor generally applicable; they “had as their object the suppression of religion.”⁴⁹ The Court explained, “The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.”⁵⁰ To determine whether the state laws violated the First Amendment, the Court applied strict scrutiny.⁵¹ The Court stated, “The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its

44. 465 U.S. 668, 690 (1984) (O’Connor, J., concurring). Choper, *supra* note 38, at 1723.

45. *Lynch*, 465 U.S. at 690.

46. *Id.*

47. 508 U.S. 520 (1993).

48. *Id.* at 526.

49. *Id.* at 542.

50. *Id.* at 543.

51. *Id.* at 546.

practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”⁵²

One example of a practice the Supreme Court has declared unacceptable under the First Amendment is the kind of prayer in government meetings that tends to favor one religion explicitly.⁵³ Not long ago, the Court stated that “[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding . . . that liberty and social stability demand a religious tolerance that respects the religious views of all citizens.”⁵⁴ That sentiment was expressed decades earlier in *Larson v. Valente*,⁵⁵ where the Supreme Court reiterated, “[N]o State can ‘pass laws which aid one religion’ or that ‘prefer one religion over another.’”⁵⁶

Another issue that the courts have historically struggled with is the question of whether students may opt out of educational activities they claim violate their religious beliefs.⁵⁷ In 1987, the Sixth Circuit in *Mozert v. Hawkins County Board of Education* decided whether a school district could require students to use textbooks containing information offensive to their religious beliefs.⁵⁸ The court held the school district’s requirement that the children use the books did not violate the right to freedom of religion, because there was no compulsion by the school district to either do an act or affirm or

52. *Id.* at 547.

53. *See McCreary Cnty.*, 545 U.S. at 844.

54. *Id.* at 860 (citation omitted).

55. 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1982)).

56. *Id.* The Court went on to state, “The government must be neutral when it comes to competition between sects.” *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Thus, when the Court is “presented with a state law granting a denominational preference,” it must apply strict scrutiny to decide whether it is constitutional. *Id.*

57. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing that “education prepares individuals to be self-reliant and self-sufficient participants in society,” but holding that the First and Fourteenth Amendments prevented a state from forcing Amish parents to send their children to school until age sixteen, where the parents claimed the state requirement violated their religious beliefs).

58. 827 F.2d 1058 (6th Cir. 1987).

disavow a belief that violated the students' religion.⁵⁹ The court noted the parents had the option to send their children to private, religious schools or to teach them at home, if they did not approve of the public school curriculum.⁶⁰

Two years earlier, the Ninth Circuit decided *Grove v. Mead School District*, in which a parent sued a school district to force officials to ban a book her daughter's class was reading, claiming it violated her religious beliefs.⁶¹ The court struggled with the tension between a parent's right to control her child's education and the school's right to teach students according to its curriculum.⁶² Importantly, the court recognized that "one aspect of the religious freedom of parents is the right to control the religious upbringing and training of their minor children."⁶³ Ultimately, however, the court held the school board's actions did not constitute a violation of the Free Exercise Clause or the Establishment Clause.⁶⁴

Rosemary Salomone, in her article "Common Schools, Uncommon Values: Listening to the Voices of Dissent," recognizes the clash between a parent's interests and a school's interests.⁶⁵ She

59. *Id.* at 1065-66. Exposure to other students performing acts that were contrary to the plaintiffs' religious beliefs was not sufficient to constitute compulsion. *Id.* at 1066. The court borrowed reasoning from the Ninth Circuit:

The lesson is clear: governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required.

In short, distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion.

Id. at 1068 (quoting *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1543 (9th Cir. 1985)).

60. *Id.* at 1067.

61. 753 F.2d 1528, 1531 (9th Cir. 1985). In *Grove*, a student and her mother determined a book she was reading in class violated their religious beliefs. *Id.* The school allowed the student to leave class while the book was being discussed, but the student remained in the classroom. *Id.* Her mother then attempted to have the school ban the book altogether, and brought suit against the school district. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1534.

65. See Rosemary Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 169-73 (1996). Salomone writes, "While courts have been less receptive to non-religion-based claims, arguments supporting both have drawn in part from the individual's freedom of conscience as the central liberty unifying the

characterizes it as a tension between individual rights to freedom of conscience and belief, including a parent's right to control her child's education, and the authority of school officials to make decisions regarding the school curriculum.⁶⁶ This tension is present in *Mozart* as well as in the Right to Pray amendment.

II. ANALYSIS OF THE AMENDMENT

Unlike the Sixth Circuit's decision in *Mozert*, the Missouri Right to Pray amendment allows parents and students to ignore part of a school's curriculum if it conflicts with their religious beliefs.⁶⁷ This could have two possible results. First, the amendment could help clarify the law where courts have not consistently explained how to allay the tension between a student's or parent's interests and a school's interests.⁶⁸ If students can opt out of some assignments under the amendment, the need for litigation might be reduced. Contrarily, the ambiguity of the amendment's text, and the uncertainty as to its application, might instead create more confusion and lead to increased litigation.⁶⁹

First Amendment clauses and in part from parental rights stemming from the Fourteenth Amendment Due Process Clause." *Id.* at 171 (internal citation omitted).

66. *Id.*

67. *Compare Mozert*, 827 F.2d at 1065 (holding the requirement that public school students study a reader series chosen by the school authorities does not create an unconstitutional burden) with MO. CONST. art. I, § 5 (stating "no student shall be compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs").

68. *See* Townsend, *Mixed Reviews*, *supra* note 13. According to John Yeats, executive director of the Missouri Baptist Convention, "The courts have muddied the water. . . . Therefore the state Legislature believed that a state Constitutional amendment was the best way to clear things up." *Id.*

69. *Id.* (quoting The First Amendment Center's Charles Haynes as saying "[the amendment] takes away ambiguity on one hand, but opens up practices that have already been struck down as unconstitutional on the other."); *see also* Stephen Steigman & Brian Ellison, *Missouri Amendment 2: 'Right to Pray' Or Redundant Rights?*, KAN. CITY PUB. MEDIA (Aug. 5, 2012, 9:48 PM), <http://kcur.org/post/missouri-amendment-2-right-pray-or-redundant-rights> ("[O]pponents argue that the measure would do more harm than good for public schools because the measure does not specify what can constitute a 'religious belief.'"); Joseph L. Conn, *Rush to Judgment: Missouri's Deceptive 'Right to Pray' Amendment Heads for August Ballot*, AMS. UNITED (May 25, 2012), <https://www.au.org/blogs/wall-of-separation/rush-to-judgment-missouri-s-deceptive-right-to-pray-amendment-heads-for> ("[T]he wording is so open-ended that it's certain to result in problems in the classroom."). If opponents are correct that schools will now be required to make value judgments as to whose religious beliefs should

A. Whom Will it Protect?

Sponsors and supporters of the amendment have made it clear its purpose is to protect Christianity and Christians from what they believe is an increasingly hostile world.⁷⁰ According to the Roman Catholic bishops that supported the measure, “Increasingly, it seems, religious values are becoming marginalized in society People of faith need assurance that they remain free to exercise and express their religious beliefs in public, provided just order be observed, without threat of external pressure to conform to changing societal ‘norms.’”⁷¹ The Reverend Terry Hodges, the pastor of Representative McGhee, who sponsored the bill, said the amendment will “level the playing field.”⁷² He stated, “For the first 150 years in this country Christianity enjoyed home-field advantage That’s changed now and there’s a hostility toward Christians.”⁷³

Supporters of the amendment cite several benefits the amendment will have in serving Christians’ interests. For example, John Yeats, executive director of the Missouri Baptist Convention, believes the amendment will help clarify Missouriian’s religious freedom rights.⁷⁴ Better information, in turn, will enable Christians to more effectively exercise these rights.⁷⁵ Additionally, supporters say, the amendment will protect those government officials who wish to begin meetings with sectarian prayers.⁷⁶

allow them to refrain from certain activities, the issue will inevitably become more confused. Townsend, *Mixed Reviews*, *supra* note 13.

70. ‘Right to Pray’ Amendment Passes, CBS NEWS (Aug. 7, 2012, 9:19 PM), <http://stlouis.cbslocal.com/2012/08/07/right-to-pray-amendment-passes/> [hereinafter *Amendment Passes*].

71. *Id.*

72. Townsend, *Mixed Reviews*, *supra* note 13.

73. *Id.* Despite Rev. Hodges’ belief that Christians in Missouri are losing their influence, about 80 percent of Missouriians currently identify as Christian. *U.S. Religious Landscape Survey*, PEW FORUM ON RELIGION & PUB. LIFE, <http://religions.pewforum.org/maps> (last visited June 28, 2014).

74. Townsend, *Mixed Reviews*, *supra* note 13.

75. *Id.* (“The measure’s champions say it better defines Missouriians’ First Amendment rights and will help to protect the state’s Christians, about 80 percent of the population, who they say are under siege in the public square.”).

76. Tim Townsend, *Missouri to Vote on Prayer Amendment 2 Known as ‘Right to Pray’*, HUFFINGTON POST (Aug. 4, 2012, 8:46 AM), http://www.huffingtonpost.com/2012/08/04/missouri-prayer-amendment-vote_n_1739968.html [hereinafter Townsend, *Missouri to Vote*].

Many supporters of the amendment also believe it will protect students who wish to refrain from learning certain subjects in school or from participating in activities they believe violate their religious beliefs.⁷⁷ And one of the most notorious subjects students will be able to avoid is evolution.⁷⁸

But evolution will not be the only subject affected. Students will also be able to avoid learning about other world religions, if they believe doing so violates their own religious beliefs.⁷⁹ Representative McGhee cited this as one of his reasons for sponsoring the amendment.⁸⁰ He said his intent was not necessarily to allow students to opt out of learning about evolution but to allow them to opt out of classes “on Buddha or on Islam, or for a Muslim kid to be able to say he won’t take a class on Christianity if he feels it contradicts his faith.”⁸¹

77. Editorial, *Prayer in Missouri*, N.Y. TIMES, Aug. 6, 2012, available at http://www.nytimes.com/2012/08/07/opinion/prayer-in-missouri.html?_r=0 [hereinafter *Prayer in Missouri*].

78. Jason Hancock, *Missouri ‘Right-to-Pray’ Amendment Spurs Debate*, KAN. CITY STAR, Aug. 2, 2012, available at <http://midwestdemocracy.com/articles/right-to-pray-amendment-spurs-debate-about-students-opting-out-of-schoolwork/>. Susan German, president of the Science Teachers of Missouri, wrote to members of the organization, “It is evident that some of the major areas of concern include teaching the age of the Earth, evolution, or climate change in the science classrooms.” *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Although critics of the amendment have focused in large part on students’ newfound freedom to refrain from learning about evolution, their ability to opt out of learning about other religions could be even more harmful than the potential for students to skip biology class. As Justice Clark wrote:

[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. . . . Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963). Thus, it is possible allowing students to opt out of the important (and constitutional) study of other world religions will put them at an educational disadvantage. In addition, at a time in the United States where ignorance and fear about religions such as Islam are prevalent, allowing students to remain ignorant about other religions could further stigmatize and endanger people who belong to those minority religious groups. See Muhammad Babur, *Ignorance, Fear and Hatred Make a Deadly Cocktail*, POST-BULLETIN, Aug. 17, 2012, available at http://www.postbulletin.com/opinion/ignorance-fear-and-hatred-make-a-deadly-cocktail/article_a281f855-f335-517a-8cca-bf72cd0691d2.html.

Students can also refuse to take sex education classes, or to learn about subjects related to social issues, such as feminism and gay marriage, if they believe those subjects violate their religion.⁸² The text of the amendment does not limit students' power to opt out of academic assignments or educational presentations; presumably, it is in the student's discretion to decide whether a particular subject violates his or her beliefs, and no topic is off-limits to that determination.⁸³

The amendment will also allow students to refer to God and religion in classroom assignments or in presentations, and neither teachers nor administrators will be able to prevent students from doing so.⁸⁴ This will benefit students who feel their religion is an essential part of the way they understand school assignments and want to freely include discussions of their beliefs in those assignments.

B. Whom Will it Hurt?

1. Religious Minorities and the Non-religious

Opponents of the amendment are concerned it will only benefit Christians, the majority religious group in Missouri, and that it will hamper the religious freedom of religious minorities.⁸⁵ Since the vast

82. See, e.g., Jonah Kaplan, *Legal Experts Warn about Ramifications of Missouri's Prayer Amendment*, KSPR NEWS (Aug. 7, 2012), http://articles.kspr.com/2012-08-07/prayer-amendment_33087631.

83. See Ashley Portero, *Missourians Pass 'Right to Pray' Amendment, Reiterating Religious Protections for All—Except Prison Inmates*, INT'L BUS. TIMES (Aug. 8, 2012), <http://www.ibtimes.com/missourians-pass-right-pray-amendment-reiterating-religious-protections-all-except-prison-inmates>.

84. MO. CONST. art. I, § 5. The text of the ballot language stated the amendment gives students the "right to pray and acknowledge God voluntarily in their schools." H.R.J. Res. 2, 96th Gen. Assemb., Reg. Sess. (Mo. 2011). See also Portero, *supra* note 83 (Representative McGhee says the amendment lets people know, "You want to pray? Go ahead, it's OK."); Kellie Kotraba, *Missouri prayer amendment passes*, USA TODAY, Aug. 8, 2012, available at <http://usatoday30.usatoday.com/news/religion/story/2012-08-08/missouri-prayer-amendment/56882182/1>.

85. Ray Hartmann, *Think Again: Missouri's "Right to Pray" Amendment Threatens Religious Freedom*, ST. LOUIS MAG., July 2012, available at <http://www.stlmag.com/St-Louis-Magazine/July-2012/Think-Again-Missouris-Right-to-Pray-Amendment-Threatens-Religious-Freedom/>. The author points out that schools and the government belong equally to people of all religious faiths and those with no religious faith at all. *Id.* Thus, "the best way for religious

majority of religious Missourians identify with Christianity, some fear that “[a]s religion dominates the town square, so will Christianity.”⁸⁶ Ghazala Hayat of the Islamic Foundation of St. Louis said of the amendment, “[T]he majority faith is sending a message to Americans of minority faiths that ‘you’re not part of us.’”⁸⁷ Indeed, the amendment provides for greater religious influence in schools and in government buildings and meetings.⁸⁸

Critics fear this fortified ability to pray in school and to express religious beliefs through class assignments and presentations will ostracize and offend students from minority religion backgrounds, such as Jewish, Muslim, or Hindu students.⁸⁹ It is similarly offensive to students who identify as atheist or agnostic, and who do not want to be indoctrinated by others’ religious expression at school.⁹⁰

The danger of ostracizing members of minority religions, and the question of where the line must be drawn, extends to government officials who do not identify with the majority religion or any religion at all. The amendment allows elected officials to pray privately or corporately in public, and it specifically allows for prayer before government meetings.⁹¹ Such a blatant display of religious belief may cause government officials to take offense or feel ostracized if they are not part of the group initiating the religious actions.

The amendment specifies that public prayer may not disturb the peace or a public meeting,⁹² but critics of the amendment question how a “disturbance” will be defined.⁹³ For example, one of the big questions with regard to the amendment and minority religions is: “What if one person’s ‘right to pray’ intrudes on another’s right to

freedom for all people to flourish is to keep it removed from the influence of the government.”
Id.

86. *Id.*

87. Townsend, *Mixed Reviews*, *supra* note 13.

88. Hartmann, *supra* note 85.

89. *Id.*

90. *Id.*

91. *Amendment Passes*, *supra* note 70.

92. MO. CONST. art. I, § 5.

93. Townsend, *Mixed Reviews*, *supra* note 13.

abstain from prayer, or to pray according to the tenets of his or her own faith?”⁹⁴

This poses a huge potential problem in both the school and the government context.⁹⁵ While the amendment “reaffirms legislative prayers for government bodies, it doesn’t make clear that if those prayers are regularly of one particular faith, the practice would likely be struck down as unconstitutional.”⁹⁶ The resulting “mess,” as Charles Haynes of the First Amendment Center referred to it, will most likely play out in the courtroom.⁹⁷ David Kimball, a political science professor at the University of Missouri-St. Louis, believes the amendment “will surely be challenged in federal court. . . . And the language seems to me so hackneyed that federal courts will strike this down pretty quickly.”⁹⁸

2. School Districts and Public Universities

The amendment has the potential to hurt public school districts in Missouri and public state universities.⁹⁹ According to the American Civil Liberties Union, “Providing all students a right to refrain from school assignments and presentations that violate their religious beliefs . . . will cause untold mischief in both public and parochial schools and will adversely affect the quality of education in Missouri.”¹⁰⁰ Others say that it will “create confusion and wreak havoc in classrooms by giving students the right to refuse to read anything or do any assignments that they claim offends their religious views.”¹⁰¹

Some opponents fear the provision of the amendment allowing students to opt out of assignments is open to abuse by students, who

94. Townsend, *Missouri to Vote*, *supra* note 76.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Janese Silvey, *Professors Discuss Effect of Right to Pray Law*, COLUMBIA DAILY TRIB., Sept. 29, 2012, available at <http://www.columbiatribune.com/news/2012/sep/29/professors-discuss-affect-of-right-to-pray-law/>.

100. Matthew Brown, *Legal Wrangling Begins over Missouri's Prayer Amendment*, DESERET NEWS, Aug. 9, 2012, available at <http://www.deseretnews.com/article/865560407/Legal-wrangling-begins-over-Missouris-prayer-amendment.html?pg=all>.

101. *Prayer in Missouri*, *supra* note 77.

might use it as an excuse to skip school or assignments they do not wish to complete.¹⁰² Teachers, then, might be forced to determine whose excuses are valid and whose are not.¹⁰³ Some schools, such as the University of Missouri System, have suggested this kind of value judgment about the sincerity of a student's objection to an assignment may be necessary.¹⁰⁴

In the wake of the amendment's passage, the University of Missouri sought guidance from its attorneys as to what the amendment would require from professors whose students objected to assignments.¹⁰⁵ Deputy Provost Ken Dean does not believe students will be able to use the amendment to refrain from participating in biology lessons that deal with evolution, since schools do not ask students to believe in evolution, only to understand it.¹⁰⁶ Gordon Christensen, a professor and the school's interfaculty representative, claims students will not be able to cite the amendment as a way to escape final exams.¹⁰⁷ Instead, he asserts, a "student must be able to demonstrate that the assignment is clearly something that he or she morally objects to because of religious beliefs."¹⁰⁸ The school has yet to decide how this determination will be made, however.¹⁰⁹

School districts and universities will suffer further if the amendment leads to increased litigation, as many opponents fear it will.¹¹⁰ Alex Luchenitser, associate legal director for Americans United for the Separation of Church and State, stated, "This is going to be a nightmare for school districts, which will end up getting sued by individuals on both sides of [the] church-state debate."¹¹¹ Many

102. See Townsend, *Mixed Reviews*, *supra* note 13.

103. *Id.*

104. Silvey, *supra* note 99.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* ("Christensen told professors the General Counsel's office might not be able to provide guidance [on how to make this determination] just yet . . .").

110. Tim Townsend, 'Right to Pray' Measure Passes by Wide Margin, ST. LOUIS POST-DISP., Aug. 8, 2012, available at http://www.stltoday.com/news/local/metro/right-to-pray-measure-passes-by-wide-margin/article_4b916011-c4cb-5f69-85c0-2fc8e3f6a36e.html [hereinafter Townsend, *Measure Passes*].

111. *Id.*

opponents believe the amendment is redundant, and fails to increase the protections for religious freedom already included in the U.S. Constitution.¹¹² Democratic State Representative Chris Kelly, who opposed the amendment, called it “a jobs bill for lawyers,” emphasizing the increased litigation and pressure on the courts many believe will result from the amendment.¹¹³

The possibility for students to opt out of assignments and classes they believe violate their religious beliefs brings into focus the debate about who controls the curriculum in public schools: the school district or the students and parents who are part of the district.¹¹⁴ Tony Rothert, legal director for the American Civil Liberties Union of Eastern Missouri, projects litigation will be the ultimate result of this debate, since “[s]chools are used to controlling the curriculum and having a wide discretion” in doing so.¹¹⁵

The amendment’s opt-out provision for students takes that control away from the schools and places it, to an extent, in the hands of parents who want to ensure their children do not have to learn about certain subjects.¹¹⁶ Representative McGhee’s solution to this problem is for school districts to bow to the will of the students and parents.¹¹⁷ He suggests if a school’s curriculum clashes with the amendment, “why not just change the curriculum so that it will be pleasing to all the students?”¹¹⁸

Joe Ortwerth, executive director of the Missouri Family Policy Council, disagrees with Representative McGhee’s recommendation that school districts should adapt curricula to remove potentially objectionable subjects.¹¹⁹ Because the courts have consistently held that school districts, not parents, control school curricula,¹²⁰ Ortwerth

112. Townsend, *Missouri to Vote*, *supra* note 76.

113. *Id.*

114. *See Prayer in Missouri*, *supra* note 77.

115. *Amendment Passes*, *supra* note 70.

116. *See* Jason Rosenbaum, *Prayer Measure: Protection, Political Ploy or Creator of Havoc?*, ST. LOUIS BEACON (July 27, 2012, 7:01 AM), https://www.stlbeacon.org#!/content/26223/constitutional_amendment_on_prayer (suggesting students will now be able to opt out of “important curriculum units.”).

117. Hancock, *supra* note 78.

118. *Id.*

119. Rosenbaum, *supra* note 116.

120. *Id.*

recognizes individual students will not be successful in challenges to curricula as a whole.¹²¹ Instead, he argues schools can reduce litigation and students can avoid potentially offensive subjects if schools provide objecting students with the option of completing alternative assignments.¹²²

3. Students

Opponents of the amendment argue students are disadvantaged when they do not learn about subjects they may not agree with.¹²³ Rothert of the ACLU stated, “Even if you have a religious disagreement about something you learn in a school, you still learn it. You don’t have to accept it, you don’t have to change your religious beliefs, but it’s part of the education system. And that’s how you get adults who know how to reason.”¹²⁴

Teachers Carol Ross Bauman and Elizabeth Petersen agree students will suffer if they are allowed to opt out of important science coursework.¹²⁵ Allowing students to complete alternative assignments, as proponents of the amendment suggest, will not solve this problem. Even if students’ grades do not suffer from the choice to opt out, their ability to reason and develop critical thinking skills will be hindered.¹²⁶

This concern was part of the basis for the Sixth Circuit’s decision in *Mozert*.¹²⁷ The court there noted the United States Supreme Court’s affirmation “that public schools serve the purpose of teaching fundamental values ‘essential to a democratic society.’ These values ‘include tolerance of divergent political and religious views’ while taking into account ‘consideration of the sensibilities of others.’”¹²⁸

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Julie Bierach, *Missourians to Vote on Prayer Amendment*, NAT’L PUB. RADIO (Aug. 6, 2012), <http://www.npr.org/2012/08/06/158185835/missourians-to-vote-on-prayer-amendment>.

126. See Rosenbaum, *supra* note 116.

127. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1986).

128. *Id.* at 1068 (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

The Sixth Circuit's decision went on to explain that "in a pluralistic society we must 'live and let live.'"¹²⁹

This is precisely the kind of understanding that might be lost on students who are able to opt out of studying any subject they or their parents find objectionable on religious grounds. Ultimately, rather than benefitting these students, the ability to opt out may cause students to suffer the greatest loss—the ability to think critically and successfully confront their own beliefs.¹³⁰

III. ARGUMENT

The Right to Pray amendment, as written, poses serious risks to the religious minority, school districts, educators, and students. It benefits those who wish to pray sectarian prayers in schools or at government meetings, and students who wish to opt out of learning certain subjects in school. However, it arguably hurts those students too, by allowing them to refrain from developing critical thinking skills.¹³¹

Representative McGhee and other supporters of the amendment claim the amendment is necessary to ensure Missouri Christians' religious freedoms.¹³² That claim has very little truth to it; the amendment is, for the most part, redundant.¹³³ For example, there has never been a prohibition on student prayer in schools, as long as their actions are not mandated by the schools and do not infringe on other students' rights.¹³⁴ Similarly, nonsectarian prayer is often a feature of government meetings and public events.¹³⁵ On its face, the amendment merely reiterates some of those rights that have always existed.¹³⁶

The requirement that all public schools have a copy of the Bill of Rights on display seems merely a nod to the concept of religious

129. *Id.*

130. See Portero, *supra* note 83; see also Rosenbaum, *supra* note 116.

131. Portero, *supra* note 83.

132. *Missouri Votes to Fortify Public Prayer*, *supra* note 14.

133. *Mo. Voters Decide on Religious-Freedom Amendment*, *supra* note 21.

134. Brown, *Missouri's Deceptive Amendment 2 Passes*, *supra* note 19.

135. *At Public Meetings, Fights Over Prayer Drag On*, FIRST AMEND. CTR. (Nov. 27, 2012), <http://www.firstamendmentcenter.org/at-public-meetings-fights-over-prayer-drag-on>.

136. Townsend, *Mixed Reviews*, *supra* note 13.

liberty in an amendment that in reality does little to further liberty.¹³⁷ The idea of reminding educators and students of their rights under the United States Constitution is a nice one, and it may not infringe on anyone's rights to require it; but it does not increase religious freedom.

Where the amendment can be read to create "rights" that did not already exist, it does so in a manner that is questionable at best, and is likely downright unconstitutional in a number of ways.¹³⁸ If the amendment is construed to allow for sectarian prayers in government meetings, it could unconstitutionally interfere with other people's religious freedoms.¹³⁹ This would occur if the prayers tended to represent a particular religion over any others, which is inconsistent with the First Amendment.¹⁴⁰ Religious tolerance may ultimately be decreased with increased sectarian prayers in government settings.

Similarly, allowing students to express their religious beliefs in school assignments opens the door to possible unconstitutional behavior.¹⁴¹ While students are already allowed to express their religious beliefs to an extent, this amendment could allow for that practice to exceed what is permitted by the federal Constitution. It would be problematic, for example, for students to use the provision to justify proselytizing to other students or teachers. If the provision was used in such a way, one student's religious expression might easily infringe on another student's religious beliefs in a way not permitted by the United States Constitution.¹⁴² This is one of the many situations those who oppose the amendment envision as ripe for litigation.¹⁴³ It remains for the courts to decide where, under this amendment, one student's religious rights end and another's begin.

Allowing students to opt out of lessons and assignments they claim violate their religious beliefs contradicts the Sixth Circuit's decision in *Mozert*, one of the most significant cases dealing with

137. See Hartmann, *supra* note 85; Portero, *supra* note 83.

138. Townsend, *Measure Passes*, *supra* note 110.

139. Townsend, *Mixed Reviews*, *supra* note 13.

140. See Townsend, *Missouri to Vote*, *supra* note 76.

141. Brown, *Missouri's Deceptive Amendment 2 Passes*, *supra* note 19.

142. *Id.*

143. Townsend, *Mixed Reviews*, *supra* note 13.

religion in schools.¹⁴⁴ In her analysis of *Mozert*, Nomi Maya Stolzenberg notes the Sixth Circuit's hesitation to accept the idea that exposing school children to competing ideas violates the right to freedom of religion.¹⁴⁵ The plaintiffs' assertion in *Mozert* was difficult for the court to accept, because the objecting students did not want to be completely removed from other students.¹⁴⁶ They wanted to remain in the public school but to opt out of certain activities.¹⁴⁷ Thus, the court's proposal that the students utilize their right to leave, and attend a private school or learn at home, did not address the complaint.¹⁴⁸ Stolzenberg writes, "[P]ermitting parents to insulate their children from exposure to foreign ideas can be seen as a way of drawing a circle that 'shut[s] [their children] out' from the larger democratic society."¹⁴⁹ The courts have historically been reluctant to allow parents to insulate their children in such a way.¹⁵⁰

144. See *Mozert*, 872 F.2d at 1068–69. See also Townsend, *Mixed Reviews*, *supra* note 13.

145. See Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 598 (1993) ("The Sixth Circuit again reversed, this time endorsing the trial court's initial view that, by definition, 'mere exposure' to ideas could not violate the right to the free exercise of religion.").

146. *Id.* at 590.

The *Mozert* plaintiffs did not challenge all or even most of the public school program. Nor did they assert the desire to opt out of public schooling altogether. For whatever reason, the plaintiffs indicated that they wished to participate in the public education system but not on conditions that violated their religious rights.

Ironically, it is this apparently moderate posture that makes the *Mozert* claim so difficult.

Id.

147. *Id.* at 589 ("They sought only to have their children excused from the Holt reading program—a remedy that in theory would permit the rest of the students to continue participating in the program and would not require teachers to alter their general course of instruction."); see also *Mozert*, 872 F.2d at 1061 ("The plaintiffs sought to hold the defendants liable because 'forcing the student-plaintiffs to read school books which teach or inculcate values in violation of their religious beliefs and convictions is a clear violation of their rights to the free exercise of religion protected by the First and Fourteenth Amendments to the United States Constitution.'").

148. Stolzenberg, *supra* note 145, at 590–91 ("Because the plaintiffs did not represent themselves as insular outsiders seeking to inhabit a perfectly separated sphere, their right to exit the public school system completely did not respond to their complaint. Conversely, because they did not seek to reshape or convert the public sphere, the school authorities could not readily dismiss their claim as an interference with the right of other students to be free from religious impositions.").

149. *Id.* at 585.

150. *Id.* at 584 (quoting *Mozert*, 872 F.2d at 1073) (Boggs, J., concurring) ("Hawkins

But the Right to Pray amendment's allowance for students to opt out of assignments gives them the opportunity to insulate themselves from the larger public school community, just as the plaintiffs in *Mozert* wished to do. Students who choose not to learn the subject of evolution, for example, or sex education are still choosing to remain in the larger public school context, but are insulating themselves from the specific teachings of the larger society they deem offensive or contrary to their religious views. Ultimately, students themselves will suffer from opting out of assignments and thereby shutting themselves out from their peers and secular society as a whole.¹⁵¹

In *Mozert*, the Sixth Circuit was not willing to allow students to maintain an insular status within the larger context of a public school, determining that “‘mere exposure’ to ideas could not violate the right to the free exercise of religion.”¹⁵² The court expressly chose not to allow students to opt out of using a particular reading series that parents claimed offended their religious beliefs,¹⁵³ thereby refusing to allow the parents in *Mozert* to exercise their “exclusive right to control their children’s upbringing,” which was the “specific interest they asserted most strongly.”¹⁵⁴ Instead, the court recognized the importance of well-rounded students who can think critically because they engage in a variety of subjects they do not necessarily agree with.¹⁵⁵ The Missouri amendment ignores the importance of that

County is not required by the Constitution to allow plaintiffs the latitude they seek to opt out selectively of the offending school program, but remain enrolled in the public school.”).

151. See Kevin Davis, *Missouri Amendment 2 Gives Kids a Free Pass Out of Class*, DIVIDED UNDER GOD (Aug. 6, 2012), <http://dividedundergod.com/2012/08/06/missouri-amendment-2-gives-kids-a-free-pass-out-of-class/>. Davis asserts:

The well-rounded student has the option to compare both of those opinions with the teachings of their faith, weighing differences of opinion between the academic viewpoint and that of their spiritual leaders.

[T]hose public school students who have had their curriculum censored, isolated, and narrowed could be subject to additional manipulation by religious leaders, taking advantage of a narrow-minded world view, thanks to this amendment.

Id.

152. Stolzenberg, *supra* note 145, at 598.

153. *Id.*

154. *Id.* at 609.

155. *Mozert*, 872 F.2d at 1068–69.

concept by permitting students to opt out of school assignments they claim violate their religious beliefs.

The ambiguity in the amendment presents the question whether it is sustainable at all.¹⁵⁶ Even the provisions that are not necessarily new, such as the allowance for prayer before government meetings, raise so many questions about how they will be construed and enforced that litigation seems inevitable.¹⁵⁷ Certainly, litigation on the subject of religious freedom is not a new phenomenon. Federal courts, and especially the Supreme Court, have heard many cases on various aspects of the intersection between religious life and government in our country's history.¹⁵⁸ But the Missouri amendment muddies the waters of prior jurisprudence on the subject and will likely serve to create more confusion than it does clarity.

The possibility of increased litigation regarding the expression of religion in public schools is especially problematic. Increased litigation harms schools; as Supreme Court Justice Jackson noted in a 1948 concurring opinion, "Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."¹⁵⁹ Justice Fortas expressed a similar sentiment twenty years later when he said that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint."¹⁶⁰ Litigation can also saddle school districts—and taxpayers—with high financial costs that harm the districts.¹⁶¹ It therefore seems quite unwise to create laws that will increase litigation involving public schools.¹⁶²

156. Townsend, *Mixed Reviews*, *supra* note 13.

157. Hancock, *supra* note 78. Gregory Lipper, an attorney for Americans United for Separation of Church and State, expressed the problem creatively: "In trying to solve a made-up problem, this amendment generates a flood of legalese. . . . It adds more fine print to the Missouri constitution than you'd find in the typical apartment lease." *Id.*

158. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see also Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

159. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

160. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

161. *See Brown, Missouri's Deceptive Amendment 2 Passes*, *supra* note 19.

162. Some litigation against public schools will probably always be inevitable, especially when dealing with such personal and controversial issues of religious freedom and expression. But legislators should be wary of introducing bills that do little more than subject public schools—and taxpayers—to increased litigation. Indeed, the Supreme Court has cautioned that

IV. PROPOSAL

The Right to Pray amendment is highly problematic from a constitutional and policy perspective. Because it will likely infringe on the religious freedoms of religious minorities, and because it is bound to lead to increased and destructive litigation within school districts, it should be struck down as unconstitutional under the First Amendment.

There are three ways the amendment may be struck down. The first possibility, suggested by Representative McGhee, is for the legislature to alter or repeal the amendment altogether.¹⁶³ However, since it is an amendment to the state constitution, any changes will have to be approved by the House and the Senate, and then placed back on the ballot for popular vote.¹⁶⁴ But Missouri voters are not likely to vote to repeal or significantly change a constitutional amendment that purports to broaden their religious freedom; this is especially true, since the majority of Missourians are Christians and fall into the category of people the amendment targets as beneficiaries. Additionally, leaving the fate of the amendment to voters is risky. Falling back on the possibility of revising the amendment is irresponsible when its drafters could have more carefully constructed it from the outset.

The second option for striking down the amendment is to challenge it in federal court¹⁶⁵ as violating the Establishment Clause of the First Amendment.¹⁶⁶ This approach is the most likely to be successful. When the courts tackle the question of the Missouri amendment's constitutionality, they will be able to decide whether to strike out portions deemed unconstitutional or whether to nullify the

“[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.” *Mozert*, 872 F.2d at 1069–70.

163. Hancock, *supra* note 78.

164. *Id.*

165. The amendment cannot be challenged in Missouri state court because a Missouri court would lack subject matter jurisdiction over the question of whether the amendment is constitutional under federal law. MO. CONST. art. V, § 3. To determine whether the amendment is constitutional under the United States Constitution, it must be challenged in a federal court, which has the power to decide questions that arise under the federal Constitution. U.S. CONST. art. III, § 2.

166. U.S. CONST. amend. I.

entire amendment. If the Right to Pray amendment is challenged in federal court, it will most likely to be struck down under the Establishment Clause.

The Court utilizes the three-part test laid out in *Lemon* to determine whether a state law violates the Establishment Clause.¹⁶⁷ Under that test, the Right to Pray amendment might be found to fail all three prongs. First, the amendment does not have a secular purpose.¹⁶⁸ The amendment's stated purpose is to advance religious freedom and expression; this is an inherently religious purpose, not a secular one.¹⁶⁹

167. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Supreme Court recognized the inherent difficulty in interpreting unclear language in the Religion Clauses of the First Amendment. *Id.* at 612.

Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law respecting an establishment of religion' . . . A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Id.

168. See *id.* ("[T]he statute must have a secular legislative purpose.").

169. Conversely, it could be argued that since the amendment on its face is designed to advance religious freedom without giving preference to any particular religion or even religious belief over unbelief, it does have a secular purpose. However, this argument is weak, since support for religion—even generally—is not advancing a secular purpose. It could also be argued that despite failing this prong of the Establishment Clause analysis, the government can support religious freedom under the Free Exercise Clause. Choper, in his analysis of the Court's First Amendment Clause jurisprudence, explained:

Although the Court's Establishment Clause opinions preached the virtues of a 'wholesome' government neutrality towards religion, its Free Exercise rulings showed that in some circumstances neutrality is not constitutionally mandated. In fact, those cases sometimes held that the First Amendment requires government to act with a nonsecular purpose in order to permit the unburdened exercise of religion.

Choper, *supra* note 38, at 1720. One could argue the amendment serves to promote the exercise of religion and is thus valid under the Free Exercise Clause. The Supreme Court has not reconciled the clash that can occur between the Establishment Clause and the Free Exercise Clause. *Id.* at 1716. Even if the amendment might have some validity under the Free Exercise Clause, it likely will be found to violate the Establishment Clause and is thus unconstitutional under the First Amendment.

Second, the amendment's primary effect is to advance religion.¹⁷⁰ Indeed, its stated purpose is to advance religion, and it does so in a number of ways. The amendment gives students permission to opt out of assignments for religious reasons, permitting under state authority that which the Sixth Circuit refused to allow individuals to do in *Mozert*. By permitting this behavior on the basis of state authority, the government is expressing a preference for religion over non-religion, which is forbidden by the Establishment Clause.¹⁷¹

Third, the amendment results in an excessive entanglement between the government and religion, because it acts to promote and further religion.¹⁷² By allowing for increased religious expression in public schools and in government meetings, and by giving state authority to a student's choice to opt out of school assignments on religious grounds, the government impermissibly entangles itself in the practice of religion and the promotion of religion over non-religion.

A third way to challenge the amendment would be to bring a claim under the Free Exercise Clause in federal court.¹⁷³ On its face, the amendment appears to promote both religious exercise and non-religious exercise, equally. But the Court in *City of Hialeah* rejected the idea that Free Exercise inquiry ends with the text of a state law.¹⁷⁴ The state legislature's purpose in drafting the amendment was to promote religion—and Christianity, specifically.¹⁷⁵ In addition, by allowing for sectarian prayer at government meetings, and by permitting students to incorporate religious beliefs into school assignments and presentations, the amendment infringes on the free

170. See *Lemon*, 403 U.S. at 612 (“[I]ts principal or primary effect must be one that neither advances nor inhibits religion.”).

171. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“Neither [state nor federal governments] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”). The amendment's provision allowing students to incorporate their religious beliefs into school assignments and presentations fails this second prong of the *Lemon* test for the same reason that the opt-out provision fails. It is a promotion of religion by the state government, and it acts to hinder the right to non-religion. The same reasoning applies to the provision potentially allowing for sectarian prayer in government meetings.

172. See *Lemon*, 403 U.S. at 613 (citation omitted) (“[T]he statute must not foster an excessive government entanglement with religion.”).

173. U.S. CONST. amend. I.

174. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

175. *Amendment Passes*, *supra* note 70.

exercise of religion for people who do not believe in the prayers or information being offered. This is the case for people who belong to a different religion than the one expressed and for those who do not subscribe to any religion. Therefore, if the court looks at the purpose of the Right to Pray amendment—according to its sponsors, to promote Christianity—and the effect the amendment will most likely have—infringing on the rights of non-Christians—it will likely find the amendment violates the Free Exercise Clause as well as the Establishment Clause.

In addition to the amendment's unconstitutionality, it should be struck down for policy reasons, since it contains few new freedoms and does more harm than good. If the court decided to remove the provisions that enable students to participate,¹⁷⁶ the amendment would be left as a reiteration of rights that have always existed under the United States Constitution. It would be useless in such a situation. Therefore, the best solution would be to invalidate the amendment as a whole and maintain the Missouri Constitution as it was prior to the Right to Pray amendment.¹⁷⁷

176. Those are the provisions most likely to be struck down in federal court as unconstitutional, if the court chooses to only strike down part of the amendment.

177. In light of recent legislation in some states, such as Tennessee, that increasingly allows for creationism or intelligent design to be taught in public schools, it is likely other states will follow Missouri's lead and introduce similar "right to pray" amendments. Adam Cohen, *A Back-to-School Fight Over the Right to Classroom Prayer*, TIME, Aug. 28, 2012, available at <http://ideas.time.com/2012/08/28/a-back-to-school-fight-over-the-right-to-classroom-prayer/>. See also Steigman & Ellison, *supra* note 69. Kevin Eckstrom, Editor-in-Chief of *Religion News Service*, says many states have been discussing the underlying questions and fears that led to the Missouri amendment. *Id.* Indeed, other states have seen recent attempts to amend their state constitutions with "religious freedom" amendments. North Dakota voters in 2012 rejected a religious freedom amendment to their state constitution that would have created new "exemptions for religious activity in secular life." John Nichols, *A Red State Rebuke to Religious Fear-Mongering*, NATION (June 13, 2012, 12:55 PM), <http://www.thenation.com/blog/168371red-state-rebuke-religious-fear-mongering#>. Florida voters similarly refused to pass Amendment 8, which would have opened the door to allow state funds to support religious institutions. Toluse Olorunnipa & Brittany Alana Davis, *Florida Voters Reject Most Constitutional Amendments, Including 'Religious Freedom' Proposal*, TAMPA BAY TIMES, Nov. 6, 2012, available at <http://www.tampabay.com/news/politics/elections/article1260351>. eee. If other states do follow in Missouri's footsteps, the country will probably see increased litigation, perhaps in the United States Supreme Court, about religious liberty in the near future.

CONCLUSION

Missouri's Right to Pray amendment presents more problems than remedies. Although it was widely supported by Missouri voters, the ballot summary left out important details: the amendment allows students to opt out of educational assignments and gives students permission to express religious beliefs in school activities.

The language that was left off the ballot has the potential to restrict the religious freedom of religious minorities by allowing for more religious expression in schools and government meetings—particularly, expressions by the Christian majority. The amendment also enables students to opt out of subjects in school they contend are contrary to their religious beliefs. Such activity is antithetical to policies that favor exposing students to diverse topics, as expressed by the Sixth Circuit in *Mozert*.¹⁷⁸

Ultimately, the amendment's vague and ambiguous language is likely to spark a great deal of litigation that will highlight the confusion inherent in the amendment text, costing taxpayers money and impeding the operations of school boards. It appears to be an issue for the federal courts, which will likely invalidate the amendment as unconstitutional under the Establishment Clause and the Free Exercise Clause.

178. See *Mozert*, 827 F.2d at 1058.