Ronald Reagan Presidential Library
Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection:
Green, Max: Files, 1985-1988
Folder Title:
Church – State (2 of 9)
Box: Box 7

To see more digitized collections visit:
https://www.reaganlibrary.gov/archives/digitized-textual-material

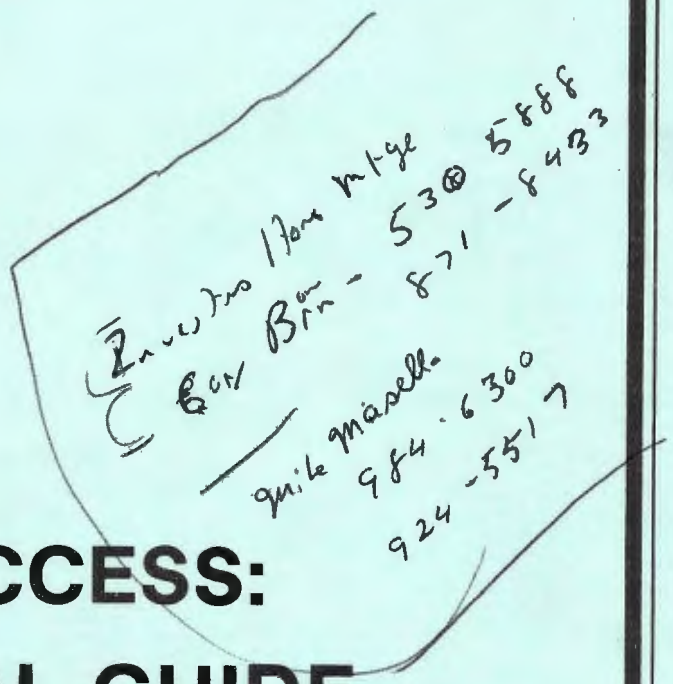
To see all Ronald Reagan Presidential Library Inventories, visit:
https://www.reaganlibrary.gov/archives/white-house-inventories

Contact a reference archivist at: **reagan.library@nara.gov**

Citation Guidelines: https://reaganlibrary.gov/archives/research-support/citation-guide

National Archives Catalogue: https://catalog.archives.gov/

Last Updated: 05/22/2023



EQUAL ACCESS:
A PRACTICAL GUIDE

Commission on Law and Social Action

AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York 10028

TABLE OF CONTENTS

INTRODUCTION

AJCONGRESS AND EQUAL ACCESS

The American Jewish Congress is a national organization of American Jews founded in 1918. It has chapters in major cities across the nation. Among its major concerns are the preservation of the right to the free exercise of religion as well as the separation of religion and state secured by the First Amendment of the United States Constitution. It is equally committed to the preservation of the public schools as the principal vehicles promoting equal opportunity in the community and as significant unifying forces in our religiously and culturally diverse society.

Because of these significant commitments AJCongress took a leadership role in the fight against the "Equal Access" legislation in both the House and the Senate. It spearheaded the coalition which, together with such education groups as the National Education Association, was originally successful in defeating passage of equal access legislation in the House under the suspension of rules procedure. It remained firm in its opposition to the bill which eventually was passed, even in the face of the many defections from the traditional broad based religious-educational-civil liberties coalition which has successfully opposed other religious intrusions into the public schools.

Despite AJCongress' continued belief that P.L. 98-377 is ill advised, badly drafted and likely to be held unconstitutional by the Supreme Court, the legal staff of the agency has attempted to provide

in the attached material as totally unbiased and helpful guide to the Act's interpretation as it was possible to prepare, given the ambiguous phraseology and poor draftsmanship of the legislation.

We sincerely hope that the predictions we made about the Act will not come true; that it will not yield a harvest of religious division and political controversy; that it will not provide a fertile ground for proselytization by extremist groups and will not distract students and administrators from their important basic educational tasks.

We promise, however, to maintain our vigilance and to monitor the administration of the Act.

Extra copies of this guide are available at bulk rates.

EQUAL ACCESS: A PRACTICAL GUIDE

On August 11, 1984, President Reagan signed into law the so-called "Equal Access" Act, P.L. 98, 377, U.S.C. . In very general terms, the Act requires that if a secondary school allows any non-curriculum related groups to meet during non-instructional time, that school must also allow groups that focus on religious, political or philosophical issues -- such as a Marxist, Hare Krishna or Anarchist club.

The Act appears deceptively simple. In fact, it is highly complex, and deciphering its meaning in order to apply it in specific circumstances will prove quite difficult. In an effort to assist professional educators who are confronted with equal access problems, as well as those who seek to avoid such problems before they ripen into litigation, we have prepared the following guide, organized in two parts.

Part I of the guide provides the language of the Act in full.

Part II of the guide provides an analysis of the Act, prepared in a question-and-answer format. It informs the school administrator about what the Act says, when it is to be applied, to whom it is applicable, and other questions about its application that are likely to arise. A word of caution: several places in the Act suffer from severe ambiguity, because of both vague language and awkward phrasing. As a result, some of the questions we pose have no clear answers, and, where this is so, we have indicated the possible alternative answers. In other instances, the Act lays out general principles which are to be applied in light of the expertise of school officials. The sources for the answers provided are the language of the Act itself, its legislative history, and the judicial decisions which gave rise to it.

Finally, we have prepared a detailed analysis of the legislative history of the Act, which may be especially helpful for legal counsel's understanding of the Act. Copies are available upon request.

This guide was designed for practical use and cannot hope to cover every problem that might arise. Should issues develop that are not covered by this guide, we invite inquiries, either written or by telephone, concerning application of the Act.

PART I

THE EQUAL ACCESS ACT: THE LANGUAGE

"Sec. 1. (a) It shall be 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.

"(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

"(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that --

"(1) the meeting is voluntary and student-initiated;

"(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

"(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

"(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities with the school; and

"(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

"(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof --

"(1) to influence the form or content of any prayer or other religious activity;

"(2) to require any person to participate in prayer or other relgious activity;

"(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

"(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

"(5) to sanction meetings that are otherwise unlawful;

"(6) to limit the rights of groups of students which are not of a specified numerical size; or

"(7) to abridge the constitutional rights of any person.

"(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

"(f) Nothing in this Act shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

"Sec. 2. As used in this title --

"(1) The term 'secondary school' means a public school which provides secondary education as determined by State law.

"(2) The term 'sponsorship' includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

"(3) The term 'meeting' includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

"(4) The term 'noninstructional time' means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

"Sec. 3. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

"Sec. 4. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title."

PART II

QUESTIONS AND ANSWERS CONCERNING THE EQUAL ACCESS ACT

A. Background

1) Q. What does the bill do?

A. The Act imposes two distinct obligations on public secondary schools receiving federal funds. First, it requires that schools which permit some student non-curricular activities provide a "fair opportunity" to all non-curricular student groups to meet, without regard to the "religious, political and philosophic" or other content of the group's activities. A school provides a "fair opportunity" if it uniformly provides for student-initiated groups to 1) voluntarily meet 2) before or after actual instruction, 3) without sponsorship by schools, government or their employees, and, as to religious groups, if school personnel do not participate in the group's activities, and if 4) outsiders do not direct, control or regularly attend activities of these groups, and 5) meetings do not materially and substantially interfere with the orderly conduct of educational activities. Schools which do not allow any non-curricular student groups to meet need not provide access for political, religious or philosophic groups.

The second related obligation imposed on the schools is that they not discriminate against religious, political or philosophic clubs based on the content of the group's activity.

2) Q. What activities are not covered by the Act?

A. · Student non-curricular activities during the school day are neither required, prohibited, or regulated.

· Rentals of school property during evening hours.

· Schools not permitting any non-curricular student activities.

· In-school released time programs in which non-school personnel offer religious instruction on school grounds.

3) Q. Why was the bill necessary?

A. A long series of federal and state court cases held that the United States Constitution prohibits public school officials from making school facilities available to student religious groups because to do so would constitute an establishment of religion. Proponents of the legislation argued that these cases were wrongly decided, that the right of religious groups to meet was protected by the Free Speech Clause of the Constitution and, that because there was one decision

requiring school officials to grant equal access to religious clubs (a decision since reversed), school administrators were confused about their legal obligations.

B. Definitions

4) Q. Does the Act define the phrase (§ 1(a)) "school which receives federal assistance?"

A. No, and nothing in the legislative history answers the question of whether the Act applies only to schools which themselves receive federal financial aid, or whether it also applies to schools which, while not themselves receiving aid, are part of systems which do, but earmark the funds for other schools in the system. The term "which receives federal funds" is frequently found in federal statutes, and is the subject of numerous court decisions, however.

5) Q. What are "secondary schools?"

A. The Act explicitly states (§ 2(1)) that this question is to be answered with reference to state law. Appendix "A" lists those states which have statutes or regulations defining "secondary schools" and summarizes the content of such provisions. There is no indication in the Act or legislative history how schools in those states which do not have such statutes should decide what is a secondary school.

6) Q. How is non-instructional time (§ 1(b)) defined?

A. The Act (§2(4)) defines "noninstructional" time as "time set-aside by the school before actual classroom instruction begins or after actual classroom instruction ends." It thus grants no right to conduct non-curricular student activities during the school day.1/* The Act as enacted thus is more restrictive than earlier proposals which created a right to "equal access" even during the school day, so long as a particular student was not required to be in class. On the other hand, the Act neither forbids nor regulates non-curricular student activities during the school day. The courts, however, have concluded -- so far unanimously -- that schools may not permit such clubs to function during the school day.

7) Q. Is a homeroom period "actual classroom instruction" within § 1(b), so that "clubs" meeting during this time do not trigger the requirements of the Act?

A. Senator Hatfield, sponsor of the legislation, thought so. He said that religious, political, or philosophical clubs need not be

---

* References to the appropriate portions of the legislative history appear at pages 21 and 22.

permitted during this time, even if other student, non-curricular clubs are, at least as far as the Act is concerned.2/

8) Q. What types of activities are "curricular?"

A. The legislative history suggests some examples. These include language clubs (French, Spanish, Latin) and drama clubs.3/

9) Q. What about athletic activities?

A. They are also considered curricular, and do not trigger an "equal access" right.4/

10) Q. What about cheer-leaders and bands?

A. Both are considered curricular.5/

11) Q. What are examples of non-curricular groups?

A. Chess clubs, "pep clubs," Young Democrats, Young Republicans, religious clubs,6/ groups to raise funds for charity,7/ or private social organizations.8/

12) Q. What constitutes a "non-curriculum related student group" (§ 1(b))?

A. The Act does not define this phrase as such. However, the Act does recast the non-curriculum related formulation (§ 2(3) as "not directly related to the school curriculum." Key portions of the legislative discussion of this phrase are reproduced as Appendix B. Unfortunately, the House and Senate debates suggest slightly different tests.

Two elements emerge from the Senate debate: 1) that school officials permit some student initiated activity; and that (2) that activity not be curriculum related, as determined by school officials in the exercise of their professional expertise. Curriculum related means an activity which, viewed objectively, helps students learn substantive course material, e.g., French club (French), band (music).

The House sponsors of the Act suggested that a curricular club was one which the school could legally sponsor (i.e., not a religious or political club) and which they in fact encouraged students to attend in connection with their education. Whether these two interpretations differ substantially is unclear.

13) Q. Does the prohibition on school sponsorship, as well as that on regular participation by non-school personnel, apply to non-ideological clubs, such as the chess club?

A. Senator Hatfield, Senate sponsor of the Act, thought so.9/ If his understanding is correct, the prohibitions contained in the Act (other than that on teacher participation) apply not only to ideological and religious groups, but to non-ideological groups such as chess clubs. It may be doubted that the Congress intended this result.

C. Application of the Act

14) Q. Under the Act can students compel schools to allow student sponsored non-curricular activities?

A. No.10/ And as far as appears, a school now having such a policy could eliminate it at any time. This result is suggested as well by the use of the phrase "limited public forum"* (§ 1(a)) which is a type of public forum the Supreme Court had indicated may be eliminated at any time. Perry Educ. Ass'n v. Perry Local Educators, Ass'n, 103 S.Ct. 948, 955 (1983).

15) Q. Must a school enforce all of the prohibitions contained in § 1(c)?

A. As noted, the Act requires that student non-curricular clubs be given "fair opportunity" to meet in school facilities. Fair opportunity is a term of art which is itself defined in the Act (§ 1(c)) (see above Q. 1).

There is a major question, however, whether the limitations contained in § 1(c) are mandatory or merely permissive, provided only that they are enforced uniformly. In other words, the question is whether § 1(c) is to be read as if it provided that a "fair opportunity" exists only if these restrictions are imposed, or if is it to be read as if it provided that a school provides a fair opportunity even if these restrictions are applied.

For example, Section 1(c)(5) says that outsiders "may not direct, control, or regularly attend" the activities of, student non-curricular groups. The language of the proviso itself sounds as if Congress intended to prohibit outsiders from regularly participating in, or controlling, the activities of student non-curricular groups. There are some indications in the legislative history that, for example, § 1(c)(5) was so understood.

---

* A public forum is a public place which either "by long tradition or by government fiat has been devoted to assembly and debate." A limited public forum is one "opened for use by the public as a place for expressive activity." It may be created for use by only a limited part of the public, e.g., students at a particular school. Perry Educ. Ass'n., v. Perry Local Educators Ass'n, 103 S.Ct. 948, 954-55 (1983).

However, it is also possible to read Section 1(c) as simply stating that fair and equal access are provided by the school even though a variety of restrictions are imposed, including those on participation by outsiders. This latter reading is consistent both with the statutory framework, the language of Section 1(c) itself, and the bulk of the legislative history.

Although the matter is hardly free from doubt, and will have to be resolved by the courts, the former interpretation appears to us to be correct. As to some of the prohibitions subsumed in § 1(c), the difference is small because no one contends, for example, that students may constitutionally be compelled to attend religious clubs (§ 1(c)(1)) or that schools may sponsor such groups. It is certainly true that Congress contemplated that schools would impose such restrictions. The rest of this section proceeds on the assumption that schools will impose them, wehther they have to or not, and explains what restrictions these sections allow, if not mandate.

16) Q. May schools insist on the presence of a teacher at non-curricular student clubs?

A. Yes, but only in a custodial role. School officials cannot sponsor, control, initiate or influence any non-curricular student club.11/ School officials may not participate in the affairs of a religious club, (§ 1(c)(3)) although they may participate in other non-curricular student activities.

17) Q. May schools discipline teachers who encourage student religious extracurricular activities, or participate in religious clubs?

A. Yes. How this is to be done is left to the discretion of school officials.

18) Q. May non-curricular student clubs be given access to school bulletin boards, yearbooks, and public address systems on the same basis as other student initiated clubs?

A. The Act requires schools to provide "equal access" clubs a fair opportunity to meet, and forbids schools from discriminating against non-curricular clubs. Denying such clubs access to school facilities for publicizing activities on the same basis as other student clubs would appear to constitute such discrimination.

However, it should be noted that the legislation was modelled after the District Court decision in Bender v. Williamsport Area School District, 563 F. Supp. 697 (M.D. Pa. 1983), rev'd, F.2d (3d Cir. 1984).

In that case, the religious club disavowed any desire to receive subsidies, to be described in the yearbook or to have meetings

announced on the school public address system. Because the statute was modelled after this program, it would not be unreasonable to read the statute in light of that decision and thus as permitting denial of these facilities.

The legislative history supports such a reading. Senator Hatfield, Senate sponsor of the Act, stated explicitly during the Senate debate that even a neutral announcement by a teacher of the operation of a non-curricular student group would constitute impermissible sponsorship.12/

19) Q. If a school provides a nominal grant to non-ideological student initiated non-curricular clubs, must it provide such a grant to ideological clubs -- e.g., Young Democrats or Youth for Christ?

A. Notwithstanding the Act's general prohibition on discrimination, a school is forbidden "to sponsor" noncurricular student clubs. (§ 1(c)(2) Financial assistance is a form of sponsorship, and hence it is forbidden under the Act. It must be remembered that the prohibition on sponsorship applies to all non-curricular student clubs. Schools which have subsidized, for example, chess, Young Republican or Young Democratic clubs may no longer do so.

20) Q. Does the Act allow for any differential treatment of student non-curricular religious clubs as compared to, say, the Young Republican club?

A. No, except that participation by school officials is prohibited only in religious clubs. (§ 1(c)(3))

21) Q. May school officials require a club to meet in a particular place?

A. Yes. Reasonable time, place, and manner restrictions are permissible. However, any such regulations must be applied in a non-discriminatory fashion. (§ 1(a))

22) Q. May space be allocated on a first-come, first served basis?

A. Yes.

23) Q. May school officials forbid loud activities?

A. Reasonable noise restrictions may be enforced on a non-discriminatory basis.

24) Q. May schools bar prayer services?

A. Probably not. The Act prohibits discrimination based on the content of speech. A distinction between prayer and other forms of

religious activity would be a form of such discrimination. The Supreme Court rejected a proferred distinction between religious speech (study) and prayer in the college equal access case, Widmar v. Vincent, 454 U.S. 263 (1981). Any effort by school officials to enforce such a distinction would also appear to run afoul of § 1(d)(1), prohibiting any effort to "influence the form or content of any prayer or religious activity."

There is, however, some legislative history suggesting such a distinction between speech connected actitities (prayer and Bible study) and other religious practices was contemplated.13/

> This amendment in no way involves religious practices, baptism, masses, or whatever. There is a difference between the right to practice religion in a synagogue, a church, or a temple. This does not involve that. We are talking about freedom of speech.
>
> Religion happens to be the triggering mechanism that brings this to the floor. It is not the freedom of religion. It is the freedom of speech. Religion happens to be the subject. It is not the right to go into those schools and practice a religious ceremony. It is purely the right of students to have an association to discuss those religious subjects, if they wish to do so, which is now being denied them.

Whether such a distinction is constitutional is not certain.

25) Q. May schools ban a drug use club?

A. Yes. School officials are authorized (§ 1(d)(5)) to deny permission to meetings which are "otherwise unlawful."

26) Q. What about a gay rights club?

A. So long as it confined its activities to discussions about homosexuality and the rights of homosexuals, a student gay rights club could not be barred.14/

27) Q. May schools ban clubs which practice racial, sexual, or religious discrimination?

A. The Act and the legislative history do not discuss this problem. Exclusionary practices of this type may be illegal under state civil rights laws, particularly public accommodation laws. If so, the Act's provision (§ 1(d)(5)) allowing officials to deny space to otherwise illegal clubs would apply. It is also possible to argue that the Constitution prohibits the use of public facilities by groups that discriminate on the basis of race, sex or religion. However, the

Supreme Court has sanctioned use of public forums by discriminatory groups if that use is not "exclusive," -- that is, it does not exclude others from all access to the facility, Gilmore v. City of Montgomery, 417 U.S. 556 (1974).* At least in the case of religious groups, the right to exclude non-believers may be constitutionally protected. Roberts v. U. S. Jaycees, 104 S.Ct. 3244 (1984).

28) Q. May a school bar a student initiated Nazi club from functioning on the ground that its very presence is disruptive?

A. This was the subject of an extended discussion on the floor of the Senate. The Act authorizes school officials to bar noncurricular student groups if their meetings (§ 1(c)(4)) "materially and substantially interfere with the orderly conduct of educational activities." Moreover, Senator Danforth sponsored an additional section (incorporated as § 1(f) of the Act) which preserves the duty of school officials to "maintain order and discipline" and to "protect the well being of students." Senate sponsors and opponents of equal access legislation debated whether this latter section would permit a ban on groups like the Nazis without any actual disruptive activity on their part.

The results of this debate (reproduced in Appendix C) are inconclusive. Of course, it would be the duty of school officials to see to it that student free speech rights were not made subject to interference by other students.

29. A. May schools pay teachers for attending "equal access" clubs?

A. The Act states that schools need not make any expenditures on behalf of noncurricular student clubs "beyond the incidental cost of providing space." (§ 1(d)(3)) As noted below, (see question 46) it is not clear whether § 1(d) of the Act was intended to prohibit such expenditures, or merely to clarify that the Act did not require them. Assuming that § 1(d) proihibits such expenditures, it is not clear how teachers may be compelled to work for nothing. While volunteers might be used, their use makes more likely a violation of § 1(c)(2)'s prohibition on sponsorship by school officials.

If § 1(d) does not state a prohibition, whether schools must pay teachers for such custodial duties would depend on state law or on the language of the relevant union contract.

---

* In Gilmore, the Supreme Court held that the mere use of public parks, playgrounds, athletic and other public facilities by a segregated private club without rationing of such facilities or providing equipment for its use did not constitute state support for racial discrimination.

30. Q. Does the Act authorize schools to compel a teacher to supervise (in a custodial capacity) a non-curricular student club?

A. No, if attendance at the club would violate the teacher's religious principles. (§ 1(d)(4))

31) Q. May teachers encourage students to attend non-curricular groups?

A. No, on the theory that such encouragement constitutes impermissible sponsorship. The answer to this depends in part on whether the provisions of § 1(c) are mandatory or not. (See question 15) However, it is clear that if rules banning teachers' encouragement are adopted, they must be applied to all noncurricular student clubs. The Act permits school authorities to forbid such efforts by any and all school officials. (§ 1(c)(2)). As to religious clubs, the Constitution requires this result.

32) Q. May a teacher announce the functioning of an non-curricular student club?

A. The question is whether such an announcement would constitute school "sponsorship," forbidden under the Act (§ 1(c)(2)). Senator Hatfield, Senate sponsor of the language ultimately adopted, thought it would be impermissible for a teacher to do so.20/ Again, the answer to this question depends in part on whether the provisions of § 1(c) are mandatory or permissive.

33) Q. May actions of school officials other than verbal encouragement to participate in such clubs be illegal under § 1(c)(2))?

A. Yes. Senator Hatfield cited as an example of illegal conduct the policy of a school district which allowed pre-school religious activity requiring non-participants to remain outside the building in the cold weather.15/ Use of the grading mechanism as a means of punishing or rewarding those who participate in "equal access" clubs would be another form of illegal coercion.

34) Q. Must outsiders be permitted to participate in non-curricular student activities?

A. The Act provides that it is not a denial of a "fair opportunity" to uniformly exclude "non-school personnel" from directing, conducting, controlling or regularly attending meetings. (§ 1(c)(5)) As far as the Act is concerned, school officials could, and may be required to (see Q. 15), ban all outsider participation in all student non-curriculum related groups.16/

However, if the provisions of § 1(c) are permissive, and nonreligious student non-curricular groups are permitted to have outsiders

participate in their activities, the Act's independent prohibition on discrimination would seem to require that religious clubs be permitted, on the same basis, to invite outsiders.17/

Conceivably, if outsiders are allowed to control other student groups, they would have to be allowed to control religious non-curricular student clubs. Such a construction of the Act would pose grave constitutional difficulties, for McCollum v. Bd. of Educ., 333 U.S. 203 (1948) seems to prohibit outsiders from providing religious instruction in the schools. However, Senator Hatfield did say that the Act was not intended to overturn that decision.18/

35) Q. If outsiders are permitted to attend non-curricular student groups on an irregular basis, but ultimately prove to be troublesome, may schools adopt regulations barring all such outsiders?

A. Yes, provided the rules apply equally to all student noncurricular groups.19/

36) Q. What constitutes regular attendance by outsiders? (§ 1(c)(5))

A. There is no definition of this phrase in the Act. Apparently, enforcement is left to the discretion of school officials.

37) Q. May schools insist on a parental consent requirement for participation in "equal access" clubs?

A. Yes, but only on a non-discriminatory basis.21/ One of the reasons for limiting the Act to either before or after school activities was to allow for greater parental control over student participation.

38. Q. May schools limit proselytizing activities by students?

A. Yes, if they can show that such activities materially and substantially interfere with the educational activities of the school.21/ As Senator Hatfield put it "We ... do not want this bill construed as giving license to older students to exert undue influence over younger students."22/ Moreover, school officials are required to insure that participation by students is truly voluntary,24/ (§ 1(c)(1)) Proselytizing activities in some circumstances could vitiate the voluntariness of the decision to participate in a particular activity. On the other hand, it was recognized that a certain amount of such activity would go on, and would be permissible.25/

39) Q. May school officials deal with particularly intrusive forms of proselytizing activities by student non-curricular groups?

A. Senator Danforth, the author of a provision of the Act (§ 1(f)) which preserves the rights of school officials to "protect the

well-being of students" said:

> The theory of this amendment is to make it clear that the school administration does have, does continue to have inherent power to prevent the unrestrained, intensive, extreme psychological pressure which could be utilized by some religious groups to attempt to bring other kids within the religious community.
>
> Under this amendment, as it is presently drafted at least, it is the intent of the author of this language that it would continue to be possible for the school boards and the school administration to take such action as is necessary to prevent kids from being in effect brainwashed within the school premises; that is to say, in the event that, for example, a cult were to set up a cell, hold meetings, attempt to go out, draw other kids into this religious organization, and use what amounts to psychological warfare in order to accomplish that objective. I believe that it has to be within the power of the school to prevent that kind of activity to operate in the same manner as a parent would operate to prevent that kind of abuse of children on school property, and to operate in loco parentis.26/

40) Q. Does the Act have any impact on the after-hours rental of school facilities to non-student groups?

A. No. Such rentals would continue to be governed by local regulations and general constitutional principles.27/

41) Q. If a school adopts a formal policy which bars non-curricular student clubs, but in practice allows such clubs, does the Act apply?

A. Yes. The legislative history makes it clear that it is actual practice, not formal statements, which govern.28/

42) Q. May schools inquire as to whether a group of students is initiated, controlled or promoted by outsiders?

A. There is no clear answer to this question in the Act itself or in the legislative history. However, the tenor of most of the legislative history is that school officials are entitled to make such inquiries.29/

43) Q. Who can enforce the Act?

A. Although the Act does not explicitly provide for a judicial remedy, the legislative history makes clear that any individual whose

rights under the Act are violated may bring a lawsuit to enforce his or her rights.

44) Q. Can the federal government cut off funds to non-complying schools?

A. No, the Act specifically forecloses the government from doing so. (§1(e))

45) Q. Do school officials retain the right to control noncurricular student clubs to maintain school discipline?

A. Yes. The act specifically allows schools to "maintain order and discipline" (§ 1(f)), to protect the well being of students and faculty, to assure that attendance in student extra-curricular clubs is voluntary, (§ 1(c)(1)), and to prohibit activities which "materially and substantially interfere" with the educational mission of the school (§ 1(c)(4)).

46) Q. May schools place a minimum participant requirement before recognizing a non-curricular student group?

A. No. The Act explicitly forbids such requirements. (§ 1(d)(6))*

* Section 1(d) of the Act, strictly speaking, does not prohibit anything. It merely makes clear that the Act does not authorize certain actions. Yet it seems to have been understood that the provisions of this section were prohibitions on school officials. In any event, the Constitution would forbid, as to religious activities at least, most of the actions described in § 1(d). This section can thus be understood as making clear Congress' understanding of the Constitution.

NOTES

1. See 130 Cong. Rec. S. 8340 and S. 8354 (daily ed. June 24, 1984) (remarks of Sen. Hatfield).

2. 130 Cong. Rec. S. 8354 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

3. 130 Cong. Rec. S. 8342-43 (daily ed. June 27, 1984) (remarks of Sens. Hatfield and Gorton).

4. Id.; 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Rep. Goodling).

5. 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Rep. Goodling).

6. Id.

7. 130 Cong. Rec. H. 7726 (daily ed. July 25, 1984) (remarks of Rep. Roukema).

8. 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Rep. Goodling).

9. 130 Cong. Rec. S. 8343 (daily ed. June 27, 1984) (remarks of Sen. Hatfield.)

10. See, e.g., 130 Cong. Rec. S. 8342 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

11. 130 Cong. Rec. S. 8343 (daily ed. June 27, 1984) (remarks of Sens. Hatfield and Gorton).

12. 130 Cong. Rec. S. 8354 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

13. 130 Cong. Rec. S. 8352 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

14. 130 Cong. Rec. S. 8343-44 (daily ed. June 27, 1984) (remarks of Sen. Hatfield.

15. 130 Cong. Rec. S. 8360 (daily ed. June 27, 1984).

16. 130 Cong. Rec. S. 8357-58 (daily ed. June 27, 1984) (remarks of Sen. Durenberger).

17. See 130 Cong. Rec. S. 8338 (daily ed. June 27, 1984); Id. at S. 8356 (remarks of Sen. Levin).

18. 130 Cong. Rec. S. 8368 (daily ed. June 27, 1984).

19. 130 Cong. Rec. S. 8364 (daily ed. June 27, 1984) (remarks of Sen. Thurmond).

20. 130 Cong. Rec. S. 8354 (daily ed. June 27, 1984).

21. 130 Cong. Rec. S. 8357 (daily ed. June 27, 1984) (remarks of Sen. Durenberger).

22. 130 Cong. Rec. S. 8363 (daily ed. June 27, 1984) (remarks of Sen. Mitchell).

23. 130 Cong. Rec. S. 8360 (daily ed. June 27, 1984).

24. 130 Cong. Rec. S. 8360 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

25. Id.

26. 130 Cong. Rec. S. 8348 (daily ed. June 27, 1984).

27. 130 Cong. Rec. S. 8350-51 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

28. 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Rep. Goodling).

29. See generally 130 Cong. Rec. S. 8343 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

APPENDIX A

State Definitions of Elementary and Secondary Schools

The following is a list of state definitions and descriptions of elementary and secondary education gathered from state statutes and administrative regulations and from conversations with representatives of state departments of education (as indicated by an asterisk(*)).

Ala. Code § 16-8-36 (1977)

The public schools of the county shall include elementary schools, that is, grades one to six, inclusive; junior high schools, that is grades seven to nine, inclusive; and senior high schools, that is grades ten to twelve, inclusive, except as otherwise authorized by the State Board of Education.

Alaska Stat. § 14.03.060 (1982)

(a) An elementary school consists of grades kindergarten through grade eight or any appropriate combination of grades within this range.

(b) A secondary school consists of grades seven through twelve or any appropriate combination of grades within this range.

(c) Grades seven through eight, nine and ten or any appropriate combination of grades within this range may be organized as a junior high school.

Ariz. Rev. Stat. Ann. § 15-447 (Supp. 1983)

Enrollment of pupils in grades nine through twelve shall be deemed to be enrollment in high school.

§ 15-701 (discusses "common schools" generally, up through grade eight)

Arkansas*

The state has no statutory definitions of elementary and secondary education, but acording to an Education Department representative, the State Board of Education defines elementary education as grades kindergarten through six and secondary education as grades seven through twelve.

Cal. Education Code § 52 (West 1978)

The secondary schools of the state are designated as high schools, technical schools, adult schools, and community colleges.

§ 53 (West 1978)

The high schools of the state are designated as four-year high schools, junior high schools, senior high schools, continuation high schools, and evening high schools.

Colorado*

There is no statutory definition of elementary or secondary education. According to a state representative, districts define these terms on their own. Generally, elementary education includes grades one through six or one through eight, and secondary education includes grades seven through twelve or nine through twelve.

Conn. Agencies Regs. §10-145(a)-11

"elementary teaching certificates" are endorsed for either:

(a) nursery school and/or kindergarten through grade three;

(b) nursery school and/or kindergarten through grade six;

(c) grades four through eight, and also in grades seven and eight of a junior high school or a junior-senior high school.

§ 10-145(a)-16

"secondary teaching certificates" are valid for all endorsed subjects in grades seven through twelve, and/or one or two elementary levels, grades five through six.

Delaware*

According to a state representative, an elementary school generally includes grades kindergarten or one through grade six, and a secondary school generally includes grades seven through twelve.

District of Columbia*

There are no statutory definitions. Acccording to an Education Department representative, the defintions of elementary and secondary schools vary locally, but most districts currently consider grades one through six as elementary school and grades seven through twelve as secondary school.

Fla. Stat. § 232.246 (1983) (R.A.I.S.E. Act)*

The Act requires, for graduation, completion of 24 credits in secondary education, to be completed in grades nine through twelve.

Fla. Admin. Code § 6A-4.23-4.231

refers generally to teacher certification for junior high school as grades 7-9 and certification for middle school as grades 5-8.

Ga. Code § 20-2-61 (1982)

The board of education of any county or independent school system is authorized, if in its opinion, the welfare of the schools of the county or independent system and the best interests of the pupils require, to reorganize the schools within its jurisdiction and to determine and fix the number of grades to be taught at each school in its respective system.

§ 20-2-158 (1982)

Annually, the State Board of Education shall allot elementary instructional specialists to local units of administration on the basis of one elementary specialist per 15 instructional units in grades one through seven.

Hawaii Rev. Stat. § 317.1 (1976)
(Secondary School Students Conference)

The purpose of this section is to provide for the establishment of an annual conference of secondary school students (grades 9-12) ....

Idaho Code § 33-119 (1981)
(Accreditation of secondary schools)

"secondary school" for the purposes of this section shall mean a school which, for operational purposes, is organized and administered on the basis of grades seven (7) through twelve (12), inclusive, or any combination thereof.

"elementary school" ... administered on the basis of grades one though six inclusive, one through eight inclusive or any combination of grades one through eight inclusive.

Ill. Rev. Stat. Ch. 122 § 13-11 (1962)

Any district maintaining grades one to eight, inclusive, may enter into an agreement with any high school district maintaining grades nine to twelve, inclusive, ... to establish ... a junior high school consisting of the ninth grade, and such additional grades as may be agreed upon.

§ 18-8 (1984 Supp.)

Basis for apportionment to districts -- common school fund

funds apportioned differently for grades K-6, 7-8, 9-12 or K-8, 9-12 if districts are divided this way.

Ind. Code § 20-10.1-3-1 (Supp. 1983)

The public schools are classified as:

(a) (1) elementary schools -- first eight years of school work

(2) high schools -- not less than four years work following elementary school.

(b) Each governing body which maintains commissioned high schools may prescribe junior high school or intermediate school courses for two or three years and may admit pupils who have completed their first six years of elementary school. The first two years may include instruction in seventh and eighth grade subjects and may include other studies, including secondary, prevocational and industrial subjects, ...

Iowa Code § 257.25 (Supp. 1983) (Educational standards)

(discusses generally separate course requirements according to grades 1-6, 7-8, 9-12)

(statute provides for media specialist in schools offering any of grades seven to twelve except school which offers grades one through eight as an elementary school)

Kan. Const. Art. VI § 2A*

Grants to State Board of Education the authority to develop rules and regulations regarding academic programs.

(A state representative indicated that elementary and secondary school programs vary throughout the State. An elementary school may be a combination of grades kindergarten through nine and a high school may include grades 7-12, 9-12 or 10-12.)

Ky. Rev. Stat. § 158.100
(Districts to provide school service)

(discusses generally high school as grades 9 through 12)

Louisiana*

According to a state representative, Board Bulletin # 741, Handbook for School Administrators, specifies elementary education as grades 1 through 8. In practice, many areas have middle schools, but there is no statewide formal recognition of this status.

Me. Rev. Stat. Ann. tit. 20-A § 1 (1983)

"Elementary school" means that portion of a school that provides instruction in any combination of grades kindergarten through grade eight.

"Secondary school" means that portion of a school that provides instruction in any combination of grades nine through twelve.

Md. Educ. Code Ann. § 1-101(g) (1978)

"Elementary and secondary education" means education and programs of education from and including preschool through the end of high school and their equivalent.

Md. Admin. Code cited "Principles and Standards: Public Secondary Education in Maryland," Maryland School Bulletin, Vol. XL, No. 3, May 1964 and subsequent revisions, in which the specifics of Md. secondary and elementary education may be found.

Md. Admin. Code tit. 1319 § 03.02-01-02 refers generally to secondary school as grades 9 through 12.

Mass. Gen. Laws Ann. ch. 71 § 11 (West 1969)

High school ... part of the school system which furnishes instruction in addition to that offered in the first eight grades.

Mich. Comp. Laws § 368.1604 (Supp. 1983)
(State School Aid Act of 1979)

"elementary pupil" means a pupil in membership in grades kindergarten to eight in a district not maintaining classes above the eighth grade or in grades kindergarten to six in a district maintaining classes above the eighth grade.

Minn. Stat. § 120.05 (Supp. 1984)

(1) elementary school ... enrollment of pupils ordinarily in grades one through six or any portion thereof.

(2) middle school ... any school other than a secondary school with a minimum of three consecutive grades above fourth but below tenth.

(3) secondary school ... enrollment of pupils ordinarily in grades seven through twelve or any portion thereof.

Miss. Code Ann. § 37-7-301 (Supp. 1983)

(Powers and duties of boards of trustees of school districts) To organize the schools of the district and to make such division between the high school grades and elementary grades, as, in their judgment, will serve the best interests of the school. In the event the board of trustees provides for a high school of six grades, the lower division thereof may be designated as the junior high school, all in the discretion of the board of trustees.

§ 37-13-1 (Supp. 1983)

(empowering board of trustees to divide up schools into grammar schools, junior high schools and high schools or any combination thereof).

Mo. Rev. Stat. § 160.011 (Supp. 1984)

(2) Elementary school ... public school giving instruction in two or more grades not higher than the eighth grade.

(4) High school ... public school giving instruction in two or more grades not lower than the ninth nor higher than the twelfth grade.

Mont. Code Ann. § 20-6-101 (1983)

elementary district ... district providing education up to grade eight.

high school district ... for education beyond grade eight in a district.

Neb. Rev. Stat. § 79-101 (1971)

(4) elementary grades ... all grades up to and including the eighth grade.

(5) high school grades .. . all grades above the eighth grade.

Nev. Rev. Stat. § 388.020 (1979)

(1) elementary school ... up to eighth grade

(2) junior high-middle school, grades six through nine.

The school is an elementary or secondary school for the purpose of teachers' certifications.

(3) high school ... above the eighth grade

high school is a secondary school

N. H. Rev. Stat. Ann § 189 :25 (1977)

elementary school ... any school in which the subjects taught are those prescribed by the state board for grades kindergarten through eight of the public schols. However, a separate organization consisting of grades seven through nine, or any grouping of these grades, may be recognized as a junior high school .... Also a separate organization consisting of grades four through eight or any grouping of these grades may be recognized as a middle school.

§ 194:23 (1977)

The term "high school" shall mean a school, academy or literary institution offering a course of studies for four years in such subjects ....

§ 194:23-A (1977)

The term "comprehensive high school" means a school ... offering a course of studies for four years for students who have completed eight years of grammar school or its equivalent.

N. J. Rev. Stat. § 18:A-45-1 (1968)

The board of education of any school district may, with the consent of the state board, establish and organize secondary schools including junior high schools which shall be subject to rules prescribed by the state board ....

§ 18:A:4-28.4

As used in this act [drug education programs], "secondary school" means grades seven through twelve and shall include high school grades, junior high school grades and other classification of grades designated in a particular school to include grades five and above.

N. M. Stat. Ann. § 22-1-3

A) "elementary school" ... grades kindergarten through eight, unless there is a junior high school program ... in which case it means grades kindergarten through six.

B) "secondary school" ... grades nine through twelve unless there is a junior high school program ... in which case it means grades seven through twelve.

N. Y. Educ. Law § 2 (McKinney 1969)*

"Secondary education" means instruction of academic grades between the elementary grades and the college or university.

(According to a State education representative, the Commissioner of Education's regulations, Point 30 (tenure areas), define an elementary school as grades kindergarten through six and a secondary school as grades seven through twelve, with an optional middle school tenure area, grades seven through eight.)

N. C. Gen Stat. § 115C-74 (1981)

The system may be organized in one or two ways as follows: The first eight grades shall be styled the elementary school and the remaining four grades, the high school; if more practicable, a junior high school may be formed by combining the first year of high school with both the seventh and eighth grades or with the eighth grade alone, and a senior high school which shall comprise the last three years of high school work. For the purposes of Title V of the National Defense Education Act of 1958 (Public Law 85-864) the term "secondary school" shall be applicable to grades seven through twelve.

N. D. Cent. Code § 15-41-01 (1981)

High schools shall be divided into the following classes and shall conform to the following requirements:

(1) six-year high schools -- grades seven to twelve

(2) five-year high schools -- grades eight to twelve

(3) four year high schools -- grades nine to twelve

(4) three year high schools -- grades ten to twelve

All other schools with high school departments shall be considered as graded schools doing high school work ....

§ 15-41-04 (1981) (Duties of director of secondary education)

(refers to duties involving high schools)

Ohio Rev. Code Ann. § 3301.16 (1980)

A high school is one of higher grade than an elementary school.

In districts wherein a junior high school is maintained, the elementary schools in that district may be considered to include only the work of the first six years inclusive, plus the kindergarten year.

§ 3327.01 (1980) (transportation of pupils)

(refers generally to pupils in kindergarten to eight as elementary pupils and pupils in grades nine through twelve as high school pupils)

Okla. Stat. tit. 70, § 1-106 (1971)

The public schools ... shall consist of ... elementary, which may include either kindergarten to six or kindergarten to eight, and secondary schools ....

Or. Rev. Stat. § 335.490 (1981)

... any union high school district may, when authorized by the qualified voters of the district, extend the course of study in the district to include five years above the seventh grade or six years above the sixth grade, and in like descending order may extend its course of study to include any or all grades of the schools in the union high school district in the manner provided in ORS 335.495 and 335.505.

Pa. Stat Ann. tit. 24, § 16:1601 (Purdon 1983)

High schools shall be designated either as junior high schools or senior high schools by the Department of Public Instruction ....

Rhode Island*

The state has no statutory definition of either elementary or secondary education. However, under Board of Regents regulations for teacher certification an elementary school is some combination of grades one through eight. Where there is a middle school, any combination of grades five through eight, the middle school is considered an elementary school.

S. C. Code Ann. § 59-1-150 (Law. Co-op. Supp. 1983)

(2) elementary school ... contains grades no lower than kindergarten and no higher than eighth.

§ 59-1-150 (Law. Co-op. 1976)

(3) middle school ... grades no lower than fifth and no higher than eighth.

(4) secondary school ... either a junior high school or a high school.

(5) junior high school -- shall be considered synonymous with the term high school.

(6) high school ... grades no lower than the seventh and no higher than the twelfth.

S. D. Admin. R. 24:03:01*

(31) An elementary school is composed of any combination of four or more grades in the range of grades kindergarten through 8, which must include grades 1 through 4.

(34) A secondary school is composed of any combination of three or more consecutive grades from the range nine through twelve, which must include grades 10 through 12.

optional classifications

(20) Junior high school ... some combination of grades seven through nine.

(22) Middle school ... some combination of grades five through eight.

Tenn. Code Ann. § 49-6-401 (1983)

(a) junior high school ... any combination of grades corresponding to seven through ten, must include grade nine though.

(b) senior high school ... any combination of grades nine through twelve, must include grade twelve though.

§49-6-301 (1983)

elementary school -- any combination of grades kindergarten through eight

middle school, grades five through eight or any combination thereof

Tex. Admin Code tit. 19 § 97.115 (1981)
(Description of content in secondary grades)

(c) each accredited secondary school (grades seven to 12) makes available to students the subjects listed ....

Utah*

The state has no statutory definitions. In practice an elementary school contains grades kindergarten or one through six and a secondary school contains grades seven through twelve. In districts with middle schools, grades six through eight, an elementary school includes grades kindergarten or one through five. According to a State representative, some rural districts may have schools with grades kindergarten through twelve or grades kindergarten through eight and nine through twelve.

Vt. Stat. Ann. tit. 16, § 771 (1974)
(N.H.-Vt. Interstate School Compact)

elementary school ... shall mean a school which includes all grades from kindergarten or grade one through not less than grade six nor more than grade eight

secondary school ... shall mean a school which includes all grades beginning no lower than grade seven and no higher than grade twelve.

Va. Code § 22.1-2 (1980)

There shall be a system of free public elementary and secondary schools established and maintained as provided in this title ....

Washington*

The state has no statutory definitions. In practice an elementary school generally contains grades kindergarten through six and a secondary school contains grades seven through twelve. However, this classification may vary according to local practice.

W. Va. Code § 18-3-11 (1984)

The state superintendent shall classify all elementary and secondary schools on the basis of standards, rules and regulations established by the state board ....

Wis. Stat. § 115.01 (1975)

The first eight grades are the elementary grades.
The last four grades are the high school grades.

Junior high school ... only grades seven through nine or seven through ten are taught.

Senior high school ... only grades ten through twelve.

This classification is not a limitation of the character of work or the studies that may be carried on in either the elementary or the high school.

Wyo. Stat. § 21-3-102 (1977)

every school district offering grades kindergarten through eight is an elementary school district.

§ 21-3-103 (1977)

every school district offering grades nine through twelve is a high school district.

§ 21-3-104 (1977)

unified school districts ... offering kindergarten or grades one through twelve.

APPENDIX B

In the Senate (where the debate on the merits was more extensive than in the House), Senator Hatfield and Senator Gorton had the following exchange: (130 Cong. Rec. S. 8342) (daily ed June 27, 1984)

> Mr. GORTON. I gather ... that the definition of these non-related student groups is fairly broad. The chess club would be such a group. If the school permits a chess club, it has thereby created the limited open forum which brings into effect the proscriptions of the Act.
>
> Mr. HATFIELD. [w]hen we say noninstructional, ... non-curriculum-related student groups, what we are recognizing there is that in a number of schools, students in a class of Spanish or French will form a French club or a Spanish club where they get together to talk nothing but that language, to get conversational proficiency. We are recognizing that as really a kind of extension of the classroom. That is the kind of category of clubs that we are trying to incorporate as curriculum related, those not covered by this amendment.
>
> . . .
>
> Mr. HATFIELD. I would say the chess club, the Young Democrats, the Young Republicans, and various and sundry other such clubs would certainly not be in the curriculum-related category. Conceivably, some of your sports activities could grow out of a physical ed curriculum requirement in the school.
>
> Mr. GORTON: What about the high school football team?
>
> Mr. HATFIELD. It is curriculum-related because that is how they can use tax dollars. The coaches are hired by the school administration. It is the department of physical education in which they teach health classes, courses within the curriculum. The athletic teams are curriculum-related.
>
> Mr. GORTON. Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related?
>
> Mr. HATFIELD. We in no way seek to limit that discretion.

> Mr. GORTON. So if the school district were to determine that the girls cheerleading squad, for example, should be led by a teacher, it could make the determination that it was curriculum-related.
>
> Mr. HATFIELD: Correct.
>
> . . .
>
> MR. GORTON. Could the school make the same determination with reference to a chess club?
>
> Mr. HATFIELD. I would not say that no school district could, but I cannot readily conceive of a criterion that could be used at this time to establish that as a curriculum-related activity. I am not saying it could not be, because as long as you have lawyers, they can find ways of doing things one way or another.

The House Debate suggests a different test: (130 Cong. Rec. H. 7732) (daily ed. July 25, 1984)

> REPRESENTATIVE GOODLING: Thus, there would be a two-step inquiry to determine whether a meeting is noncurriculum related.
>
> First, is the subject matter of the meeting of a type which a public school could sponsor? In other works, the meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and a school band would all clearly fall within this category. A young Democrat or Republican club, private social organizations, or religious groups would not be of the type which a school could sponsor.
>
> Second, does the school or a school-teacher require or directly encourage student participation in such group in connection with curriculum course work?
>
> . . .
>
> If both elements of this two-part analysis are satisfied, the meeting would be considered curriculum related and the equal access policy would not be triggered.

APPENDIX C

The results of this debate (reproduced in Appendix C) are something of a standoff (Cong. Rec. S. 8344) (daily ed. June 27, 1984)

> Mr. GORTON. I gather the summary of what the Senator has said is that the creation of a limited open forum does not require that student organizations be permitted for any speech purpose whatsoever: that at least with the perfecting amendment of Senator Danforth, [§ 1(f) recognizing the authority of school officials to protect the well being of students], if the school finds that the prohibition of an organization is necessary or advisable to maintain order and discipline on school premises, they can prohibit the formation of a student organization in spite of the limited open forum, even though that student organization is only going to engage in talk and not in any form of action or physical disruption whatsoever.
>
> Mr. HATFIELD. The answer to the Senator's question is "yes," but I come back to the basic purpose and the reason we have this whole matter coming up in the Senate is for none of those issues but, rather, the simple proposition that schools today are increasingly limiting in the area of free speech.
>
> . . .
>
> Mr. GORTON. I regret to say ... that I do not believe the courts are likely to interpret this bill in the way the Senator has described it in answer to these last few questions. I am convinced that the limited open forum which the Senator has described clearly covers the Ku Klux Klan -- as long as it agrees not to engage in any violent activity -- clearly allows an organization, discussions of which involve promoting the idea of racial superiority of one group or another, clearly beyond the slightest peradventure of argument protects a gay rights organization in a school.
>
> Mr. HATFIELD. ... Now that is the risk. That is the gamble in a free society, because you are always going to have people or organizations who are going to abuse it whether it is the Ku Klux Klan, whether it is the John Birch Society, whether it is the Communist Party, or whatever it may be. You are going to have groups that will seek to abuse the rights of the constitution. But by the same token, I would rather take that risk than to narrow something down so much

> to satisfy the concern about one group not getting in under the tent that we in effect, by the same token, have tightened it down so that even legitimate groups cannot get in under the tent.

See also 130 Cong. Rec. S. 8347 (daily ed. June 27, 1984) (remarks of Senator Metzenbaum) (courts will not allow exclusion of the Klan).

Later, however, Senator Hatfield, the Senate sponsor of the Equal Access Act, sounded a different note.

> Now, if it is just, say, a group of students within that school that wants to form a club to discuss a political matter and they are asking for some regularity of use of that facility -- it does not fall under the rental policies of an outside group -- then the principal or the school administration, however they are structured to handle this kind of a question, will have to make a determination. That determination would be whether it has a nondisruptive character, and does not violate or interfere with the discipline or the instructional time of the school. If they can demonstrate that it does comply with all of that, then the principal would be empowered by the school board, I assume -- I do not think I know of any school board that would want to rule on each such case -- to make a decision.
>
> Now, if there is included among the so-called political-action groups the Senator recites a group which attempts to advance the cause that discriminates against another person's religion, or race, national origin, or whatever, do not forget there is an equal-protection clause of the 14th amendment that has to be considered as a safeguard against those possible abuses of this freedom about which we are talking.

This last comment may have been a reference to § 1(d)(7) of the Act which states that the Act does not entitle school officials to "abridge the constitutional rights of any person." However, Tinker v. Des Moines School District, 393 U.S. 503 (1969), imposes important limitations on the ability of school officials to control political speech.

TESTIMONY OF RABBI SEYMOUR SIEGEL, RALPH SIMON PROFESSOR OF ETHICS AND THEOLOGY, THE JEWISH THEOLOGICAL SEMINARY OF AMERICA.

My name is Seymour Siegel. I am an ordained rabbi. I have served as Professor of Ethics and Theology at the Jewish Theological Seminary of America for the past twenty years. I have written extensively on questions of bioethics.

I wish to express my viewpoint as the Judaic position on 1)the status of the human foetus and 2) the relationship between the issues before this committee and the First Amendment guarantees concerning the prohibition of the establishment of a religion and the non-permissability of the abridgement of the free exercise of religion.

Before making my statement let me observe that Judaism is a non-hierachal religion. There is no <u>one</u> supreme authority or any <u>one</u> body who can claim to express <u>the</u> view of Jewish faith. Rabbis and scholars are the religious authorities. They interpret precedents and principles in the light of their own understanding. The scholarship and strength of their logic win for them acceptance and authority. Therefore, there can be differening interpretations of Jewish teachings which stem from different understandings of sacred texts.

Judaism, like other high religions, is pro-life. It stresses time and again through precept and precedent the inestimable value of human life. The concern for life extends even to non-human life. We are forbidden to cause <u>tsaar galey chayim,</u> suffering of any being which possesses life. Life is seen as a gift of the Creator. This is especially true of human life which is the foundation of those created in God's image. The Torah, a Hebrew term for the teachings of Judaism is a <u>Torat Chayyim</u>, a Torah of

life. Judaism has a bias for life.

What is the status of the foetus? They are in Jewish tradition, possessed of life. The Talmud and the rabbinic writings frequently speak of the ubar b'mey imo , the foetus in the womb as praising God, even discussing questions of religious faith. These are, of course, poetic images not to be taken literally--but they do reflect the attitude that entity growing in the mother's womb has life, and therefore value. A most stdriking phrase in found in the Zohar, the principal book of Jewish mysticism, "He who causes the fetus to be destroyed in the womb, destroys the artifice of the Holy One, blessed be He and His workmanship ...for these abmominations the Spirit of Holiness weeps.

It is in Jewish law that one finds normative doctrine in regard to action.

In formulating the principles of Jewish law, the rabbis see the responsibilities in two phases. One is the universal law applicable to all men. This is akin the doctrine of natural law in Western thought. It is called the Laws of the Sons of Noah. Noahide laws specifically enjoins the destroying of fetal life (Sanhedrin 57b) on the basis of Genesis 9:6.

In discussing the laws flowing from the special covenant made with the Children of Israel, it is clearas has been summarized by a distinguished authority, Rabbi David Bleich

> Judaism regards all forms of human life as sacred, from the formation of germ plasm in the cell of the sperm until the decomposition of the body after death....fetal life is regarded as precious and may not be destroyed wantonly. (Contemporary Halakhic Problem,Ktav, p.326)

In Jewish discussions, the problem of abortion is seen in the context of the "law of the aggressor" (rodef). This is an aspect of the law of self-defense. When an aggressor "pursues" an intended victim, the latter has the right to defend himself. If the aggression threatens

the life of the "pursued", then it is permitted to kill the "pursuer" in self-defense. If the nature of the aggression is not life threatening, then the measures taken would not morally be justified if they took the very life of the rodef. Therefore, in cases where the woman is having extreme difficult in giving birth and her life is being threatened, talmudic law permits abortion. The Talmud states: "for her (the mother's) life has priority over the life of the foetus." (see Maimoonides, HIlkhot Roteach 1:9 and Schulchan Arukh, Hoshen Mishpat 425:2) Therefore, it is clearly inferred that where there is no threat to the mother's life abortion is not permitted (Bleich, op.cit. p.327). This is because the "pursuer" does not pose a threat serious enough to kill the life bearing the threat.. Rashi, the greatest of talmudic exegets explains the justification for therepeutic abortion in a different way: " As long as the foetus has not emerged from the womb, lav nefesh hu . It is not a full human life." The implication of Rashi's viewpoint is that the foetus, though possessing human characteristics and attributes is not "human" to the same degree that themother. His viewpoint would not, in any way, sanction abortions for less than the most serious cause, that is, the threat to themother's life. There is a differace of opinion among the many authorities dealing with the question of abortion if the foetus can be sacrificed where the threat of the "aggressor" foetus is less than death to the mother:for example, if she is suFFERIng from terminal cancer or is in severe pain. Rabbi Bleich in the source quotes gives the contending opinions. In the process of deciding, legal authoritie interpreting Jewish law, are free to choose which authority they will follow. It is clear, however, that those who wish to understand Jewish ethical teaching as

protecting the human-ness of fetal life have strong support from the traditional authorities,

The viewpoint of traditional Judaism, as I see it, therefore can be summarized in the following way:

1. The foetus possesses a human dimension. It is human life on the way.

2. As life it is entitled to benefit from our "bias for life" to be protected from harm and certainly being killed.

3. It is only when it poses a severe threat to another life as in the cases cited in the Talmud, is it morally justified to terminate its life since it is a rodef, an aggressor.

II.

The argument that the passing of legislation severely restricting access to abortion would be a violation of the free exercise clause of the Constitution, seems tome to be unjustified.

If we were to posit the notion that legal judgments based on religious principles are unconstitutional, we would have to eliminate most of our legal structure. As Professor Hadley Arkes wrote in the current issue of the Wilson Quarterly, it is wrong to believe that you cannot legislate morality. The fact of the matter is that it is only morality that we legislate. Our laws and court decisions are concretizations of our moral outlook. We believe that ultimately morality has as its foundation religious belief. Therefore, in effect, we are expressing our faith committments in all the legislation which we support.

Furthermore, the history of the United States presents several examples where religious beliefs which are counter to the consensus of of our civilization are not justified merely because they are held by various faith communities. The most obvious example of this is the prohibition against polygamy in spite of the fact that a large and influential religious group sanctions it.

Religious beliefs may be held; they may be furthered; they may be preached and spread , whatever they may be. Actions are the subject of legislative and judicial decisions. If it is decided that abortions are against the public good, disturb public order and outrage public morality, they can be prohibited and limited despite the fact tha some religious groups believe that killing the foetus is justified or even mandated.

It should be the policy of the United States to further life, to enhance it, and protect it. We should allbe cognizant of the bias for life which is part of our civiliaation. We should also recognize the fact that our responsibilities are not fulfilled merely by protecting fetal life. We must revere and help life after it is is born as well. That means that special services and facilities must be provided for those who give birth, especially under trying circumstances. Our bias for life should be evident in actions designed to assist our fellow men and women to live their slives and especially to care for those whose life result from the partnership--as the Talmud puts it--of God, man and woman.

We should heed the ancient admonition: Choose life!

School prayer
Silent prayer

NEWS FROM THE COMMITTEE

ajc THE AMERICAN JEWISH COMMITTEE Institute of Human Relations, 165 E. 56 St., New York, N.Y. 10022, (212) 751-4000

The American Jewish Committee, founded in 1906, is the pioneer human-relations agency in the United States. It protects the civil and religious rights of Jews here and abroad, and advances the cause of improved human relations for all people.

MORTON YARMON, Director of Public Relations

Church
State

FOR IMMEDIATE RELEASE

NEW YORK, July 27....The American Jewish Committee today expressed strong opposition to the provision passed yesterday in the House of Representatives denying public schools the right to prohibit silent prayer.

In a statement issued by Dr. David M. Gordis, AJC Executive Vice President, the human relations agency also said it believed that a formal period of silence "constitutes a devotional exercise that circumvents the Constitutional prohibition against Government-sponsored prayer in public schools."

Pointing out that the provision was passed "with unseemly haste...in a surprise amendment to a broader educational bill" -- and was, moreover, passed the day after approval of equal-access legislation -- Dr. Gordis said: "This action creates a troubled atmosphere that will signal to many Americans that this week was not a good one in Congress for supporters of the Constitutional separation of church and state."

The complete text of Dr. Gordis's statement follows:

"The American Jewish Committee strongly opposes the provision passed yesterday by the House of Representatives denying public schools the right to prohibit silent prayer.

"Since any person in a public school today is perfectly free to pray silently any time the spirit moves him to do so, this provision is totally unecessary.

"As far as a formal period of silence is concerned, we believe this constitutes a devotional exercise that circumvents the Constitutional prohibition against Government-sponsored prayer in public schools.

"The unseemly haste with which this action was taken in a surprise amendment to a broader educational bill, when coupled with yesterday's rapid passage of Equal Access legislation, creates a troubled atmosphere that will send a signal to many Americans that this week was not a good one in Congress for supporters of the Constitutional separation of church and state.

"The issue is, in any event, now before the U.S. Supreme Court, which has agreed to review the Alabama moment-of-silence statute that was struck down as unconstitutional by the U.S. Court of Appeals for the 11th Circuit in the case of Wallace v. Jaffree.

"We hope that the House's hasty action may still be corrected in the Senate. We urge the Senate to reject the silent prayer provision as passed by the House."

84-960-314
A, EJP, REL, Z

Howard I. Friedman, President; Theodore Ellenoff, Chairman, Board of Governors; Alfred H. Moses, Chairman, National Executive Council; Robert S. Jacobs, Chairman, Board of Trustees.
David M. Gordis, Executive Vice-President
Washington Office, 2027 Massachusetts Ave., N.W., Washington, D.C. 20036 • Europe hq.: 4 Rue de la Bienfaisance, 75008 Paris, France • Israel hq.: 9 Ethiopia St., Jerusalem 95149, Israel
South America hq. (temporary office): 165 E. 56 St., New York, N.Y. 10022 • Mexico-Central America hq.: Av. Ejercito Nacional 533, Mexico 5, D.F.

CSAE 1707

NEWS FROM THE COMMITTEE

ajc THE AMERICAN JEWISH COMMITTEE Institute of Human Relations, 165 E. 56 St., New York, N.Y. 10022, (212) 751-4000

The American Jewish Committee, founded in 1906, is the pioneer human-relations agency in the United States. It protects the civil and religious rights of Jews here and abroad, and advances the cause of improved human relations for all people.

MORTON YARMON, Director of Public Relations

FOR IMMEDIATE RELEASE

NEW YORK, March 14...The American Jewish Committee today declared that while it shared the concern of many Americans of all faiths about "the breakdown of values and the deterioration of morality in our country," it emphatically opposed all proposed constitutional amendments to allow prayer in public schools as dangerous and divisive tampering with the First Amendment protections of religious liberty.

In a statement by its President, Howard I. Friedman, the human relations agency argued that voluntary prayer was not prohibited by the U.S. Constitution or by Supreme Court rulings, adding that "any student is and, indeed, should be perfectly free to pray on his or her own, silently or orally, at any time in the school day provided the praying does not disrupt educational activities."

However, Mr. Friedman's statement continued, "organized group prayer led by a teacher or student can never be truly voluntary. To an impressionable young student subject to compulsory attendance in a state-controlled environment, and guided intensely by peer pressure, no part of school routine is voluntary. Students who do not wish to listen to a prayer must suffer in conspicuous silence or be isolated or stigmatized as 'different' if they feel compelled to leave the room while praying is occurring."

As for morality concerns in the U.S., the AJC statement added that "we do not believe that these problems can be cured merely by daily rote repetition."

Instead, it went on, "we strongly support the teaching of common core values — such as honesty, decency, compassion, patriotism, reverence, and respect for the rights, freedoms and feelings of others — that are broadly shared by people of all denominations or none."

Mr. Friedman pointed to the three Constitutional amendments, one supported

...more

Howard I. Friedman, President; Theodore Ellenoff, Chairman, Board of Governors; Alfred H. Moses, Chairman, National Executive Council; Robert S. Jacobs, Chairman, Board of Trust
William S. Trosten, Acting Director
Washington Office, 2027 Massachusetts Ave., N.W., Washington, D.C. 20036 • Europe hq.: 4 Rue de la Bienfaisance, 75008 Paris, France • Israel hq.: 9 Ethiopia St., Jerusalem 95149, Israe
South America hq. (temporary office): 165 E. 56 St., New York, N.Y. 10022 • Mexico-Central America hq.: Av. Ejercito Nacional 533, Mexico 5, D.F.

CSA

by President Reagan, that have been introduced into Congress to permit organized prayer in the public schools. He added:

"The clear intent of the proposed constitutional amendments is to encourage state and local governments to organize prayer sessions as a part of their regular class scheduling. Even a 'silent prayer' amendment would allow the state to set aside time during the school day for group religious observance."

The AJC statement offered other points in developing its opposition to school prayer:

* "There is great potential for state entanglement in developing procedures for selecting daily prayers in an orderly fashion."

*"A high potential for divisiveness exists when students may wish to offer vocal prayers fully consistent with their own beliefs and those of their families, but which are considered theologically offensive or even blasphemous by others."

* "Any official theologically neutral prayer is likely to be spiritually bland, trivial and meaningless."

* "We reject the claim that by not allowing government sponsored prayer, the nation is expressing hostility toward prayer or religion. Rather, it is merely being vigorously neutral so as to avoid the repetition of religious intolerance and persecution where governments have attempted to impose majority sectarian activities upon all of its citizens."

* "We also reject emotional appeals to tamper with the Constitution for partisan political ends. The First Amendment and Supreme Court decisions have wisely and sensitively built a delicate balance between church and state in this country by blocking unnecessary government interference with freedom of worship."

America's strength lies in its pluralism, with its "deep and abiding respect for the rights of its diverse and unique population," he added. "The very purpose of the Bill of Rights was to recognize the rights of the minorities within our society and to protect them from tyranny by the majority.

"Spiritual nurturing belongs in churches, synagogues, religious schools and homes, where people are and should be free to pray according to the precepts of their own distinctive faiths. It is simply not the function of public schools which are government institutions supported by taxes paid by Americans of all faiths -- and those who profess no faith -- to sponsor religious activities or to support or advance any or all religions."

...more

The full text of Mr. Friedman's statement follows:

"The American Jewish Committee has a long-standing policy opposing prayer in the public schools. In our 1979 Statement of Views on Religion and Public Education, we declared that '[o]rganized prayer, whether spoken or silent, constitutes an act of worship and has no place in public school classroom or assembly. ...[I]n the United States it is not the business of government either to compose or to sponsor prayers for children to recite.

"This position was based upon the firm conviction that strict separation of religion and govenment offers the best guarantee of religious freedom for all. It was because of confidence in this belief that our Founding Fathers, in painful awareness of the history of religious conflict and persecution of minority sects, both in Europe and in the American colonies, wrote into the First Amendment to the U.S. Constitution the No-Establishment Clause (as well as the Free Exercise Clause). We have consistently supported this position through participation in court cases and submission of Congressional testimony when this principle has been at issue.

"Three proposed constitutional amendments, one actively supported by President Reagan, have been introduced in Congress to permit organized prayer activities in the public schools. The clear intent of the proposed constitutional amendments is to encourage state and local governments to organize prayer sessions as part of their regular class scheduling. Even a 'silent prayer' amendment would allow the state to set aside time during the school day for group religious observance. In light of these proposed amendments, AJC deems it imperative to reaffirm emphatically its opposition to state sponsored prayer activities in the public schools.

"We, too, share the concern of many Americans of all faiths about the breakdown of values and the deterioration of morality in our country. However, we do not believe that these problems can be cured merely by daily rote repetition. Instead, we strongly support the teaching of common core values — such as honesty, decency, compassion, patriotism, reverence and respect for the rights, freedoms and feelings of others — that are broadly shared by people of all denominations and none.

"All the First Amendment mandates — and the Supreme Court has reiterated — is that the public schools may not direct, sponsor or organize official prayer during the school day or provide publicly supported school property for organized prayer. Neither the Constitution, nor Supreme Court interpretations of the Constitution, prohibit voluntary prayer by any student. Any student is and, indeed, should be prefectly free to pray on his or her own, silently or orally, at any time in the school day provided the praying does not disrupt educational activities. Any constitutional amendment to permit this right would be superfluous. However, organized prayer led by a teacher or student can never truly be voluntary. To an impressionable young student subject to compulsory attendance in a state-controlled environment, and guided intensely by peer pressure, no part of the school routine is voluntary. Students who do not wish to listen to a prayer must suffer in conspicuous silence or be isolated or stigmatized as 'different' if they feel compelled to leave the room in which praying is occurring.

"Furthermore, there is great potential for state entanglement in developing procedures for selecting daily prayers in an orderly fashion. A high potential for divisiveness exists where students may wish to offer vocal prayers fully consistent with their own beliefs and those of their families, but which are considered theologically offensive or even blasphemous by others. Yet, any official theologically neutral prayer is likely to be spiritually bland, trivial and meaningless.

"We reject the claim that by not allowing government sponsored prayer, the nation is expressing hostility toward prayer or religion. Rather, it is merely being vigorously neutral so as to avoid the repetition of religious intolerance and persecution where governments have attempts to impose majority sectarian activities upon all of its citizens.

"We also reject emotional appeals to tamper with the Constitution for partisan political ends. The First Amendment and Supreme Court decisions have wisely and sensitively built a delicate balance between church and state in this country by blocking unnecessary government interference with freedom of worship.

...more

"America's strength lies in its pluralistic nature, with its deep and abiding respect for the rights of its diverse and unique population. The very purpose of the Bill of Rights was to recognize the rights of the minorities within our society and to protect them from tyranny by the majority.

"Spiritual nurturing belongs in churches, synagogues, religious schools and homes, where people are and should be free to pray according to the precepts of their own distinctive faiths. It is simply not the function of public schools which are government institutions supported by taxes paid by Americans of all faiths — and those who profess no faith — to sponsor religious activities or to support or advance any or all religions."

The American Jewish Committee is this country's pioneer human relations organization. Founded in 1906, it combats bigotry, protects the civil and religious rights of people here and abroad, and advances the cause of improved human relations for all people everywhere.

* * * * * *

#84-960-111
A, EJP, REL, COL, CP, PP, Z
RTV-EP, ED, ED-L, JN-L, N, R, TS, W
V082-PEI/cpa

...more

STATEMENT

OF

JOEL H. LEVY

1985 Public Comments on
Christmas Pageant of Peace

on behalf of the

AMERICAN JEWISH CONGRESS

NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

and the

SYNAGOGUE COUNCIL OF AMERICA

BEFORE THE NATIONAL PARK SERVICE

November 1, 1985

AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, NY 10028

On behalf of the American Jewish Congress, whose Governing Council I co-chair, the National Jewish Community Relations Advisory Council, and the Synagogue Council of America, I urge that a creche not be included as a part of the annual Christmas Pageant for Peace. Whether or not it is constitutionally permissible to include a creche (or the religious symbol of any other faith) in the Pageant, its inclusion certainly is not constitutionally required.

However much some may regret it, the fact is that the inclusion of a creche in this publicly sponsored event is divisive. Moreover, as last year's hearing record before this body demonstrates, the effort to have the creche included as an official part of the pageant is nothing less than an attempt to enlist the imprimatur of government for the display's message, and should for that reason be rejected.

On either ground, it would be wise for the Park Service to exclude any and all officially sponsored religious symbols from any occasion sponsored by it. For some Americans who are not Christians -- American Jews, Moslems, Hindus and Buddhists - the inclusion of the creche in the pageant is perceived as an indication that they are, at least to this extent, less than fully equal. For some Christians, inclusion of a creche in a secular Christmas pageant borders on sacrilege.

I.

The American Jewish Congress is a membership organization which has as its purpose the preservation of the civil and constitutional

rights of American Jews. It has a particular concern with the separation of church and state, because that principle is essential to the vitality of Jewish life in a country in which Jews constitute a small minority.

The National Jewish Community Relations Advisory Council (NJCRAC) and its member agencies -- American Jewish Committee, American Jewish Congress, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations in America, United Synagogue of America, Women's American ORT, Women's League for Conservative Judaism -- and the 113 local Jewish community relations councils (including the Jewish Community Council of Greater Washington), representing all of the major Jewish communities in the United States, are likewise dedicated to the well-being and security of American Jews.

The Synagogue Council of America is a co-ordinating body consisting of the organization representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of: Central Conference of American Rabbis, representing the Reform rabbinate; Rabbinical Assembly, representing the Conservative rabbinate; Rabbinical Council of America, representing the Orthodox rabbinate; Union of American Hebrew Congregations, representing the Reform congregations, Union of Orthodox Jewish Congregations of

America, representing the Orthodox congregations, United Synagogue of America, representing the Conservative congregations.

The American Jewish Congress, NJCRAC and its constituent agencies, and the Synagogue Council, have long opposed on both policy and constitutional grounds, the placement of religious symbols on public property. Indeed, in 1970 I filed an amicus curiae brief on behalf of the American Jewish Congress in Allen v. Hickel, 424 F.2d 944 (D.C.Cir. 1970), urging that the inclusion of the creche in the Pageant was unconstitutional.

Last year's Supreme Court decision in Lynch v. Donnelly, 104 S.Ct. 1355 (1984), upholding the inclusion of a creche in a municipal Christmas display, did not endorse certain of the constitutional arguments AJCongress, NJCRAC, and the Synagogue Council have made over the years against the inclusion of religious symbols in publicly sponsored Christmas pageants. Nevertheless, the decision by no means settled all the legal issues raised in connection with the display of religious symbols by public authorities. Unlike the Pageant, for example, the Pawtucket creche stood on private, not public, land. And Lynch did not decide whether creches standing alone, not enveloped in a secular context, are constitutional, compare Levin v. City of Birmingham, 588 F. Supp. 1337 (E.D. Mich 1984), appeal pending (6th Cir. 1985) and Burelle v. City of Nashua, 599 F. Supp. 792 (D.N.H. 1984) with McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), aff'd by an

equally divided court, ___U.S.___(1985).

I do not propose to engage in a debate over how those questions should be answered. Surely, reasonable lawyers -- (I hesitate to say persons) -- can conclude that a government-sponsored creche -- or the religious symbol of any other faith -- can be included as part of the Pageant for Peace without violating the Establishment Clause, notwithstanding the District of Columbia Circuit's opinions in Allen v. Hickel, 424 F. 2d 944 (D.C.Cir. 1970) and Allen v. Morton, 495 F.2d 65 (D.C.Cir. 1973).

For present purposes, it is sufficient to note that whatever else Lynch held, it did not hold that goverment must sponsor creches or the religious symbols of any other faith.* The question before this body today, then, is not whether it is constitutional to allow the creche to be a part of the officially sponsored pageant. Rather, it is whether, as a matter of public policy, it ought to be included.

In answering this question, it is important to bear in mind the purposes of the Pageant and the reasons for the inclusion of the creche. The pageant was intended to mark the Christmas holiday and generate "good will among men." The creche was included because it "is part of a commemoration of the Nation's celebration of Christmas as a

* Lynch does not require governmental bodies to allow private parties to erect religious symbols on public property. Whether such permission must be granted in the case of a public forum, however, is a complicated question, McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), aff'd by an equally divided court, ___ U.S. ___ 1985).

national holiday, by depicting all the traditional aspects of our national history associated with Christmas."

That purpose is one which is inherently divisive, and one which excludes Americans who are not Christian and who reject, as do Jews, the religious symbolism of the creche. See, T. R. Mann, Religious Symbols In Public Places, Congress Monthly (April,1985) p. 3.

III.

Sensitive Americans, including many who believe that Lynch was correctly decided, have recognized the divisive effect of public displays of creches. Thus, shortly after the Lynch decision, Samuel Ericsson, then legal director of the Christian Legal Society (which supported the City in Lynch), noted that because of these divisive effects not every locality ought to sponsor a creche. James Kilpatrick, the conservative columnist, writing of last year's controversy, termed the inclusion of the creche "a poor idea." He recognized, as the Department of the Interior did not, that "the government has no business promoting the divinity of Jesus Christ." Last year, too, many Washington area religious leaders, Christian, Jewish and Moslem, urged that the creche not be made a part of the Christmas Pageant.

The group which pressed hardest last year for the inclusion of the creche in the Pageant did so not in spite of these divisive effects, but because of them. They sought to have this religious symbol wrapped in the mantle of government for the benefit they believe

would accrue to their religion by having government endorse its central tenet. It was not the religious message of the creche as such which they sought to have communicated; it was governmental endorsement of that message that was crucial.*

Those who spoke in favor of the creche at this hearing last year were, perhaps, blunter than most of those who seek to have the creche included in the Pageant. But whether intended or not, the inevitable effect of this display is to secure governmental approval for a particular religious message and for religion in general.

Lynch may well mean that the Park Service would not violate the Constitution by allowing that message to be sent. But what is constitutional is not necessarily wise or desirable, either for government or religion. (The Christian religious message is hardly advanced if it depends on governmental approval for its validity.) This is one of those instances where what is constitutional and what is sound public policy do not coincide.

The gap between law and policy is heightened because the creche is located in the national capital. If a creche, or the religious symbol of any other faith, is controversial and divisive, and hence inappropriate, on the local level, it is, a fortiori, inappropriate at the seat of national government. Washington, D. C., and the Ellipse in

---

* Indeed, that group went so far as to urge that only Christians had a right to use public land. The Park Service correctly -- and commendably -- rejected that suggestion out of hand.

particular, are sites of particular importance in American life. They are at the center of representative government. This city, together with the monuments, parks and governmental buildings which adorn it, are symbols of our common national aspirations. Hence, religious displays in this city, with all the divisiveness they inevitably bring with them, have a significance far beyond that of publicly sponsored religious symbols in other locations.

Different individuals come to the non-religious symbols found in the nation's capitol with different backgrounds. I have a different reaction to these patriotic, non-sectarian symbols than an unemployed ghetto youth. Those differences stem, however, from the subjective reactions and experiences of the viewer, not the design of the symbols. The symbols do not themselves suggest favoritism towards one or the other political, religious, or geographic interest. Neither does setting aside the Ellipse as a location for the exercise of the right to petition for redress of grievances.

A creche, or the religious symbol of any other faith, sponsored by government as part of a display on the Ellipse, is quite obviously a different matter. The different reactions of Jews, Catholics, Methodists, Southern Baptists, Hindus, Buddhists, Moslems and atheists to such displays are not purely subjective. They inhere in the very essence of the government display of this, or any other, religious symbol.

A government sponsored religious display necessarily suggests, as Justice O'Connor wrote in Lynch v. Donnelly, supra, that there are religious insiders and outsiders -- some whom are favored by government, and others who are disfavored. The very fact that Americans will perceive themselves as favored or disfavored is a catalyst for controversy, as the experience of hundreds of communities attests.* That sort of divisiveness hardly generates "good will towards men" -- the stated purpose of the pageant.

IV.

A decision to exclude the creche would in no way suppress religion. Creches can be and are placed on church and other private property. Such creches would be just as visible to passersby as governmentally sponsored ones. Because they are understood to be private expressions of religious belief, they would not give offense to Americans of different faiths. Moreover, they more fully respect the religious spirit which lies behind Christmas. Public religous displays -- that is, religious displays sponsored by government -- inevitably and inescapably detract from the religious message of the symbol.

In announcing last year's decision to sponsor the creche, a spokesperson for the Department of the Interior announced that the creche "is not meant, and shall not be taken, to either promote

* See Waldman, After Pawtucket: Religious Symbols on Public Land (AJCongress, 1985).

religious worship or profane the symbols of any religion." (How the Park Service intended to insure that an onlooker would not take the creche as an endorsement of any religion is not clear). Rather it was "intended to be reverential to the religious heritage aspect of Christmas. Reverence for one religious heritage or all religious heritage, however, is not a proper function of the federal government. It is not justification for the inclusion of the creche in the pageant.

V.

There is, to be sure, a practical problem -- last year's decision to once again include the creche as part of the Pageant. We recognize that a decision to eliminate the creche this year would attract a fair degree of attention, and would be construed by some as an attack on religion in general, and Christianity in particular. These attacks will generally take the form of suggestions that Christmas without Christ is a misrepresentation and distortion of that holiday.

For many years, from the time of the Morton decision until last year, the Pageant was presented to the public without a creche. We know of no complaints about this state of affairs, no calls for the discontinuation of the Pageant unless the creche were returned to it. Religion was not harmed, nor Christmas distorted. The feelings of non-Christians were fully respected by this policy.

We think the American public could be made to understand -- if not endorse -- a decision that, to avoid giving offense to Americans of different faiths, the National Park Service is not going to include a creche in the Pageant this year.

Marc D. Stern
of counsel
November, 1985