NJCRAC-85

NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL
443 PARK AVENUE SOUTH, NEW YORK, NEW YORK 10016 • 684-6950

Memo

12 June 1985

TO: Members of the Commission on Church-State and Interreligious Relationships

FROM: Barry Ungar, Chairman, and Helen Hoffman, Vice Chair

RE: Background Materials for June 23 Commission Meeting

As you are aware from our previous mailing, the Commission on Church-State and Interreligious Relationships will meet on Sunday, June 23, 1:30 - 4:30 pm, at the Conference Center of the UJA-Federation of New York, 130 East 59th Street (corner East 59th Street and Lexington Avenue), New York City.

Enclosed for your review are the following background materials:

I. Public Support of Religious Symbols

1. Summary of March 15 NJCRAC community survey of menorahs on public property.

2. Excerpt from April 12 NJCRAC memo on Supreme Court McCreary decision.

3. NJCRAC letter to JCRC of the Jewish Federation of Southern New Jersey on the menorah situation in Cherry Hill.

II. Recent and Upcoming Developments on Church-State Issues

1. June 5 NJCRAC memo on Wallace v. Jaffree silent-prayer case.

2. Text of S. J. Res. 2, proposed Constitutional amendment on "individual or group silent prayer," introduced by Sen. Orin Hatch (R-Ut).

3. An article, reproduced from the New York Times, June 9, 1985, on the Jaffree decision.

III. Strategic Approaches to "Equal Access."

A guide, Equal Access: What it Means to Your Schools, prepared by Marilyn Bravemen, Education Director, American Jewish Committee. (Guides on "equal access" prepared by the

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Anti-Defamation League of B'nai Brith and the American Jewish Congress have previously been circulated.)

IV. Question on Religious Affiliation in the 1990 Federal Census

1. An article, "Is it the Government's Business?" by Leo Pfeffer, formerly Special Counsel to the American Jewish Congress, reprinted from The Christian Century, 30 October 1957.

2. A 1966 memorandum on the Constitutional questions related to the religion question, prepared by Abraham H. Foxman, of the Anti-Defamation League of B'nai B'rith.

3. A background paper on the issue, prepared by Alvin Chenkin of the Council of Jewish Federations.

V. Women's American ORT Proposal on Major NJCRAC Initiative on Church-State

Presentation by Bea Forrest, National Vice President, Women's American ORT, to the NJCRAC Task Force on Domestic Concerns.

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MENORAHS ON PUBLIC PROPERTY: NJCRAC COMMUNITY RESPONSE

In response to a memo sent on March 15, 24 out of 41 communities that responded advised us that they have had problems related to menorahs on public property.

Dallas

A multi-agency-sponsored menorah was not placed at City Hall, a result of communicating our position and concerns to Events Chairman.

New York

Menorahs on a public street median in Lincoln Center area and in Central Park, both under Chabad/Lubavitch auspices; menorah placed at public monument in Riverdale, under auspices of local rabbi.

Pittsburgh

Lubavitch menorahs at City Hall and public library; negotiations continuing.

Southern New Jersey

Plan to donate a menorah, courtesy of local temple, to municipality; consultation is taking place at present time.

Madison, WI

Chabad/Lubavitch menorah, at State Capitol rotunda; negotiations with Governor continuing.

Washington, DC

Lafayette Park, by Lubavitch; representation fruitless to date.

Boston

Lubavitch menorah on Boston Common; no CRC response to date.

Bergen County, NJ

Public thoroughfare in Fort Lee; local rabbi who is involved in placement "enjoys the publicity"; CRC will take action this year.

Chicago

Civic Center Plaza, Lubavitch-sponsored. Chicago PAC issued press release and resolution. Lubavitch response: "We understand the PAC does not approve of our menorah but we really don't care what the PAC thinks."

Philadelphia

Lubavitch menorah on Independence Mall since 1976; CRC request to remove menorah to private property declined.

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Norfolk

Lubavitch menorah in public park in Virginia Beach; discussions held with Lubavitch to no avail.

Utica

State Office Building, placed by B'nai B'rith.

Orlando

City Hall of Winter Park. Placed by Mayor in response to a letter by a Jewish constituent.

Rochester

Public Library, Lubavitch; request that menorah be removed to private property denied.

Syracuse

Public area downtown, placed by Lubavitch.

Springfield

After creche was removed from City Hall at urging of coalition including Christian leadership, a menorah, under Lubavitch sponsorship, was placed at City Hall.

Seattle

Lubavitch-sponsored menorah in public square. Private discussions held with Lubavitch with no progress to date. Local ACLU may file complaint.

Worcester

Annual menorah placed by Chabad/Lubavitch. Community education strategies are being developed.

Tucson

Lubavitch-sponsored menorah last two years. No CRC response.

St. Louis

Lubavitch-sponsored menorah in the county government-center plaza past three years. Efforts to persuade county executive to refuse to permit menorah were fruitless.

New Brunswick, NJ

Lubavitch menorah at City Hall. No CRC response to date.

Los Angeles

Lubavitch menorah lit on City Hall steps first night of Chanukah. Calls from Jewish agencies on "informal basis" eliminated lighting on subsequent nights.

Portland, OR

Lubavitch menorah at city-owned courthouse square. CRC letter to courthouse square board of directors. No response to date.

Teaneck, NJ

Lubavitch menorah in front of town hall, supported by "many non-Lubavitch groups in the area."

Excerpt from April 2 NJCRAC
Memorandum on Supreme Court
Decision in McCreary v. Stone

Thus it appears that, for the time being, we cannot rely solely on legal sanctions to make our case in regard to challenging religious symbols on public property. What is required, as Theodore Mann asserted at the recent NJCRAC Plenary Session, is that we make our case based on the wisdom of sound public policy and its consequences on critical factors that go to the rationale of the separation of church and state. Thus, questions that might be raised are whether religious symbols signal state endorsement of religion; whether they foster community divisiveness; whether they signal to the community that there are those who are "insiders" and "outsiders;" whether they have a negative effect on religion itself; whether they project government into the area of belief. These and other key questions ought to be addressed in advocating our position to public officials and other appropriate parties.

We will be sending to you shortly a publication comprised of three presentations that present the issue in the terms we have outlined. Communities may find it useful to draw upon the arguments developed in these addresses, which were delivered by Theodore R. Mann, President of the American Jewish Congress; Albert D. Chernin, Executive Vice Chairman of the NJCRAC; and Michael Pelavin, Chairman of the NJCRAC Task Force on Domestic Concerns.

The question of community strategy in regard to placement of menorahs on public property was discussed at a meeting on March 25 of a subcommittee of the NJCRAC Commission on Church-State and Interreligious Relationships, under the chairmanship of H. William Shure of New Haven. Triggered by concerns raised at the Plenum, this discussion was preliminary to a fuller discussion by the Task Force on Domestic Concerns when it meets on April 30. The subcommittee did not address the question of litigation with regard to this issue which Ted Mann raised at the Plenum, since we were still awaiting at the time of the meeting, the Supreme Court decision in McCreary.

The subcommittee agreed that the ideal would be to dissuade those in the Jewish community from seeking to place menorahs on public property. If this goal is not attainable, it was felt that it is legitimate for the Jewish community involved to go to the public officials responsible for making decisions to urge them not to erect a menorah as a matter of sound public policy. To be effective in such a presentation means being able to convey overwhelming Jewish community opposition to such symbols on public property. The subcommittee recognized that this may not be true in many communities. Clearly some in the Jewish community, among the rank-and-file and even some leaders, do not view public-sector placement of menorahs as harmful; quite the contrary, they regard such placement as beneficial. Thus, it was felt that the Jewish community-relations field should initiate a major educational program within the Jewish community to interpret the rationale of our opposition to religious symbols including menorahs on public property in terms of Jewish self-interest.

These recommendations will be discussed further at the Domestic Task Force meeting on April 30, and we would welcome your views prior to that meeting.

National Jewish Community Relations Advisory Council

443 Park Avenue South, New York, N.Y. 10016 (212) 684-6950

May 7, 1985

Mark Jacobs, Esq.
President
Jewish Community Relations Council
Jewish Federation of Southern New Jersey
2393 W. Marlton Pike
Cherry Hill, NJ 08002

Dear Mark:

We were most distressed to learn of the proposal of a [redacted] in Cherry Hill to present a menorah to the municipality for lighting and placement together on public property with the Township Christmas tree. We reiterate the long-standing policy of the NJCRAC in opposition to the government sanction and support of religious symbols, including menorahs. It ought to be noted at the outset that our position regarding menorahs is a consensus one, advocated by and agreed to by all of our member agencies, consisting of eleven national Jewish organizations--including the congregational bodies of Orthodox, Conservative, and Reform Judaism--and 113 local community agencies reflecting the views and concerns of a broad spectrum of our constituency.

Our opposition to publicly-supported display of religious symbols, including creches and menorahs, arises not only from our view that such displays are violative of the principle of separation of church and state as articulated in the Establishment Clause of the First Amendment, but, even more important, on the wisdom of sound public and community policy and its consequences. We believe, for example, that placement of menorahs on public property is a source of potential divisiveness within the Jewish community. Moreover, such displays can engender divisiveness between Jews and their Christian neighbors, arising out of what we consider to be a fundamental misrepresentation of Chanukah as being equated with Christmas in terms of public perception. Moreover, in order for the Jewish community-relations field to maintain credibility in our position on religious symbols, our position must be a consistent one that includes all religious symbols.

From the legal viewpoint, even with the 4-4 deadlock in the recent U.S. Supreme Court McCreary v. Scarsdale case, the issue of religious symbols on public property has not been definitively resolved. You will recall that Justice Sandra Day O'Connor, in last year's Lynch v. Donnelly Rhode Island creche case, made judgments that could be invoked in a broad range of cases. She asserted that government endorsement of religion--any religion--"sends a message to non-adherents that they are outsiders, and not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

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We ask you, Mark, to urge Rabbi [redacted] and [redacted] to reconsider their decision of involvement in the public placement of a menorah, in light of the consensus position of the Jewish community and in further light of the harm that this action could bring to our community on this issue, and to consider other responsible alternatives, such as placement of the menorah on centrally-located private grounds.

Sincerely,

Matthew B. Weinberg
Chairman, NJCRAC Commission
on Church-State and
Interreligious Relationships

Michael Pelavin
Chairman, NJCRAC
Task Force on Domestic Concerns

MP, MBW,:bp

cc: Albert Vorspan, Union of American Hebrew Congregations
Rabbi Pinchas Stolper, Union of Orthodox Jewish Congregations of America
Rabbi Zachary Heller, United Synagogue of America

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Memo

5 June 1985

TO: NJCRAC Member Agencies

FROM: Barry Ungar, Chairman, NJCRAC Commission on Church-State and Interreligious Relationships
Michael Pelavin, Chairman, NJCRAC Task Force on Domestic Concerns

RE: Supreme Court Decision in Wallace v. Jaffree, Alabama Silent-Prayer Case

The Supreme Court's 6-3 decision yesterday in the case of Wallace v. Jaffree is most welcome. As you know, the Court ruled that an Alabama law that authorized a one-minute period of silence "for meditation or voluntary prayer" violates First-Amendment guarantees of the separation of church and state. This judgement reflects consultation with the legal staffs of the American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith; their initial reactions are reflected in this memo.

The NJCRAC Joint Program Plan has highlighted our concern over the utilization of "moment of silence" as a legal subterfuge to reintroduce prayer into the public schools. The NJCRAC and its member agencies have opposed such efforts, basing its opposition on the fears and expectations that "moment-of-silence" periods will be abused, and, either explicitly or through implicit pressure, may be converted into compulsory prayer periods. Additionally, it is our view that any "non-sectarian" ritual, by its nature, cheapens the coin of religion and undermined distinctive religious commitments, whether Jewish or Christian.

We view this decision as reaffirming the Supreme Court's traditional insistence, dating back to the 1962 Engle v. Vitale case, that, as noted by Justice Stevens in his majority opinion, "states are prohibited from authorizing prayer in public schools" and that "school prayer constitutes state involvement in the establishment of religion." The decision will require careful study in terms of its implications. To this end a committee of the NJCRAC, and the Commission on Church-State and Interreligious Relationships, will meet shortly to assess the implications of Jaffree. We will have to be especially alert to the introduction in the Congress of a Constitutional amendment on school prayer or other legislative subterfuge.

The Jaffree case was on appeal from the U.S.Court of Appeals for the 11th Circuit that had reversed a Federal District Court decision allowing the period of silence "for meditation or voluntary prayer." You will recall that, in this case, the District Court, in a preliminary ruling, invalidated sections of the Alabama statute that authorized vocal written prayer and a period of silence "for meditation or voluntary prayer," later holding these sections to be constitutional. The 11th Circuit Court of Appeals held these two sections of the Alabama statute to be unconstitutional. (A section of the law authorizing a period of silence "for meditation" was not challenged.)

Justice John Paul Stevens, in his majority opinion, held that the Alabama law is violative of the Establishment Clause of the First Amendment, in that it violated at least one prong--the "purpose" test--of the Supreme Court's "three-part test," in use since 1971. (You will recall that, in order to be constitutional, legislation or governmental activity must 1) have a secular purpose; 2) have an effect that neither advances nor inhibits religion; and 3) avoid excessive government entaglement with religion.)

Justice Stevens held that the purpose of the Alabama law was religious and not secular, and that such religious intent was impermissable. Citing the legislative history of the statute, Justice Stevens reported that the law's sponsor in the Alabama legislature stated that "the legislation was an effort to return voluntary prayer to the public schools," and that there was no "purpose for the legislation other than returning voluntary prayer to public schools."

Additionally, and more generally, Justice Stevens in his opinion addressed the question of the limitations on the States' power to legislate on First Amendment issues, or indeed on any other issues. In commenting on this question, Justice Stevens asserted that

> the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forstalling intolerance extends beyond intolerance among Christian sects--or even intolerance among "religions"--to encompass intolerance of the disbeliever and the uncertain.

Justice Sandra Day O'Connor, in a concurring opinion, suggested (as she did in the Lynch v. Donnelly Pawtucket, R.I., creche case) that religious liberty is infringed when government makes religious adherence relevant to a person's standing in the community. The Constitution, reiterated Justice O'Connor in Jaffree, does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the non-adherent. If the purpose of the statute was to return voluntary prayer to the classroom (as is clear from the legislative history), the message of such an endorsement--to encourage impressionable schoolchildren that prayer was the endorsed activity during the moment of silence--would clearly convey to those who do not conform that they are outsiders.

Left open by yesterday's decision is the question of states that have "moment-of-silence" laws. Twenty-five states have enacted such legislation; six of those states (other than Alabama) authorize prayer in one form or other. Jaffree would seem to indicate that if a state enacts a " moment-of-silence"

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statute with the purpose of encouraging prayer, it is violative of the Constitution. The decision would therefore appear to invalidate statutes in those states where either the statute or the legislative history indicates state-authorized prayer. The NJCRAC subcommittee and Commission will examine the full reach of the decision, and these judgements.

Enclosed are excerpts from the majority and concurring opinions in Jaffree. Available from the NJCRAC is a copy of the full text of the Supreme Court opinions in this case.

Please share with Jerome Chanes any statements that you may issue and editorial comment on this issue, and reports of any "moment-of-silence" activity in your State legislature or by any members of your Congressional delegations.

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Excerpts from Majority Opinion of Justice Stevens and Concurring Opinions of Justice Powell and O'Connor in Case of Wallace V. Jaffree

June 4, 1985

Justice Stevens for the Court

Our unanimous affirmance of the Court of Appeals' judgment concerning § 16–1–20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.[3] Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States.[4] But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.[5]

Writing for a unanimous Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), Justice Roberts explained:

> ". . . We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

Cantwell, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First Amendment.[8] Enlarging on this theme, THE CHIEF JUSTICE recently wrote:

> "We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, at 637.
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> . . . . .
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> "The Court in *Barnette*, *supra*, was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that 'a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority

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under powers committed to any political organization under our Constitution.' 319 U. S., at 636. Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' *Id.*, at 642." *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977).

Just as the right to speak and the right to refrain from speaking are complimentary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism.[8] But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[9] This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful,[10] and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.[11] As Justice Jackson eloquently stated in *Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States, must respect that basic truth.

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), we wrote:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz* [v. *Tax Commission*, 397 U. S. 664, 674 (1970)]."

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.[12] For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see, *e. g.*, *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 296–303 (1963) (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.[13]

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion."[14] In this case, the answer to that

question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16–1–20.1 was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.

Justice Powell, concurring

The first inquiry under *Lemon* is whether the challenged statute has a "secular legislative purpose." *Lemon* v. *Kurtzman*, *supra*, at 612 (1971). As JUSTICE O'CONNOR recognizes, this secular purpose must be "sincere"; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a "sham." *Post*, at 10 (O'CONNOR, J., concurring in the judgment). In *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*, for example, we held that a statute requiring the posting of the Ten Commandments in public schools violated the Establishment Clause, even though the Kentucky legislature asserted that its goal was educational. We have not interpreted the first prong of *Lemon*, *supra*, however, as requiring that a statute have "exclusively secular" objectives.' *Lynch* v. *Donnelley*, —— U. S. ——, —— n. 6. If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated. See, *e. g.*, *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970) (New York's property tax exemption for religious organizations upheld); *Everson* v. *Bd. of Education*, 330 U. S. 1 (1947) (holding that a township may reimburse parents for the cost of transporting their children to parochial schools).

The record before us, however, makes clear that Alabama's purpose was solely religious in character. Senator Donald Holmes, the sponsor of the bill that became Alabama Code § 16–1—20.1, freely acknowledged that the purpose of this statute was "to return voluntary prayer" to the public schools. See *ante*, at 18, n. 43. I agree with JUSTICE O'CONNOR that a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose. See *post*, at 11 (O'CONNOR, J., concurring in the judgment). But, as noted in the Court's opinion, the religious purpose of § 16–1—20.1 is manifested in other evidence, including the sequence and history of the three Alabama statutes. See *ante*, at 19.

Justice O'Connor, concurring

The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*, at ——. Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of Government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

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The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engle* v. *Vitale*, 370 U. S., at 431. At issue today is whether state moment of silence statutes in general, and Alabama's moment of silence statute in particular, embody an impermissible endorsement of prayer in public schools.

* * *

Relying on this Court's decisions disapproving vocal prayer and Bible reading in the public schools, see *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), *Engle* v. *Vitale*, *supra*, the courts that have struck down the moment of silence statutes generally conclude that their purpose and effect is to encourage prayer in public schools.

The *Engle* and *Abington* decisions are not dispositive on the constitutionality of moment of silence laws. In those cases, public school teachers and students led their classes in devotional exercises. In *Engle*, a New York statute required teachers to lead their classes in a vocal prayer. The Court concluded that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." 370 U. S., at 425. In *Abington*, the Court addressed Pennsylvania and Maryland statutes that authorized morning Bible readings in public schools. The Court reviewed the purpose and effect of the statutes, concluded that they required religious exercises, and therefore found them to violate the Establishment Clause. 374 U. S., at 223–224. Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her non-conformity. The decisions acknowledged the coercion implicit under the statutory schemes, see *Engle*, *supra*, at 431, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise.

A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, *supra*, at 281 (BRENNAN, J., concurring) ("[T]he observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government"); L. Tribe, American Constitutional Law § 14–6, p. 829 (1978); P. Freund, The Legal Issue, in Religion and the Public Schools 23 (1965); Choper, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich. L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period. Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 272, n. 11 (1981) ("by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there"). Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not.

* * *

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. ——, —— n. 1 (REHNQUIST, J., dissenting) (noting that questions whether fighting words are "likely to provoke the *average* person to retaliation," *Street* v. *New York*, 394 U. S. 576, 592 (1969), and whether allegedly obscene material appeals to "prurient interests," *Miller* v. *California*, 413 U. S. 15, 24 (1973), are mixed questions of law and fact that are properly subject to *de novo* appellate review). A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect. Alabama Code § 16–1–20.1 (Supp. 1984) does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. I accordingly agree with the Court of Appeals, 705 F. 2d 1526, 1535 (1983), that the Alabama statute has a purpose which is in violation of the Establishment Clause, and cannot be upheld.

* * *

The primary issue raised by JUSTICE REHNQUIST's dissent is whether the historical fact that our Presidents have long called for public prayers of Thanks should be dispositive on the constitutionality of prayer in public schools.[4] I think not. At the very least, Presidential proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. See, *e. g.*, *Marsh* v. *Chambers*, *supra*, at ——; *Tilton* v. *Richardson*, 403 U. S., at 686. Although history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here.

* * *

The solution to the conflict between the religion clauses lies not in "neutrality," but rather in identifying workable limits to the Government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues free exercise clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose

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when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *ante*, at ——, is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

While this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law. If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by Alabama Code § 16–1–20.1. No law prevents a student who is so inclined from praying silently in public schools. Moreover, state law already provided a moment of silence to these appellees irrespective of Alabama Code § 16–1–20.1. See Ala. Code § 16–1–20. Of course, the State might argue that § 16–1–20.1 protects not silent prayer, but rather group silent prayer under State sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama, but by the Establishment Clause as interpreted in *Engle* and *Abington*. In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself. I conclude that the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute.

1ST SESSION

S. J. RES. 2

Proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or reflection.

IN THE SENATE OF THE UNITED STATES

JANUARY 3, 1985

Mr. HATCH (for himself and Mr. DECONCINI) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or reflection.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE —

"Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.".

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Alabama's Moment of Silence Law Was Struck Down Last Week

The Court's New Line on Religion Isn't So New

By LINDA GREENHOUSE

WASHINGTON — The Supreme Court did more last week than strike down one state's effort to put prayer back in the public schools. In declaring unconstitutional Alabama's "moment of silence" statute, the Court signaled an unexpected about-face in its approach to the relationship between church and state. The principle that "government must pursue a course of complete neutrality toward religion" — less than prominent in recent Supreme Court opinions — emerged as the centerpiece of the analysis. Furthermore, the 6-to-3 majority placed firm restraints on the notion, dominant in recent rulings, that "accommodation" of religion is an appropriate, perhaps even necessary goal of Government policy.

As only the first of a string of religion cases that the Court is due to decide in the next four weeks, the decision provides no firm basis for predicting how the Justices will rule on such questions as public aid for parochial schools or favored treatment for religiously observant employees. But the cases were all argued within weeks of one another last winter, and it is unlikely that the words of the moment-of-silence decision, involving opinions by six Justices totaling 81 pages, were chosen without awareness of the other cases. In the long run, adherence to the framework that Associate Justice John Paul Stevens invoked for the majority last week could well prove more significant than the outcome of particular cases.

When the term began last October, it was widely assumed to be only a matter of time before the Court openly jettisoned its traditional approach to deciding when a governmental practice amounted to an unconstitutional "establishment" of religion. In the previous term, the Court had upheld the display of a municipally owned Nativity scene in a 5-to-4 opinion by Chief Justice Warren E. Burger that paid perfunctory attention to the Court's precedents in this area.

But last week, far from abandoning the traditional approach, the Court used the moment-of-silence case to strongly reaffirm what is usually called the "three-part test." Justice Stevens said the Court would continue to invalidate laws that: lack a secular purpose; have the primary effect of advancing or inhibiting religion; or foster an excessive entanglement of government with religion. The sponsor of the Alabama law testified that "I did not have no other purpose in mind" than to return prayer to the schools. Thus, the law failed the "secular purpose" test and was doomed.

'An Uphill Battle'

The Chief Justice called the result "bizarre" and "ridiculous," and the two other dissenters wrote separate opinions calling for a basic reconsideration of the Court's precedents. There was a loud negative reaction in Congress. Several Republican senators said they would renew the stalled drive for a constitutional amendment to permit organized prayer in the public schools.

The Reagan Administration strongly supports the amendment. Speaking in Birmingham, Ala. on Thursday, President Reagan urged Alabama's Congressional delegation to push for the prayer amendment, noting that "we still have an uphill battle before us."

Many State Laws Unaffected

The strong negative reaction slid by the fact that in practical terms, many of the 25 state laws permitting a moment-of-silence will be unaffected by the decision. The Court strongly suggested that it would uphold any such law that a state could plausibly defend as having a secular purpose. While Alabama made no effort to defend its law on anything other than religious grounds, other states are likely to accept the Court's invitation to portray their laws as bringing a momentary sense of order and repose to the classroom or as providing a time for private thoughts, religious or otherwise, with no endorsement of or favoritism toward prayer.

But it is apparent that the body count — how many laws are safe, how many are in danger — is beside the point to those who had looked to this decision as an opportunity for fundamental change. Their bitter disappointment is an acknowledgement that the battle, at least for now, seems lost. The scope of that defeat is measured most clearly by the Court's handling of the concept of "accommodation." In his Pawtucket crèche opinion, Chief Justice Burger wrote that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions."

The Reagan Administration seized the accommodation theme, entering the Alabama case with a friend-of-the-court brief that urged the Justices to rule that private religious practices should be accommodated in, rather than "extirpated from" the public schools. But in his opinion last week, Justice Stevens took the unusual step of directly refuting the Government's brief. "There is no basis," he said, for the argument that the Alabama law was an appropriate means of accommodating religion, and that even without the law there was nothing to stop Alabama students from offering silent prayers; consequently there was nothing to "accommodate."

Associate Justice Sandra Day O'Connor made the point even more forcefully in a concurring opinion. She said that while "any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights," that approach "would completely vitiate the Establishment Clause." The accommodation concept makes sense, Justice O'Connor said, only when the Government is lifting a burden that Government itself has placed on religious exercise. She said the prohibition against organized prayer in the schools was a burden placed on religion not by the Government but by the Constitution; a state law lifting that burden "accordingly cannot properly be viewed as an accommodation statute."

The distinction is one of essence, not merely nuance. It is likely to be critically important as the constitutional debate goes on.

AMERICAN JEWISH COMMITTEE

NATIONAL AFFAIRS COMMISSION

"EQUAL ACCESS"

WHAT IT MEANS TO YOUR SCHOOLS

I - Background

The "Equal Access Act," signed into law in August 1984, applies to public secondary schools that receive federal financial funding and provide a "limited open forum," i.e., they permit non-curriculum related student groups to meet on school premises during non-instructional periods. Under these circumstances, schools must give "equal access" to all student groups to meet. More specifically, under the Act they may not deny other students a fair opportunity to meet because of the "religious, political, philosophical or other content of the speech at such meetings." If a school does not provide a limited open forum, "equal access" is not triggered.

The American Jewish Committee opposes "Equal Access" because it is part of the move to bring religious practices into the public schools, has potential for provoking intergroup and community hostility, and for dividing students and the community along religious lines.

Implementation of the Act is uncharted territory for school boards and administrators. The intent of Congress is not always clear and there are no federal guidelines. The language is often ambiguous and some provisions appear inconsistent with others.

Many school boards are now struggling with the need to decide how to handle "equal access." Others are not willing to deal with its problems and have taken the option to eliminate all non-curriculum related activities even though their vital role in the educational process is recognized. Still others hope the issue will never arise in their districts and have not given it serious thought.

Our study of more than half a school year of experience with "equal access" makes it clear that it will continue to present educational and community relation problems. But we believe it is

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possible for school boards, administrators and coalitions of civic, ethnic, religious, racial and parent groups to come to grips with the issue and develop school policies that may be least destructive to education and to the life of the community.

This guide is written to help in the process. It is based on over half a year of schools experiences with "equal access," an AJC survey of school practices, and consultation with school boards, parents and school administrators. In addition to the Congressional record and media reports, the source material includes the legal analyses prepared by the American Association of School Administrators, the advice of AJC's Legal Director, Samuel Rabinove and others. The guide describes provisions of the Act, notes where there are differing interpretations, discusses their implications, and gives examples of how school districts have responded.

Marilyn Braveman
Director of Education
National Affairs Commission
American Jewish Committee

March 1985

II - DESCRIPTION OF PROVISIONS AND DISCUSSION OF THE ISSUES.

A. *The "Equal Access" law affects public secondary schools which receive federal financial assistance and which provide a limited open forum, i.e., they permit non-curriculum related groups to meet on school premises during non-instructional periods.*

DESCRIPTION	*DISCUSSION*
1) The definition of secondary school is determined by each state's law. Most, though not all, states consider that secondary education begins in seventh grade.	1) The intent of Congress appears to be to limit "equal access" to high school grades. But in practice, impressionable children as young as 11 or 12 years old can be exposed to outside influences on school premises with minimum school control. In Georgia, where state laws permit flexibility, one county decided that eighth graders housed in secondary schools will be specifically excluded from "equal access." School authorities recognize that this can cause tensions among students and that other provisions of the Act relating to school sponsorship may make it impossible to enforce. Nevertheless, they believe this is their least harmful choice.

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DESCRIPTION

2) The definition of a non-curriculum related group appears to be left for determination by local school authorities. In the past, activities such as athletics and cheerleading, language and math clubs, etc., have generally been considered curriculum related, while chess clubs, service organizations, political clubs, etc., have not.

DISCUSSION

2) There is no broad consensus on which groups are or are not curriculum related. Most schools have not developed a systematic process of making this determination because, in the past, it was not critical to do so. A Seattle, Washington school Administrator and the Saddleback Unified School District in California state that their schools do not provide a limited open forum because all clubs, including service clubs, are related to curriculum objectives and can be considered "co-curricula." But neighboring school district San Juan Capistrano, took a different view and ended its schools' limited open forum effectively banning about eight clubs which they dubbed non-curriculum related. In the aftermath of community conflict, the Boulder, Colorado School Board also closed down its limited open forum.

3) Non-instructional time is defined as time set aside before actual classroom instruction begins or after it ends.

3) There are two possible interpretations of this provision. The majority opinion during the Congressional debate appears to define non-instructional time as the period in the morning before school begins and in the afternoon after school ends. But some sponsors meant non-instructional time to include periods during the school day when students were not in class, including lunch-time, study-hall, etc. In Maryland, the State Attorney General defines non-instructional time as "free time," including lunch hour.

In the Saddleback, California School District the School Board changed a practice which permitted students to hold prayer meetings during lunchtime and limited them to times before and after the school day. In response, proponents of lunchtime "equal access" have demanded that all other student clubs be similarly banned. It appears that the law would not require this action.

Another problem is that many secondary school students in all parts of the country have different hours. Their time before and after the school day takes place during the instructional periods of other students. Thus, under "equal access" there is the possibility that religious clubs and others not subject to school standards could meet during the school day and at the same time that other students are in class.

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The dilemma is that, in these cases, schools might have to adopt strict attendance and supervisory regulations which run counter to other requirements of the law, discussed below.

B. *At schools which permit non-curriculum related groups to meet, "equal access" is triggered when a student or group of students request permission to meet. The following conditions apply:*

DESCRIPTION	*DISCUSSION*
1) The meetings are voluntary and student initiated.	1) A key to "equal access" is that only a student or students can request permission to meet. The meetings then must be student-led. A school cannot refuse a group permission to meet because school officials or other students do not like the content of the meeting, because a group may advocate changes in existing law or discuss controversial social issues or because school officials suspect that adults or outside groups have encouraged students to request meetings. Nor can it deny permission to students, including cult members, to meet for religious purposes. Schools can refuse permission to groups that are illegal or that materially interfere with the orderly conduct of educational activities.

But administrators may not make arbitrary speculative decisions. A group cannot be barred at one school because a similar group at another school has caused problems. The school can refuse permission only if that group actually is engaged in or plans unlawful activities.

Schools may make rules concerning the time and place of meetings. These rules must be reasonable and non-discriminatory.

2) Non-school persons may not direct, conduct, control or regularly attend activities of student groups.

2) Schools retain the right to develop regulations covering the conditions under which outsiders may attend meetings. They must also monitor the number and frequency of outside guests.

3) Schools must not sponsor "equal access" meetings. Sponsorship is defined as "the act of promoting, leading or participating in a meeting."

3) The assignment of a teacher to a meeting ordinarily does not constitute sponsorship, at least where the teacher's function is custodial. In fact, teachers are commonly required to be present at student meetings because of insurance requirements, local policy or state law.

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The requirement of non-participation" can create serious problems for teachers who take seriously their responsibility to guide young people and make their participation in clubs a meaningful educational experience.

It is doubtful that Congress intended to prohibit teacher participation in non-religious student meetings. But many school districts have interpreted the Act to mean that school-assigned personnel must not participate actively in any non-curriculum related meetings.

Two districts have developed an educationally questionable response to the issue of supervision. A Long Island, New York School Board is considering whether or not to appoint the school custodian as its agent responsible for "equal access" meetings. In Fulton County, Georgia, meetings may be conducted before or after regular school day hours, but "must be held during the time regularly scheduled for school custodians."

4) Schools are not required to expend more than the incidental cost of providing the space for student-initiated meetings.

4) Congress appears to include payment for a school employee to monitor a group as an "incidental cost." School administrators do not agree. Several

analysts argue that it would violate the U. S. Constitution for a school to spend any money for a student religious meeting.

In Portland, Oregon, the school district believes that a school agent cannot be paid for his or her time. The teachers' union will not permit teachers to monitor or supervise meetings without payment. In addition, it requires students to find their own advisor. This creates the possibility that groups that are small or have unpopular ideas will not be able to meet because they cannot find one.

5) The Act does not address the issue of whether or not the use of school media to announce meetings is considered sponsorship.

5) If the public address system, the school paper, bulletin boards, etc., are generally used to announce student meetings, it may be that using them to announce "equal access" meetings is not considered school sponsorship. However, one major proponent of the Act argued that even a simple announcement of a meeting by a teacher would constitute sponsorship.

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6) A school is not authorized to "limit the rights of groups of students which are not of a specified numerical size."	6) This provision was included to guarantee the rights of students who are in the minority in a school. It apparently also means that a school could not set maximum limits unless the meetings are so large that they become unruly. Nevertheless several school districts give principals the power to set maximum limits in advance of meetings because of Fire Marshall regulations.
7) The Act does not address the issue of whether or not clubs must have an "open admissions" policy.	7) Whether or not each meeting must be open to all students without regard to race, gender, or national origin is an open constitutional question. It appears that religious groups may be permitted to exclude those with a different belief system.

C. *There are special provisions regarding meetings of student religious groups which create additional considerations.*

DESCRIPTION	DISCUSSION
1) There must be no attempt by a school "to influence the form or content of any prayer or religious activity."	1), 2), and 3) These provisions are straightforward.
2) No school agent or employee can be required by the school "to participate in prayer or other religious activity."	

3) No school agent or employee can be compelled "to attend a school meeting if the content of the speech at the meeting is contrary to his or her beliefs." (This provision applies to non-religious meetings as well.)

4) "Employees or agents of the school or government are present at religious meetings only in a non-participatory capacity."

4) This provision is one of the most troublesome. Since schools are required to insure that "non-school persons may not direct, conduct, control or regularly attend activities of student groups," they will have to keep records of which outsiders attend meetings, how often, and decide whether or not they are influencing the meeting. Schools have to insure that student participation is truly voluntary. Several analysts believe that even this limited school participation required by the Act may constitute unconstitutional entanglement with religion. It appears to be clear that schools retain a certain amount of power to act "in loco parentis" (in place of the parent). However, when religious cult groups meet, there is disagreement about what action schools can take to prevent children from being brainwashed and to make sure that the psychological warfare practiced by cults does not take place.

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III - Conclusion

There are no perfect solutions to the problem created by "equal access." But some community relations problems can be minimized when groups believe that they are being treated fairly. There are several ways to shape policies which contain the least potential for community divisiveness and interference with sound educational practices.

These include development of clear and uniform regulations covering "Equal Access," which take into account the needs of individual communities. In one suburban area, AJC and several other civic and religious groups will join with a regional school board association and use case studies to develop appropriate guidelines. In one industrial mid-west city, AJC will join with the Catholic Diocese, an interfaith coalition, a local congressional office and city officials to develop guidelines.

In a West Coast city where school officials have been reluctant to come to grips with the issue, a Jewish-Christian Assn. along with the Ecumenical Ministries Organization will offer model guidelines for their consideration. Other projects are being planned.

The American Jewish Committee will continue to monitor the progress of "Equal Access." We are prepared to work with schools and communities to help them develop specific plans for their districts. For further information, please call or write to Marilyn Braveman, (212) 751-4000.

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 within 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 religious 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;

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"(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."

P. L. 98 - 377

MEMORANDUM OF LAW

Constitutional Questions Related to the Inclusion of a Question on Religion in the Federal Census

Introduction:

The United States Census Bureau is considering the inclusion in the questionnaire to be used in the regular 1970 federal decennial census of population in the U.S.A., of a question on religion.

There is no record that a question on religion has been asked in any previous regular federal census of population. From 1906 until 1936, the Bureau of Census did conduct a decennial Census of Religious Bodies. But this was done by circulating questionnaires to the various religious bodies, which took their own censuses of their members and filled in the questionnaires on the basis of these censuses. Recently, in March, 1957 and again, in October, 1965, a question on religion was included, but only in the monthly sample studies carried on by the Bureau of Census. The October, 1965 sample study included a question as to both race and religion, but this was a result of a very special situation. Section 402 of the 1964 Civil Rights Act (Public Law 88-352, 88th Congress, H.R. 7152, July 2, 1964) specifically provided that the Commissioner of Education shall "make a report to the President and the Congress...concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States..."

The 1964 Civil Rights Act contains another census taking provision but this

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one does not include religion as an item to be ascertained. Section 801 which deals with Registration and Voting Statistics provides that the Secretary of Commerce "shall promptly conduct a survey to compile...a count of persons of voting age by race, color, and national origin, and determination of the extent to which such persons are registered to vote, and have voted in any statewide primary or general election in which the members of the United States House of Representatives are nominated or elected...Such information shall also be collected and compiled in connection with the 19th decennial census, and at such other times as the Congress may prescribe... Provided, however, that no person shall be compelled to disclose his race, color, national origin, or questions about his political party affiliation, how he voted, or the reasons, therefore, nor shall any penalty be invoked for his failure or refusal to make such disclosure. Every person interrogated orally, by written survey or questionnaire, or by any other means with respect to such information, shall be fully advised with respect to his right to fail or refuse to furnish such information."

However, if the projected 1970 Federal Census of the United States population includes a question to be asked by census takers of respondents as to the religious affiliation or belief of the respondents and those in whose behalf they answer, this would be the first time that individuals would be <u>required</u>, under penalty for failure to do so, to state their religious affiliations or beliefs to census enumerators, duly designed officers of the federal government.

The federal statute of August 31, 1954, 68 Stat. 1019, which directs the Secretary of Commerce to take a population census in 1960 and every ten years thereafter, provides for penal sanctions for refusal to answer questions and for replying falsely. A person over eighteen years of age who refuses or wilfully

neglects when requested by an authorized officer of the Department of Commerce acting under the instructions of the Secretary of Commerce to answer, to the best of his knowledge, any question submitted to him in connection with any population census, is liable to a fine of up to $100.00, or imprisonment up to sixty days, or both. 13 USCA 221 (a). A person who wilfully gives a false answer to any question he is asked is liable to a fine of up to $500.00 or imprisonment of up to one year, or both. 13 USCA 221 (b). The statute does provide, however, that "where the doctrine, teaching, or discipline of any religious denomination or church prohibits the disclosure of information relative to membership, a refusal, in such circumstance to furnish such information, shall not be an offense" under the provisions cited above. 13 USCA 225 (d).

This memorandum deals with the propriety of including a question on religion in the regular federal decennial census of population in terms of its consistency with the safeguards of freedom of religion contained in the United States Constitution.

Constitutionality of Including a Question on Religious Affiliation or Belief in the Federal Census of Population

The First Amendment to the Federal Constitution provides, in part, as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This prohibition, of course, is addressed not only to the legislative branch of government but to the Federal Government as such, including all its branches. McCollum v. Board of Education, 333 U.S. 203,206 (1948); as to the judicial branch see United States v. Ballard, 322 U.S. 78 (1944).

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The meaning of the "establishment of religion" clause of the First Amendment has been defined by the United States Supreme Court in Everson v. Board of Education, 330 U.S. 1, (1947) and McCollum v. Board of Education, supra, as follows:

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

In Zorach v. Clauson, 343 U.S. 306 (1952), the Supreme Court adhered expressly to its interpretation of the First Amendment as given in the McCollum and Everson cases. It is true that in the Zorach case the Supreme Court did not strike down as unconstitutional the New York "released time" program as it had done in the case of the Champaign program, involved in the McCollum case. But the Court made it clear that the different treatment of both programs was not due to a change in the Court's attitude on the interpretation of the First Amendment ("We follow the McCollum case," page 315), but solely to factual differences in the two programs.

In two later decisions, Engel v. Vitale, 370 U.S. 421 (1962) and in Schempp v. School District of Abington Township and its companion case Murray v. Curlett,

374, U.S. 203 (1963), the Supreme Court again clearly expressed its adherence to the interpretation given to the First Amendment in the McCollum and Everson decisions.

In the Engel case, the Court in a 6-1 decision, ruled that the requirement of the recital of a state composed prayer in a New York public school classroom was unconstitutional as a violation of the Establishment Clause of the First Amendment.

The Schempp and Murray cases presented the Court with ruling on the validity of Bible reading and praying in the public school system. The Court unequivocally held such activities to be violations of the Establishment Clause of the First Amendment.

In the Schempp case, Justice Clark in rendering the opinion of the Court, reviewed related previous cases decided by the Court:

> "Thus, as we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the establishment clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion... The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."

The provisions of the First Amendment relating to religion rest on the premise that "both religion and government can best work to achieve their lofty aims if each is left free from the other in its respective sphere." McCollum v.

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Board of Education, supra, at p. 212. In particular, the government cannot, under our constitutional system of separation of state and church, pry into the religious beliefs of citizens. Religion is a private matter, of no concern to the civil authorities. "Religion is wholly exempt from the /Civil Society's/ cognisance." Madison's Remonstrance, Point 1.

The inclusion of a question as to religion in the forthcoming census would run counter to these time-honored principles of our constitutional system. A government agent would have the duty to ask a citizen to declare his religious conviction and affiliation, if any; and, if none, to so declare. The individual would be faced with a mandate from the government to "profess" his religious beliefs, which is forbidden under the First Amendment. Everson v. Board of Education, supra, p. 15. Something that is and should remain exclusively a matter of the conscience of the individual would be whittled away if a government official "armed with the sanctions of the law" (Madison's Remonstrance, first paragraph) were given the authority to examine him as to his true religious beliefs.

To a certain extent the law reflects awareness of the danger to religious freedom inherent in compulsory questions by federal officials relating to religious belief or affiliation. As mentioned before, it exempts from punishment for refusing to answer a census question, a person who does so because "the doctrine, teaching, or discipline of any religion or church prohibits the disclosure of information relating to membership." 13 USCA 240. But this exemption does not suffice. It fails to provide for the case where the individual, quite apart from the teachings of his religion, may be unwilling to reveal his religious beliefs to anybody, least of all to a government agent, for reasons of fear or conscience wholly apart from religious scruples.

As has been pointed out above, the Supreme Court has said on several different occasions that the First Amendment means at least that neither a state nor the federal government can pass laws which aid one religion, aid all religions, or prefer one religion over another. Yet the sole purpose of including such a question in the census would be to aid some or all religions. Since under our constitutional system the government may not aid religious groups or, for that matter, even take cognizance of the religious affiliations of its citizens, there can be no legitimate reason why the federal government should need information on the religious affiliations of its citizens; and no such legitimate government reason has been asserted. Although Congress has authorized inclusion in the census of questions relating to agriculture, irrigation, drainage, distribution, unemployment, mines, and more recently as to race and religion resulting from the 1964 Civil Rights Act (only on a sample basis), such questioning has been considered proper as a legitimate exercise of the Government's right to obtain information necessary for intelligent legislative action. These data can also be helpful to agencies and departments of government in appraising the economic development of the country. This justification can hardly apply to mandatory questions on religion in the regular decennial census, since Congress is estopped by the First Amendment from making any laws on this subject. In an effort to justify the broadening of census questions to subjects such as those listed above the Bureau of the Census has pointed out that the information it gathers on these other subjects has proved most useful to various business and other groups in the population. Certainly the census of manufacturers has developed information of great value to some industrial

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groups. But there is no constitutional provision barring federal aid to industrial or private business groups. There is a constitutional provision barring such aid to religious groups. Hence, the fact that the Bureau of Census, through some questions included in the census, does obtain information which is most useful to certain business, labor and other groups, cannot be used to justify a similar program to obtain information to aid one or some or even all religious groups.

The inclusion of a question on religion in the federal census may constitute an unwarranted infringement upon the privacy of American citizens resulting in an interference with religious freedom. American democracy flows in large measure from the freedom to think as one wishes. We have long recognized that pressures, particularly those from official sources, tending to force conformity, pose a grave danger to a free and democratic society. In a totalitarian society no interest of the people is deemed outside the jurisdiction and concern of the state. In a democracy certain aspects of the people's lives are held inviolable -- chief among these is the relation of man to his Maker. In a democracy committed and secured by the Constitution to the principle of separation of church and state, the religion of every person is not a proper subject of government inquiry. A mandatory requirement to divulge one's religion to an official government source may be viewed as a violation of the right of privacy interfering with religious freedom.

Privacy is defined "as the right of an individual to be free from undesired or unwarranted revelation to the public of matters regarding which the public is not concerned" (Warren and Brandeis, The Right to Privacy, Harvard Law Rev., 193, 214) and as "the right of a person to be let alone" (Cooley, Torts, Sect. 135, 4th Ed. (932)) -- the right of inviolate personality. Justice Brandeis, in his

dissenting opinion in Olmstead v. United States 277 U.S. 438 (1918), described the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men." Justice Douglas in the Pollak case (Public Utilities Commission v. Pollak, 343 U.S. 451, 1952) stated that "the right to be let alone is indeed the beginning of all freedom."

In a law review article written in 1890 by Warren and Brandeis, "The Right to Privacy," (Harvard Law Review, Vol. IV, No. 5, Dec. 15, 1890) Brandeis contended that the right to privacy required no new legal principles, but only the application of an existing principle to a new state of facts: the right to life and property should encompass "right to enjoy life," the right of a person to protect "his private life, which he has seen fit to keep private." The underlying principle is that of "an inviolate personality," which includes the right to the privacy of one's thoughts, emotions, and sensations, expressed in writing, conduct, conversation, attitudes, facial expressions, personal appearance, sayings, acts, and personal relations -- the right to "the immunity of the person, -- the right to one's personality."

"The makers of our Constitution," said Brandeis, "undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. They knew that only a part of the pain, pleasures and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

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Religious freedom became rooted in American thought and society, not out of indifference to religion, but precisely for the very opposite reason, out of deference for religion. Matters of conscience were so important that it was considered intolerable to delegate to others the power to dictate with respect to them. To have religion supported by force meant to put expediency in the place of conviction, and pretense in the place of sincerity; it meant the subordination of life's supreme and most sublime value to considerations that were insignificant and petty. With the passage of time, this came to mean that the state had no business to intervene in the relations between man and God, even if the motive for the intervention was to give aid and comfort to the man in those relations; for intervention, even when seemingly friendly, was seen as an impediment, as a compromising of the spiritual wholeness and purity.

Following the adoption in 1776 of the Virginia Declaration of Rights, Jefferson framed a bill to implement the guarantee of religious freedom. It was not, however, until 1785, following Madison's victory with his Remonstrance, that Jefferson's bill for establishing religious freedom came before the legislature for effective action. It became law in 1786. Some of its phrases have now become part of the American heritage:

> "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession of provocation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being, of course, judge of the tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purpose of civil government, for its officers to interfere when the principals break out into overt acts against peace and good order;..."

Justice Douglas concurring in the Schempp decision stated that "under the First Amendment it is strictly a matter for the individual and his church as to what church he will belong..." Justice Brennan concurring in the Schempp case said: "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: a man's belief in the verity of some transcendental idea and man's expression and action of the belief or disbelief."

This principle was clearly established in the Ballard case, where the Court said: "Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."

It therefore seems incomprehensible that citizens will be compelled to make a profession to a census enumerator of their faith or lack of it. Certainly, to force such a profession is to impose a degree of pressure for religious conformity. That the responses given to the census enumerator are maintained in confidence is hardly a satisfactory answer to this objection. In many instances the enumerator is a neighbor of the respondent. True, the enumerator is bound to secrecy, but most respondents will not know this and, in any event, anything known to more than one person can no longer be regarded a secret. Hence, the inevitable result of the inclusion of such a question in the census is to exert pressure on the respondent who may have unorthodox religious beliefs which he wishes to conceal. Thus, there would be additional wrongs -- a degree of certain error in the census result, as well as a loss of freedom of conscience.

Conclusion:

The foregoing discussion demonstrates that the inclusion of a question on

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religion in the 1970 federal decennial census would raise serious constitutional questions. It would involve the federal government in actions which may well amount to a violation of constitutional limitations.

--Abrahamm H. Foxman

Is It the Government's Business?

By

Leo Pfeffer

Reprinted from
The Christian Century
October 30, 1957

Is It the Government's Business?

By Leo Pfeffer

IF THE FEDERAL census bureau has its way the American housewife who comes to the door to answer the census taker's ring in 1960 will be asked not only the names and ages of the members of the household but their religion or religions as well. According to the latest available information, the bureau is presently inclined—although it has not finally decided—to include among the questions asked in the course of the next census the question: "What is your religion?" If the bureau does ask this question it will be the first time in the history of our nation that the federal government assumes the power and right to query the American people as to their religious affiliations or beliefs. A breach in a tradition going back 170 years to the first decennial census of 1790 should not be undertaken lightly and without serious consideration as to its validity, implications and potential consequences.

A Questionable Interpretation

The government has in the past gathered statistics relating to religious bodies. It has done so, under a specific statute (of at least arguable constitutionality) authorizing such gathering of statistics, by inquiries directed to the religious bodies. What the census bureau proposes to do now is something entirely different. The statistics resulting from inquiries sent to denominational headquarters have been much criticized on the score of reliability. Churches, it seems, are not immune from the very natural tendency of organizations toward liberality in estimating their membership. Hence it has been felt—and the bureau apparently agrees—that the only practicable way of getting reliable statistics is by direct questioning of the American citizen as to his own religious affiliation or belief.

The authority of the bureau to include a question on religion in the census is by no means free from doubt. The bureau does not propose to act under the specific statute authorizing it to gather statistics relating to religious bodies but under the general statute directing it to take a decennial "census of population." In the past the bureau has construed this general section as authorizing it to query individual Americans not merely as to name and residence but also as to age, occupation, place of birth, citizenship, and even as to what language they speak at home. It has taken the position over the years that such information is relevant to a "census of population," and now appears to take the same position in respect to information regarding the citizen's religion. It may well be conceded that if there were no questions of constitutional law or public policy such an interpretation might not be unreasonable.

But fundamental questions of constitutional law and public policy do exist. The most obvious is the issue of compulsion. If the bureau is correct in its interpretation and has authority to include a question on religious affiliation or belief in making a census of population, then Americans to whom the questions are put must answer them. The federal statute is clear: any person who willfully refuses to answer a question put to him by a census taker is guilty of a criminal offense which makes him liable to imprisonment.

As any constitutional lawyer will attest, nothing can be said to be certain in constitutional law until the United States Supreme Court has specifically and unequivocally passed upon the particular point. The Supreme Court has never specifically passed on the issue whether a person can be prosecuted criminally for refusing to answer a census taker's queries on religion—for the simple reason that the government has never yet permitted its census takers to query Americans on their religion. But if anything can be predicted as to what the Supreme Court will do in a particular case, it is more than a fair prediction that it would not countenance imprisoning Americans for refusing to disclose their religious beliefs to governmental officials. In *Everson* v. *Board of Education,* decided in 1947, and again in *McCollum* v. *Board of Education,* decided the following year, the Supreme Court stated that under the First Amendment to the Constitution, which guarantees religious freedom and the separation of church and state, neither a state government nor the federal government can force an American "to profess a belief or disbelief in any religion." In *Board of Education* v. *Barnette,* decided by the court in 1943, it was held that the government has no constitutional power to force people to salute the national flag or recite the Pledge of Allegiance. In one of the court's most recent cases (*Swezey* v. *New Hampshire,* decided in June of this year), Justice Frankfurter asserted as incontrovertible that an American cannot constitutionally be compelled to disclose with which political party he is affiliated. It would seem even clearer that he cannot be compelled to disclose with which religion he is affiliated. These rulings and the tenor of other Supreme Court decisions indicate fairly clearly that compulsion to disclose one's religion to a census taker or other government official would violate rights secured by the First Amendment.

No Tampering with a Congressional Statute

It is probable that the census bureau recognizes the constitutional difficulties, for it apparently has expressed willingness to make answering of the question optional. But it is very doubtful that it has the power to do this. The statute that makes it a punishable crime to refuse to answer any question lawfully put by the census taker is a federal statute enacted by Congress. The statute has no exceptions in it, and it is very much to be doubted that an administrative officer or agency has the power to carve out exceptions to a penal law enacted by Congress. The most that the census bureau can do is to seek to assure Ameri-

cans that it will not prosecute them if they should elect not to answer the question. The difficulties with this solution are, first, that responsibility for enforcement of federal penal laws rests not with the census bureau but with the department of justice, and, second and perhaps more important, that a government official's counseling violation of the law is questionable legally and even more questionable morally.

For these and other reasons I think it clear that if answering a question on religion is to be made voluntary it will have to be made so by an act of Congress, not by any action of the census bureau. But inasmuch as Congress has recessed and will not reconvene until January 1958, and the census bureau has indicated that it expects to make a final decision on inclusion of the question by the end of this year, congressional action does not appear practicable.

Neither Constitutional nor Practical

Even should Congress enact an amendment to the census law removing the criminal penalty for refusing to answer the proposed question on religion, neither the constitutionality nor the wisdom of the proposal would thereby be settled. In the first place, it is far from certain that a declaration by Congress that answering shall be voluntary would in fact make it voluntary. One of the recognized constitutional objections to sectarian practices and teachings in the public schools is that though they purport to be voluntary they are in fact not so at all, and that when the prestige and machinery of government are patently behind a particular endeavor, compliance can hardly be said to be truly voluntary. This, of course, is more obvious in the case of children than of adults; yet even in the latter case many timid, semi-literate and particularly noncitizen Americans will not consider answering purely voluntary even if the census takers tell them it is.

And who is going to police every census taker to make sure that he tells the person questioned that answering is entirely voluntary? Experience with schoolteachers and other government officials imbued with a sense of religious mission has shown that reliance upon them to safeguard the rights of nonbelievers and even believers of a different faith is often reliance upon a slim reed. There is no reason to be certain that census takers similarly motivated will behave differently.

A Case in Point

That this objection is not purely speculative is indicated by the following: In June of this year the *Minneapolis Tribune* took a poll in Minnesota on the question whether religion should be included in the census. Of those who replied 22 per cent thought that the idea was a poor one (as against 34 per cent who thought it was a good one). It is certainly a reasonable assumption that those who felt the idea to be a poor one—or most of them at least—would not answer the question if answering were truly voluntary. Hence it is of great significance that when the federal government at about the same time conducted a test-run of a census with a religious question in the near-by state of Wisconsin less than one per cent of the people questioned refused to answer. The most reasonable explanation for this large difference is that in one case the question was put by a private person while in the other it was put by an official of the federal government.

Even if true voluntariness were present there would still be grave doubts as to the constitutionality of the action. The First Amendment not only guarantees freedom of speech (which the Supreme Court has held includes freedom of silence) and freedom of religion; it also commands the separation of church and state. That mandate requires that the government do not permit itself or its machinery to be used to promote religious purposes or advance religious interests. The church groups which have been pressing for inclusion of the question have had no hesitation in asserting the great value the results would have in church planning and recruitment. It is true that statistics on religious beliefs and affiliations may have value to sociologists and demographers, and that many of them would like to see such a question included in the census (as they would like to see many other sociological and demographic questions included). But sociologists and demographers have little political influence and all their efforts would never get the question into the census if there were not a strong church pressure for it. If the proposal is effected, the sociologists and demographers will be the indirect or incidental beneficiaries; the direct beneficiaries will be the churches. If that is not using the government as an instrumentality to promote church purposes, I do not know what is.

The Church-State Separation Mandate

More serious is the question whether in any event a democratic government committed to the principle of separation of church and state has any legitimate business to inquire into the religious beliefs or affiliations of its citizens. An informative study, published in 1938 by H. S. Linfield, of nations that include questions on religion in their censuses showed that in practically every case the government either had an established religion or was in some way involved in religious affairs. Under our Constitution, the Supreme Court has stated in both the Everson and McCollum decisions, not only may there be no established religion, but "neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." As Thomas Paine said in *Common Sense,* other than protecting all conscientious professors of religion, there is "no other business which government hath to do therewith." When the very first census was being considered by Congress in 1790, Madison, the father of the Constitution and of the Bills of Rights, expressed reservations about including questions relating to "the learned professions" because, "as to those who are employed in teaching and inculcating the duties of religion, there may be some indelicacy in singling them out, as the General Government is proscribed from interfering, in any manner whatever, in matters respecting religion. . . ." For that reason perhaps more than for any other our government

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has never authorized the census taker to question Americans about their religion.

Aside from their value to churches and religious organizations, the sociological and demographical utility and reliability of the results of a religious census is seriously open to question. The 1938 Linfield study shows that in countries where the residents are required to disclose their religion to the census taker there is much skepticism as to the validity and reliability of the results. Denmark discontinued asking about religion because it was "evident that the answers to the question of religious creed did not give a true picture of the distribution of the several creeds." The head of the Mexico census bureau stated that "the census reports on religion are among the least conclusive." In the United States, even among those sociologists and demographers who favor the religious census there are many, perhaps a majority, who entertain grave doubts as to the reliability if answering were to be entirely voluntary.

In a letter to the *New York Times,* Dean James A. Pike of the Cathedral of St. John the Divine in New York accurately pointed out the basic meaninglessness of the results of answers to a question "What is your religion?":

> What will the resulting statistics really prove? Most people who are Jewish by ethnic background will probably answer "Jewish," even though they haven't been near a synagogue since their Bar Mitzvah (whether or not even to that). Most persons of Roman Catholic background who have been inactive, but who have not become otherwise affiliated, will probably answer "Catholic." Worse still, people who are nothing at all, either by present commitment or past association, will probably say "Protestant," since, unfortunately, in our culture this latter word has come to include also "miscellaneous."

The probable unreliability and invalidity of the results of a religious census are perhaps the least important objection to the proposal. The basic objection is that it is an unwarranted invasion of the right of privacy. The right of privacy, the right of silence, the right to be left alone has accurately been described as the most fundamental of all liberties. Life would hardly be worth living if man could not keep quiet when he wanted to. Certainly man would not be free if he did not have the right of silence; forced speech no less than forced labor is slavery. To the extent that information regarding Americans is necessary for the proper functioning of government, the Constitution authorizes limited invasion of the right of privacy and empowers the government to compel citizens to reveal such details of their secular life as their age or income. But no necessary or legitimate function of government is furthered by questioning citizens as to their relationship to God. The religion of Americans is sacred. It is literally none of the government's business.

BACKGROUND STATEMENT ON INCLUSION OF A QUESTION ON RELIGIOUS IDENTIFICATION AS PART OF THE CENSUS BUREAU'S CURRENT POPULATION SURVEY SAMPLE

An informal contact with a representative of the United States Census Bureau indicated that the Bureau was considering the possibility of including a question on religious identification in one of their monthly population surveys scheduled for 1987. This issue apparently arose because it would be 30 years from the inclusion of such a question in 1957.

BACKGROUND

Jewish community organization were unaware that the Census Bureau was including a question on religion in a 1957 sample survey. After the publication of the results the Community Relations agencies met and came to a joint decision that the inclusion of such a question was a violation of the constitutional separation of church and state. It was so represented to the Census Bureau especially with regard to 1960 decennial Census which was then being prepared. Other organizations such as the American Civil Liberties Union and the Southern Baptists also were opposed to the inclusion of a question on religion in the decennial Census. Undoubtedly as a result these representations no such question was included in the 1960 Census.

The decision indicated above had been made at the time almost entirely by the agencies concerned with community relations and there was little input from Federations or academicians who would find such data useful in their work. Prior to the 1970 Census the Census Bureau again indicated its interest in including a question on religion in the 1970 decennial Census. The Council of Jewish Federations, which was then preparing for the National Jewish Population Study (to be conducted in 1970) requested the National Community Relations Council to re-examine the issue. In 1966 a task force was set up consisting of the NCRAC,the CJF and the Synagogue Council. The charge of this task force was not to reach an opinion but to develop views from all elements within the Jewish community and report these to the individual agencies comprising the NCRAC. Each agency would then develop, through its own channels, its position on the issue.

The task force agreed, on a consensus basis, that the Jewish community should oppose the inclusion in the decennial census of a question on religion because of the mandatory nature of the census. However, the issue of whether a question included in a Government sample study to which response is not legally mandatory, was not resolved. At the conference held in October 1967 sociological, public policy and constitutional aspects were explored. The constitutional question was reviewed by Dr. Milton Konvitz of Cornell, Leo Pfeffer of the American Jewish Congress and

Professor Kent Greenewalt of the Columbia Law School. Dr. Konvitz came to the conclusion that a question of the voluntary-answer type was constitutional. Leo Pfeffer disagreed in toto while Professor Greenewalt felt that constitutional arguments could be advanced for either side. Representatives of the CJF and academics interested in Jewish research argued that information on religious identification would of use to Federations in their planning, and would have sociological value in understanding the dynamics of group action as these are influenced by religious identification. Those arguing for this position felt that a non-mandatory question which obtained from the individual respondent his sense of affiliation with a religious group and which excluded questions dealing with the individual's set of beliefs or religious actions would not be forbidden by the First Amendment.

The arguments of those opposed were based not only on legal constitutional grounds but on policy and community relations considerations as well. It was felt that any question on religion might be an opening wedge for later inclusion of other questions such as church attendance, belief in God, etc.

No consensus as such was reached by the conference and the issues were referred back to the participating agencies. In 1968 the NCRAC adopted a position opposing both a question on religion in the decennial census and in any voluntary sample. The American Jewish Committee which was not initially a member of the NCRAC, had taken in 1966 a position before the Congressional Sub-Committee on the Census and Statistics in favor of the inclusion of a question on religion in non-mandatory sample surveys. Prior to the NCRAC decision in 1968 the Board of Governors of the AJC was asked whether or not to reaffirm their 1966 position and in a close vote opposed the inclusion of a voluntary question on religion. Thus the CRC Agencies were unanimous in this regard.

CURRENT STATUS

Since 1957 the Census Bureau has not made an effort to include a question on religion in any of its sample surveys although a representative of the Bureau had asserted, prior to 1970, that the Bureau felt it had a legal right to introduce such a question. However, in the absence of any action by the Bureau the constitutional issues remain moot.

During the 1970's and until today there has been a substantial expansion in research within the Jewish community. Such research has not only been of service to individual Federations and local service agencies in planning for community needs but have also raised various issues for national considerations. Data on Jewish intermarriage, fertility, Jewish poor, divorce rate, etc. are issues which have engaged not only the planners in local communities but national organizations and academics concerned with Jewish community structure. There is general agreement by those responsible for these research and data gathering efforts that a national sample of the Jewish population obtained through a voluntary question conducted by the Census Bureau would be of intrinsic interest as well as improving the usefullness of the materials collected directly

through community studies. Major benefits of course would be achieved if such a sample inquiry would be conducted on an on-going basis so that trends could established.

Since the possibility exits of the Census Bureau proceeding with a population sample study on religion it is appropriate for the NCRAC to review, some 18 years after its last decision, whether it wishes to once again evaluate its position on this issue.

Alvin Chenkin, Council of Jewish Federations, June 1985

WOMEN'S AMERICAN ORT, INC.

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PRESENTATION TO DOMESTIC TASK FORCE NJCRAC
April 30, 1985 - New York

Bea Forrest, National Vice President, Women's American ORT

Allow me at the outset to thank Jackie, Al, Mike Pelavin and Marlene Provizer for the opportunity to express in behalf of Women's American ORT our concerns and agenda for action to stem and reverse the recent onslaughts to church-state separation. I hope many of you have had the opportunity to read the address by our National Executive Vice President, Nathan Gould, to our 600 member National Board last October entitled, THE PRICE OF LIBERTY which provides the focus of this presentation. It calls for "the summoning of a National Emergency Community Conference, initiated by NJCRAC, to consider the current nature, and scope of anti-Semitism and the threats to individual liberties, pluralism and the democratic society itself, posed by the emergent 'radical right.' Nothing on the calendar of our future is so pregnant with foreboding implications for the American Jewish community -- and for America as is the unabated ascendancy of the Radical Right which has emerged as a formidable political force in the U.S...."

Certainly the seriousness of church-state separation was and continues more aggressively now to be a major priority of NJCRAC. In Jackie's presentation to the Budget Hearing of the New York Federation-UJA in March, she said, "From the very creation of NJCRAC, protecting the principle of separation of church and state has been a major priority as an essential condition for the kind of society American Jews require. ....In those years (40's and 50's) church state was one of our highest priorities and the joint actions of our agencies led to the historic milestone decisions of the Supreme Court from 1948-1963. As a result of those great decisions, we were able to shift our resources to other priorities in the 60's and 70's, particularly in the international field. But in 1980, NJCRAC's process led to a renewed emphasis of our field on church-state, to where it is now one of our highest priorities. We have always looked to the courts to ultimately assure the integrity of the First Amendment of the Bill of Rights. This past year, as in our earlier years, we were able to achieve agreement among our member agencies on a single brief which was submitted to the Supreme Court in the Silent Prayer case by the American Jewish Congress on behalf of NJCRAC. Similarly we reached agreement on a single brief submitted to the Supreme Court by the Anti-Defamation League in the Scarsdale Creche Case."

The eight regional consultations convened by NUCRAC last fall involved nearly 100 communities and every national agency. They were called together to formulate a comprehensive set of guidelines for dealing with the increasing threat to the separation of church and state which underscores the growing awareness of the seriousness of this development.

We are cognizant also of the outstanding programs, actions and educational materials of many of our national agencies -- The American Jewish Congress, The American Jewish Committee, Union of American Hebrew Congregations and the Anti-Defamation League. Over the past few years, Women's American ORT has sponsored forums on this issue in communities from coast to coast and in Atlanta, Georgia last year in collaboration with the American Jewish Congress. Al Vorspan electrified a National Board Conference of Women's American ORT several years ago on this subject. Films supplied by People For The American Way were used in all instances. National Council of Jewish Women, at their recent convention in March adopted constitutional rights as a priority area of their work.

Let us recall Ted Mann's passionate speech at the Plenum in San Francisco alerting us to the psychological impact and theological implications of growing governmental involvement in religion eroding the constitutional principle of church state separation, threatening to transform American Jews into "outsiders" and "strangers in their own land." And Reverend Charles Bergstrom who followed, deplored the intolerant attempt to "Christianize America," based upon "a misreading of the Constitution and a misinterpretation of Scripture." "A more proper role for religion in politics," he said, "is to use it as a guide and an inspiration for seeking social justice." Both Ted and the Reverend called for education of the community and coalition building to counteract the "twisted logic" of our opponents.

Certainly the enlarged draft section on Church State and Interreligious Relations of the 1985 Joint Program Plan provides background, guidance and strategic goals for local crc's, national agencies and community organizations ---- It was obvious that we all share many similar views, attitudes and concerns individually and collectively... through the NJCRAC consensus process.

The bottom line, not only for Jews, but for all Americans is the preservation of our Constitution and the Bill of Rights as essential to safeguarding our democracy and the spirit and guarantees embodied therein for a pluralistic society.

We do share a common agenda -- but, as Nathan Gould states, "each organization brings to bear upon the issues of that agenda its own distinctive approach, ideology, its particular skills and its unique facilities for involvement and participation of their respective constituences."...

So what is Women's American ORT suggesting in convening a National Emergency Community Conference -- certainly not to supercede or obviate the ongoing functions of individual organizations but according all of us the opportunity to develop action on a broader and more concerted level for the rapid mobilization of combined forces, for greater impact, visibility and action on the part of the American Jewish community and a wider spectrum of the American community -- a collective voice to counteract "the tandem development of the radical right and rising anti-Semitism."

We are projecting ideas for your consideration. We don't feel proprietary of them. Our proposal is not a finished product and deliberately so -- but provides a basis for discussion on what measures best be taken by us.

Briefly and simply our proposal for the development of a coherent policy for mobilization and action is:

1. That NJCRAC assemble a small group of selected and indicated planners and initiators in both the Jewish and non-Jewish community, for the purpose of establishing a provisional committee for the organization of a broad coalition of American organizations having common views and interests in this issue.

2. That the provisional or organizing committee would determine the organizations, agencies and guests to be invited. It would draft a preliminary program and agenda and would also be empowered to prepare for the financing and other physical arrangements of this special National Conference.

3. That the broad based coalition, tied together by a unified "declaration of purpose", issue a call for the holding of a national emergency conference, with the widest representation from grass roots organizations, to confront the threat of the radical right and to identify strategies that could be taken by the national coalition and by local parallel coalitions toward the end of countering threats to our constitutional freedoms and pluralism.

GOALS

1. Fountainhead of this campaign to be at the National level.

2. Greater utilization and more efficient use of energy -- now fragmented

3. Campaign has more than one dimension -- legal process is limited and its reaching of people limited

4. Potential for reaching out to the entire Jewish and American community, showing unity of purpose and determination to protect our liberties

5. Obviating for us what Earl Raab calls the one issuism (American-Israeli relations), of the American Jewish Community as perceived by most and which has become understandably dominant in the network. In his report to the San Francisco Plenum --"Washington: Who Makes the Decisions for the American Jewish Community?" He stated, "The genius of our community relations agenda is that different issues are strongly interconnected. For example, the ability of American Jews to influence American policy on Israel or on Soviet Jews is directly related to the status of those American Jews as affected by such other issues as anti-Semitism, basic church/state separation, and general democratic life in America. All of those issues affect each other deeply. Any attempt by the 'National Jewish Political Association' to deal with anyone of these issues without affecting the others at various times would be doomed to long term failure... Perhaps indeed the more complicated circumstances that America is facing

should impel us to try to extend the kind of decision making we do within our political association so that we can 'make our case' more convincingly. But the other fundamental which we must revive is the understanding that our access and edge are the result of the total strength of our political association."

The JTA of March 7, reported on a study written by Earl Raab and Seymour Lipset -- "The Political Future of American Jews" which was released by Ted Mann at the National Domestic Policy Conference of the American Jewish Congress' leadership. "The future political impact of American Jewry will depend more on the 'perceptions and values' they pass along to American society than on their enthusiasm as voters and financial contributors to political campaigns...."

Do you not envision a National Emergency Community Conference as the arena for the reinforcement of our values as American Jews and our deep commitment to the "public good?"

What price liberty! What do you think, and what is your reaction?

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