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SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING

August 21, 1998

U.S. Commission on Civil Rights
Schools and Religion Project

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Agenda

Schools and Religion Project: Seattle Briefing
U.S. Commission on Civil Rights

Notice of Briefing

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Notices

COMMISSION ON CIVIL RIGHTS (CCR)

Briefing on Schools and Religion

63 FR 43661

DATE: Friday, August 14, 1998

ACTION: Notice of briefing.

SUMMARY: Notice is hereby given that a public briefing before the U.S. Commission on Civil Rights will commence on Friday, August 21, 1998, beginning at 9:00 a.m., in the Renaissance Madison Hotel, located at 515 Madison Street, South Room, Seattle, WA 98104. The purpose of the briefing is to collect information within the jurisdiction of the Commission, to examine the operations of the Equal Access Act and similar laws and the adherence by the public schools to these laws and the Constitution in regard to religious freedom. The Commission is an independent bipartisan, factfinding agency authorized to study, collect, and disseminate information, and to appraise the laws and policies of the Federal Government, and to study and collect information with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.

Hearing impaired persons who will attend the briefing and require the services of a sign language interpreter, should contact Betty Edmiston, Administrative Services and Clearinghouse Division at (202) 376-8105 (TDD) (202) 376-8116, at least five (5) working days before the scheduled date of the briefing.

FOR FURTHER INFORMATION CONTACT: Barbara Brooks, Press and Communications (202) 376-8312.

Dated: August 10, 1998.

Stephanie Y. Moore,

General Counsel.

[FR Doc. 98-21816 Filed 8-13-98; 8:45 am]

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Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Opening Statement

OPENING REMARKS OF HON. MARY FRANCES BERRY
CHAIRPERSON, U.S. COMMISSION ON CIVIL RIGHTS

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING

AUGUST 21, 1998

This briefing of the United States Commission on Civil Rights will now come to order.

Good morning and welcome to this briefing of the U.S. Commission on Civil Rights in Seattle. I am Mary Frances Berry, Chairperson of the Commission, and I will be presiding over this briefing. Scheduled testimony will commence at 9:30 a.m. and conclude at 4:45 p.m. as indicated on the agenda.

Before I detail the purpose and scope of this briefing, I would like to introduce myself further, and then allow the other members of the Commission to introduce themselves.

In addition to serving as the Chairperson of the Commission, I am the Geraldine R. Segal Professor of American Social Thought, and Professor of History and Adjunct Professor Law at the University of Pennsylvania in Philadelphia, Pennsylvania.

Joining me today are Commissioners Carl Anderson, A. Leon Higginbotham, Jr., Constance Horner, Robert George, Yvonne Lee, Russell G. Redenbaugh and the Vice Chair of the Commission, Cruz Reynoso.

Finally, I would like to introduce our Staff Director, Ruby Moy.

Today the Commission will focus on the civil rights issues growing out of religious discrimination as it relates to the nation's public schools. In other words, we are concerned with those acts which deprive individuals of certain rights because of their religious beliefs and practices. This Commission has a responsibility to ensure that the Nation's civil rights laws with respect to schools and religion are being applied and carried out in a non-discriminatory manner. Through this proceeding, we also seek to determine if further actions are necessary to ensure non-discrimination.

Within the broad area of religious discrimination as it relates to public schools, we will concentrate on student and teacher rights within the schools, the right of equal access to school facilities for religious groups, and curriculum issues. This is the last of three proceedings which have addressed these issues – the first was held in Washington, D.C. during May of this year, and the second was held in New York City in June. While the first proceeding addressed these issues from a national perspective, these last two proceedings examine the issues at a local level.

The authority of the U.S. Commission on Civil Rights to conduct briefings emanates from the 1957 legislation which establishes it as an independent, bipartisan Federal agency of the United States government. Among the Commission's duties are: (1)to appraise the laws and policies of the Federal government; (2)to study and collect information; and (3)to serve as a national clearinghouse for information – all in connection with discrimination or the denial of equal protection of the laws of this nation, because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.

The Commission submits reports containing findings and recommendations for corrective legislative and executive actions to the President and to Congress.

The Commission has scheduled 16 witnesses. These witnesses have been selected due to their knowledge of and/or experience with the issue on which this briefing will focus. We will hear from public officials, civil rights and religious advocates, academicians and other concerned individuals.

Before we proceed, I want to stress the functions and limitations of this Commission. As the Supreme Court of the United States explained, "This Commission does not adjudicate, it does not hold trials or determine anyone's civil or criminal liability. It does not issue orders nor does it indict, punish or impose legal sanctions. It does not make determination depriving anyone of life, liberty or property." In short, the Commission does not and cannot take any action which will affect an individual's legal rights. The Commission takes very seriously, however, its mandate to find facts which may be used subsequently as a basis for legislative or executive action designed to improve the quality of life for all inhabitants of these United States.

I am certain that my colleagues join with me in the hope that this briefing will lead to open dialogue and will educate the nation on existing civil rights problems, encourage sensitivity in our continuing effort to resolve these problems, and aid generally, in decreasing religious discrimination that may exist in public schools.

Please note that the record of this briefing will remain open for 30 days for inclusion of materials sent to the Commission at the conclusion of this briefing. Anyone who desires to submit information relevant to these proceedings may do so during this time period in accordance with the Commission's rules.

I want to thank you for your attention and indicate that I intend to adhere strictly to all the times set forth in the agenda.

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Welcoming Remarks

Hearing on "Schools and Religion"
Seattle, WA August 21, 1998

WELCOMING STATEMENT OF BILL WASSMUTH
Chairperson, Washington State Advisory Committee

Ladies and gentlemen of the United States Commission on Civil Rights, the Washington Advisory Committee welcomes you to Seattle. My name is Bill Wassmuth; I chair the Washington SAC. We are pleased that you are here and we expect that today will be a productive briefing on this most important subject.

While discussion on the matter of "Schools and Religion" is very necessary, it is also important to clearly define where that discussion may not go. Some in our society misuse religion to establish a faith basis for anti-Semitism and racism. Under the label of Christian Identity Theology, they preach hate in the name of God. Obviously, such a position does not need to be included in the discussion.

Those who value the civil rights of all and believe that the separation of church and state is crucial to maintain those rights for people of all faiths must be even more watchful of that segment of our society that has as its agenda the establishment of a theocracy. It is within this larger theocratic agenda that they have set their sights on schools with, in some cases, the stated goal of taking over the entire educational system one school board at a time. To discuss core values in the schools is valuable; to do so in the context of a theocratic agenda should concern all who respect diversity of religion and the separation of Church and State.

To be critical of the faith based conclusions of someone does not threaten that person's religious freedom. To counter a group that attempts to impose its faith based values on the whole of society does not violate their rights of free speech and freedom of religion. To be complacent in the face of the promotion of a theocratic agenda is to risk the erosion of the separation of Church and State and the denial of the rights protected by that wall for people of diverse faith beliefs.

The subject for today is "Schools and Religion." The context for today is the separation of Church and State and the attacks on that principle coming from those who are more comfortable living in a theocratic society than one that welcomes diversity of religious belief.

It is the task of the Commission on Civil Rights and the state advisory committees to work to protect the rights of all people in this country. We need not and may not sacrifice the rights of anyone even in the name of security or a "return to core values."

Again, in the name of the Washington Advisory Committee, I welcome you to this great part of the country. I am sure that you will find your time here productive and worthwhile.

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Staff Report

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING

AUGUST 21, 1998

This section contains the following documents which are relevant to schools and religion issues in the Pacific Northwest:

1. Confidential staff briefing paper.
2. Confidential staff report.
3. Washington State statute on public school students' religious rights.
4. Washington State Attorney General's opinion on the use of school districts' facilities by student groups for religious purposes.
5. *Insight* Magazine articles on the current debate involving biology and school curricula.

Schools and Religion Project
Seattle Briefing

Introduction

As in other school districts around the nation, school districts in the Pacific Northwest, and particularly in the Seattle-Tacoma, Washington area, have experienced conflicts and controversies involving the legal contours of religious expression in public schools. The issues the staff identified in the Pacific Northwest are, in many instances, similar to the issues examined in the Washington, D. C. national overview hearing and in the N. Y. hearing. Among them are the following:

Curriculum

In March 1990 at a gathering of state public school teachers, principals and administrators in Seattle, a noted educator urged the school officials to put religion in its proper place in the curriculum in the state's public schools. The speaker was the past president of the Association for Supervision and Curriculum Development and the current professor of curriculum and instruction at the University of Texas at Austin. At the time of the speech, the Seattle public schools policy and guidelines reportedly included only two sentences encouraging the teaching of religion. In May 1991 parents in Walla Walla, Washington, who were represented by the Virginia-based Rutherford Institute, challenged the use of the "Impressions" reading series, which was selected in 1990 by the school district. The parents claimed that the materials in the series involved occult behaviors, including chanting and the casting of spells.

Equal Access

In May 1991 the Rutherford Institute charged that public school students in Bellevue and Puyallup, Washington were being prevented from using school buildings for Bible and prayer meetings. In the fall of that same year, a Seattle federal judge reaffirmed his 1987 decision which upheld the Renton School District's decision to prohibit a Christian student club from conducting prayer meetings at school.

Another equal access controversy arose in February 1992 and involved a Shoreline, Washington high school Bible club. The club, which had been meeting on school grounds, was told by the school district that its new policy prohibited the use of school facilities for worship or religious instruction. The school board's decision resulted in about 70 angry students, parents and teachers attending the board's regular meeting. In addition, the Christian Legal Society's Center for Law and Religious Freedom reportedly was contacted by many parents and students who strongly objected to the new policy.

In October 1993 the U.S. Supreme Court declined to hear an appeal by the Renton School Board which had challenged the appeal court's decision regarding the Equal Access Act. The appeals

court had ruled that schools must provide religious clubs the same access to facilities as that provided to other student clubs. The decision by the Supreme Court ended a nine-year legal battle.

In July 1994, Washington state's South Central School District, which is in or near the town of Tukwila, reaffirmed its ban on religious clubs and undertook a study of several school clubs to ensure that all clubs are curriculum related. Also, that same month, the Washington state Council of School Attorneys and the School Directors' Association asked the state attorney general to issue an opinion on whether the state constitution required that school districts ban all non-curriculum clubs in order to maintain the separation of church and state.

Free Exercise/Free Expression

In 1994 a Kirkland, Washington fifth-grader reportedly was not allowed to "express" his Christian faith in a class assignment. According to reports, the child's teacher asked each student in her class to state three wishes. One student stated that he wished "for all of my friends to be Christians." The teacher reportedly asked the child to add "if they want to be." The same child also reportedly stated that one of his wishes was to meet God "because he is the one who made us!" The teacher suggested that he add "in my opinion." Finally, in 1996, Elma and Shelton, two small communities in the southwestern part of Washington, considered policy changes involving religious expression in schools.

Recent Cases and Controversies

Washington state and the entire Pacific Northwest have continued to experience a variety of schools and religion controversies well into the latter part of the 1990's.

In the area of curriculum, in May 1998 the Elma School Board voted to allow a creationism advocate to address students of Elma High School at a regular assembly during the school day. The American Civil Liberties Union threatened a lawsuit, claiming that such a speech would violate the principle of separation of church and state. An ongoing dispute on origin of life issues involves a biology teacher in Burlington, Washington. For the last ten years, the teacher has included materials on intelligent design along with materials on evolution when discussing the origin of life. The American Civil Liberties Union has threatened to file suit against the school district in order to stop the teacher's activities.

There are also a number of Free Exercise/Free Expression disputes. In May 1998, a Seattle middle school student, who is a Jehovah's Witness, was removed from class for refusing to pledge allegiance to the flag. The student has filed suit against the Highline School District, charging that the school action violated his religious liberty rights. Also in May, a tenth grader from Spanaway Lake High School, near Tacoma, filed suit against the Bethel School District, charging that school officials refused to allow her to form a Bible club. And that same month, the 9th Circuit Court of Appeals upheld a lower court decision regarding student prayers. The

lower court had ruled that graduation ceremony prayers may be allowed if student-led and if conducted without school district interference. Although the case arose in Idaho, the ruling applies to Washington, which is in the 9th Circuit.

Finally, a Federal Way, Washington high school senior accused school officials in October 1997 of blocking his attempt to form a Satanist club at the school. School officials countered that such a club could lead to conflicts and could prove to be disruptive to the school environment.

While the selected panelists for this Briefing will not address every dispute mentioned in this introduction, they will provide Commissioners with an opportunity to hear statements from persons who possess in depth information on a number of these controversies in the Pacific Northwest and around the nation involving public schools and religion and on the ongoing efforts to avoid or resolve these disputes.

Panel One

Part One: Schools and Religion in the Pacific Northwest

This panel will provide the Commissioners with background information regarding the structure of the Washington State Educational System and the recent legal developments in Washington relating to schools and religion. In addition, this panel will present information relating to recent efforts to prevent schools and religion conflicts. Finally, the Commission will learn of ongoing disputes centering on the role of religion in the public schools.

Washington is a "local control" State. Thus, each school district has a local board that handles the daily operation of the schools. The Superintendent of Public Instruction is a statewide elected official who is responsible for supervising K-12 education throughout the State of Washington. As required by a recently enacted State statute, the Superintendent of Public Instruction recently drafted a brochure containing guidelines relating to religious rights of public school students. The brochure will be mailed to every school district in the State at the beginning of this school year.

In the early 1980s, in response to pressure from groups like the American Civil Liberties Union, the Washington State Board of Education promulgated a regulation requiring schools to adopt policies addressing the proper role of religion in the public schools.[1] As a result of that regulation, every school in the State of Washington has its own policy addressing the treatment of religion. Some of the witnesses assert that the existence of these policies has assisted schools in both avoiding and resolving disputes.

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[1] The Washington Administrative Code provides as follows:

> It shall be the responsibility and duty of each school district to adopt policies of the district for implementation of students' rights to freedom of religion and to have their schools free from sectarian control or influence while they are participating in any school district conducted or sponsored activity or while they are otherwise subject to school district supervision and control. Such rules shall be adopted by December 1, 1985 and shall be transmitted to the superintendent of public instruction by December 10, 1985.

Wash. Admin. Code § 180-40-227 (1997).

Although significant progress has been reported throughout Washington State, schools and religion conflicts continue to arise, usually involving objections to school curricula. One witness, Theo Vander Wel, reports that school administrators are trying to usurp parents' role in raising their children by indoctrinating children into non-Christian religions. For example, some object to the use of the "impressions curriculum," which reportedly teaches children to cast spells and engage in chanting, activities that evidently are related to witchcraft. Other witnesses have reported that the most contentious schools and religion issue in Washington State centers around the creationism/intelligent design/evolution debate.

Part Two: Equal Access, Individual Students' and Teachers' Rights

This panel will allow the Commission to consider problems faced by groups of students wishing to form religious clubs, non-religious individual students seeking to avoid religious activities, and individual teachers attempting to teach about religion in a constitutional manner.

Specifically, Commissioners will hear from the Director of the Western Center for Law and Religious Freedom about specific allegations of discrimination against students' and teachers' rights of religious expression and equal access to school facilities throughout the Pacific Northwest.
The president of American Atheists will provide the Commission with the unique perspective of individuals who are non-religious. She will provide information regarding the impact on Atheists of schools' efforts to accommodate students who wish to express their religious views.

Finally, this panel will include the Executive Director of the California-based Christian Educators Association International. He will discuss the mission of the association to encourage its members to include constitutionally permissible teaching about religion in the public schools. He will also discuss specific incidents involving alleged violations of teachers' religious rights.

Panel Two

Part One: Curriculum

It has been argued that when religion is left out of textbooks and the curricula altogether, students will conclude that only secular ideas and events have any effect upon the world – that religious ideas have had no influence and are irrelevant. Individuals who favor increased infusion of religion into public schools suggest that being completely silent about religion – which some schools decide is the most appropriate way to be "neutral" on the issue – is in effect saying that religion is wrong, untrue, or irrelevant to events today.

On the other side of the issue, however, are non-religious individuals, or, in some cases, members of minority religions, who have argued that students in public schools oftentimes comprise a "captive audience" whose members can potentially be subjected to what they consider to be improper and/or offensive religious expression.

The manner in which religion is currently addressed in the classroom varies greatly from school to school and, indeed, from classroom to classroom. Dr. Bruce Grelle, professor of religious studies in the California State University system and head of its Religion in Public Education Resource Center, suggests that while some school administrators' and teachers' behavior may border on the illegal practice of indoctrination and proselytizing, others are so cautious that they inappropriately restrict students' religious speech rights.[2] He points out that while it is difficult to generalize about what is happening in the classroom, it is clear there is a great deal of confusion.

Two recent statements have garnered a good deal of attention in the area of schools and religion: First, the Joint Statement of Current Law, Religion in the Public Schools (issued by a coalition of religious and civic groups in 1995), and second, the guidelines on religious expression issued the same year by the office of U.S. Secretary of Education Richard Riley. Professor Grelle argues that while these statements very clearly delineate the law, they have not been disseminated widely enough. Moreover, says Dr. Grelle, a cursory reading of the documents will not suffice – they must be studied carefully if the distinctions and principles set forth are to be fully assimilated.

Reviews of public school textbooks suggest that religion is slowly being reintroduced after several studies showed that religion had been stripped out of most public school textbooks.[3] Gilbert E. Sewall, director of the American Textbook Council, an independent research organization which conducts reviews of textbooks and curricula nationwide, stated in his 1995 report, "Religion in the Classroom: What the Textbooks Tell Us":

> [M]any Christian activists remain deeply disturbed by textbook content in history and the social studies. A few are upset because textbooks do not emphasize Christianity in U.S. and world history; many more because non-historical social studies textbooks acquiesce in or promote lifestyles at variance with old-fashioned standards of personal conduct.

In a recent interview with Commission staff, Mr. Sewall argued that it is possible for students to study religion in public schools – including the questions asked by religion and the answers given by religion – without resorting to indoctrination. He suggests that public schools are ignoring important and fundamental existential questions (such as "who am I?" and "what is the world all about?") because they fall within the domain of religion. Mr. Sewall contends that students will not be equipped to begin answering these fundamental questions for themselves unless they are exposed to great – and, at times, religious – writings such as the Psalms, the Proverbs, or the Gettysburg Address.

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[2] While teachers cannot *teach religion* – which amounts to illegal religious indoctrination – they can teach *about religion*, which means teaching the subject matter in the historical, cultural, economic and social development of the United States and other nations.

[3] *See* "Religion in the Public Schools: The Issue in Cultural and Historical Perspective," by Elliott Wright, Indiana Humanities Council. URL: http://www.ihc4u.org/wright.htm. While teachers cannot *teach religion* – which amounts to illegal religious indoctrination – they can teach *about religion*, which means teaching the subject matter in the historical, cultural, economic and social development of the United States and other nations.

Some states have become very active in bringing religion back into the curriculum. In 1987, California decided to restore and amplify the subject of religion in the state social studies kindergarten through eighth grade curriculum. The state's history framework for elementary and secondary grades included lessons on five world religions – Christianity, Judaism, Islam, Hinduism, and Buddhism.

Many school districts have also incorporated classes on the Bible into their curricula. The National Council on Bible Curriculum in Public Schools says its Bible instruction materials have been adopted by seventy different public school districts in twenty-five states nationwide, including California and Alaska. The course, which teaches both the Old and New Testaments, is an elective, and teachers are specially trained to avoid personal or denominational viewpoints; indoctrination and proselytizing are, of course, prohibited.[4] So far, there appears to be positive feedback from the parents, teachers, students and communities that have adopted the Council's curricula. Moreover, the Council has attempted to place individuals on its Advisory Board who can ensure sensitivity to non-Christians – one such member is Rabbi Daniel Lappin, the co-founder and President of Toward Tradition in Seattle. Toward Tradition was founded in 1991 and has as a goal, among others, to serve as a think tank for conservative people of different faiths and to derive religiously based moral arguments for specific policy issues.

Part Two: Curriculum Controversies in Biology

A specific curriculum issue that has been the subject of numerous disputes is the treatment by biology teachers of the origin of life. A science teacher may present only genuinely scientific critiques of, or evidence for, any explanation for life on earth, but not religious critiques or beliefs unverified by scientific methodology. Schools may not refuse to teach evolutionary theory in order to avoid giving offense to religion nor may they circumvent these rules by labeling as science an article of religious faith. Public schools may not refuse to teach as scientific fact or theory any religious doctrine, including "creationism," although any genuinely scientific evidence for or against any explanation of life may be taught.[5]

A group of scientists and philosophers propose a theory of the origin of life known as "intelligent design." Proponents of intelligent design maintain that evidence of design in even the simplest organism is scientifically detectable. It is the result of an inference from scientific data and is therefore something that should be part of the public discussion in this area. Students should be allowed to learn about the Cambrian explosion which is discussed in major paleontology journals. Fossil studies reveal a "biological big bang" near the beginning of the Cambrian period some 530 million years ago. At the time, at least fifty separate major groups of organisms or "phyla" emerged suddenly without precursors. Students should also be allowed to learn about the problems with chemical evolution and the design in molecular motors or information on DNA.

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[4] The U.S. Supreme Court has ruled that while the Bible may be studied as literature, it cannot be studied as religious doctrine. *School Dist. of Abington Twnshp, Pa.* v. *Schempp*, 374 U.S. 203 (1963); *Hall* v. *Board of School Commissioners of Conecuh County*, 656 F. 2d 999 (5th Cir. 1981).

[5] Religion in Public Schools: A Joint Statement of Current Law. URL: <http://www.ed.gov/Speeches/04-1995/prayer.html>.

They also say that biology books are wrong because they use evidence of small scale evolution and present it as evidence of large scale changes. These things do not involve discussions with the Book of Genesis or attempts to teach the origin of life from a religious source.

Eugenie C. Scott, Executive Director of the National Center for Science Education, says that intelligent design is another variation of creationism, though more sophisticated. She says that if you look at the scientific community, the number of journals that deal with evolution, the number of classes at the college level, the pronouncements of the National Academy of Sciences and the American Association for the Advancement of Science, it is evident that the scientific establishment says that evolution happened. According to Ms. Scott *Freiler v. Tangipahoa Parish Board of Education*[6] is a case with language saying that intelligent design is synonymous to creationism.

According to Steve C. Meyer, Director of the Center for Renewal of Science and Culture of the Discovery Institute, scientific journals are generally hostile to this point of view because they say theories are only scientific if they have naturalistic causes. A parallel scientific culture is beginning to develop that does not subscribe to that principle. Works by individuals with this view are being published in the mainstream press. For example, this fall William Dembsky has a book coming out in Cambridge University Press called *The Design Inference.* He says that contrary to public opinion, design inferences are not unscientific but are actually employed routinely in several scientific disciplines.

There are number of controversies concerning these issues in the Pacific Northwest.

In 1995 in Sultan, Washington, the school board gave equal time to intelligent design and required that the biology textbook Pandas and People by Dean Kenyon be used. The book discussed six different areas of biology and, according to Mr. Meyer, shows how they can be interpreted more profitably through the theoretical idea of design. Some of the teachers were opposed to this. There was a lot of influence by outside groups, like the National Center for Science Education. The school board finally backed down.

In Burlington, Washington, there is currently an ongoing controversy. One teacher is presenting intelligent design theory as an alternative. The American Civil Liberties Union is involved. The school district was scheduled this summer to decide whether to allow the teacher to continue to teach intelligent design next to evolution.

Panel Three: Partnerships Between Schools and Communities on Religious Freedom Issues

Previous panels have discussed the major schools and religion controversies occurring throughout the nation and, specifically, in Washington state and the Pacific Northwest. Many of these disputes involve various curriculum issues, i.e., the origin of human life and health

[6] 975 F. Supp. 819 (1997).

education topics. Other disputes which were identified include free exercise rights of students and teachers—students refusing to pledge allegiance to the flag for religious reasons and teachers' objecting to various work-related activities which are against their religious beliefs. The question remaining, however, is can these disputes be resolved? What laws, policies or other actions can the Federal government effect in order to address these remaining, and in some instances recurring, conflicts which have continued to plague many parts of the country, including communities throughout the Pacific Northwest? Are there policies and/or practices which non-governmental entities can effect in order to resolve these disputes?

Initially, the Supreme Court has clearly stated that the teaching of evolution cannot be restricted[7] and that it is unconstitutional to require the teaching of creationism when evolution is taught.[8] In addition, the Court also has held that public schools cannot teach religion but may teach *about* religion.[9] Finally, the Court has ruled that the Bible can be studied as literature, although it may not be taught as a religious doctrine.[10] Thus, there is well-established legal precedent regarding a number of major curriculum issues.

Despite these legal precedents, curriculum disputes abound. In an attempt to resolve these conflicts, several private sector organizations have initiated programs to educate school officials and religious communities regarding constitutionally permissible religious activity and instruction as well as to encourage a dialogue between the schools and religious groups. Among these organizations are Bridgebuilders and the 3Rs Project in California.

Also working to resolve school and religion issues is the Comprehensive Health Education Foundation (CHEF) which has begun a partnership project to encourage cooperation and understanding between faith communities and public educators. CHEF travels throughout Washington state conducting seminars and workshops for school administrators, principals, curriculum developers, and health teachers in an attempt to establish health education programs which will be supported by educators as well as the entire community.

Finally, the Commissioners will hear about the efforts of another private sector organization which is working to educate school officials about permissible religious expression in public schools -- the Washington, DC-based Center for Jewish and Christian Values of the International Fellowship of Christians & Jews. Through its Religious Expression in the Public Schools (REPS) project, the organization attempts to inform educators about constitutionally appropriate ways of teaching about religion. The project's Burbank, California site is one of 3 REPS cities—the others being Charlottesville, Virginia and Grand Rapids, Michigan--with a full time program director. In addition to the 3 cities with full time directors, the program has initiated four other programs: Golden, Colorado; Colorado Springs, Colorado; and two programs in Albuquerque, New Mexico.

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[7] Epperson v. Arkansas, 393 U.S. 97 (1968).
[8] Edwards v. Aguillard, 482 U.S. 595 (1987).
[9] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).
[10] Hall v. Board of Sch. Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. 1981); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

The information presented by the panelists at the Briefing will be used to supplement the sworn testimony presented at the previous hearings in Washington, D. C. and New York City. It will provide facts and perspectives from individuals about another region of the nation on issues concerning public schools and religion, as well as specific aspects of this topic not presented at the previous hearings.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING

CONFIDENTIAL STAFF REPORT

Prepared for the U.S. Commission on Civil Rights

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ACKNOWLEDGEMENTS

This report was prepared by Staff Attorneys Sicilia Chinn, Lynn Dickinson, Peter Reilly, and Maxine Sharpe in preparation for the Washington, D.C. hearing. The report was prepared under the direction and supervision of Emma Gonzalez-Joy, Team Leader, Edward Hailes, Jr., Deputy General Counsel/Project Director and Stephanie Y. Moore, General Counsel.

Chapter One: Introduction

Origins of Religious Freedoms

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."*[1]

Religious liberty has been safeguarded in the Federal courts since the beginning of the republic by these two clauses of the First Amendment. Before 1940 the U.S. Supreme Court held that these clauses did not allow the Federal government to dictate the expressive rights of students in public schools, which were, instead, under the purview of State constitutions. In 1940, however, the Supreme Court held that the fundamental concept of liberty embodied in the 14th Amendment, which applies to state action, also embraces the liberties guaranteed by the First Amendment.[2] Consequently, the doors of the Federal courts were opened to challenges of state and local actions concerning religious issues.

During the 1960s and 1970s, the Supreme Court issued a number of controversial decisions dealing with separation of church and state. During this period the emphasis was on setting parameters for separation of church and state intended to ensure fairness in a modern multi-religious society. The Supreme Court emphasized the rights of the individual, and for the first time, in *Tinker v. Des Moines Independent School District,*[3] the rights of public school students and teachers to express themselves during the school day on school property were recognized. Also recognized by the Court were legitimate reasons that modify such expression, such as the interest of school officials to maintain discipline and to communicate lessons.

During the last 18 years there has been an expansion of the religious expressive rights of groups rather than those of individuals. In 1981, the Supreme Court in *Widmar v. Vincent,*[4] recognized the right of university students under the First Amendment to meet for religious purposes in school facilities after school when similar groups are so authorized. Then in 1984, Congress enacted the Equal Access Act.[5] In enacting the law, Congress sought to end perceived discrimination against religious groups requesting access to school premises for extracurricular activities.

The debate as to the meaning and interaction of the two religion clauses continues today. The debate is, in part, about history and constitutional interpretation centering around the

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[1] U.S. CONST. amend. I.

[2] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[3] 393 U.S. 503, 506 (1969).

[4] 454 U.S. 444 (1981).

[5] 20 U.S.C. §§ 4071-4074 (1997).

proper role of religion in public life. Those who advocate for the separation of church and state argue that the founders intended that the Establishment Clause should deprive the government of power either to aide or hinder religion. Others insist that the state retains power, with certain limitations, constitutionally to advance religion as a moral good. At a minimum, there is some consensus that the Free Exercise Clause was intended to preserve for each individual the right, with some limitations on conduct, to follow the dictates of their own conscience.

The focus of much debate is on the meaning of the Establishment Clause. The writings of both Jefferson and Madison have been relied upon by some as instructive as to the meaning of the First Amendment. On January 16, 1786, Virginia passed the Bill for the Establishment of Religious Freedom, drafted by Thomas Jefferson. The bill ended support for the Anglican Church and guaranteed full religious liberty for all citizens of the State. Thomas Jefferson is quoted as stating that the Constitution gives no power over religion to the Federal government:

> Believing that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[6]

James Madison is recognized as the primary advocate of Federal protection of religious liberty. In 1947 in *Everson v. Board of Education*[7] the importance of his work and the impact of Virginia's stance on religious freedom on the language of the First Amendment was summarized as follows:

> Ratification thus accomplished, Madison was sent to the first Congress. There he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia. Within a little more than three years from his legislative victory at home he had proposed and secured the submission and ratification of the First Amendment as the first article of our Bill of Rights. All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship.[8]

Ironically, Madison, who was responsible for the language of the First Amendment, was willing to support the Constitutional Convention, even without an amendment to protect

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[6] 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).

[7] 330 U.S. 1 (1947).

[8] *Id.* at 39. The Court also quoted Thomas Jefferson's letter to the Danbury Baptists in *Everson;* however, some critics maintain that reference to Jefferson's letter was based on a mistaken understanding of Constitutional history.

religious liberty. In his journal he explained what he thought ensured this religious liberty:

> Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from the multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.[9]

Chief Justice William Rehnquist, following the historical tradition of Patrick Henry and John Cotton, is the modern day advocate for those who favor government encouragement of religion. The Chief Justice wrote in his dissent in *Wallace v. Jaffree*[10] as follows:

> The Establishment Clause did not require neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*. . . .
>
> The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.[11]

Overview of The Schools and Religion Hearing Project

The U.S. Commission on Civil Rights will conduct three one day hearings: Washington DC, New York, NY, and a location yet to be selected.

The hearing in Washington DC will feature experts to discuss issues of discrimination against religion from a national perspective. The hearing will focus on major issues concerning schools and religion, in particular the following: (1) how and to what extent, if any, religion might be integrated into classroom lesson plans and school textbooks in a manner that conforms to current laws and court opinions; (2) how well are schools both accommodating students' and teachers' religious practices and protecting their freedom from harassment and coercion; and (3) what impact, if any, the *Statement of Principles of Religious Expression,* discussed below, has had in public schools, and whether the right of equal access of religious groups to school facilities is adequately protected.

New York City was selected as a hearing site because its people represent diverse religious beliefs and it is located in a State which in recent years has been the site of several significant schools and religion disputes. The hearing in New York City will

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[9] Norman Cousins, ed., *In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers* (New York: Harper & Brothers, 1958), pp. 314-315.

[10] 472 U.S. 38 (1985).

[11] *Id.* at 106-07 (Rehnquist, J., dissenting).

address the following issues, which are more fully addressed below: (1) government funding and religious schools; (2) equal access; and (3) religious rights of teachers.

As part of the hearing project, the U.S. Commission on Civil Rights will examine the impact of the *Statement of Principles of Religious Expression in Public Schools* issued by the U.S. Department of Education (DoE) three years ago. In 1995, there was widespread confusion in the aftermath of Supreme Court decisions generally perceived as contradictory. This confusion led to a concerted effort by diverse groups to educate the public on the rights of religious expression of students in public schools. These groups included those who supported and those who opposed an expansion of the rights of religious expression. Jointly they drafted a pamphlet entitled *Religion in the Public Schools: A Joint Statement on Current Law,*[12] which, in April 1995, was signed by a coalition of 30 religious and civil liberties organizations.

Shortly after, in July 1995, President Clinton sent to the Secretary of Education a set of guidelines on the constitutionally protected right of school children to religious expression in public schools. The Secretary then sent the *Statement of Principles of Religious Expression in Public Schools* to all school superintendents in the country. The *Statement of Principles* details what is permissible under existing law and is only advisory, not an official policy that schools are legally bound to follow. Generally, the *Statement of Principles* says that students have the same right to engage in individual and group prayer and religious discussion during the school day as they do to engage in other comparable activities. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable non-disruptive activities. Local school authorities retain substantial authority to impose rules of order or other teaching-related restrictions on student activities, but they may not discriminate against religious activity or speech.

One issue that the *Statement of Principles* did not address was student-led prayers at graduation ceremonies. The legal status of student-led prayer has been uncertain since 1992, when the Supreme Court ruled in *Lee v. Weisman*[13] that school districts cannot permit clergy members to deliver prayer at graduations. The statement also did not provide guidance with regard to prayers at sporting events or parameters on performing religious music. Representatives of various civil rights and religious groups agree that the distribution of the *Statement of Principles* has been beneficial, but disagree on the extent of its impact.

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[12] *Religion In The Public Schools: A Joint Statement of Current Law* (Apr. 1995) (hereafter cited as *Joint Statement*), p. 1. The drafting committee for the guidelines consisted of representatives from the following organizations: American Jewish Congress, American Civil Liberties Union, American Jewish Committee, American Muslim Council, Anti-Defamation League, Baptist Joint Committee, Christian Legal Society, General Conference of Seventh-day Adventists, National Association of Evangelicals, National Council of Churches, People for the American Way, and Union of American Hebrew Congregations. Ibid., cover page. The guidelines were endorsed by a number of additional organizations. Ibid.

[13] 505 U.S. 577 (1992).

Chapter Two: Curriculum

Teaching religion

Although the Supreme Court has consistently rejected efforts to teach religion in the public schools, it has permitted teaching *about* religion.[14] While teaching religion amounts to illegal religious indoctrination, teaching *about* religion is learning about religion in the historical, cultural, economic and social development of the United States and other nations.

Thus, while the Bible cannot be studied as religious doctrine, it may be studied as literature.[15] Indeed, Bible courses are being taught throughout the country: according to the National Council on Bible Curriculum in Public Schools, its Bible instruction materials have been adopted by public school districts in 22 states. While the Council, in order to avoid litigation, will not reveal the precise location of those districts utilizing its materials, it is known that in North Carolina at least 20 school districts now offer some sort of Bible instruction, and Texas has 219 public school courses throughout the State in biblical history or literature. In addition, nine counties in Florida offer Old or New Testament history.

Oliver Thomas, counsel to the National Council of Churches, and co-author of Finding Common Ground: A First Amendment Guide to Religion and Public Education, maintained in a recent interview with Commission staff that while the curriculum developed by the National Council on Bible Curriculum in Public Schools is "well intentioned," it was "clearly flawed" in some significant ways. Said Mr. Thomas:

> The curriculum was based upon some fundamental assumptions that were wrong. You don't teach Bible as history – that's suggesting that something is factual that may or may not be factual, and is a matter of faith. I think there was a failure to appreciate that it's not just history that's in the Bible, but it's sacred history, it's a revealed tradition. So we encouraged them to either do a course teaching kids about the Bible and Bible literacy, or Bible as literature. . . I think they've modified it to a point where it's OK – but the original curriculum was flawed.[16]

While religion is being incorporated into the curricula of many school districts, some proponents of religious incorporation argued that, nationwide, the vast majority of districts largely lack such a component. Professor Warren Nord, director of the Program

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[14] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[15] Hall v. Board of Sch. Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. 1981); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[16] Oliver Thomas, Esq., Counsel, National Council of Churches, telephone interview, Apr. 30, 1998 (hereafter cited as Thomas Interview) (unverified).

in Humanities and Human Values at the University of North Carolina at Chapel Hill, and author of Religion & American Education: Rethinking a National Dilemma,[17] argues that religion is virtually excluded from public school education. Said Professor Nord in a recent interview with Commission staff:

> By virtue of excluding religion from the curriculum, I've come to the conclusion that public education discriminates against religion. The problem is sufficiently deep that it even begins to make sense to talk about a kind of secular indoctrination against religion. The problem is largely a philosophical one for me: we teach students to think about the world in secular categories that conflict with or at least stand in some tension with religious categories. And this is a problem which occurs across the curriculum. While we do teach students things about religion in history courses and literature courses, the problem is that when we look at courses that help students understand the world here and now – science courses, sex education courses, economics, civics, etc. – what role should religion have there, and the usual argument is, well, religion is something different, it's something else that we can compartmentalize.[18]

Professor Nord argues that society therefore eliminates religion from all those "here and now" subjects, which he concludes results in an "uncritical socialization" into a "secular mentality" or a secular way of thinking about the world. Professor Nord argues that on both educational grounds, in terms of what constitutes a good education, as well as constitutional grounds, in terms of what the courts require, religious voices need to be included in the curricular conversation, and need to be "taken much more seriously" than they are at the present time.[19]

Religion in Textbooks

Two types of controversies usually develop around religion and textbooks: the first involves what they *say*; the second involves what they *fail to say*, or what they leave out. In one example, five school board members in Austin, Texas objected last year to a new biology textbook because, they said, it failed to point out the weaknesses in the theory of evolution. The book was finally adopted on a vote of 9 to 5. The vote – which was rather contentious – was part of a $177 million dollar textbook purchase by the school board. Some have argued that this and similar episodes have forced textbook publishers to anticipate contentious and protracted school board approval processes for their products – thereby causing the publishers to avoid controversy altogether by deleting and/or watering down all potentially controversial material. Moreover, the State of Texas is one of the largest textbook purchasers in the Nation and, thus, has a large influence on books marketed in other states.

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[17] Warren Nord, *Religion & American Education: Rethinking a National Dilemma* (Chapel Hill: The University of North Carolina Press, 1995).

[18] Professor Warren Nord, University of North Carolina Chapel Hill, telephone interview, May 1, 1998 (hereafter cited as Nord Interview).

[19] Ibid.

With respect to what textbooks leave out, in 1987 a lawsuit filed in Alabama alleged that history books left out historical facts regarding religion, and failed to discuss the place of religion in modern American society. The district court agreed, finding that the history books "uniformly ignore the religious aspect of most American culture." The appellate court, however, ruled that the education officials had control over the curriculum and had the discretion to continue using the books.[20]

In his interview with Commission staff, Professor Nord stated:

> As we get to the last century or two, religion largely disappears from the standards and the textbooks. They don't take theology seriously, or religious ways of making sense of history seriously – that is, they assume history is a secular discipline. . . . Of all the national standards, the history and civic standards are the best when it comes to religion. The other standards are completely inadequate. None of the other standards really takes religion seriously. And in almost all cases the textbooks are worse than the standards.[21]

It was this same issue – the lack of religion in school textbooks – which led Dr. Charles C. Haynes, Scholar in Residence at the Freedom Forum First Amendment Center, to become involved in the area of schools and religion. A recent article in the *Wall Street Journal*[22] profiles Dr. Haynes, who currently runs a mediation and training program addressing the way religion is treated in thousands of schools nationwide. Dr. Haynes was also one of the principal organizers and drafters of *Religious Liberty, Public Education, and the Future of American Democracy*, a statement of principles sponsored by 21 major educational and religious organizations.

Since researching textbooks in 1986 and concluding that, in his estimation, scant attention was being paid to religion, Dr. Haynes, who formerly worked as a consultant to the research foundation of Americans United for Separation of Church and State, has teamed up with Oliver Thomas to design religion policies for schools that could be endorsed by people on both ends of the political spectrum. The program they developed is called "Finding Common Ground." Dr. Haynes indicated in his interview with Commission staff that public school curriculum is still "very poor" when it comes to treatment of religion:

> At best we have religion mentioned now more often than we did five or ten years ago, and when we actually got out there working with schools, we found we had a *long* way to go. And to change things is a very labor intensive and difficult process. In recent years, this change has accelerated partly because of our work, and partly because of the

[20] Smith v. Board of Sch. Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987).

[21] Nord Interview.

[22] Edward Felsenthal, "Cease-Fire: End of a Culture War? How Religion found Its Way Back to School; Theologian Charles Haynes Finds Signs of Truce in Long-Running Battle 'After 150 Years of Shouting,'" *The Wall Street Journal*, Mar. 23, 1998.

> guidelines that the [Clinton] administration issued [in 1995] based on a consensus of what current law is. And other factors: the change in the culture, and the entrance into the political arena of religious voices, mostly conservative, and [various legal trials that have occurred around the country involving schools and religion].[23]

Dr. Haynes said during the interview that the "Finding Common Ground" project is an effort to present a shared vision of religious liberty in the schools that most people – whether they are on the right or the left, religiously or politically[24] – could support. Said Dr. Haynes: "Our contention was that unless we offered the schools a safe harbor on these issues, they cannot move forward and will be forever polarized and doomed to shout past one another about religion and values in the schools."[25]

Oliver Thomas, counsel to the National Council of Churches and co-author with Dr. Haynes of Finding Common Ground: A First Amendment Guide to Religion and Public Education, suggested during an interview with Commission staff that there are also forces working to *prevent* the finding of common ground. Mr. Thomas contends that numerous individuals have a "great deal at stake" in continuing the current culture wars: "There's a lot of money being made by telling people that kids cannot pray in schools or that the Christian right is taking over. . .You get fundraising letters on both sides that demonize and caricature the opposition, and . . . groups on both the right and left are making money. . . "[26]

Teaching evolution versus teaching creationism

The debate over the teaching of evolution versus creationism was made famous more than 70 years ago in the "monkey trial," which led to the conviction of John Scopes for teaching evolution in a Tennessee school. The Supreme Court, however, made clear 30 years ago that it is unconstitutional to restrict the teaching of evolution.[27] And in 1987, the Supreme Court held that it is unconstitutional to require educators who teach evolution, to also teach creationism.[28]

Despite the Supreme Court rulings, the National Academy of Sciences issued in April 1998, a 140 page document entitled "Teaching About Evolution and the Nature of Science," which argues that many public school students receive little or no exposure to

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[23] Dr. Charles C. Haynes, Freedom Forum, telephone interview, Apr. 29, 1998 (hereafter cited as Haynes Interview) (unverified).

[24] The groups working with the "Finding Common Ground" project range from Pat Robertson's organization to the ACLU, the Christian Legal Society, the Union of American Hebrew Congregation, and the National Association of Evangelicals. Thomas Interview.

[25] Haynes Interview.

[26] Thomas Interview.

[27] Epperson v. Arkansas, 393 U.S. 97 (1968).

[28] Edwards v. Aguillard, 482 U.S. 595 (1987).

the theory of evolution – which the academy considers "the most important concept in understanding biology."

The National Academy reports that teachers are reluctant to teach evolution because of pressures from special interest groups to downplay or eliminate it as part of the science curriculum. However, the academy states that the guide is not an attempt to abolish discussion of creationism, pointing out that it focuses only on how all forms of life have evolved over time – not on the question of how the very first cell in the process may have originated.

In some states, it has been reported that several school boards have ordered teachers to give equal time to creationism, and lawmakers in a few states want to remove the term "evolution" from their science curricula altogether. In Alabama, biology textbooks now include a disclaimer telling students that evolution is only a "controversial theory."

Controversies arising out of the "evolution" theory are sometimes resolved without court intervention. In Colorado recently a student objected to a video tape because it depicted evolution as "scientific fact" rather than theory. The school district formed a review committee and decided the best course of action was to withdraw the tape from the curriculum.

It is not yet clear how the National Academy of Sciences report will be received by people who determine school curricula. However, since these matters are controlled locally, school districts are not required to accept the advice in the report.

National Council of Churches counsel Oliver Thomas argued during his interview with Commission staff that the "only place" to find common ground between conservative religious people and the scientific community is to "just teach the controversy." Said Mr. Thomas:

> Let the students know that the vast majority of scientists interpret the data in this particular way, and make sure the students understand evolutionary theory. Don't suggest to [the students] that it's equally weighted – let them know that a small minority voice is challenging that paradigm, and that minority voice has support from a lot of people outside the scientific community. . .Let the students know that this [controversy] is going on and will continue to go on . . . I don't have a problem teaching kids evolutionary theory, but I think it needs to be done in the context of a richer, honest conversation about the fact that there are dissenting views.[29]

Professor Nord of the University of North Carolina at Chapel Hill had similar views regarding the teaching of evolution:

[29] Thomas Interview.

> The public discussion [of the evolution verses creationism debate] has become hopelessly polarized and people are scared to death of it, and, as a result, students don't learn much of what they should. They should learn how biologists understand evolution. They should also learn a variety of religious ways of understanding nature, some of which stand in tension or conflict with how biologists understand how biology works.[30]

[30] Professor Nord added that "part of the problem is that the discussion is so polarized that there are usually only two views: Christian fundamentalism on one side, and modern biology on the other, when in fact there are at least a half dozen major views, and there are all kinds of mainline and liberal views of evolution which accept evolution, but put it in a broader theological context for making sense of it." Nord Interview.

Chapter Three: Individual Students' And Teachers' Religious Freedom

Religious Expression of Students in Public Schools

The proper boundaries of individual student religious expression and practice at school has long been a controversial issue. One representative of a Christian organization described the manner in which the issue came to the forefront as follows:

> When you had Christian prayer in school in the 1940s, that was no big deal. It was not offensive; it was part of the culture. . . . But after World War II, the world came to America. . . . We could no longer take for granted that everyone was Christian. How do you mandate Christian prayer when the whole country has changed?[31]

After members of a variety of religions began migrating to the United States, religious practices that had previously received the acceptance of homogeneous communities became problematic.[32] Controversies developed and eventually the U.S. Supreme Court was asked to decide whether school-sponsored prayer could continue. In 1962, the Court stated that "[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."[33] In that landmark case, *Engel v. Vitale*, the Court held that a school district policy requiring that a certain prayer be read aloud by each class at the beginning of every school day violated the Establishment Clause.[34]

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[31] Caryle Murphy, "At Public Schools, Religion Thrives; Students of All Faiths Increasingly Active," *The Washington Post*, May 7, 1998 (hereafter cited as Murphy, "Religion Thrives"), p. A-1 (quoting Benny Proffitt, "founder of First Priority, a Tennessee-based church group that helps Christian students set up religious groups at their schools"). "Between 1820 and 1930, 38 million immigrants came to America." United States Commission on Civil Rights, *Religion in the Constitution: A Delicate Balance* (Washington, DC: The Government Printing Office, Sept. 1983), p. 15.

[32] Marc D. Stern, Co-Director, Commission on Law and Social Action, American Jewish Congress, telephone interview, Apr. 29, 1998 (hereafter cited as Stern Interview) (stating that school prayer disputes often arise in formerly homogeneous communities that are becoming religiously heterogeneous); Terri Schroeder, Lobbyist, American Civil Liberties Union, telephone interview, Apr. 30, 1998 (hereafter cited as Schroeder Interview) (stating that the number of schools and religion disputes has increased as communities have become more diverse).

[33] Engel v. Vitale, 370 U.S. 421, 431 (1962).

[34] *See id.* at 424; *see also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (holding that a State statute and a school board rule requiring Bible readings at the beginning of each school day violated the Establishment Clause).

In the years following that decision, according to some observers, many school districts "reacted by purging religion from their classrooms."[35] Again, according to some, in many instances, even individual student prayer and religious expression – as distinguished from the school-sponsored prayer practices expressly struck down by the Court – were deemed impermissible.[36] As noted in the introductory chapter of this report, due to the confusion regarding the scope of the Supreme Court's rulings, in April 1995 a number of organizations, "span[ning] the ideological, religious and political spectrum," issued a "statement of consensus on current law as an aid to parents, educators and students."[37] The guidelines attempt to clarify the law on issues including student prayers, official participation or encouragement of religious activity, student assignments and religion, distribution of religious literature, religious persuasion versus harassment, religious holidays, excuses from religiously objectionable lessons, student clothing, released time, and more.[38]

In addition to the *Joint Statement*, in July 1995 President Clinton ordered the Secretary of Education to "provide every school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools."[39] The President stated:

> Nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the consciences of our students, or to convey official endorsement of religion, the public schools also may not discriminate against private religious expression during the school day.[40]

The Secretary of Education issued the guidelines, discussed above, in August 1995.[41]

Crediting these and other efforts, some have begun to note a "remarkable turnabout in the

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[35] Edward Felsenthal, "Cease-Fire; End of a Culture War? How Religion Found Its Way Back to School; Theologian Charles Haynes Finds Signs of Truce In Long-Running Battle 'After 150 Years of Shouting,'" *The Wall Street Journal*, Mar. 23, 1998, p. A-10 (hereafter cited as Felsenthal, "Cease-Fire").

[36] *See* Jay Alan Sekulow, James Henderson, and John Tuskey, "Proposed Guidelines for Student Religious Speech and Observance in Public Schools," *Mercer L. Rev.*, vol. 46 (1995), p. 1018 ("Many officials are still under the misguided assumption that the Establishment Clause requires schools to stifle [individual] student religious speech.."); Stern Interview (noting that some children are improperly prohibited from praying during their free time).

[37] *Religion In The Public Schools: A Joint Statement of Current Law* (Apr. 1995) (hereafter cited as *Joint Statement*), p. 1.

[38] Ibid., pp. 1-9.

[39] Richard W. Riley, U.S. Secretary of Education, letter to Superintendent, Aug. 10, 1995 (describing the order he received from the President) , U.S. Commission on Civil Rights files.

[40] President Clinton, July 12, 1995, *reprinted in*

[41] Richard W. Riley, U.S. Secretary of Education, *Religious Expression in Public Schools* (1995).

battle over religion in the schools."[42] "Public educators are . . . giving students unprecedented freedoms to observe their faiths at school, permitting everything from T-shirts with religious messages to student prayer meetings."[43] A recent article in *The Washington Post* reported that "signs abound . . . across the country that 36 years after the U.S. Supreme Court ruled compulsory, school-sponsored prayer unconstitutional, praying and other types of religious practices are flourishing in public schools."[44]

Staff interviews suggest that despite the consensus on current law reached among a wide variety of leaders in the religious community, disputes continue to arise, allegedly due in large part to a lack of information on the part of school administrators.[45] Thus, the Commission's Washington, DC hearing will address the extent to which schools are both accommodating children's religious practices and protecting members of minority faiths from coercion and harassment.

Legal Background

Students' constitutionally protected rights of freedom of religion and freedom of speech derive from the Religion and Speech Clauses of the First Amendment .

Freedom of Religion

The constitutional right of freedom of religion derives from both the Establishment Clause and the Free Exercise Clause.[46] The two religion clauses impose different requirements, which often are in tension with one another.[47] To safeguard religious

[42] Felsenthal, "Cease-Fire," p. A-1; Schroeder Interview (stating that religious expression is functioning very well in the public schools).

[43] Ibid.

[44] Murphy, "Religion Thrives," p. A- 1.

[45] Schroeder Interview (stating that many educators and administrators are unaware of what the law requires); Mohamed Nimer, Ph.D., Research Director, Council on American-Islamic Relations, telephone interview, May 8, 1998 (stating that many problems arise because Muslims are a newly emerging group in the U.S. and many people are unaware of Islamic practices); Julie Underwood, General Counsel Designate, National School Boards Association, telephone interview, Apr. 30, 1998 (stating that before the *Joint Statement* was issued, many school administrators were unaware of the legal requirements regarding religion at school). In addition, Steven T. McFarland, Director of the Center for Law and Religious Freedom at the Christian Legal Society, stated that he supported instructing teachers and other school officials about the principles set forth in the *Joint Statement*. Steven T. McFarland, telephone interview, Apr. 29, 1998.

[46] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); *see* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222-23 (1963).

[47] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").

rights, the government must maintain a proper balance between the often competing concerns addressed by each clause of the First Amendment .[48]

The Free Exercise Clause was adopted to prevent the government from restraining the practice of any religious faith.[49] The freedom to exercise one's religion has two components: the freedom to believe and the freedom to act or engage in religious practices.[50] Because the freedom to engage in religious practices is not absolute, it may be subjected to some government-imposed burdens.[51] However, the government may not implement policies that have a coercive effect on the ability of individuals to exercise their religious beliefs freely.[52] Thus, the overriding principle that derives from the Free Exercise Clause is accommodation: the government may not unnecessarily curtail religious practices.[53]

The Establishment Clause was adopted to prevent the religious majority from using the arm of the state to infringe upon the beliefs of members of minority religions.[54] Accordingly, the government must remain neutral and may not promote one religion over others, religion over non-religion, or non-religion over religion.[55] The principle underlying the Establishment Clause, therefore, is neutrality: the government may not engage in discrimination based on religion.[56]

Taken together, the two religion clauses require that the government maintain a delicate balance between accommodating individual religious beliefs and doing so without promoting or advancing one belief over others.[57]

Free Speech

The U.S. Supreme Court has stated that under the Free Speech Clause[58] a student may express his or her beliefs as long as the student's expressive conduct does not "'materially

[48] *See id.* at 591-92; *Schempp*, 374 U.S. at 217-18.

[49] *See Schempp*, 374 U.S. at 222-23; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

[50] *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("[T]he [First] Amendment embraces two concepts, --freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

[51] *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[52] *See Schempp*, 374 U.S. at 222-23.

[53] *See Church of the Lukumi Babalu Aye*, 508 U.S. at 532.

[54] *See* Engel v. Vitale, 370 U.S. 421, 429-31 (1962).

[55] *See Schempp*, 374 U.S. at 222.

[56] *See id.*

[57] *See id.* at 225-26.

and substantially interfere with the requirements of appropriate discipline in the operation of the school'" or "impinge upon the rights of other students."[59] For example, obscene speech - which conflicts with schools' basic educational mission - may be prohibited.[60]

In the context of religious expression, confusion sometimes arises as schools attempt to abide by both the Free Speech Clause and the Establishment Clause. For example, in one case a school argued that banning student distribution of religious materials was necessary to avoid violating the Establishment Clause.[61] The Federal district court held that the school's policy prohibiting speech based on its religious content itself violated the Establishment Clause because it disfavored religion.[62] Thus, as a general matter, students have a right to engage in non-disruptive speech, and schools may not prohibit expression based on its religious content.[63]

Current Disputes

Disputes implicating the religious rights of individual students have arisen mostly in the South. The leading controversies that have arisen in the past few years are described briefly below.

Alabama

Individual students' rights of freedom of religion have formed the center of two disputes in Alabama communities where the vast majority of citizens seek the inclusion of prayer in school ceremonies.

The first dispute began when Michael Chandler, vice-principal of DeKalb County Schools and parent of a student, filed a lawsuit in February 1996. Chandler alleged that: (1) Alabama's school prayer statute violated the First Amendment; and (2) school systems were engaging in religious practices that violated students' religious liberty and unconstitutionally promoted religion.

On March 12, 1997, Federal District Judge Ira DeMent ruled on the first prong of Chandler's challenge, holding that the school prayer statute was unconstitutional.[64] Although one of the stated purposes of the law was "'to properly accommodate the free

[58] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[59] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[60] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[61] *See* Johnston-Loehner v. O'Brien, 859 F. Supp. 575, 580 (M.D. Fla. 1994).

[62] *See id.*

[63] *See id.*

[64] *See* Chandler v. James, 958 F. Supp. 1550 (M.D. Ala. 1997).

exercise of religious rights of its student citizens in the public schools,'" the court found that, by its terms, the law allowed only "'non-sectarian, non-proselytizing student-initiated, voluntary prayer.'"[65] The judge held that the law "unreasonably restrict[ed] the free speech and religion rights of Alabama's public school students,"[66] and on October 29, 1997, the judge issued an injunction barring enforcement of the law.[67] The judge also appointed a "monitor" to visit the schools and ensure that the order was followed.[68]

In reaction to these legal developments, students at several schools in the northern area of Alabama known as Sand Mountain walked out of classes or other school events to pray. Such "prayer protests" occurred in Boaz, Albertville, and Glencoe.[69] In addition, Alabama Governor Fob James issued a statement describing the order as an "unwarranted restriction[] on religious freedom" and stating his intention to "resist [the] . . . order by every legal and political means with every ounce of strength [he] possess[ed]."[70]

Chandler's second claim challenged various religious practices, including student-led prayer at high school football games; Bible readings at school-sponsored events and over the public address system; faculty solicited prayers during classes; and distribution of Bibles by non-students in school classrooms.[71] In November 1997, the judge agreed with Chandler and held that the practices were unconstitutional.[72]

The second Alabama dispute began on August 4, 1997, in Troy Alabama, when Jewish parents sued the school district alleging violations of their children's religious freedom. The parents alleged that: (1) one of their children was required to write an essay on "Why Jesus Loves Me;" (2) another child was physically forced to bow his head during a school prayer ceremony; and (3) the children were prohibited from wearing yarmulkes

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[65] *Id.* at 1553 (quoting Ala. Code §§ 16-1-20.3(a) - (b) (1995)). The law was the Alabama legislature's fourth attempt to regulate school prayer. *See id.* at 1553.

[66] *Id.* at 1568.

[67] *See* Chandler v. James, 985 F. Supp. 1062 (M.D. Ala. 1997).

[68] *See id* at 1067-68. As of March 4, 1998, the monitor appointed by the Federal court judge had completed his first visits to the thirteen schools in DeKalb County. *See* The Freedom Forum Online, "Court monitor completes first visits to Alabama schools in prayer case," *free!* (visited Mar. 10, 1998) <http://www.fredomforum.org/religion/1998/3/4alaprayer.asp>.

[69] Kevin Sack, "In South, Prayer Is a Form of Protest; A Ruling Is Opposed in Classrooms, Courtroom and Statehouse," *The New York Times*, Nov. 8, 1997, p. A-9.

[70] Governor Fob James, "Statement of Gov. James Relative to DeMent Prayer Ruling," Nov. 4, 1997, *reprinted in* American Civil Liberties Union Freedom Network, *In the States* (visited Mar. 10, 1998) <http://www.aclu.org/community/alabama/fobstatement.html>, p. 2.

[71] *Chandler*, 985 F. Supp. at 1098-1102 .

[72] *See id.* The ruling granted the plaintiff's Motion for Summary Judgment. *Id.*

and Star of David symbols.[73] The parents alleged that other incidents, such as harassment by other students, had occurred as well.[74] The suit sought injunctive relief prohibiting religious practices in school and ending the harassment.[75] Because many of the issues mirrored those decided in the DeKalb County case, the parties reached a settlement that was approved by the judge on April 23, 1998.[76] In the settlement, the School Board agreed to abide by Judge DeMent's order in the DeKalb County case.[77]

Mississippi

A dispute in Mississippi began in January 1998 when Christopher Edward Childs challenged the Poplarville High School's policy of allowing a minister or school official to lead the audience in prayer at the beginning of home football games. The plaintiff reportedly seeks an amended policy allowing for a moment of silent reflection before each game.

Another dispute began in 1994 and was temporarily resolved when Federal District Judge Neal Biggers ruled that the North Pontotoc Attendance Center's practice of permitting students to offer prayers over the public address system was unconstitutional.[78] After some deliberation, the Pontotoc County school board voted unanimously not to appeal the court's decision. However, on May 6, 1997, school officials - including one school superintendent - led prayers at a mandatory "school pride day" assembly. The current status of this dispute is unknown.

Florida

Students' free speech rights have been at issue in Florida. Nicholas Wright, a senior at the Niceville High School, was suspended for five days for distributing religious tracts at school. Wright distributed his materials to interested friends at school during non-instructional time. The principal and the vice principal told him that if he did not stop he would be suspended. After he refused, claiming he had a constitutional right to distribute his literature peacefully, he was suspended on May 19, 1997. As a result, he failed his

[73] American Civil Liberties Union Freedom Network, "Jewish Parents Sue Alabama School System For Persecuting Their Children," *News & Events* (visited Feb. 24, 1998) <http://www.aclu.org/news/n081497b.html> (hereafter cited as ACLU, "Jewish Parents Sue"); Gita M. Smith, "Taunts, torment on religion alleged; Family blasts Alabama schools." *The Atlanta Journal and Constitution*, Aug. 13, 1997, p. 3-A.

[74] ACLU, "Jewish Parents Sue."

[75] Ibid.

[76] Jay Reeves, "School Board Settles Religion Suit," *The Associated Press*, Apr. 22, 1998.

[77] Ibid. In addition, the parties agreed to an "undisclosed plan for paying the [plaintiffs'] . . . attorneys." Ibid.

[78] *See* Herdahl v. Pontotoc County Sch. Dist., No. 3:94cv188-B-A (N.D. Miss. June 3, 1996), *reprinted in* <http://www.olemiss.edu/~llibcoll/ndms/june96/96d0083p.html> (visited Oct. 3, 1997).

senior year and was unable to graduate with his class. Wright's lawsuit was settled in January 1998, when the school agreed to revise its student literature distribution policy and to pay Wright's attorney's fees and costs.[79]

A second dispute in Florida began in 1993 when students challenged a Jacksonville school district's policy of allowing each graduating senior class to elect to have two minutes of uncensored speech during graduation ceremonies. One student was chosen to address each class, and the content of the speech was up to the student to decide. During the 1993 graduation ceremonies, 6 senior classes in the district chose to have a secular message or no message at all. The remaining 11 classes in the district chose to have a religious message. The students who challenged the policy sought the removal of religious speech from their graduation ceremonies. The current status of this case is unknown.

West Virginia

In September 1997, before the Nitro High School home football game began, the entire audience stood and bowed their heads for a prayer announced over the intercom system. At least one parent of a student from a visiting school's band and the Executive Director of the West Virginia Civil Liberties Union, complained. Previously, in 1994 a Jewish student had complained after a similar incident. At that time, a clergyman reportedly said the student should go back to his own country, even though the student was a native of Charleston, West Virginia. The current status of these disputes is unknown.

Resolving a separate dispute, one Federal District Court recently held that a West Virginia school board and the school superintendent did not violate the First Amendment by permitting citizen groups to place boxes of Bibles in the school hall for a day with a sign that said, "Feel free to read a copy."

Texas

In October 1997, a U.S. District Judge held that administrators at New Cane High School could not forbid two high school freshmen to wear rosary beads to school because they were considered "gang-related" jewelry. The symbols had a legitimate use that was protected by the First Amendment . The two students both had a sincerely held belief that they ought to wear the beads as part of their Catholic faith, and neither boy had been involved with gang activity.

[79] The Freedom Forum Online, "Florida school board votes to settle First Amendment lawsuit," *free!* (visited Feb. 24, 1998) <http://www.freedomforum.org/religion/news/980115.asp>.

Indiana

A program in a Marion County public school district that permits local clergymen to counsel students during the school day has prompted a Federal lawsuit claiming violation of the separation of church and state. For more than a decade, public schools in Marion County have sponsored a "Listening Post" program in which clergymen associated with the Ministerial Alliance are permitted to counsel students, primarily during lunch hours. The school issues guidelines for the program which state, in part, that members of the Ministerial Alliance must not attempt to "convert students to their particular church congregation." The suit was brought by two students at Decatur Central High School and alleges that ministers stopped uninvited at cafeteria tables and insisted upon praying with the students. The current status of this case is unknown.

Idaho

In 1990, two families and the American Civil Liberties Union (ACLU) filed suit against the Madison School District, arguing that prayer at graduation ceremonies violated the Establishment Clause. Last year, Federal District Court Judge Edward Lodge ruled that district officials had done nothing unconstitutional by allowing students to decide whether to pray at graduation. Since the decision was left to the students, the district did not violate the First Amendment. The ACLU appealed Lodge's decision shortly thereafter, arguing that district officials were ultimately involved because they sponsored the event. The Ninth Circuit Court of Appeals heard arguments on Feb. 6, 1998, and has not yet rendered a decision.

Pennsylvania

During the spring of 1997, a Rocky Grove, Pennsylvania student notified the school board that because she is an atheist, prayers offered at her upcoming graduation ceremony would violate her constitutional rights. After the Pittsburgh office of the American Civil Liberties Union threatened to bring Federal court action on behalf of the student, the school board removed the prayer from the ceremony.[80] A similar issue arose in Peters Township in 1995.[81]

Religious Expression of Teachers in Public Schools

At the Federal level, religious expression of public school teachers is covered by the Constitution and Title VII of the Civil Rights Act of 1964. States may also have

[80] American Civil Liberties Union Freedom Network, "PA Graduation Prayer Controversy Continues," *News* (visited Mar. 25, 1998) <http://www.aclu.org/news/w060397c.html>.

[81] American Civil Liberties Union Freedom Network, "Jane Doe Discontinues Suit Over Peters Township School District's Graduation Prayers," *News & Events* (visited Mar. 25, 1998) <http://www.aclu.org/news/n072695b.html>.

provisions in their constitutions or statutes which govern teacher expression within the parameters of Federal law. Similar to the other topics covered by these hearings, the religious expression rights of teachers are subject to the tension inherent in the First Amendment in which religious expression is guaranteed by the Free Exercise Clause while at the same time restricted by the Establishment Clause.

In addition to constitutional guarantees, Title VII of the Civil Rights Act of 1964 requires an employer reasonably to accommodate an employee's religious observances, practices and beliefs unless the employer can show that an accommodation would cause "undue hardship."[82] Although there is no comprehensive definition of what constitutes an "undue hardship," in one case, the Supreme Court held that an employer need not bear more than a de minimis cost to accommodate an employee.[83]

To some extent, teachers' rights of religious expression may be discerned by examining the law and policies on religious expression of public employees generally. On August 14, 1997, President Clinton issued an executive order entitled, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace.* The guidelines primarily pertain to employees who are acting in their personal capacity in the workplace. The guidelines direct agencies to permit personal religious expression to the "greatest extent possible" without jeopardizing workplace efficiency or creating the appearance of an official endorsement of religion.[84] The guidelines state that Federal agency employees may express their religious views toward one another as long as proselytizing stops when it is unwelcome and does not amount to religious harassment. Employees may hand out information on religious doctrine and invitations to worship services to colleagues unless the recipient indicates that it is unwelcome. The guidelines caution employees to be sensitive to Establishment Clause issues in workplace areas that are accessible to the public.

While employees may express religious convictions privately among themselves, they are not entitled to make public religious representations that conflict with the employer's mission. In deciding Free Speech cases, the Supreme Court has applied a balancing test, weighing the employee's Free Speech rights and the employer's interest in "promoting the efficiency of the public services it performs through its employees."[85] This balancing test has been applied to freedom of religion cases. In *Lumpkin v. Brown*,[86] a clergyman was removed from the San Francisco Human Rights Commission because of his public statements against homosexuals based on his strong religious beliefs. The mission of the

[82] 42 U.S.C. §2000e (1994).

[83] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[84] *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (hereafter cited as *Federal Workplace Guidelines*).

[85] Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

[86] 109 F.3d 1498 (9th Cir. 1997).

Human Rights Commission was "to eliminate prejudice and discrimination because of race, religion, color, ancestry, age, sex, sexual orientation. . . . and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people."[87] In this case, the clergyman appeared on television publicly condemning homosexuality as a sin according to the Bible. Applying the Supreme Court's balancing test between the employee's Free Exercise right and the government's interest in workplace efficiency, a Federal court of appeals found that the clergyman could be removed from his position for making public statements that contradicted the commission's mission, even though his views stemmed from strong religious convictions. The court held that the First Amendment does not require any level of government "to put up with policy-level officials who work at cross-purposes with the policies they are responsible for carrying out."[88]

In the case of religious expression of teachers, Establishment Clause issues must be considered along with the interest of efficient operations. As instructors, teachers occupy a unique position. Their rights of religious expression may change depending on the circumstances. Therefore, while teachers may not lead a class in prayer or otherwise proselytize with respect to students, they have greater freedom of expression among colleagues or in the faculty lounge.

The fact that teachers may wish to express religious viewpoints does not create special First Amendment Free Speech rights. In 1986, a Federal court of appeals ruled that a public school could prohibit teachers from holding religious meetings on school premises before the start of the school day.[89] In that case, the teachers held prayer meetings on school facilities before students were allowed in the building. When the principal prohibited the meetings, one of the teachers sued, alleging that the ban violated her Free Speech rights. The court reasoned that the school was not required to permit meetings on the premises by private citizens during those hours, and the fact that the plaintiff worked there did not give her that right.[90] The case was decided on free speech, not religious exercise grounds. Furthermore, the Establishment Clause was not a overriding concern in part because students were not aware of the meetings.

Questions of religious accommodation also arise when teachers wear religious dress or religious symbols during work hours. As stated previously, employers must generally make reasonable accommodations without incurring undue hardship. Safety concerns are generally considered to be an undue hardship. In the teacher context, a public school must balance the teacher's right of expression with maintaining a neutral learning environment. Some states have simply passed statutes prohibiting public school teachers from wearing religious dress while teaching. The Supreme Court has not ruled on the

[87] *Id.* at 1500 (citing San Francisco Admin. Code §12A.2).

[88] *Id.*

[89] May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105 (7th Cir. 1986).

[90] *Id.* at 1110.

constitutionality of these statutes. However, other courts have upheld statutes restricting religious dress.

In Oregon, a State statute prohibits teachers from wearing religious dress while teaching in the public schools.[91] A teacher who had become a Sikh was suspended for wearing a white turban and white clothing while teaching.[92] The teacher then challenged the constitutionality of the statute. The Oregon State Supreme Court held that the statute did not violate the Oregon Constitution or the First Amendment of the Federal Constitution because its purpose was to maintain an atmosphere of neutrality in the public schools.[93] The Oregon Supreme Court noted the historical circumstances underlying many of these statutes which generally involved nuns who wore their habits while teaching.[94]

In Pennsylvania, a State statute prohibits public school teachers from wearing any religious dress or insignia while teaching.[95] The statute was challenged by a Muslim teacher who claimed that her religion required her to cover her entire body except for the face and hands.[96] After she was prohibited from teaching in her religious dress, she sued under Title VII of the Civil Rights Act of 1964. The Court of Appeals for the Third Circuit reasoned that the statute furthered a compelling state interest in maintaining the appearance of neutrality in the public schools, and thus held that "forcing an employer to sacrifice a compelling state interest would undeniably constitute an undue hardship."[97] In this case, the teacher did not challenge the constitutionality of the statute but only alleged that the school failed to make reasonable accommodations as mandated by Title VII.

Both the Oregon and Pennsylvania cases concern State statutes that prohibit teachers from wearing religious dress. The cases do not stand for the proposition that religious dress by teachers in public schools would rise to the level of excessive entanglement with religion in violation of the Establishment Clause. However, they both hold that a rule prohibiting religious dress is permissible to avoid the appearance of favoring a particular religion.

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[91] ORS 342.650 provides: "No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher."

[92] Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986).

[93] *Id.* at 313.

[94] *Id.* at 308.

[95] The Pennsylvania Religious Garb statute provides:

"[N]o teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, set or denomination. 24 P.S. §11-1112(a).

[96] United States v. Board of Educ. of Sch. Dist. of Phila., 911 F.2d 883 (3d Cir. 1990).

[97] *Id.* at 890.

Chapter Four: Equal Access

Constitutional right to public access to school facilities

Though the Establishment Clause prohibits organized prayer and most other forms of religious activity during school hours, the Free Speech Clause requires public schools to allow students and outside religious groups to meet on school property if the school facilities are open to similar groups.

In 1981, the Supreme Court in *Widmar v. Vincent*[98] applied the public forum analysis of the Free Speech Clause to the religious speech of university students participating in extracurricular activities. As a result religious groups have rights of expression in school facilities before or after instructional hours depending on the character of the facilities under the public forum doctrine of the First Amendment .

- A public forum is property that has been traditionally dedicated to free speech and assembly, such as streets and parks. Any member of the public may speak on any issue within the confines of neutral, generally applicable regulations, such as time, place and manner restrictions.

- A nonpublic forum is property that by neither tradition or designation is a forum for public communication. The government can restrict access as long as the restriction is reasonable and viewpoint neutral.

- A limited public forum is property the government intentionally designates as a public forum. The government can restrict access, as long as the restriction is reasonable and viewpoint neutral.

The public forum analysis balances the government's interest in limiting the use of its property against the speaker's interest in using the property for another purpose. Factors considered under this analysis include the type of property, its intended use, and the disruption likely to be caused by the speaker. Historically, schools are generally held to be either limited public forums or closed, nonpublic forums.

In *Lamb's Chapel v. Center Moriches School District No. 10,*[99] the Supreme Court noted that when a wide variety of organizations utilize a school, it might be considered a public forum. Specifically, the Court, rejecting the decisions of the lower courts, held that a Long Island school district was engaged in viewpoint discrimination when it barred a religious group from using a public school building to show family life films with a religious perspective. The Court found that "[a]ccess to a nonpublic forum can be based

[98] 454 U.S. 263 (1981).

[99] 508 U.S. 384 (1993).

on subject matter or speaker identity, as long as the distinctions are reasonable and viewpoint neutral."

Content neutrality is a broad prohibition on the government to restrict the subject matter of the speech itself. Viewpoint neutrality means that the government should not favor one particular viewpoint over another on a certain subject matter that the forum encompasses. The Supreme Court's opinions before *Lamb's Chapel* considered limitations on religious speech to be content-based, normally permissible in nonpublic fora. *Lamb's Chapel* characterized any limitations on religious expression as viewpoint discrimination, which is prohibited in any type of forum. In *Lamb's Chapel* a wide spectrum of the legal community, including advocates of religious expression and groups that advocate separation of church and state filed amicus briefs in support of permitting access to the "nonpublic" forum. The only group in opposition was Americans United for Separation of Church and State.

Some religious advocates interviewed for this project indicated that they were interested in obtaining statutory protection for religious groups who are not protected by law, namely university students, students younger than elementary school children, and for religious worship. They are concerned about the application of the *Lamb's Chapel* rule to two recent decisions emanating from New York. After the *Lamb's Chapel* decision the New York School District changed its rule, at issue in that case, to permit outside groups to use school facilities for discussing religious material or material containing a religious viewpoint. The amended rule, however, specifically prohibits the use of school facilities for religious services or religious instruction. Recent decisions involve the denial of the use of these facilities for religious services.

In *Bronx Household of Faith v. Community School District No. 10*[100] an evangelical Christian church requested to use a gymnasium/auditorium to conduct church services every Sunday. After the church was denied access, a lawsuit was filed. The United States Court of Appeals for the Second Circuit concluded that the school district had created a limited public forum by restricting access to its facilities to certain speakers and certain subjects. An important consideration to the court was that the school had not previously leased that particular school to an outside group for religious instruction. The Court held that the prohibition against Sunday worship was reasonable because the public might associate the school with the church. The New York State School Boards Association, Inc. filed an amicus brief in support of the New York City Board. During the Commission's Washington, DC hearing, it is expected that Julie Underwood, General Counsel Designate for the American Schools Board, will provide the Commission with the official position of the Board on this matter.

Those who are critical of the *Bronx Household of Faith* decision argue that the sanctioned policy allows bureaucrats in New York to decide when a meeting to discuss religious

[100] 127 F.3d 207 (2d Cir. 1997), *cert. denied*, __ U.S. __ (1998).

matters constitutes "worship." These critics maintain that the government is incompetent to make such determinations and, further that it involves matters with which the government is forbidden by the First Amendment to be involved. Furthermore in *Widmar v. Vincent* the Supreme Court had reasoned that the difference between religious beliefs and worship is a distinction without a difference. Thus, some critics argue that the Court in *Bronx Household of Faith* erroneously made that distinction the basis for its decision. Moreover, as a practical matter, there are those who suggest that outside of New York virtually every other school district allows renting of school facilities for religious worship on weekends because it is a source of revenue.

Another area of concern to Equal Access advocates is the religious expression rights of groups of students attending school at grades below the secondary school level. Since these students are younger, they typically meet in groups that are led by parents. Conflicts arise when schools allow the use of their facilities after instructional time to non-religious groups led by parents, such as the Boy Scouts, but deny similar access to parent-led religious groups. For example, in *Good News/Good Sports Club v. School District of Ladue*[101] a school district policy only allowed athletic groups and the Boy Scouts to meet between 3 p.m. to 6 p.m. Scout meetings were only allowed if they did not include any activity involving religion or religious beliefs. The Good News Club is a group of elementary school students who meet with parental consent. Based on the Supreme Court's analysis in *Lamb's Chapel*, the Eighth Circuit Court of Appeals held that the school policy discriminated on the basis of viewpoint.

Some religious advocates contend that students are not a captive audience. Those who oppose allowing use of school premises argue that there should be a difference between children at the primary and secondary level because primary level school children are much more susceptible to religious persuasion and implied coercion by adults. Thus, they argue that it is more important to keep religion out of the public schools and in the homes of primary school level students.

In October 1996, a lawsuit was filed in the Federal District Court in Buffalo, New York, by University Students for Life against the State University of New York. The lawsuit was the result of the failure of the school to permit the student group to sponsor an event on campus by requiring a security deposit not required of other student groups, and a refusal to permit student activity fees, that were used to fund other religious organizations, to be used by University Students for Life. The case was settled in early March 1998, granting the religious student group the same rights as other student groups.

The Christian Legal Society has a law school student ministry with chapters on about 85 campuses of the 175 law school campuses accredited by the American Bar Association. In a presentation to the United States House of Representatives Subcommittee on the Constitution on March 28, 1998, Steven T. McFarland, Director of the Center for Law

[101] 28 F.3d 1501 (8th Cir. 1994).

and Religious Freedom, described how the clubs encounter many problems in both public and private campuses. According to McFarland, the clubs are told they may not meet on campus and may not be officially recognized as long as they require their voting members and leaders to be Christians. McFarland recommended that Congress adopt legislation with a strict scrutiny standard whenever the government imposes a burden on an individual's religious beliefs that is more than *de minimis*.

The Equal Access Act

The purpose of the Equal Access Act[102] is to permit student groups to meet for student initiated activities not directly related to the school curriculum. The Act provides that public secondary schools receiving Federal financial assistance may not discriminate against student groups on religious, political, philosophical, or other content-based grounds.[103] The Act therefore allows student organized religious prayer in public schools, as long as certain conditions are met. The statute focuses on organized religious expression, not on individual or informal religious activities in which students may constitutionally participate. There is a difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

When Congress approved the Equal Access Act in 1984, it used the term "limited open forum,"[104] rather than one of the terms of the Supreme Court's free speech doctrine. The use of the term "open" rather than "public," as used in Free Speech cases, suggests that perhaps Congress intended to establish a different standard. Since the Equal Access Act does not use the constitutional public forum doctrine to determine if there is a limited open forum, it is unnecessary under the Act to analyze the factors used in forum classification doctrine, such as policy, practice and the speech's compatibility with school property. The constitutional public forum doctrine requires an affirmative act of designation to establish a limited public forum on public property which is normally nonpublic, such as school. A limited open forum is triggered if a school simply allows one or more "non- curriculum related" student groups to meet.

In 1990 the Supreme Court upheld the constitutionality of the Act in *Board of Education of Westside Community Schools v. Mergens.*[105] For purposes of the Act, state law determines whether an institution is a secondary school.[106] In order to avoid an Establishment Clause violation, the Act provides that when a school creates a limited open forum, no school employee or official can participate in the club's activities, except

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[102] 20 U.S.C. §§ 4071-4074 (1994).

[103] *See* 20 U.S.C. § 4071 (1994).

[104] 20 U.S.C. § 4071(a) (1994).

[105] 496 U.S. 226 (1990).

[106] *See* 20 U.S.C. § 4072(1) (1994).

to facilitate the opening and closing of classroom space for the group's meetings.[107] Excluding a religious club amounts to content discrimination, which is forbidden under the Act.[108] Under the Act, contrary to Free Speech doctrine, a much narrower range of groups can render a school accessible to student religious organizations. The presence of even one student group lacking a corollary formal course in the school curriculum would establish a limited open forum.

The Act only protects student initiated and student-led meetings.

The Act provides access for student religious groups if the schools allow "non-curriculum related" groups to meet. The Act fails, however, to define the term "non-curriculum related clubs." The Supreme Court had stated:

> [A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[109]

State or local authorities might explicitly define what activities are related to a school curriculum. Some contend that the Act does not attempt to limit local school boards' authority defining the boundaries of their curricula[110] because any such attempt by Congress would have upset the country's commitment to leave control of public education to state and local authorities. Similarly, it is argued that the courts should interfere with local autonomy over schools only if constitutional values are threatened.[111]

Upholding the constitutionality of the Equal Access Act may be seen as a trend toward allowing religious expression in an otherwise restrictive forum. The Act involves younger children, while the constitutional equal access doctrine has generally been applied in situations involving older students. The Act was deemed necessary to ensure equal access for students at the secondary school level. Students in even lower grades, however, were considered as lacking the necessary maturity to understand that religious activities were not sponsored by the public schools. Nevertheless, some argue that the Act should be extended to students in lower grades in parent-led religious activity on the ground that parents have the right to determine the religious upbringing and education of their children.[112] Families entrust public schools with the education of their children, but

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[107] *See* 20 U.S.C. § 4071(c)(3) (1994).

[108] *See* 20 U.S.C. § 4071(a) (1994).

[109] *Mergens*, 496 U.S. at 239-40.

[110] *See* 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

[111] *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[112] *See* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925).

condition their trust on the understanding that classrooms will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his/her family. In such situations parental permission is generally required.

Those who oppose extension of the Act say that younger students are impressionable and their attendance at any religious activity would be essentially involuntary. School authorities may exert great authority and coercive power through mandatory attendance requirements, student emulation of teachers as role models, and children's susceptibility to peer pressure.[113] Educators can exercise control over student expression if it involves materials inappropriate for their level of maturity.[114]

Recent articles in national journals discuss how religious clubs at high school and middle school campuses across the nation are drawing thousands of teenagers to regular meetings. For example, the Fellowship of Christian Athletes (FCA) is a Christian youth club that exists in all of the high schools and nearly all of the middle schools in Polk County, Florida. The club is also a national group operating in more than 7,000 schools nationwide. While some parents suggest that FCA clubs raise grades and improve behavior, critics argue that teachers participating with the clubs are not neutral observers but are actively proselytizing. In February 1998, student members from one chapter of the FCA club requested and obtained permission to perform a gymnastics routine to a song with lyrics stating that America needs God as the true basis of freedom. School officials publicly chastised the Christian club and prohibited it from making future presentations of its message during school hours. Members of the club filed suit contesting the school's actions.

In the past a project coordinator for Youth for Christ in Long Island, New York, said that teachers and school officials tore down fliers announcing religious club meetings, and challenged the clubs' right to use school facilities. Youth for Christ works with teenagers who participate in student clubs. It is a 50-year-old organization that in 1995 had 225 chapters in the United States.

Another issue that has arisen under the Equal Access Act, and alluded to in the previous section, involved a situation where a high school club had a requirement that its officers be professed Christians.[115] The Second Circuit said in *Hsu v. Roslyn School District*[116] that the Equal Access Act protects religious expression and allows a rule that those officers who are involved in directing religious services be Christians. In this case two students brought a lawsuit against the Roslyn High School located at Long Island. The

[113] Edwards v. Aguillard, 482 U.S. 578, 584 (1987); *see* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963).

[114] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[115] *See* discussion above regarding the testimony of Steven McFarland before the U.S. House of Representatives.

[116] 85 F.3d 839 (2d Cir. 1996).

school would not allow them to have an official school club which required its officials to be professed Christians. The Club's proposed constitution had an exclusionary leadership policy that restricted the five officer positions to professed Christians. This was counter to the school's policy of prohibiting discrimination because of religion. The Bible Club would have been open to all, with the meetings devoted to prayer, singing and Christian fellowship. Since the position of secretary and activities coordinator were ministerial functions unrelated to the overall purpose and character of the club, the club could not apply its exclusionary leadership policy to these two offices. However, the President, Vice-President, and Music Coordinator of the club, had duties consisting of leading Christian prayer and safeguarding the religious character of the meetings. The court upheld the Christian only leadership provision, ruling that the requirement is essential for the expressive content of the club's meeting, and therefore, protected by the Equal Access Act. The court reasoned that the club's religious discrimination was not invidious, which protects it both from a constitutional challenge under the Equal Protection Clause and the statutory claim under the Equal Access Act. In reaching its decision, the court relied on a 1987 Supreme Court holding that a religious entity could discriminate on the basis of religion for all jobs. Critics say that the exemption for Bible Clubs violates the constitutional separation of church and state. The court held, however, that this exception allowed the club to ensure the religious content of its speech. The exception was necessary to ensure equal access.

CHAPTER FIVE: GOVERNMENT FUNDING AND RELIGIOUS SCHOOLS

Introduction

In recent years, Americans have been increasingly troubled and disappointed by the scholastic performance and conduct of students attending the Nation's public schools, particularly those enrolled in urban school districts.[117] These concerns have been raised by people across all racial, ethnic and economic lines. In addition, recent incidents of shootings by students in public schools--the most recent involving two middle school age students in Arkansas--can be expected to result in increased criticism and examination of the country's public school system. Can public schools accomplish their mission of educating a new generation of students in a safe environment? Will these youngsters be capable of competing in the new technological age of the next millennium? Will they compare favorably with their counterparts elsewhere in the world in terms of basic skills development? Are private, non-religious schools, religious schools, charter schools or home-based schools better able to educate America's youngsters?

Poor student performance and violence in schools are two of the reasons cited by many advocates for alternatives to the country's public education system. Private schools, especially religious schools, according to some, simply do a better job of educating America's children than public schools. Moreover, public schools, they claim, will only improve if they are faced with competition from other schools, i.e., religious schools, which also are better able to address issues regarding values and behavior. However, the question remains to what extent can public funds be used to help accomplish these worthy goals of educational achievement outside the public educational system? More specifically for purposes of the instant project, to what extent can public funds be used to provide services or instruction or to support other education related activities that are provided in or associated with parochial schools, without violating either the Establishment Clause or the Free Exercise Clause of the First Amendment to the U. S. Constitution?

General Legal Principles Regarding Government Funding and Religious Schools

The recent Supreme Court decision in *Agostini* v. *Felton,*[118] along with earlier Supreme Court decisions, provides some answers regarding the extent to which government

[117] Troy Segal, "Saving Our Schools," *Business Week*, Sept. 14, 1992, p. 70 ("America is ...losing faith in public education."). Also a 1988 Gallup poll stated that 48 % of Americans gave public schools a grade of C, 13% a grade of D and 3% a grade of F, while only 23% gave public schools a grade of A or B, as cited in Mark J. Beutler, "Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications," *George Mason Independent L. Rev.*, vol. 2 (Winter 1993) (hereafter cited as Beutler article), p. 7.

[118] 117 S. Ct. 1997 (1997).

funding may be utilized in connection with parochial schools. In *Agostini* the Court held that New York City public school teachers may provide educational services on private or parochial school premises during school hours under certain circumstances without violating the Establishment Clause of the First Amendment. Specifically, publicly funded New York City teachers may now provide Title I services in the city's private and parochial schools rather than continuing the practice of providing Title I services in trailers near the schools. Title I refers to Title I of the Federal Elementary and Secondary Education Act of 1965[119] which provides Federal funds to local school districts for remedial education and job counseling to low income students who have difficulty achieving state student performance standards. The Supreme Court stated that interaction between church and state is inevitable and that some level of involvement of the two has always been tolerated. The Court found that the nature of the church-state involvement did not result in the government becoming excessively involved in the workings of a church institution and the interaction was limited to a particular Federal fund.

Agostini overruled an earlier Supreme Court case, *Aguilar* v. *Felton*[120] which involved the same parties. In that decision, the Court held that New York City's Title I program resulted in excessive church-state entanglement because it required pervasive monitoring of instruction in parochial schools. *Agostini* also overruled in part *Grand Rapids School Dist.* v. *Ball*[121] which held that a similar local program impermissibly advanced religion. Both *Aguilar* and *Ball* were premised on the rationale that public employees who are located on the grounds of parochial schools represent a union of church and state, require extensive monitoring or eventually result in government-sponsored inculcation of religion. However, following *Aguilar* and *Ball*, the Supreme Court retreated from this rationale in a 1993 case *Zobrest* v. *Catalina Foothills School District.*[122] In *Zobrest* the Court upheld the use of a publicly funded sign language interpreter by a parochial school student.

With these most recent cases—*Zobrest* and *Agostini*—which authorize the use of sign language interpreters and Title I teachers in parochial schools, respectively, the Supreme Court has added to the following publicly funded activities that can be connected to religious schools:

1. payment of transportation costs of students to parochial schools;
2. property tax exemptions to churches sponsoring religious schools;
3. public schools lending textbooks to parochial school students;
4. providing vocational tuition grants to the blind; and
5. funding a religious publication from student fees collected at a public, state-run university.

[119] 20 U.S.C. § 1400 *et seq.* (1994).

[120] 473 U.S. 402 (1985).

[121] 473 U.S. 373 (1985).

[122] 509 U.S. 1 (1993).

After the Court's decision in *Agostini*, the DoE implemented guidelines to ensure that the decision was properly implemented. The guidelines can be summarized as follows:

1. Only public school employees can serve as Title I instructors;
2. Public schools must assign personnel to private schools without regard to the employee's religious affiliation;
3. All religious symbols must be removed from spaces used for Title I services;
4. Public school teachers must limit their consultations with parochial school personnel to discussions of student education; and
5. A public school field supervisor should make an unannounced visit to each teacher's classroom each month to ensure that the program does not contain any religious aspects.

However, the guidelines have been criticized by some groups as not properly interpreting *Agostini.* Among the concerns raised by one New York-based group are that (1) the guidelines state that religious symbols may be removed, while the group claims that such symbols must be removed; and (2) the guidelines, according to the group, have no enforcement mechanism to insure their proper implementation.

The Commission's investigation may examine school districts' compliance with the guidelines and determine whether an effective enforcement mechanism exists. If there is no effective enforcement mechanism in place, the Commission could explore possible mechanisms which could ensure compliance with *Agostini.*

Vouchers

In light of the *Agostini* decision, which continues a trend by the Court to extend the types of public financial assistance that may be properly associated with parochial schools, the question is whether publicly-funded vouchers can be used for tuition in parochial schools without violating the Constitution? In the 1925 case of *Pierce* v. *Society of Sisters,*[123] the Supreme Court ruled that parents may elect to send their children to a private school rather than a public school. However, the Court has never specifically answered the question whether public funding may be used to assist parents in exercising that right. The issue of the legality of publicly-funded vouchers has arisen in communities throughout the Nation, including the following:

1. The Southeast Delco School Board in Pennsylvania in March 1998 proposed vouchers for its students. The proposal would provide parents of district students vouchers worth from $250 for kindergarten to $1000 for high school to be used at private schools, including religious schools, or at public schools outside the district. However, the Pennsylvania State Constitution prohibits the use of public funds for

[123] 268 U.S. 510 (1925).

private and religious schools. And, in April 1998, the Pennsylvania State Education Association, along with 15 other organizations, filed suit to block the proposal.[124]

2. Also in Pennsylvania, statewide voucher legislation has been pending since 1997;

3. Voucher initiatives have been reported in Washington, DC, California, Colorado, Illinois, Minnesota and Texas. In May 1998, the U.S. House of Representatives narrowly passed a voucher bill for Washington, DC. Under this bill, up to 2,000 low income children would receive tuition vouchers worth from $2400 to $3200 annually which could be used at private schools, including religious schools. In addition, the bill allocates $500 annually to up to 2000 of the school system's remaining 78,000 students for tutoring.[125]

4. Wisconsin, Puerto Rico and Ohio have passed voucher measures. In Cleveland, Ohio, the experimental voucher program provided 3,000 low income students with vouchers to attend private schools.

5. Finally, an experimental voucher program is in its second year in New York City. Initially, 1200 low-income public school students received vouchers to attend private or religious schools at a cost of about $6 million in private donations, largely from foundations and Wall Street corporations. Later this year, the program will be enlarged by 1000 students who will be selected form the city's 14 school districts with the lowest reading scores. The program originated when the mayor accepted a long-standing challenge by the city's Catholic archdiocese which had offered to accept some of the lowest achieving public school students, in part to demonstrate that Catholic schools could provide them with a better education.

Tax Credits and Tax Deductions

Another funding topic which could be addressed during a Commission hearing is the constitutionality of tax credits and tax deductions for tuition paid to parochial schools.[126] Recent controversies involving this issue have arisen in several locations across the country.[127] In Oregon, a voter-led initiative proposing a tax credit for private school tuition failed at the polls. The proposal would have provided for tax credit for either private school tuition or expenses for educating a child at home. However, Minnesota has passed a tax deduction program. This program allows parents a tax deduction of

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[124] *See* "School Choice Foes sue small district in Pennsylvania; Vouchers aimed at Easing Crowding," *The Washington Times*, Apr. 17, 1998, p. A-5.

[125] *The Washington Post*, May 7, 1998, p. VA- 9.

[126] A tax credit is subtracted from the amount of tax owed while a tax deduction is subtracted from taxable income.

[127] *See generally*, Clint Bolick, "School Choice, The Law, and The Constitution: A Primer for Parents and Reformers," *Heritage Foundation Reports*, Sept. 19, 1997.

$650 for children in kindergarten through 6th grade and $1000 for those in grades 7 through 12 for use toward any private school expenses except religion classes, and for certain additional public school programs. In addition, a new Arizona law provides tax credits for contributions to private school scholarship funds and payment of extracurricular activities fees at public schools.[128]

Special School Districts

Another funding issue which arose in New York State, and which could be addressed by the Commission, is the constitutionality of using public funds to establish a special school benefiting one particular religious sect. In August 1997, the New York Governor signed a bill into law allowing a small Orange County village of Hasidic Jews to create a special public school district for disabled children in their community. The courts have ruled that this and similar bills for the village, Kiryas Joel, violate the constitutional separation of church and state.

In sum, there is a growing judicial trend permitting the government to provide financial assistance that is related to religious organizations so long as the organizations receive only an indirect benefit and so long as the primary purpose of the financial aid is secular. Issues concerning the constitutionality of particular types of financial assistance are occurring throughout the country and can be expected to continue for sometime to come.

[128] Randi Barocas, "State Supreme Court Hears Arguments on Tax Credit," The Ethnic NewsWatch, *Jewish News of Greater Phoenix*, Dec. 19, 1997, p. 1.

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE HOUSE BILL 1230

Chapter 131, Laws of 1998

55th Legislature
1998 Regular Session

STUDENTS' RELIGIOUS RIGHTS

EFFECTIVE DATE: 6/11/98

Passed by the House March 7, 1998 Yeas 93 Nays 3

CLYDE BALLARD

Speaker of the
House of Representatives

Passed by the Senate March 3, 1998
Yeas 37 Nays 12

CERTIFICATE

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE HOUSE BILL 1230 as passed by the House of Representatives and the Senate on the dates hereon set forth.

BRAD OWEN
President of the Senate

TIMOTHY A. MARTIN
Chief Clerk

Approved March 25, 1998

FILED

March 25, 1998 - 4:17 p.m.

GARY LOCKE
Governor of the State of Washington

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE HOUSE BILL 1230

AS AMENDED BY THE SENATE

Passed Legislature - 1998 Regular Session

State of Washington 55th Legislature 1997 Regular Session

By House Committee on Education (originally sponsored by Representatives Backlund, Johnson, Lambert, Carrell, Sherstad, D. Schmidt, Thompson, Boldt and Pennington)

Read first time 02/11/97.

AN ACT Relating to students' rights; adding a new section to chapter 28A.600 RCW; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

{+ NEW SECTION. +} Sec. 1. The legislature recognizes the right of free speech and freedom of religion as guaranteed through the First Amendment to the United States Constitution and Article I, sections 5 and 11 of the Washington state Constitution and that these rights extend to students enrolled in the common schools of our state.

The legislature also recognizes that students may choose to exercise these rights, as protected under the law, in response to the challenges of academic pursuit. While the legislature upholds the rights of students to freely express their religious beliefs and right of free speech, it also holds firmly that it is not the role of education to solicit student responses that force students to reveal, analyze, or critique their religious beliefs.

{+ NEW SECTION. +} Sec. 2. A new section is added to chapter 28A.600 RCW to read as follows:

(1) The First Amendment to the United States Constitution, and Article I, sections 5 and 11 of the Washington state Constitution guarantee that students retain their rights of free speech and free exercise of religion, notwithstanding the student's enrollment and attendance in a common school. These rights include, but are not limited to, the right of an individual student to freely express and incorporate the student's religious beliefs and opinions where relevant or appropriate in any and all class work, homework, evaluations or tests. School personnel may not grade the class work, homework, evaluation, or test on the religious expression but may grade the student's performance on scholastic content such as spelling, sentence structure, and grammar, and the degree to which the student's performance reflects the instruction and objectives established by the school personnel. School personnel may not subject an individual student who expresses religious beliefs or opinions in accordance with this section to any form of retribution or negative consequence and may not penalize the student's standing, evaluations, or privileges. An employee of the school district may not censure a student's expression of religious beliefs or opinions, when relevant or appropriate, in any class work, homework, evaluations or tests, extracurricular activities, or other activities under the sponsorship or auspices of the school district.

(2) This section is not intended to impose any limit on the exchange of ideas in the common schools of this state. No officer, employee, agent, or contractor of a school district may impose his or her religious beliefs on any student in class work, homework, evaluations or tests, extracurricular activities, or other activities under the auspices of the school district.

(3) The superintendent of public instruction shall distribute to the school districts information about laws governing students' rights of religious expression in school.

Passed the House March 7, 1998.
Passed the Senate March 3, 1998.
Approved by the Governor March 25, 1998.
Filed in Office of Secretary of State March 25, 1998.

3/26/98 1:15 p.m.

WASHINGTON STATE LEGISLATURE
History of HB 1230

HB 1230 Protecting students' religious rights.

Sponsors: Representatives Backlund; Johnson; Lambert; Carrell; Sherstad; D. S
Thompson; Boldt; Pennington

-- 1997 REGULAR SESSION --
Jan 17 First reading, referred to Education.
Feb 7 ED - Majority; 1st substitute bill be substituted, do pass.
Minority; do not pass.
Feb 11 Passed to Rules Committee for second reading.
Feb 20 Made eligible to be placed on second reading.
Mar 3 Placed on second reading by Rules Committee.
Mar 10 1st substitute bill substituted.
Floor amendment(s) adopted.
Rules suspended. Placed on Third Reading.
Third reading, passed; yeas, 92; nays 4, absent, 2.
-- IN THE SENATE --
Mar 12 First reading, referred to Education.
Apr 4 EDU - Majority; do pass.
Passed to Rules Committee for second reading.
Apr 7 Made eligible to be placed on second reading.
Apr 9 Placed on second reading by Rules Committee.
Apr 26 Referred to Rules.
Apr 27 By resolution, returned to House Rules Committee for third reading.
-- 1998 REGULAR SESSION --
-- IN THE HOUSE --
Jan 12 By resolution, reintroduced and retained in present status.
Jan 15 Placed on third reading by Rules Committee.
Jan 16 Third reading, passed; yeas, 84; nays 4, absent, 10.
-- IN THE SENATE --
Jan 20 First reading, referred to Education.
Feb 23 EDU - Majority; do pass.
Passed to Rules Committee for second reading.
Feb 26 Made eligible to be placed on second reading.
Feb 27 Placed on second reading by Rules Committee.
Mar 4 Rules suspended. Placed on Third Reading.
Rules suspended.
Returned to second reading for amendment.
Floor amendment(s) adopted.
Rules suspended. Placed on Third Reading.
Third reading, passed; yeas, 37; nays 12, absent, 0.
-- IN THE HOUSE --
Mar 7 House concurred in Senate amendments.
Passed final passage; yeas, 93; nays 3, absent, 2.
Mar 9 Speaker signed.
-- IN THE SENATE --
Mar 10 President signed.
-- OTHER THAN LEGISLATIVE ACTION --
Mar 11 Delivered to Governor.
Mar 25 Governor signed.
Chapter 131, 1998 Laws.
Effective date 6/11/1998.

18 SLD 1485

Opinion

Christine O. Gregoire — Attorney General of Washington

SCHOOLS — DISTRICTS — STUDENTS — RELIGION — USE OF SCHOOL DISTRICTS' FACILITIES BY STUDENT GROUPS FOR RELIGIOUS PURPOSES

1. The state constitution does not prohibit schools from adopting a "limited open forum" policy for student organizations making use of school districts' facilities, even where federal law requires that equal access be granted to student groups for religious purposes, so long as it is clear that the school district maintains a neutral position on religious matters.

2. A school district may recognize student groups engaged in religious activity and grant such groups access to school time and space on the same basis offered to other student organizations, so long as the district grants equal access to all points of view and neither endorses nor opposes the activities of any particular group.

* * * * * * * * * * * * * *

March 23, 1995

Dr. Larry Swift
Executive Director
Washington State School Director's Association
221 College Street NE
Olympia, WA 98516-5313

Cite as:
AGO 1995 No. 3

Dear Dr. Swift:

By letters previously acknowledged, you have requested our opinion on several questions which we have reordered and paraphrased as follows:

1. Does the Washington State Constitution (specifically article 1, section 11 and/or article 9, section 4) permit public school districts to provide access to school facilities for student groups for religious meetings?

2. If Question 1 is answered in the negative, is the state constitution preempted by either the United States Constitution or the federal Equal Access Act (20 U.S.C. §§ 4071-4074)?

3. If it is a violation of the state constitution for school districts to provide access to school facilities for meetings held by student religious groups, and if federal law requires a school district to provide access on an equal basis to religious groups if it provides access to other noncurricular student groups, are school districts required to deny all access to school facilities for noncurricular student groups in order to comply with both state and federal law?

4. Assuming Question 1 is answered in the affirmative, to what extent and under what circumstances may student religious clubs be recognized by school districts or student body organizations, such as being listed or registered as an "official" student organization, being granted access to space in school publications and bulletin boards for announcements concerning meetings and club activities, or being assigned a faculty member or other school district employee to serve as adviser to such a group?

BRIEF ANSWERS

Although the Washington State Constitution prohibits the use of public funds and public property to support religious activity, and although school districts are specifically required by the constitution to be free of sectarian control and influence, these provisions are not violated if voluntarily organized student religious organizations incidentally receive the same benefits of access to school district property as would be granted to another student organization whose purpose was not religious, so long as the circumstances are clear that the school district in no sense sponsors or endorses the views of any such organization and neither favors nor disfavors any group on the basis of the specific views advanced within such an organization. In light of this interpretation of the state constitution, we do not need to consider the extent to which the state constitution is preempted by federal statute, or whether school districts must deny access to all noncurricular student groups in order to comply with both state and federal law. School districts may extend "recognition" to student groups organized to engage in religious activity if the "recognition" merely opens access to a limited public forum on the same basis that other groups organized for other purposes have access. However, forms of "recognition" which amount to official school district endorsement or support of a religiously-oriented organization would violate the state constitution (and perhaps the federal constitution as well).

Our basis for these answers is more thoroughly discussed in the analysis below.

ANALYSIS

Factual Background

This opinion is not based upon the actual circumstances at any particular school, but is rather an attempt to assess the constitutional options available to school districts who are considering whether to allow school property and facilities to be used by various categories of organizations consisting of students of the school. As we understand it, it is a common practice in this state for secondary schools to allow the formation of clubs and other organizations among the student body.[1] Some of these clubs may be closely related to a course or a series of courses offered in the school (such as a French club which is an outgrowth of a French class, or a future farmers organization which is directly related to classes on agriculture). Some organizations may be educational in nature, but not specifically related to courses offered in the school (such as clubs devoted to discussion of great literature or current events, or drama societies or musical ensembles which may supplement the school's educational offerings, but are not directly an outgrowth of them). Still other organizations are not specifically educational in nature, but are primarily social, recreational, or charitable in nature (booster clubs for the school's athletic teams, clubs whose primary function is to plan and organize dances and social events, or organizations that engage in community outreach projects ranging from care for the sick and homeless to conserving natural resources). In many schools, student organizations of all these types are allowed to conduct meetings and other activities at the school, and many schools designate or set aside times (before or after the school day, or during the lunch hour, or during a designated activity period) in which student organizations may hold meetings or otherwise conduct their business. Beyond supplying time and space, the extent to which school staff and administration are directly involved with student activities can vary greatly (see discussion in response to Question 4, at pages 15-17 below). For purposes of your questions, however, we will assume at a minimum a district which supplies both school owned property and school controlled time as a sort of "public forum" for students to engage in club or organization activities. We will also assume that, for purposes of your question, participation by an individual student in a particular organization is completely voluntary, and that the school is not

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[1]We understand your opinion request to concern student organizations at the high school (secondary) level of education. Many of the same principles discussed in this opinion might apply to similar activities conducted at other levels in the public education system, such as elementary school on the one hand, or colleges and vocational schools on the other. It is well to point out, however, that federal case law interpreting the applicability of free speech and freedom of religion in schools does vary somewhat depending upon the age of the students. We will not attempt in this opinion to analyze the potential variations in analysis that varying the age of the students could inspire. The use of surplus school property for nonschool community activity, including use by churches and other religious groups, also presents a somewhat analogous situation to the one presented in this opinion. However, because, again, the federal statutes and constitutional case law are not quite the same with respect to this category of school property use, the reasoning of this opinion should not be read as automatically extending to other forms of use of school property by religious groups. This opinion relates only to uses of school property by student groups, and does not cover uses by groups composed wholly or partially of non-students.

encouraging students to join particular organizations or to engage in any particular activities. We further assume that students who join such organizations are neither favored (such as by earning class credit) nor disfavored by the school for their participation.

Students in some schools have formed (or have requested permission to form) organizations which are religious in nature. In effect, these students are asking for the opportunity to spend their time praying or engaged in theological discussion while their fellow students are playing chess or planning a banquet. Religious organizations can vary a great deal too, of course. Some such organizations promote a specific religious point of view, or engage in prayer or ceremonial practices related to a particular religion. Other groups which might be formed to discuss philosophical and theological issues in general, or to organize debates among students holding varying religious points of view. It is also conceivable that students who are atheists or otherwise irreligious could form organizations advocating their positions. For the purposes of your questions, we will assume all of these as possibilities.

Based upon these factual assumptions, we turn now to the legal background which must be discussed before we answer your questions.

Federal Constitutional Law

The opening language of the first amendment to the United States Constitution contains a few simple words which have provided one of the most fertile fields of inquiry in the entire constitution for courts and scholars:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

While nearly all scholars and citizens agree that one purpose of this language was to prohibit Congress from establishing an official religion or from intermeddling in the religious affairs of citizens,[2] the inherent tension between the "Establishment Clause" and the "Free Exercise Clause" has been the subject of a great deal of scholarly writing and litigation, as well as the cause for a great deal of confusion and misunderstanding about freedom of religion and the United States Constitution. See, e.g., Robert T. Miller & Ronald B. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court (4th ed. 1992); James E. Ellsworth, Esq., "Religion" in Secondary Schools: An Apparent Conflict of Rights—Free Exercise, the Establishment Clause, and Equal Access, 26 Gonz. L. Rev. 505 (1991).

The tension between the two religious freedom clauses can be illustrated nicely with the subject of your question. If a school district allows a Christian prayer group to meet on school

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[2]Like other parts of the Bill of Rights, the religion clauses of the First Amendment are applicable to state government by virtue of the adoption of the Fourteenth Amendment. Committee for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973).

property during school hours, has the school district violated the constitutional provision prohibiting the "establishment" of religion? On the other hand, if a school district prohibits its students from organizing religious discussions, or engaging in religious practices on school property or during school time, is the district interfering with the students' "free exercise" of their religion? Confronted with student requests to conduct religious activities on school property, school districts must deal with the uncomfortable possibility that federal constitutional litigation may ensue whether the request is granted or denied. The final result of that litigation is not perfectly predictable, and usually depends upon the particular context of a case.

In the area of your inquiry, there is at least a leading case which lays down an analysis which appears to continue to enjoy the support of most of the United States Supreme Court. Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981), was a challenge to a policy of the University of Missouri at Kansas City whereby any registered student association was allowed use of university facilities for its meetings except religious organizations. The university apparently believed that allowing the use of university facilities by a religious group would violate the Establishment Clause of the federal constitution as well as portions of the Missouri State Constitution. Although the federal district court ruled in the university's favor (Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979)), the Eighth Circuit reversed (Chess v. Widmar, 635 F. 2d 1310 (8th Cir. 1980)) and the United States Supreme Court affirmed the Eighth Circuit. Basing its reasoning as much on free speech as on freedom of religion grounds, the Court found that the university's policy amounted to creation of an "open public forum" in university facilities for organizations advocating all types of positions and points of view. The Court found that the adoption of such a policy, and its extension to religious groups, would not violate the Establishment Clause of the federal constitution because it would meet all three prongs of the test established in Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), reh'g denied 404 U.S. 876, 30 L. Ed. 2d 123, 92 S. Ct. 24: (1) that the governmental policy have a secular legislative purpose; (2) that its principal or primary effect be one that neither advances nor inhibits religion; and (3) that the policy not "foster an excessive government entanglement with religion". The Court disposed of the first two prongs quite easily, holding that an "open public forum" policy, at least if honestly adopted and administered, had a secular purpose and neither advanced nor inhibited religion. The Court found that such a policy would not "entangle" government with religion, and agreed with the Eighth Circuit in suggesting that the opposite policy—of excluding religious groups from an otherwise open public forum—amounted to greater "entanglement" than the "open public forum" policy in question. Widmar v. Vincent, 454 U.S. at 272.

The Court also rejected the argument that extending the "open public forum" to religious groups would foster religion because religious groups would benefit from access to public facilities. The Court found that the benefit to religion was entirely incidental and could not be shown to be a primary effect of an open public forum. Widmar v. Vincent, 454 U.S. at 272-75. Indeed, the Court quoted an earlier case in noting that a strict reading of the Establishment Clause would prohibit churches from being protected by police and fire departments, or from having their public sidewalks kept in repair. Widmar v. Vincent, 454 U.S. at 274-75 (quoting

Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 747, 49 L. Ed. 2d 179, 96 S. Ct. 2337 (1976)).

The Widmar Court noted the University of Missouri's arguments that the policy of excluding religious groups was necessary to comply with certain provisions of the Missouri State Constitution. Noting that the Missouri courts had never ruled on the state constitutionality of an "open public forum" policy, the Supreme Court found that the policy actually adopted violated the Free Exercise Rights (as well as the Free Speech Rights) of persons desiring to use an open public forum for religious purposes. Therefore, granting equal access to religious groups was not only constitutionally permissible, but constitutionally required.

Federal Equal Access Act

At least partly in response to Widmar, Congress sought to extend Widmar's "open public forum" principles to federally-supported secondary schools through the enactment of the Equal Access Act. Pub. L. No. 98-377, Title VIII, 98 Stat. 1302-04 (1984), codified as 20 U.S.C. §§ 4071-74. The most relevant portion of this law is 20 U.S.C. § 4071(a) which reads as follows:

> 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.

20 U.S.C. § 4071(b) defines "limited open forum" as follows: "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." The purpose and effect of this language, then, was to extend to religious groups the benefit of any access to a "limited open forum" which a secondary school might choose to provide for its students.[3]

The Equal Access Act was inevitably the source of litigation, and its constitutionality was upheld by the Supreme Court in Board of Educ. of Westside Comm'ty Schs. v. Mergens, 456 U.S. 226, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990). The Court had before it a policy of the Westside High School, a public secondary school in Omaha, Nebraska. By this policy, students were encouraged to form clubs which met certain broadly defined school district goals and such

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[3]Although the Equal Access Act only reaches public secondary schools which receive federal financial assistance, it is interesting to note that the same act specifically provides that failure to comply with the act will not subject the school to a denial or withholding of federal financial assistance. 20 U.S.C. § 4071(e). Congress's apparent intent was merely to create a new statutory right on the part of students at such a school, to be enforced through civil litigation, rather than to use the administrative machinery of withholding federal benefits to districts which were out of compliance with the act.

clubs, upon recognition by the school, were entitled to access to district space and time for their meetings and certain other activities. Several students applied for the formation of a Christian club and the school denied the request, apparently on the reasoning that (1) to be recognized as an official student activity, a club had to have a faculty sponsor; (2) the school could not assign a faculty sponsor to the Christian club without violating the Establishment Clause of the federal constitution; and (3) therefore, school district policy did not allow the district to recognize the Christian club or grant it access to school facilities. The school denied that it maintained a "limited open forum" as defined in the Equal Access Act, and further contended that the Equal Access Act was unconstitutional as applied to the school.

Although the U.S. District Court for the District of Nebraska upheld the policy, finding that Westside did not have a "limited open forum" because all of its clubs were curriculum related, the Eighth Circuit reversed the district court (867 F.2d 1076 (8th Cir. 1989)) and, again, the U.S. Supreme Court upheld the Eighth Circuit. Most of the opinion dealt with the problem of defining the term "noncurriculum related student groups". The Court adopted a fairly broad reading of this term, concluding that a club or other organization is "noncurricular" if it is not directly tied to a specific course being offered in the school. Because Westside had groups such as a chess club, a stamp collecting club, and a community service club whose activities were not related to any particular course in the high school curriculum, the Court found that Westside had a "limited open forum" as defined in the Equal Access Act.

The Court also found that the Equal Access Act as applied to Westside was constitutional. On this point, there was no majority opinion, but eight of the nine justices upheld the Act. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Blackmun, concluded that the Equal Access Act met the Lemon v. Kurtzman test referred to above and thus did not violate the Establishment Clause. Justices Kennedy and Scalia rejected the Lemon v. Kurtzman test, but applied their own test to find that the Act neither granted any special benefits to religion nor coerced students into religious activity. In a third opinion, Justices Marshall and Brennan agreed that the Act was theoretically constitutional, but warned that a school district was in danger of violating the Establishment Clause if it did not take affirmative steps to disassociate itself with Christian clubs and similar organizations and make it sufficiently clear that these organizations were in no sense endorsed or supported by the school district. Justice Stevens dissented.

Based on Widmar and Mergens, and the language of the Equal Access Act itself, we conclude that (1) a secondary school which establishes an open forum or a "limited open forum" as described in Mergens does not violate the Establishment Clause of the federal constitution; (2) the Equal Access Act itself is constitutional and applies to any secondary school in this state which receives federal assistance; and (3) a school district policy denying access to school facilities to religious groups based on the religious nature of the organization or the specific religious content of the positions advocated by such groups, while access was broadly granted to other voluntarily organized student groups, might well be held to violate the Free Exercise Clause of the federal constitution, even if the Equal Access Act were not involved.

Washington State Constitution and its Case Law

The Washington State Constitution contains its own provisions intended to guarantee freedom of religion, and phrased in somewhat different terms from the federal constitutional language discussed above. Article 1, section 11 of the state constitution provides in part as follows:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .[4]

(Emphasis added.) In addition to this general provision, there is a specific provision for schools, article 9, section 4, which reads as follows: "All schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence."

From the language of the state constitutional provisions, which are more specific and include more details than the equivalent federal provisions, it seems clear that the drafters of the state constitution intended to guarantee the free exercise of religion in this state more vigorously than the federal constitution, and (on the free exercise question at least) our state courts have so held. First Covenant Church v. Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992). As to the other aspect of freedom of religion in the Bill of Rights—the prohibition against the establishment of religion—the state constitution, again, seems intended (note the underlined language above in article 1, section 11, and the whole of article 9, section 4) to require, if anything, a stricter separation of religion from governmental support or involvement than the federal provisions. While the state courts have not explicitly so held, this is the clear implication of cases such as Witters v. Commission for the Blind, 112 Wn.2d 363, 771 P.2d 1119, cert. denied, 493 U.S. 850 (1989).[5]

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[4]The remainder of article 1, section 11, not of direct relevance to our discussion, permits certain state institutions to employ chaplains, prohibits any kind of religious test or qualification for public office in this state, and provides that no person will be incompetent as a witness or juror in consequence of his opinion on matters of religion.

[5]As will be discussed more extensively later, a federal court interpreting Washington law has concluded that the state constitution requires a stricter separation of church and state than does the federal constitution. Garnett v. Renton Sch. Dist. 403, 675 F. Supp. 1268 (W.D. Wash. 1987). However, on matters of state constitutional interpretation, the Supreme Court has held that federal courts lack appellate review authority, with the implication that a state's supreme court is the final judge as to state law interpretation. See, e.g., Murdock v. Memphis, 87 U.S. 590 (1874).

Granting that the state constitution intended a stricter separation of government from religious activity than the federal, the state courts have never had occasion to interpret the "open public forum" issues discussed above. In cases dealing with a variety of other matters, the state supreme court has held to a very strict rule with respect to the appropriation of public funds and their use, even incidentally, for religious or sectarian instruction. In State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918), the state supreme court invalidated a scheme by which schools would give school credit for bible classes taught outside the school by religious educators. The court found such a practice violative of article 1, section 11 of the state constitution. In Perry v. School Dist. 81, 54 Wn.2d 886, 344 P.2d 1036 (1959), the court invalidated a "released time" program in which students were released for a part of their classroom day to leave the school and attend religious instruction. The religious instruction was on a purely voluntary basis, but the program included distribution in the school of cards and other material announcing and describing the released time program, and also involved representatives of religious groups appearing in the school to discuss the program.[6] In Weiss v. Bruno, 82 Wn.2d 199, 509 P.2d 973 (1973), the State Supreme Court struck down a scheme of tuition grants by the state to students at non-public schools, holding that such grants were clearly a violation of article 9, section 4 of the state constitution.

By contrast, the courts have upheld certain practices which, in the opinion of the court, amounted to no significant support of religion with public funds or property. In Calvary Bible Presbyterian Church v. Board of Regents, 72 Wn.2d 912, 436 P.2d 189 (1967), the state supreme court held that it did not violate either the federal or state constitutions for the University of Washington (a state supported institution) to offer courses discussing the bible as literature. In Health Care Facilities Auth. v. Spellman, 96 Wn.2d 68, 633 P.2d 866 (1981), the court upheld the establishment of a state agency to market non-recourse revenue bonds in the state's name for the purpose of financing capital improvements to hospitals and other health care facilities in the state, even though health care facilities owned and operated by religious organizations would receive the benefit of the program. The court found, in effect, that the state was merely lending its name, without any risk of expenditure of public funds, in order to take advantage of certain provisions in the federal tax laws. The same principles were reaffirmed and somewhat expanded in Higher Ed. Facilities Auth. v. Gardner, 103 Wn.2d 838, 699 P.2d 1240 (1985), in which the Legislature adopted essentially the same scheme for privately-owned higher education institutions in the state.[7]

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[6]The Perry court suggested that a released time program not including announcement cards for in-school discussion of the contents of religious instruction might not violate the constitution. It appears that this issue has never been tested in the appellate courts, however, and it is not certain whether courts today would follow the Perry dictum.

[7]Our own office has issued a series of opinions which, again, draw the distinction between direct involvement by school districts with religious activity and the merely incidental connection of a public institution with religion. In AGO 1961-62 No. 119, we held that a school could not foster, sponsor, or participate directly in baccalaureate exercises that are religious in nature. In AGO 1961-62 No. 118, we

(continued...)

Garnett v. Renton School District

The passage of the federal Equal Access Act, when taken against the background of the state's strictly worded constitutional provisions concerning the use of public money and property for religious purposes, led to disagreement and ultimately litigation concerning the applicability of the Equal Access Act to school district practices in the state of Washington. Students at Lindbergh High School in Renton requested permission to hold religious meetings in a high school classroom before the start of the school day. The district denied their request and litigation was filed in federal district court to test the applicability of the Equal Access Act to Renton School District's policies. The district court initially denied relief to the students. Garnett v. Renton Sch. Dist., 675 F. Supp. 1268 (W.D. Wash. 1987). The Court of Appeals affirmed. 874 F.2d 608 (9th Cir. 1989). However, the United States Supreme Court granted certiorari, vacated judgment and remanded the case in light of its decision in Mergens. 496 U.S. 914, 110 L. Ed. 2d 628, 110 S. Ct. 2608 (1990).

On remand, the district court, applying the analysis of Mergens to the facts before it, concluded (1) that the Renton School District was offering a "limited open forum" for purposes of the Equal Access Act; (2) that the Washington State Constitution absolutely prohibited the use of school property for sectarian purposes; and (3) the school district was excused from compliance with the Equal Access Act by virtue of the fact that it could not lawfully comply with the federal act without violating the state constitution. Garnett v. Renton Sch. Dist., 772 F. Supp. 531 (W.D. Wash. 1991).

The matter was again appealed to the circuit court, and the Ninth Circuit reversed. The circuit court accepted the district court's finding that Lindbergh High School operated a "limited open forum" but found that the Equal Access Act was intended to preempt state law. The appellate court found that the Equal Access Act did not excuse school districts from compliance, even if compliance would result in a violation of the state constitution. The appellate court did not explicitly attempt to construe state law to determine whether or not the school district could have granted the religious group's request for access to school facilities without violating the state constitution. Garnett v. Renton Sch. Dist. 403, 987 F.2d 641 (9th Cir. 1993).

With all of this as background, we turn to your specific questions.

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[7](...continued)
held that a school could not undertake to distribute bibles on school premises. By contrast, we had earlier found that a college could permit the distribution of bibles to students who had requested them. AGO 1955-57 No. 277. And we found no violation of the state constitution for public libraries to purchase bibles and other religious material and make them available for public reading and borrowing. AGO 1955-57 No. 226.

Question 1:

Does the Washington State Constitution, and specifically article 1, section 11 and/or article 9, section 4, permit public school districts to allow access to school facilities to student groups who intend to use the access for meetings relating to the practice of a religion?

Reviewing the question you have posed in light of the state case law discussed above, we note first of all that this is an area in which the state appellate courts have not had an opportunity to interpret the constitution. Access to school facilities to conduct religious meetings is certainly a more significant involvement of public property than was at issue in Health Care Facilities Authority, discussed above. However, allowing access to school facilities for religious groups in a "public forum" context is a far less clear application of public money or property to a religious exercise or instruction than the tuition assistance involved in Weiss v. Bruno, also discussed above. Answering your question inevitably involves some guesswork about where Washington courts might draw the line between those two types of cases.

In our opinion, it would not be a violation of article 1, section 11, or article 9, section 4 of the state constitution for school districts to make space and/or time available to student groups for religious purposes, at least if all of the following conditions are present: (1) school policy generally makes school facilities available for noncurricular student groups; (2) if the school places any restrictions on the type of groups entitled to use school facilities, such restrictions are based upon "neutral" factors such as the need to keep order or protect school property, and not upon the specific content of the ideas expressed or advocated by a particular group; (3) school officers and employees maintain a position of neutrality with respect to the content of the discussions in a student group and do not endorse, oppose, or otherwise entangle themselves in the substantive issues such groups might deal with.

To explain our conclusion, we turn initially to the language of the state constitution itself. As noted earlier, the key sentence in article 1, section 11 reads as follows: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Assuming for purposes of argument that the activities of a student religious group might include "worship, exercise or instruction", the question becomes whether allowing access by such a group to school facilities amounts to the appropriation or application of public money or property to such activities. Since the constitution does not define the terms "appropriated" or "applied", we give them their generally understood meanings. The ordinary meaning of "appropriate" is to "set apart for or assign to a particular use in exclusion of all others". Webster's Third New International Dictionary at 106 (1981). The term "apply" is slightly broader, but the dictionary gives the following relevant definitions: "[T]o make use of as suitable, fitting, or relevant . . . to put to use esp. for some practical purpose". Id. at 105.

Both of these terms connote some action, some conscious policy decision by a public officer (legislative or executive) to use public funds or property in a particular manner. Since

your question is based upon the assumption that the school district in no sense created or made any conscious decision to apply state money or property to the group in question, we think the better view is that merely allowing access to public property to noncurricular student groups is not an "appropriation" or "application" of either public funds or public property for a religious purpose, even though some groups may use this access for religious conduct.

To the extent that a school creates an open forum for student groups, and does not take steps to endow the groups formed with an official stamp of approval, and to the extent one or more of the student groups formed use the forum to express views on religious matters, the resulting use of school facilities is a merely passive or incidental use that could be best analogized to the incidental use of public property which is made available to the general citizenry without restriction (other than restrictions imposed to keep the peace, or to protect public safety or public property) as to the specific nature of use. There is a great deal of public property (whether owned and controlled by the state government or by the various local governments organized under state law). Some of that property is dedicated to particular uses and is not generally open to private citizens unless they happen to have specific business there. However, many categories of public property—roads and streets, forests and parklands, and publicly owned amphitheaters and auditoriums are the obvious examples—are left open for private citizens to use as they choose, restricted only by laws designed to protect public safety and keep the peace. Still other categories of public property, while not always open for private use, are not needed all the time for the designated public purpose and are (to an extent defined in statute, ordinance, or policy) made available for general use at certain times.

While it would surely violate article 1, section 11 for a public body to specifically designate some public property for a religious use[8], no one has seriously suggested that the voluntary incidental use by private citizens of public property to perform religious ceremonies or engage in worship or religious discussion is an "appropriation" or "application" of public property for a religious purpose. If article 1, section 11 were read that strictly, it would be unconstitutional to conduct a religious procession on a public street, to perform a religious wedding in a public park, or to meditate silently on matters eternal as a member of the audience at a school board meeting.

The context of the "non-establishment" language in article 1, section 11 makes it unlikely that the framers of the constitution intended to exclude all religious practices from public property. The opening language of that section of the constitution provides that "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property

[8]Article 1, section 11 does contain a proviso allowing for the employment of chaplains by certain public institutions, but the proviso is not of direct relevance here.

on account of religion".[9] Thus, the purpose of article 1, section 11 was not to denigrate, repudiate, or isolate religion, such as by confining religious practices exclusively to private property, but to protect and enhance religious liberty by assuring that every citizen could follow his or her own religious faith without fear of government entanglement.[10]

Allowing students to use a school room for a religious activity on the same basis that other students are using adjacent rooms to play chess or plan a party is not an "application" of school property for a religious use in the sense prohibited by article 1, section 11. On the facts as you have given them to us, school property is merely the incidental location, in which private citizens (the students) are given time to engage in non-curricular activities of their own choosing.

Article 9, section 4 of the state constitution appears to have a narrower purpose than article 1, section 11. Article 9, section 4 provides that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence". On the facts as you have supplied them, merely allowing students to conduct voluntary meetings could not be construed as "sectarian control or influence" over a school maintained by public funds.[11] Allowing the students free expression is not an indication that the school is improperly subject to influence or control by the ideas which the students might happen to express.

In finding that religiously-oriented student groups can be included in an "open public forum" policy, we recognize that we are disagreeing with the federal district court in Garnett v. Renton Sch. Dist., 772 F. Supp. 531. While Garnett is a thoughtful opinion, we think it overstates the extent to which the state constitution prohibits private uses of public property. Garnett relies heavily on Weiss v. Bruno, supra, and on Witters v. Commission for the Blind, 102 Wn.2d 624, 689 P.2d 53 (1984), reversed on other grounds sub nom., Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986). Both Weiss and Witters, however, involved appropriations of state funds and their use to support religious education. Neither of those cases involved a mere passive use of public property otherwise made available as an open public forum. Accordingly, in our opinion, the Garnett court mischaracterized the state constitution in stating that it "denies religious groups any use of public money or property". Garnett v. Renton Sch. Dist., supra, 772 F. Supp. at 535 (emphasis added). In our opinion, mere "use" of public property is not necessarily an "appropriation" or "application" of such property. The words of the constitution require some

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[9]The cited language, as well as the sentence under discussion in this opinion, have appeared in every version of article 1, section 11. Compare original text, article 1, section 11, to the language in Amendment 4 (1904), Amendment 34 (1957), and Amendment 88 (1993).

[10]The Washington Supreme Court has specifically noted that the constitution was not intended to promote hostility toward religion. Perry v. School Dist. 81, 54 Wn.2d 886, 897, 344 P.2d 1036 (1959).

[11]The answer could be very different, of course, if school officers and employees actively encouraged or participated in student religious organizations, or specifically set aside school money or property for such activities. Note discussion in response to Question 4 at pages 15-17.

specific, knowing choice by public officers, more than a decision to make public property available for general use.[12]

Finally, we think our suggested reading of the state constitution is more likely to put state constitutional law in harmony with federal law than an alternative reading. While federally-supported schools could escape the effects of the Equal Access Act by closing school facilities to all student groups except those meeting the supreme court's definition of "curricular", Widmar was based directly upon the constitution and not upon the Equal Access Act or another federal statute.[13] Although Widmar involved the higher education system, and courts have been somewhat more accepting of restrictions on free speech and freedom of religion in the elementary and secondary schools, there is no obvious distinction between high school and college students that would clearly justify a result different from Widmar if a federal constitutional challenge were brought against a school denying access to religious groups to an otherwise open forum, even apart from the Equal Access Act.

Since the language of the state constitution is not so plain that it must be read as the district court in Garnett read it, and since a narrower reading carries forward sound policies of allowing free exercise of religion without excessive government entanglement, we answer your first question in the affirmative, always assuming the facts as they were laid out earlier in this opinion.

Questions 2 and 3:

> If Question 1 is answered in the negative, is the state constitution preempted by either the United States Constitution or the federal Equal Access Act (20 U.S.C. §§ 4071-4074)?
>
> If it is a violation of the state constitution for school districts to provide access to school facilities for meetings held by student religious groups, and if federal law requires a school district to provide access on an equal basis to religious groups if it provides access to other noncurricular student groups, are school districts required to deny all access to school facilities for noncurricular student groups in order to comply with both state and federal law?

Because we have answered Question 1 in the affirmative, it is not necessary for us to reach the issues posed by your second and third questions. As a general matter of course, state

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[12] As noted earlier, the state courts are the final authority on state constitutionality interpretations. Footnote 5, at 8.

[13] In 1993, Congress passed the Religious Freedom Restoration Act of 1993 (Pub. L. No. 103-141, § 2, 107 Stat. 1488, 42 U.S.C.A. § 2000bb), generally prohibiting government at any level from burdening the exercise of religion without "compelling justification". We note the existence of this new federal statute without speculating as to its applicability in school affairs.

laws (including state constitutional provisions) are superseded and preempted by properly enacted and constitutionally sound federal statutes and by the federal constitution. The Ninth Circuit Court of Appeals specifically found that state law is preempted by the Equal Access Act to the extent they are inconsistent. Garnett, 987 F.2d 641.

Your third question presents a fascinating and unresolved issue of constitutional law: if engaging in certain discretionary conduct would violate state law under circumstances where the state law is preempted by federal law, is one obligated to avoid the clash of conflicting state/federal policies by avoiding the conduct altogether? We gratefully defer consideration of this issue since we do not need to reach it in light of our answer to your first question.

Question 4:

> Assuming Question 1 is answered in the affirmative, to what extent and under what circumstances may student religious clubs be recognized by school districts or student body organizations, such as being listed or registered as an "official" student organization, being granted access to space in school publications and bulletin boards for announcements concerning meetings and club activities, or assignment of a faculty member or other school district employee to serve as adviser to such a group?

The shortest answer to your fourth question is that it is impossible to predict precisely where the courts will draw the line between school conduct which merely facilitates the exercise of free speech and free exercise of religion rights by the students and conduct which amounts to "excessive entanglement" of the school district in religious matters or constitutes a violation of the establishment clauses of the federal and/or state constitutions. At least as to the federal constitution, the familiar test of Lemon v. Kurtzman, 403 U.S. 602, appears still to be good law, and would require (as applied to the facts of your questions) that school districts meet the following standards: (1) that their policy have a secular purpose; (2) that the school policy's principal or primary effect be one that neither advances nor inhibits religion; and (3) that the policy not foster an excessive government entanglement with religion.

We will briefly discuss certain of the issues you have raised, without presuming to give very definite answers.

First, you have asked about "registering" or "recognizing" groups as student body organizations. As we understand it, schools which offer time and space for student group activities often require groups to get some sort of official recognition in order to qualify for access to school district facilities. As to such a requirement, the answer to your question would depend upon the standards that the school district employs in deciding which groups qualify. At one end of the scale, some schools might grant access only to student groups whose activities are directly related to the school curriculum. Another school might grant recognition to any group which forms requiring minimal information about the nature and membership of the group. Most schools would range in between these two extremes.

If the standards adopted by the school are secular in purpose, and do not either promote or discourage religion, and do not entangle school officials in religious matters, the courts under current thinking would likely uphold the school policy. Merely requiring student groups to register would appear to meet the test, like requiring those using a state park to register with the ranger. The purpose of such a requirement would be orderly management of school property and affairs, so the school would know which groups were using school facilities and whom to hold responsible for proper conduct on and use of school property.

The question of access to space on school bulletin boards, or in student newspapers, presents analogous issues. What are the school's general policies with regard to access to such school facilities? If a school newspaper is generally open to the expression of views by individual students, or to announcement of upcoming meetings by non-curricular student groups in general, it would not seem to present serious constitutional problems to make the newspaper available for religious student organizations. By contrast, a school publication which is otherwise limited to announcements about official school district policies and events would seem an inappropriate place to insert an announcement about the activities of a student religious group, and might, given the context, give the impression that the religious group has some official connection with the school. If a student newspaper or school bulletin board is treated as an open forum for expressions of private views and announcements about non-curricular activities, such a forum presumably may (and arguably must) be open for expressions and announcements concerning religious matters.

The assignment of a faculty member or other school district employee as an adviser to a student organization appears to be a continuing issue, just as it was at the heart of the facts in Mergens. Schools may wish to require that recognized student groups have an assigned adviser. What is the role of the adviser? If the adviser's role is to keep order, to supervise the conduct of the students to protect their safety and to protect school property, and perhaps to serve as a neutral communications link between the group and the school administration, the assignment of a faculty adviser to a religiously oriented student organization on the same basis as they would be assigned to any other non-curricular student group, or the mere presence of the adviser at meetings of the organization, would not constitute a violation of the state constitution as we interpret it. Again, the analogy of the park ranger comes to mind. The mere presence of a faculty adviser at a meeting in which religious ideas are discussed or advanced would not appear to constitute official endorsement or support of religion any more than the presence of a park ranger in a state park would constitute public endorsement of the various views expressed around the campfires.

However, it is also possible that faculty advisers are expected to play (or in fact do play) a much more active role in the activities of the student groups they advise. Advisers might lead or call meetings, direct or participate in discussions, actively recruit new members, be heavily involved in the activities conducted by the group, drive or accompany the students on field trips or other activities outside the school, or serve as the group's advocate in meetings both inside and outside the school. If the group's activities are not religious in nature, these heavier levels of involvement by faculty or staff advisers present no serious constitutional or other legal

problems, so long as they are consistent with school policy and with the purposes for which the school was established. But heavy involvement by a paid school employee in the activities of a religious group (or, for that matter, a group which actively opposes religion) might well, in our opinion, be interpreted as an application of public money or property to support religious activity. Given these considerations, and the difficulty of drawing a clear line between permitted and unpermitted activities, we can only suggest, in this area as well as the others posed by your fourth question, that school districts consult carefully with their own legal counsel to develop policies designed to protect the free exercise of religion without involving district employees in religious affairs or employing district resources to promote or oppose any particular religious view.

We trust this opinion will be of assistance to you.

Very truly yours,

CHRISTINE O. GREGOIRE
Attorney General

JAMES K. PHARRIS
Senior Assistant Attorney General

Open the Debate on Life's Origins

By Stephen C. Meyer

is a philosophy of science professor at Whitworth College in Spokane, Wash. His opinion piece in the Wall Street Journal *in December broke the Dean Kenyon story in the national media.*

Should a university biologist be allowed to challenge evolutionary theory in his lectures? Yes, says Stephen C. Meyer, since he does so on scientific grounds. That's creationism, which has no place in beginning science classes, counters Eugenie C. Scott.

is executive director of the National Center for Science Education in Berkeley, Calif., and publishes Creation/Evolution *journal, which deals with the creation/evolution controversy.*

Can scientists change their minds about controversial theories if the evidence requires it? That may depend upon the theories at stake. Consider a disturbing case in California involving a distinguished biology professor, Dean Kenyon. In 1992, Kenyon was removed from his biology classroom at San Francisco State University after a few students complained about ideas they heard in his lectures.

The problem? Kenyon's approach to teaching evolutionary theory. Kenyon had grown increasingly skeptical about the textbook theory of how life originated on Earth — a theory he had earlier done much to advance. University administrators insisted that Kenyon not discuss his views with introductory biology students. Ironically, they justified their actions in the name of science.

The controversy emerged in the fall, after the biology department chairman, John Hafernik, told Kenyon not to teach "creationism." Kenyon, who included three lectures on biological origins (out of a total of 27) in his introductory course, presented both the standard evolutionary interpretations of biological evidence and the difficulties with them. He also discussed philosophical controversies raised by the origins issue and his own view that living systems display evidence of "intelligent design," a view not incompatible with some forms of evolutionary thinking.

Hafernik accused Kenyon of teaching biblical creationism and ordered him to stop. Kenyon then wrote to School of Science Dean James Kelley to clarify what it was he could not discuss. Was he "forbidden to mention to students that there are important disputes among scientists about whether or not chemical evolution could have taken place on the ancient earth?" Was he barred from mentioning "the important philosophical issues at stake in discussions of origins?"

Kelley insisted that Kenyon "teach the dominant scientific view," not the religious view of "special creation on a young Earth." Kenyon replied that he taught the dominant view, but he also discussed that some biologists see evidence of intelligent design and have problems with the dominant view.

He received no reply. Instead, he was yanked from teaching introductory biology and reassigned to labs.

Recently, under pressure from the university's Academic Freedom Committee, the Academic Senate and the American Association of University Professors, Keynon was reinstated. The biology department, however, has proposed a ban on further discussion of intelligent design as unscientific.

The case raises some troubling questions about whether scientists must now pass ideological muster to remain in the scientific community.

Kenyon is an authority on chemical evolutionary theory and the scientific study of the origin of life. He received a Ph.D. in biophysics at Stanford University and completed postdoctoral work at Oxford University in England, NASA and the University of California at Berkeley. In 1969, he cowrote a seminal theoretical work titled *Biochemical Predestination*. The book articulated what was arguably the most plausible evolutionary account of how a living cell might have organized itself from chemicals in "primordial soup."

Kenyon's subsequent work resulted in numerous scientific publications on the origin-of-life problem. But as more research was done in the late 1970s, Kenyon began to question some of his own ideas. Experiments designed to simulate life's origin increasingly contradicted the dominant view in his field.

When run under realistic conditions, simulation experiments repeatedly produced biologically irrelevant sludge or insignificant amounts of necessary amino acids. Further, molecular biology had revealed the presence of encoded messages along the spine of large biomolecules such as DNA. Experiments and developments in a field known as information theory suggested that simple chemicals do not arrange themselves into such complex information-bearing molecules without guidance from experimenters.

To Kenyon and others, such results raised important questions about how "naturalistic" the origin of life really was. If undirected chemical processes cannot produce the coded strands of information found in even the simplest cells, could perhaps a directing intelligence have played a role? By the 1980s, Kenyon thought it could.

That someone of Kenyon's stature should have to lobby for the right to teach introductory biology, whatever his current view of origins, is absurdly comic. Kenyon knows perhaps as much as anyone about a problem that has stymied an entire generation of research scientists. Yet he has been prevented from reporting the negative results of research and from giving students his candid assessment of it.

Indeed, as Kenyon has explained to his administrators, his view hardly qualifies as biblical creationism, let alone religious advocacy. When he discussed the notion of intelligent design, he did so based on biological data and not from opinions based on religion.

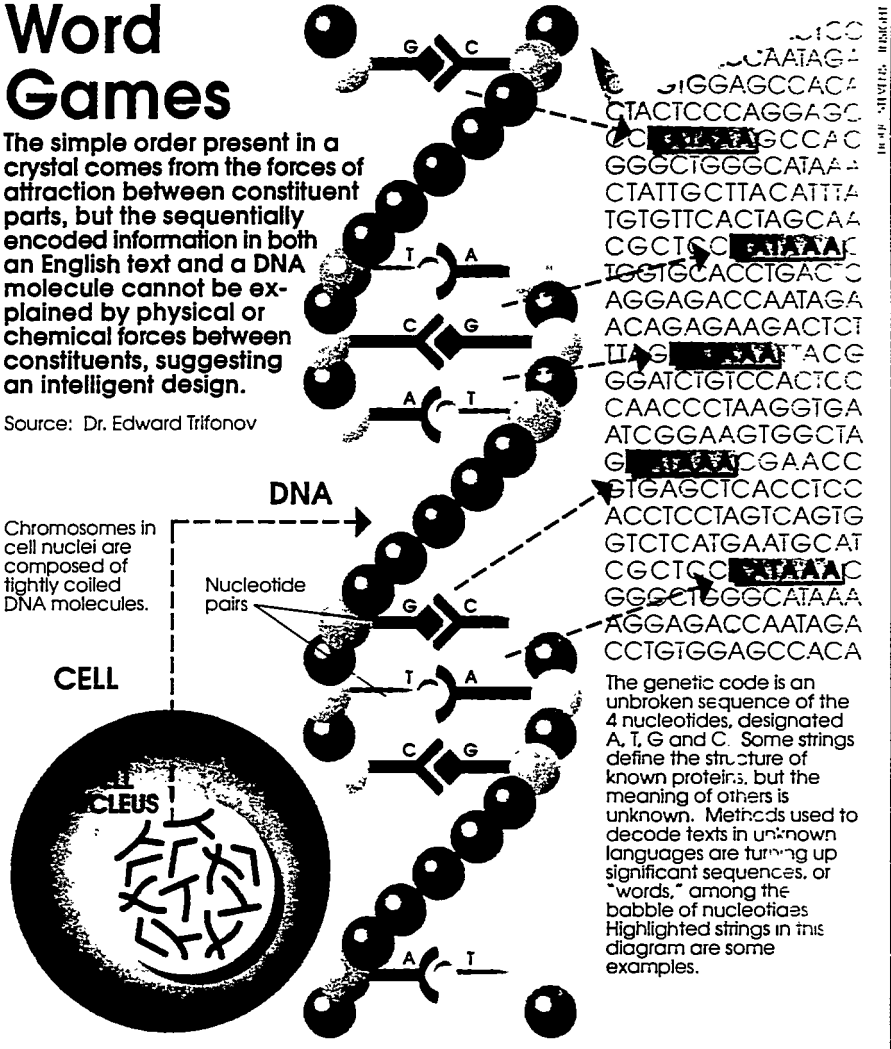
Kenyon's opponents assume that science has a unique rational standing and ideological neutrality. Subjective considerations from philosophy and religion do not influence scientific theories; and scientific theories, in turn, can have no philosophical or religious implications. Intelligent design, with its potential implications, violates this alleged neutrality. Thus, despite Kenyon's credentials and clear concern with biological data, Hafernik and Kelley decreed that he had moved beyond science and into religion. Therefore, he needed to be muzzled, ignoring concerns about academic freedom.

This line of reasoning may seem plausible. It certainly seems consistent with the "just-the-facts" stereotype of science presented in high school and college science courses. Nevertheless, it reveals a disturbing double standard

Word Games

The simple order present in a crystal comes from the forces of attraction between constituent parts, but the sequentially encoded information in both an English text and a DNA molecule cannot be explained by physical or chemical forces between constituents, suggesting an intelligent design.

Source: Dr. Edward Trifonov



The genetic code is an unbroken sequence of the 4 nucleotides, designated A, T, G and C. Some strings define the structure of known proteins, but the meaning of others is unknown. Methods used to decode texts in unknown languages are turning up significant sequences, or "words," among the babble of nucleotides. Highlighted strings in this diagram are some examples.

at work within an area of science notorious for its philosophical overtones.

On any reasonable assessment of the issues at stake in the origin-of-life controversy, Kenyon's design theory and the dominant materialistic evolutionary view are not two different types of thinking, one religious and the other scientific. They are two competing answers to the same question: "What caused life to arise on Earth?"

This competition is tacitly conceded in the biology texts that routinely recapitulate Darwinian-style arguments against intelligent design. Yet if arguments against intelligent design are philosophically neutral and strictly scientific, why are Kenyon's arguments for design inherently unscientific and religiously charged?

Neither approach to the origin of life can claim philosophical neutrality. Standard evolutionary theories make the metaphysical claim that brute matter organized itself into more and more complex living structures without assistance from a guiding intelligence. Neo-Darwinism teaches, in the words of the late Harvard biologist George Gaylord Simpson, that even "man is the result of a purposeless and natural process that did not have him in mind. He was not planned."

Evolution conceived as a completely purposeless process — a "blind watchmaker," says biologist Richard Dawkins — eliminates any role for creative intelligence in the origin of living things. Therefore, it directly contradicts not only "special creationism," but also all theories inconsistent with an aggressive philosophical materialism. This includes "God-guided evolution" and other generic notions such as intelligent design. Whatever the merits of "blind watchmaker" evolution, it's hardly ideologically neutral.

Yet Kenyon's opponents still would

insist that scientific theories must limit themselves to strictly materialistic explanations. Science is by definition limited to observable realities. Its explanations must invoke only natural processes or events. Scientists must obey what philosophers call the principle of "methodological naturalism."

This judgment agrees with popular conceptions of what most scientists, especially experimental scientists, do. But methodological naturalism cannot be justified as a normative principle for all types of science — if science is to seek the truth.

Prohibitions against inferring intelligent design are particularly problematic in historical sciences such as archaeology, forensics and paleobiology. Historical scientists address different kinds of questions. Rather than asking about how a part of nature generally behaves, historical scientists ask how things came to be. For example, origin-of-life biologists ask, "What happened to cause life to arise on Earth?" Since a designer could have played a role, it is difficult to see why postulations of such agency must necessarily be excluded — especially if biological evidence supports such a view.

It is true that scientists in other fields do not generally make design inferences. Yet, these scientists are not asking about causal origins. Consider the question "How does atmospheric pressure affect crystal growth?" To state that "crystals were designed by a creative intelligence" or that "crystals evolved via natural processes" fails to answer the question. Here appropriate answers are necessarily naturalistic, but only because of the question. Other types of questions may require other types of answers.

Defenders of methodological naturalism insist, however, that prohibitions against design inferences are necessary to preserve the rigor of scientific reasoning. Some of Kenyon's critics at the university argue that his theory of intelligent design fails to qualify as scientific because it alludes to an unseen entity. Since the existence of an unobservable designer cannot be tested, it can't be part of a scientific theory.

Yet many scientific theories postulate unobservable events and entities. Physicists postulate forces, fields and quarks; biochemists infer submicroscopic structures; psychologists discuss their patients' mental states. If unobservability precluded testability and scientific status, many scientific theories would not qualify as science.

Evolutionary biologists themselves traffic in "unobservables." They invoke processes whose creative effects often are too slow to see and infer the existence of extinct organisms for which no fossils remain. Like Kenyon's designer, the existence of unobservable ancient life forms is inferred because it explains evidence in the present.

By inferring an unobservable entity, Kenyon violated no canon of scientific method. Indeed, in seeking the best explanation for evidence, Kenyon has employed the same method of reasoning he used when he supported chemical evolution. His conclusions, not his methods, have changed.

The Kenyon case illustrates another important reason for challenging methodological naturalism: It limits the ability of scientists to seek the truth. Especially in historical sciences, where theories cannot be tested by predicting outcomes or by repeating experiments, scientists must test theories indirectly by comparing the explanatory power of competing theories.

As the Kenyon case illustrates, both biological and chemical evolutionary theories are protected from competition by arbitrary rules excluding nonmaterialistic theories. Yet the question that must be asked about origins is not "Which materialistic theory can best explain the origin of life?" but "What actually happened to cause life to arise on Earth?" Insisting upon strictly materialistic explanations — whatever the evidence — may force scientists to reject a true theory for the sake of an arbitrary convention.

Considerable evidence now contradicts the dominant evolutionary view of biological origins. The universally recognized failure of chemical evolution to explain life's initial origin is now matched by neo-Darwinism's failure to account for subsequent biological form. Fossil studies now reveal a biological "big bang" in which 100 major groups of organisms emerged suddenly without clear precursors 530 million years ago. Fossil finds repeatedly confirm a pattern of sudden appearance and prolonged stability (not gradual change) in living forms. Biochemical evidence reinforces the impression of organisms as systems whose parts — as with machines — can not be altered gradually or dramatically without destroying the functioning whole.

For naturalistic theories, a growing awareness of the complexity of living systems has posed enormous, and perhaps insuperable, challenges. Organisms display any number of distinctive features of intelligently engineered high-tech systems: information storage and transfer capability, regulatory and feedback mechanisms, hierarchical logic and organization, and precisely sequenced strings of code.

Confronted with problems and evidence suggesting a new approach, the Darwinist lobby resorts to subjective complaints about the design of human eyes, panda thumbs and male nipples. They also invoke their own self-serving rule — theories must be materialistic — to discredit challengers as crackpots.

Yet personal attacks and arbitrary rules can not suppress alternative theories forever. With recent developments in probability and complexity theory, the detection of intelligent design has already entered science proper. NASA's $100 million search for extraterrestrial intelligence has been based upon the ability to find the statistical and mathematical signature of intelligently encoded messages.

Less exotic (and more successful) design detection occurs routinely in both science and industry. Archaeology and insurance fraud investigation, forensic science and cryptography would all be impossible if prohibitions against design inferences were applied universally. Imagine an archaeologist forced to treat the Rosetta Stone as a natural erosional effect or a homicide detective required to conclude that all victims died of natural causes.

Kenyon believes similar absurdities now rule origins biology. To Kenyon and many others, the presence of biochemical messages and a corresponding molecular grammar in the cell strongly suggest a prior intelligent design. About this, he may be wrong or right. His argument is based, however, neither on ignorance nor religious authority but on biological data and an expertise informed by the modern informational sciences.

It has no doubt served the purposes of philosophical materialists to portray Kenyon as a religious fundamentalist unwilling to revise dogma in the face of new evidence. In fact, it is their fundamentalism that is on trial. •

Keep Science Free from Creationism

by Eugenie C. Scott

Who is Dean Kenyon and why are we mindful of him? Twenty-five years ago he cowrote a pretty good book on the biochemistry of the origin of life, but hasn't published much in mainline science journals since. He teaches at a good state university with a graduate program, but has no graduate students of his own and hasn't had a research grant since the mid-1970s. He recently cowrote a supplemental text for high school biology, *Of Pandas and People*, that was criticized by a number of scientists for inaccuracy and by teachers for bad pedagogy.

Such is the resume of the man whom Stephen Meyer, coauthor of a section of that text, calls a world-class scientist. More accurately, Kenyon is a scientist of modest accomplishments who apparently has let his religious views cloud his scientific judgment.

Kenyon is embroiled in a debate at San Francisco State University, which, depending on your view, centers on the right to advocate scientifically defendable if unorthodox views, or the right of a department to protect less-knowledgeable students from faulty scholarship. Kenyon was not fired, was not given a pay cut and was not forbidden from teaching his ideas to advanced students. He was removed from teaching ideas outside of science in an introductory biology class.

Can a college professor teach anything he wants? Obviously, if I offer a class in physics, I should not teach students French literature; no one argues whether class content should match the course description. Now, suppose the physics course description directs me to teach mechanics. I might want, for historical purposes, to discuss both Aristotelian and Newtonian mechanics and that would be appropriate. But what if I taught that the two views are equally viable explanations? Do I have the academic freedom to teach students erroneous science? Maybe, but my colleagues would certainly not want me indoctrinating freshman nonmajors in such irregular physics.

This directly parallels Kenyon's situation. Kenyon is teaching inexperienced students that evolution did not occur. (He describes his position thus: "Microevolution is well-documented, but macroevolution is far less documented and may not have occurred.") While the general public understands that advocating Aristotelian mechanics is "wrong" physics, it does not realize that teaching that evolution did not occur is equally "wrong" biology. Kenyon is teaching that the organizing principle of biology — evolution — just did not occur. This is like a chemist contending that he has academic freedom to teach students that the periodic table of elements is irrelevant to chemistry.

Let's define some terms. The creation/evolution conflict reflects two views of the history of the universe. Creationists argue that the galaxies, the solar system, the planet Earth and the plants and animals on it were produced all at once, in their present form. Evolutionists say that the universe did not appear all at one time but gradually over billions of years. Elements were formed in stars, space dust coalesced into planets and the Earth gradually took form. Simple life appeared and later gave rise to a great diversity of living things. Rather than being created separately as "kinds," living forms are descended, with modification, from common ancestors.

"Simple life appeared" is a major issue for creationists. Was it through natural or supernatural causation?

The study of how life originated is an active area in science today. The primordial soup theory, the formation of replicating molecules on crystalline clay substrates, the seeding of amino acids and other components of life from comets and meteors (in which these molecules form spontaneously in space) and other ideas are all under consideration.

Meyer's contention that life is too complex to form naturally ignores research exploring the possibility that life is actually self-organizing. Combining the tools of mathematics, physical properties of matter and informa-

Kenyon *was banned from teaching "intelligent design" theories of biology.*

tion theory, this field has its roots in the work of chemistry Nobel Laureate Manfred Eigen and has been expanded by Peter Schuster and Bernd-Olaf Kuppers. In the United States, it is being pushed forward by several investigators, including Stuart A. Kauffman, whose book *The Origins of Order: Self-Organization and Selection in Evolution* was published in 1993.

These investigators observe that the building blocks of life (amino acids and other compounds known to form spontaneously) can link together, and some of the compounds formed are "autocatalytic": They cause other amino acids to link up. Something like a primitive metabolism emerges in these models, which scientists are testing in laboratories. Exciting developments in the production of something very close to RNA, a major chemical of life, have recently been announced. If life is capable of self-organization, the criticisms raised by Meyer against primordial soup biochemistry are irrelevant.

Scientists do not agree on how life began — yet. And "yet" is a very important word in science. It should not be assumed that just because something is not now understood that it never will be understood. Meyer suggests that because some models of the natural origin of life have been disproved, we must give up our search and seek a supernatural explanation.

Resorting to the supernatural violates a major canon of modern science: explain only through natural causes. The reason is not antireligious but purely practical: Better answers are found when only natural causes are specified.

Consider: If I grow two plots of corn, fertilize only one and find that both yield the same number of ears, how do I explain my results? I can examine the chemical content of the fertilizer, and find that it contained no nitrogen, or I can say, "God wanted both plots to produce the same number of ears." Well, maybe so.

So I plant two more plots, fertilize only one and, this time, the fertilized plot produces more ears. How do I explain this? Looking for natural causes, I might find that this batch of fertilizer has nitrogen, and maybe I can make a generalization to test further. But if I allow supernatural explanation, I have to consider that maybe God did it. Where would this get me? How can I establish general explanatory principles such as corn needs nitrogen to grow well if I can explain away my results by invoking a capricious creator? If I am to understand the natural world, I have to conduct my science as if only natural forces affected my subject.

And, indeed, the world appears to operate according to regularities — it looks as if God doesn't reach down and arbitrarily mess up experiments. So we don't need to look for miracles but just keep trying to find the natural explanation. In *Pandas*, Meyer claims that scientists don't allow supernatural explanation because the supernatural is not observable. Nonsense. Particle physicists study phenomena they can't directly observe, as so do many other scientists. But you can't (scientifically) study variables you can't test, directly or indirectly. You can't use supernatural explanation because you can't put an omnipotent deity in a test tube (or keep it out of one). As soon as creationists invent a "theo-meter" maybe then we can test for miraculous intervention.

Kenyon and Meyer know that science has to work without supernatural intervention, but for theological reasons they make an exception for evolutionary sciences. In *Pandas*, they redefine science into two kinds: inductive sciences and historical sciences. My corn plot example falls into inductive science: Explanations do not invoke supernatural intervention but refer only to natural law. The goal of inductive science, they say, is to discover how the "natural world would normally operate on its own." (We assume that "normally operate" allows even here for a miracle or two when needed.) The supposed goal of historical science is "to reconstruct past events and conditions." We're supposed to believe that geology does not refer to natural laws and regularities.

In reality, historical sciences boil down to those disciplines that have theological implications; inductive sciences are those that don't. Similarly, creationists accept microevolution — genetically based change within species — but deny macroevolution — the evolution of new species. The mechanisms of microevolution can produce speciation, which is the first step in macroevolution.

What makes the authors nervous is the possibility of descent with modification. Stars and galaxies may be evolving, but not starfish and galagos. The nervousness is theological: If descent with modification took

Evolutionary glitch? *The anhinga lacks waterproof feathers.*

Symposium

place, humankind becomes part of nature, less special, and to some, less likely to have been created with a purpose in mind. But purpose or meaning of life is a philosophical matter, not a scientific one. Many accept evolution as the history of life and still believe that life has a purpose. But purpose must be found in metaphysics, not in physics.

Within historical science, Kenyon and Meyer are especially wary of Darwinism, evolution by natural selection. In modified form, it provides the basis of our understanding of how descent with modification has taken place. Darwinism causes them difficulty because it provides a natural mechanism to explain both the variety and similarity of living things. They seem to feel that if life could have come about naturally and if the variety of life can be explained by Darwinism, then God is diminished. He is a less active creator not personally involved in his creation. Their solution is to reject Darwinism, origin-of-life research and the methodology of modern science. Theology overshadows science.

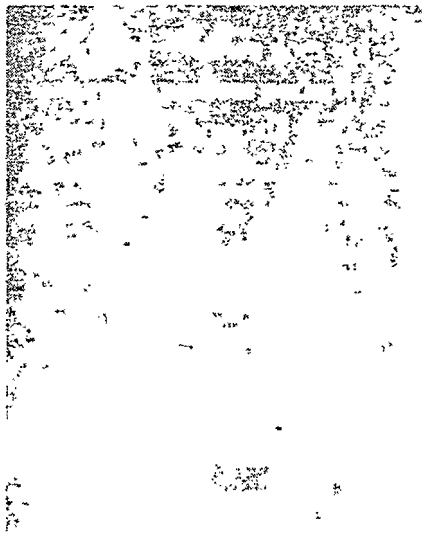
Kenyon and Meyer are now reviving special design and creationism under the title "intelligent design theory." They hearken back to William Paley, who in 1802 proposed that the existence of complex structures in living organisms proved the existence of God. Just as a complex artifact such as a watch had to have a watchmaker, he reasoned, so complex structures such as the eyes of vertebrates have to have a designer. The modern incarnation, intelligent design theory, maintains that complexity is the result of a plan or blueprint. Blueprints are too complex to spontaneously occur, thus they must have creators.

Both Paley and "intelligent design" are refuted by the same arguments.

First, people seem to find design even when it is not there. A nature photographer, after searching through hundreds of thousands of butterflies, has discovered the "butterfly alphabet," naturally occurring patterns on butterfly wings that look like English letters. Does this mean that butterflies read English? Would a Russian entomologist find a different set of letters? It is more sensible to explain the butterfly alphabet as random markings that the human mind has organized into a pattern.

But even if we tend to see design more often than it actually occurs, there are organisms that work well and structures that are quite ingenious. Can perfection be explained by natural rather than supernatural causes? Yes. A complex structure such as the vertebrate eye is produced by a plan held in the DNA of the cell. This plan can evolve through natural selection. Complex, well-working structures could have been produced by supernatural intervention or they could have evolved by natural selection. Observing "perfection" in nature doesn't allow us to choose.

One has to look at the clunkers, the Rube Goldberg structures, and ask if



these are more likely the result of omniscient design or of evolution. And there are plenty of examples of questionable design.

How about human bipedalism? If an engineer were to design a biped from scratch, he or she would not take the body plan of an arboreal quadruped and tip it on its back legs. Would an omnipotent designer deliberately create our injury-prone lumbar vertebral region, our hernia-prone abdominal region, our fracture-prone knee joint? Why don't birds get hernias or slipped disks? Did God design better bipedalism for birds than for humans?

If a panda needed a grasping hand, why make a thumb out of a wrist bone, instead of using the extant thumb? Natural selection operating on available genetic variation could explain such a Rube Goldberg structure. Would an omniscient creator produce a water bird such as the anhinga of Florida that lacked waterproof feathers?

Natural selection does not have to produce perfectly adapted forms; all that's needed is "survival of the fit enough." But the presence of so many structures that barely work or which are obviously cobbled together from earlier stages of evolution is more than enough reason to doubt that creatures were separately, specially designed.

Such disproofs of intelligent design do not mean that evolution is incompatible with the idea of a creator. Recently I went on a retreat with a group of ministers who were creationists, but who were also evolutionists: They believe that evolution was God's mode of creation. But we should not be teaching their theistic evolution in science class any more than we should be teaching Kenyon's "intelligent design." Evolutionary biologists have given us a very good picture of the history of life and have earned their place in science. The ultimate cause of life is a matter of theology, which should be kept out of science classes.

All science, not just "inductive science," has to operate without reference to the supernatural. To study the history of life without reference to the supernatural is no more atheistic than taking a square root without reference to the supernatural.

But Meyer and Kenyon accuse scientists who disallow supernatural explanations for natural phenomena of being philosophical naturalists who deny the existence of God. They are confusing a necessary methodological naturalism with a philosophical naturalism that, indeed, some scientists (and some bookkeepers and some ballet dancers) hold. But like bookkeeping and ballet dancing, there is nothing inherent in science that forces someone to accept naturalism as a philosophy.

Meyer's arguments are ignored in universities today not because they are too new but because they have been tried and found wanting, some of them decades ago. The scientific community looks at these criticisms as an elephant does a fly: If noticed at all, they are viewed as minor annoyances that take time from more important work.

As Thomas Henry Huxley said, "Life is too short to occupy oneself with the slaying of the slain more than once."

And that is why Dean Kenyon should not be teaching creationism as science to freshmen. •

Correspondence

Insurance Act Can Be an Enriching Measure

Thank you for your expose of the evils of the Employee Retirement Income Security Act [Cover Story, Feb. 28], which unquestionably has many shortcomings and inequities.

You were, however, inaccurate in asserting that only through self-insurance by the employer can the insurer escape state taxation and regulation. In fact, this iniquitous act prevents an individual insured from claiming penalties, attorneys' fees and expenses in cases in which the insurer arbitrarily denies or delays payment, and that shelter is applied to insurance companies as well as employers.

The insurers take full advantage of this loophole to deny a percentage of legitimate claims. As a result, many claimants simply give up, resulting in unconscionable enrichment of the insurer.

From my experience as a claimant and practicing lawyer, I am convinced that the insurers pursue this policy cynically and calculatedly. Even if they are sued and judgment is rendered against them, they have to pay only the sum for which they originally were obligated.

Robert E. Barfield
Amarillo, Texas

Financial Gain, Not Religion Accounts for NATO Inaction

I enjoyed the article on the situation in Bosnia [Symposium, Feb. 28]. I found especially interesting Richard Rubenstein's argument concerning the role of religion as the reason NATO has not become involved further. This is an interesting hypothesis, but I think that financial gain has more to do with the West's inaction than anything else.

Aside from the absence of oil, can anyone explain how the Bosnian situation differs from that involving Iraq's invasion of Kuwait in 1990?

The Bosnian conflict does entail religious differences, but that should not matter. If Yugoslavia is allowed to capture large chunks of Bosnia, this sends a dangerous message to other world communities.

Many European powers have stated they renounce territorial claims on their neighbors. However, others, such as Hungary, Bulgaria and Romania, have strong revisionist movements among their people. This does not even take into account Vladimir Zhirinovsky, the Russian nationalist.

Perhaps the arms embargo should be lifted, although this would not solve the problem completely.

On the positive side, other Muslim nations would be able to send arms to the Bosnian Muslims. However, Russia would be able to do the same with their Slavic Orthodox brethren, the Serbs. Should Zhirinovsky rise in power, the U.S. would be forced to choose sides.

If the Serbs are successful in their expansion, I fear for the future of the human race.

Matthew Davis
Calhoun, Ga.

Heated Origin-of-Life Debate Challenges Science Mentality

I appreciate your running the spirited exchange between Eugenie C. Scott and me concerning the Dean Kenyon case at San Francisco State University [Symposium, Feb. 21]. If my own mail is any judge, such intellectual give-and-take is not only stimulating, but actually fun. One wonders what precisely the moguls at the university fear in allowing such open discussion. Letting students evaluate and debate the merits of competing theories might go a long way toward dispelling the sterile, men-in-white-coats image that many science educators say drives talented students away.

While I appreciate Scott's willingness to debate the merits of the university's actions, I must set the record straight concerning Kenyon's scientific accomplishments, which she unfortunately misrepresented.

As I can document from my own doctoral research at Cambridge University, Kenyon maintained a distinguished publication record in origin-of-life biology for about 15 years following the publication of his book *Biochemical Predestination*. Indeed, he continued to publish in refereed venues for several years after his change of view in the late 1970s.

The abrupt cessation of his publication success in 1985 corresponded not to a sudden loss of scientific ability or motivation but to word getting around about his change of view.

I happened to witness an unpleasant spectacle at a conference in 1985 that illustrates what Kenyon has been up against. While on the podium, some of Kenyon's colleagues took it upon themselves to read pedantically to Kenyon from his own book as if to censure him for betraying their cause.

Their sense of betrayal was, no doubt, particularly acute because of the importance of Kenyon's work. Though Scott attempts to damn his book with transparently faint praise ("a pretty good book about biochemistry"), *Biochemical Predestination* was, in fact, a seminal work that had helped change the course of origin-of-life biology.

Before its publication, researchers had relied upon explanations involving "pre-biotic" natural selection acting upon "chance" events to explain the origin of the cell. After 1969, "pre-biotic" natural selection was seen increasingly as an oxymoron; "blind chance" was seen as a confession of ignorance in the face of overwhelmingly biological complexity.

The "self-organizational" theorists who Scott commends are carrying out the very research program that Kenyon initiated in 1969 as alternatives to chance-based scenarios. Kenyon, of course, later repudiated this approach as well, after both experiments and information theoretic analyses contradicted his essential claim. It turned out that energy in a system *can* create patterns of symmetric order such as the whirling vortices that "self-organize" in a bathtub. However, raw energy *does not* have the capacity to encode functionally specified message sequences (whether biochemical or otherwise).

Those who continue to pursue the self-organizational approach are, of course, free to do so. It should be clear, however, that such models maintain their popularity not because scientists have demonstrated matter's capacity to create functional information, but because the dominant religion of many in science — philosophical materialism — says that it must be so.

Stephen C. Meyer
Assistant Professor of Philosophy
Whitworth College
Spokane, Wash.

Write: **Insight**, *Correspondence Editor, 3600 New York Ave. N.E., Washington, D.C. 20002. Fax: (202) 529-2484. Please include an address and a daytime phone number. Letters may be edited for spoce.*

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Panel One: Overview

August 21, 1998
9:30 - 11:30 a.m.

Part One: Schools and Religion in the Pacific Northwest

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Schools and Religion in the Pacific Northwest
Richard Wilson, Ph.D.
Counsel, Office of Superintendent of Public Instruction

Background

Richard Wilson has served as Counsel to the Superintendent of Public Instruction since 1987. Before serving in that capacity, Dr. Wilson worked in a private firm, where his clients included various school districts throughout Washington State. Dr. Wilson has also served as an adjunct faculty member at Heritage College and St. Martin's College, where he continues to teach graduate courses in law and education.

Dr. Wilson received his Doctor of Philosophy in 1989 after writing a dissertation entitled, *The Supreme Court, Religion and Education; an Investigation of Intention.* Dr. Wilson received his law degree in 1980 from Gonzaga University School of Law in Spokane, Washington.

Questions

- Please describe the structure of the Washington State Educational System and the procedures followed by the appropriate offices to resolve schools and religion controversies.

- In an interview with a member of our staff, you indicated that the most prevalent current issue in Washington is school curricula. What, in your opinion, is causing curriculum disputes to continue to arise more often than other issues? Do school policies address the role of religion in the curriculum? If so, why are the policies failing to prevent these disputes?

- Please describe the major schools and religion controversies that have arisen in Washington State in recent years.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Schools and Religion in the Pacific Northwest
Julya Hampton
Legal Program Director, American Civil Liberties Union of Washington

Background

Julya Hampton has been employed with the ACLU of Washington since 1980. During that time, she has monitored a wide variety of schools and religion disputes that have occurred throughout Washington State. Ms. Hampton received her undergraduate degree from Seattle University in 1980.

Questions

- In an interview with a member of our staff, you indicated that the number of schools and religion disputes has declined over the past ten years. Could you please describe in detail the climate that existed ten years ago and how it differs from the climate in Washington today? In your opinion, why has it changed?

- You indicated that the most prevalent current issue is the inclusion of creationism or intelligent design materials in science classes. What, in your opinion, is causing this issue to continue to arise? Do school policies address this issue? If so, why are the policies failing to prevent these disputes?

- Please describe the major schools and religion controversies that have arisen in Washington State in recent years.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Schools and Religion in the Pacific Northwest
W. Theodore Vander Wel, Esq.
Vander Wel & Jacobson, P.L.L.C.

Background

W. Theodore Vander Wel has served as a pro bono attorney for the Rutherford Institute in Washington State since 1989. The Rutherford Institute, founded in 1982 by John W. Whitehead, brings lawsuits on constitutional law issues and provides representation free of charge through pro bono attorneys. The Rutherford Institute previously had a state chapter network in Washington State and Mr. Vander Wel was the president of the network while it was in operation. Mr. Vander Wel has been involved in hundreds of disputes involving religious rights in the State of Washington, including an estimated 150 - 200 disputes on religion and public schools. At his law firm of Vander Wel & Jacobson, P.L.L.C., Mr. Vander Wel is a civil litigator concentrating primarily in real estate and business. The law firm of Vander Wel & Jacobson, P.L.L.C. represents individuals and businesses throughout Washington State. Mr. Vander Wel graduated in 1988 with honors from Drake University Law School.

Questions

- Please outline the ongoing issues that you are aware of pertaining to religion and public schools in the Washington State area.
- Have you seen any improvement in the way in which religious freedom issues are handled by public school officials since the Equal Access Act was passed?
- Please describe some of the recent cases in which you have been that address schools and religion issues.
- Do you have any comment on the recently enacted HB 1230 ("Students' Religious Rights"), detailing the religious rights of public school students?
- What are your suggestions for preventing disputes on religion in the public schools?

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Panel One: Overview

August 21, 1998
9:30 - 11:30 a.m.

Part Two: Equal Access, Individual Students' and Teachers' Rights

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Equal Access, Individual Students' and Teachers' Rights
Douglas Vande Griend, Esq.
Director, Western Center for Law and Religious Freedom

Background

Doug Vande Griend obtained a Bachelor of Arts, with a major in Philosophy and History, from Dourdt College, Sioux Center, Iowa in 1976. He received his Juris Doctor from Willamette University College of Law, Salem, Oregon in 1979. He is the Director of the Western Center for Law and Religious Freedom, a west coast public interest law firm currently affiliated with Christian Legal Society,, a 35-year-old nationwide professional membership organization of more than 4,5000 Christian attorneys, judges, law students and law professors.

Questions

- Please describe the activities of your organization with regard to any controversies situations in the Pacific Northwest, whether in litigation or not, concerning denial of school facilities to:

    a Students
    b. Teachers
    c. Parents

- Can you cite any specific instances in which religious school clubs are treated differently than curriculum related clubs?

- Do you think that the rights of these groups are adequately protected at present, or is there a need for additional protection to be available for all or some? Please explain.

- Do you think the Equal Access Act should be amended? Please explain.

- Please describe the cases where your organization has represented students denied their rights of religious expression in the Pacific Northwest.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Equal Access, Individual Students' and Teachers' Rights
Ellen Johnson
President, American Atheists

Background

Ellen Johnson is a second generation Atheist and has served as the President of American Atheists since 1996. American Atheists is a non-profit, non-political, educational organization dedicated to the separation of church and state and the civil liberties of Atheists. The organization was founded in 1963 by Madalyn Murray O'Hair, a party in the Supreme Court case of *Murray v. Curlett*. *Murray v. Curlett* was a companion case to *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), which held that State mandated Bible readings and recitations of the Lord's Prayer are unconstitutional. Ellen Johnson has a Master's Degree in Political Science and two undergraduate degrees.

Questions

- In an interview with a member of our staff, you mentioned that you believe there are inadequate legal mechanisms to redress violations of the Establishment Clause and the Equal Access Act. Please describe a mechanism that in your view would adequately address individual students' complaints alleging violations of their rights at school.

- You told a member of our staff that Atheism is not a religion, and therefore, Atheists are not protected under the Federal civil rights laws. Please explain.

- You have stated that religious clubs become problematic for Atheists when they hold their meetings in public areas such as hallways. How does the presence of religious club meetings in public areas harm Atheists? What do you propose under these circumstances to balance the interests of students who are Atheists and students who are members of religious clubs in public schools? Are Atheist clubs active in public schools, and if so, do they gather in public places as well?

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Equal Access, Individual Students' and Teachers' Rights
Forrest L. Turpen
Executive Director, Christian Educators Association International

Background

Forrest L. Turpen is the Executive Director of Christian Educators Association International, headquartered in Pasadena, California. He was a public school teacher for seven years, teaching science, physical education, and social studies. Mr. Turpen spent thirteen years as a public school administrator for two school districts in Illinois. Mr. Turpen received his B.S. in Education at Northern Illinois University in 1963 and completed 40 additional hours of graduate credit at Utah State University and the University of Georgia. He attended Stanford University during the 1968-69 school year where he earned his Masters degree in Science Supervision.

Christian Educators Association International (CEAI) is a professional association of approximately 7,500 Christian teachers. The majority of members are public school teachers. CEAI publishes a magazine, provides professional benefits such as liability insurance, and provides prayer groups at local chapters. The association also organizes workshops, seminars, conventions, and works with local churches to recognize outstanding teachers.

Questions

- What issues are of greatest concern to your membership?
- Please describe some of the specific instances of alleged discrimination or improper conduct that have been brought to your attention by your members.
- From your experience, are public school administrators becoming more informed about the rights and responsibilities of public school teachers?
- What does CEAI do to address instances of alleged discrimination or improper conduct?

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Panel Two: Curriculum

August 21, 1998
11:45 a.m. - 1:00 p.m.

Part One: Curriculum Overview

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Curriculum Overview
Bruce Grelle, Ph.D.
Director, Religion and Public Education Resource Center

Background

Dr. Bruce Grelle is an associate professor at the Department of Religious Studies at California State University, Chico. He is also the Director of the Religion and Public Education Resource Center (RPERC). RPERC was established in 1995 by the Department of Religious Studies in collaboration with the Butte County Office of Education in Oroville, California. RPERC promotes an understanding of the distinction between the school sponsored practice of religion and the academic study of religion. RPERC provides resources for teaching about religions in public schools by offering curriculum guides and sample lessons. Dr. Grelle holds classes for teachers and prospective teachers on the academic study of religion. Dr. Grelle received a B.A. in Religious Studies/Political Science from Indiana University in 1979. He earned his M.A. in Religion from the University of Chicago in 1981, and his Ph.D. in Ethics and Society from the University of Chicago in 1993.

Questions

- Briefly describe the functions of the Religion and Public Education Resource Center and your work in connection with the center.

- In your experience, how well are educators informed about students' religious rights on one hand, and restrictions on school sponsorship of religion on the other?

- In your experience, how well are educators equipped to incorporate the study of religion into the curriculum?

- How important is it for public school teachers to undergo formal training to maintain a distinction between celebrating religion and teaching about religion in the classroom?

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Curriculum Overview
Gilbert T. Sewall
Director, American Textbook Council

Background

Mr. Sewall is president of the Center for Education Studies in New York City, where he directs the American Textbook Council, an independent research organization that conducts textbook reviews and curriculum studies in history and humanities. He is the author of the reports *History Textbooks: A Standard Guide* (1994) and *Religion in the Classroom: What the Textbooks Tell Us* (1995). This fall, Sewall will publish *Learning about Religion, Learning from Religion,* completing a six-year study of religion in public schools.

Mr. Sewall is a former instructor of history at Phillips Academy, Andover, and an education editor at *Newsweek* magazine. He is on the editorial boards of *Phi Delta Kappan* and *Publishing Research Quarterly.*

Questions

- Could you briefly summarize some of the major findings and conclusions you draw in your 1995 report, *Religion in the Classroom: What the Textbooks Tell Us.*

- Could you briefly summarize some of the mayor findings and conclusions from the six-year study you expect to publish this fall, *Learning about Religion, Learning From Religion.*

- What rules and guidelines are used by textbook publishers to determine whether and, if so, how to infuse religion into non-historical social studies textbooks (e.g. psychology)?

- What do you see as the potential consequences of increasing the infusion of religion on school textbooks as it relates to the wide diversity of religious faiths in our nation and to non-religious persons?

- The National Science Academy released a report earlier this year titled "Teaching About Evolution" which argues that evolution is not being taught in many schools around the country. Do you find the "evolution v. creationism" debate to be ongoing in the area of textbooks?

- Since education is mostly a local issue, what role should the federal government play in controversies involving in public school textbooks?

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Curriculum Overview
John Eidsmoe, Esq.
Legal Counsel, National Council on Bible Curriculum in Public Schools

Background

John Eidsmoe serves as legal counsel to the National Council on Bible Curriculum in Public Schools, a nationwide non-profit based in North Carolina whose curriculum has been adopted by seventy different school districts in 25 states all over the country, including Alaska and California.

Mr. Eidsmoe teaches constitutional law at the Thomas Goode Jones School of Law in Montgomery, Alabama.

Questions

- Please discuss the curriculum that the National Council on Bible Curriculum in Public Schools has developed.

- Please discuss how the schools and school districts respond to the Bible courses that you have helped implement nationwide (including reaction from teachers, students, parents, and the community).

- Please explain the difference between your Bible study curriculum and that of "higher criticism" Bible study courses where students study *interpretations* of the Bible rather than the text of the Bible itself.

- How would you respond to the argument that if the Bible is taught in a school, then other texts that are held sacred by other religions – such as the Koran – should also be taught.

- What has been the initial thinking of officials in school districts where you have sought to implement a Bible curriculum regarding the legality of implementing a Bible course as part of the curriculum of the school?

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Panel Two: Curriculum

August 21, 1998
11:45 a.m. - 1:00 p.m.

Part Two: Curriculum Controversies in Biology

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Curriculum Controversies in Biology
Stephen C. Meyer
Director, Center for Renewal of Science and Culture, Discovery Institute

Background

Stephen C. Meyer received his Ph.D. in the History and Philosophy of Science from the University of Cambridge in 1991 for a dissertation on origin-of-life biology and the methodology of the historical sciences. Formerly a geologist with the Atlantic Richfield Company, he is currently the Director of the Center for Renewal of Science and Culture at the Discovery Institute and an Associate Professor of Philosophy at Whitworth College. He has contributed to several scholarly books and anthologies including *The History of Science and Religion in the Western Tradition: An Encyclopedia, Darwinism: Science or Philosophy, Pandas and People: The Central Question of Biological Origins, The Creation Hypothesis: Scientific Evidence for An Intelligent Designer* and *Facets of Faith and Science: Interpreting God's Action in the World.* He is currently working on a book formulating a scientific theory of biological design, which looks specifically at the evidence for design in the encoded information in DNA.

Questions

- What is the theory of the origin of life known as intelligent design and how does it differ from the theories of evolution of neo-Darwinists?
- What are the criticisms of intelligent design advocates to the texts used currently in biology class rooms?
- Please describe some of the controversies in the Pacific Northwest concerning use of books advocating intelligent design for biology class.
- Please describe the goals of the Center for the Renewal of Science and Religion at the Discovery Institute.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Curriculum Controversies in Biology
Eugenie C. Scott, Ph.D.
Executive Director, National Center for Science Education

Background

Dr. Scott has a bachelors degree in biological anthropology. She taught as a scientist for many years at various universities. She has been the Executive Director of the National Center for Science Education since 1987. This is a membership organization composed primarily of scientists, but with other interested citizens concerned with the teaching of evolution and the teaching of science in public schools. It is a nationally-recognized clearinghouse for information and advice to keep evolution in the science classroom and "scientific creationism" out. NCSE is the only national organization that specializes on this issue.

Questions

- Please describe your duties as Executive Director of the National Center for Science Education.
- Please describe the theory of intelligent design and why you consider it to be religious belief rather than a scientific theory.
- Is the theory of intelligent design gaining acceptability in scientific circles?
- Please describe some of the controversies in the Pacific Northwest that you have been involved with concerning the teaching of creationism in biology class.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Curriculum Controversies in Biology
Richard Sybrandy, Esq.
Law Offices of Richard C. Kimberly

Background

Richard Sybrandy is an attorney with a general practice firm in Bellingham, Washington. Previously, he worked for approximately two years at the National Legal Foundation in Chesapeake, Virginia, on public school issues. While working at the National Legal Foundation, he compiled a parent and teacher's handbook on the rights of parents, teachers, and students in the public schools from the religious freedom perspective. Through a referral from the Rutherford Institute, Mr. Sybrandy represents Roger Dehart, a biology teacher from Burlington, Washington. Mr. Dehart has, for the past ten years, included materials on intelligent design along with materials on evolution when teaching about the origin of life. Intelligent design criticizes the theory of evolution and suggests that life is the work of an intelligent designer. The ACLU has threatened to sue in this case.

Questions

- Please outline the current controversy surrounding Roger Dehart's biology course.
- Please describe the principles of the intelligent design curriculum.
- In what way does Mr. Dehart propose to maintain a neutral attitude with respect to religion when teaching about the origin of life?

Schools and Religion Project: Seattle Briefing

U.S. Commission on Civil Rights

Panel Three: Partnerships Between Schools and Communities on Religious Freedom Issues

August 21, 1998
3:30 - 4:45 p.m.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Partnerships Between Schools and Communities On Religious Freedom Issues
Jerry Don Warren
Health Education Specialist, Comprehensive Health Education Foundation

Background

As a Health Education Specialist with the Comprehensive Health Education Foundation (CHEF) since 1990, Mr. Warren has developed comprehensive health education programs for public schools in Washington state. CHEF, a Seattle-based non-profit organization founded in 1974, is dedicated to promoting good health by providing leadership, support and resources for health education in schools and communities. One of CHEF's current programs is a partnership project in which it encourages cooperation an understanding between faith communities and public educators.

Mr. Warren earned both a bachelors degree in teaching (health and psychology) and a masters degree in teaching (health education) from Lewis & Clark College. He also holds an Oregon Standard Teaching Certificate and is a certified Health Education Specialist.

Questions

- Which CHEF-developed health education programs or portions of programs have been criticized by religious groups or parents as being contrary to their religious beliefs? Please describe the programs at issue, the nature of the criticism and, if applicable, the resolution of the religious groups' objections.

- What effect, if any, has criticism by religious groups and/or parents had on the ability of CHEF to develop quality health education programs for Washington state public school students?

- Describe CHEF's current partnership project. Include in your response the number of partnerships that have been created, their locations within Washington state, and profiles of the members of the various partnerships.

- Has CHEF been successful with its partnership project? Have the groups and individuals who have joined partnerships resolved their various disputes? Would you recommend that the partnership project be replicated in other parts of the country?

- What role, if any, should the federal government play in the types of schools and religion controversies that CHEF has discovered are occurring in Washington state?

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Partnerships Between Schools and Communities on Religious Freedom Issues
Wayne L. Jacobsen
President, BridgeBuilders

Background

Mr. Jacobsen is the president of BridgeBuilders, which helps school districts build bridges to parents of religious conviction through training seminars, community forums, mediation and consulting services. The topics he covers include:

- Staking out the common ground
- Disarming the fears of religious parents
- What we can and can not do with respect to religion and public schools
- Is there any common ground in family-life curriculum?
- Can science and religion co-exist in the classroom?

Jacobsen served for two decades in Christian ministry as a pastor. He was first an Associate Pastor at the Valley Christian Center in Fresno, California (1975-1980), and then Pastor of The Savior's Community Church in Visalia, California (1980-1994). He has a Bachelor of Arts in Biblical Literature from Oral Roberts University (1975 Honors Graduate).

Questions

- In your interview with Commission staff, you said you work with schools and school districts to point out how curriculum and policies can sometimes appear to be hostile to people of religious faith. Could you provide examples of that, as well as tell us whether – and how – the problems were remedied?

- In your interview with Commission staff, you suggested that a large percentage of the problems you mediate in public schools are due either to: (1)a lack of information; or (2)a misperception of what the objectives are on the "other" or "opposing" side. Could you please elaborate?

- Since education is mostly a local issue, what role should the federal government play in controversies involving schools and religion?

- In conducting your work in different school districts, what is the most significant misunderstanding you find among school officials, teachers, students and parents regarding religious expression in public schools? Please explain.

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Partnerships Between Schools and Communities On Religious Freedom Issues
D. Keith Naylor, Ph.D.
Chair, Department of Religious Studies, Occidental College

Background

Since 1994, Dr. Naylor has been Associate Professor and Chair of the Department of Religious Studies at Occidental College in Los Angeles, California. A former adjunct assistant professor--from 1988 to 1989--and assistant professor--from 1989 to 1994-- in Occidental's Department of Religious Studies, Dr. Naylor has authored a number of articles, presented papers on and conducted research on various religion issues. Beginning in 1996, Dr. Naylor has worked as a consultant to the California 3Rs Project, a non-profit, non-partisan educational program, whose mission includes encouraging cooperation between schools and communities on religious freedom issues. In August 1998, he became a member of the advisory board of the Project.

He received a bachelors degree in English—Creative Writing from Stanford University, a masters degree in Theology from Pacific School of Religion, and a doctorate in Religious Studies from the University of California, Santa Barbara. His doctoral dissertation was entitled, "Liberal Protestant Campus Ministry: The Dilemma of Modernity."

Questions

- Please describe the California 3Rs program. Specifically, what methods does it utilize to encourage cooperation between schools and communities on religious freedom issues?

- Based on your experience as a consultant for the California 3Rs program, have you found any confusion on the part of school officials, teachers, parents and students regarding the proper application of current law to schools and religion issues? Please explain.

- Based on your work with the 3Rs program, what is the most significant misunderstanding you find among school officials, teachers, students and parents regarding religious expression in public schools? Please explain.

- Has the 3Rs program been successful in bringing together various groups with different opinions regarding schools and religion issues? Would you recommend that the program be replicated in other parts of the country? Please explain.

- What role, if any, should the federal government play in the types of schools and religion controversies that the 3Rs program has encountered in California?

SCHOOLS AND RELIGION PROJECT
SEATTLE BRIEFING
Partnerships Between Schools and Communities On Religious Freedom Issues
Christopher D. A. Meidl
Executive Director, International Fellowship of Christians & Jews, and Vice President, Center for Jewish & Christian Values

Background

Since August 1997, Mr. Meidl has held two positions with the International Fellowship of Christians & Jews, a Chicago-based non-profit organization which was founded in 1983. As its executive director, he provides overall management for an organization with the mission of fostering better relations and understanding between Christians and Jews, supporting Israel, and working to build a more moral society. He is also vice president of the public-policy office of the International Fellowship, the Center for Jewish & Christian Values, which has its headquarters in Washington, D.C.

Ordained as an Evangelical minister in 1995, he has over 15 years experience in local church-related teaching, music, administration and government. Prior to assuming his current positions with the International Fellowship, he helped create and operate several businesses and also practiced law for seven years.

Mr. Meidel received a bachelors degree from the University of California at Berkeley and a juris doctorate from Santa Clara University School of Law.

Questions

- What are the official positions of the International Fellowship or the Center on public schools and religious freedom?

- Information provided to Commission staff identifies one of the Center's projects—Religious Expression in the Public Schools (REPS)--and states that its purpose is to educate school officials about "legally permissible religious expression". Please describe the project in detail and include in your response the number of REPS projects, their locations and the methods which the project uses to accomplish its stated goal.

- Has REPS been successful? Would you recommend that it be replicated in areas where it has not yet been introduced?

- What role, if any, should the federal government play in controversies involving schools and religion?