

Stuck with a Lemon

A new test for establishment clause cases would help ease current confusion

BY MICHAEL W. McCONNELL

The U.S. Supreme Court soon will hear arguments in *City of Boerne v. Flores* that will determine what legal standard applies to claims of burdens on the free exercise of religion under the First Amendment to the Constitution.

For a time, the constitutional standard limited free exercise claims to laws specifically targeting religious activity. In 1993, however, the Religious Freedom Restoration Act became law, creating a statutory right to challenge any governmental action that burdens the exercise of religion and forcing government to show it has a compelling justification for a challenged restriction.

The question in *Flores* (No. 95-2074, being argued Feb. 19), concerning whether a historic preservation ordinance can be used to block a church expansion project, is whether the act is constitutional.

If it is upheld, the exercise of religion will receive the same high degree of protection accorded other important constitutional rights. If it is not upheld, the exercise of religion will be protected only in the relatively rare instances in which government has deliberately singled out a religious practice for prohibition or persecution.

But while that issue presumably will be resolved before the summer recess, the Court will leave unresolved the equally important question of what legal standard applies to the other First Amendment provision relating to religion.

The establishment clause provides that "Congress shall make no law respecting the establishment of religion." This clause is no less cen-

tral to protecting religious liberty than the free exercise clause. It is the constitutional provision principally implicated in such issues as school prayer, aid to parochial schools and public displays for religious holidays.

In a 1971 decision in *Lemon v. Kurtzman*, 403 U.S. 602, written by then-Chief Justice Warren E. Burger, the Court announced a three-part test for determining whether a law or governmental practice violates the establishment clause:



The Court ruled on state funding for parochial school teachers in 1971.

1) Does it have a secular purpose?

2) Does it have a "primary effect" of either "advancing or inhibiting" religion?

3) Does it entail an "excessive entanglement" between government and religion?

If a law or practice violates any one of these three criteria, it is deemed unconstitutional.

The Perils of Ambiguity

But the problems with the test are numerous. Each part of the *Lemon* test is deeply ambiguous, and each—if taken literally—would produce highly unattractive results. Consequently, the lower federal courts and state courts have given the test widely different and seemingly contradictory interpretations, and they often ignore it altogether to avoid undesirable results.

The "secular purpose" requirement of the *Lemon* test has been taken by some courts to mean that legislation inspired by religious conviction is constitutionally forbidden—leading to such spectacles as the surveillance of Rep. Henry J. Hyde, R-Ill., attending mass to prove that the legislative amendment bearing his name (passed in the mid-1970s to eliminate public funding of abortions) is religiously motivated.

Since many Americans take their bearings from religious values on issues of justice and the common good (from welfare policy to defense policy to family law), courts would be busy indeed if this interpretation were rigorously enforced.

Perhaps more important, the secular purpose requirement sometimes has been interpreted to mean that government efforts to facilitate or accommodate religious freedom are constitutionally illegitimate.

The challenger in *Flores*, for example, contends that the Religious Freedom Restoration Act lacks a secular purpose because its only goal is to accommodate religious practice. On this theory, the free exercise clause itself violates the establishment clause.

The problem with the "effects" part of the *Lemon* test is that it fails to specify a baseline for comparison.

If a government program extends benefits to a wide spectrum of private groups, secular as well as religious, does this "advance" religion? The answer, according to the courts, is sometimes "yes," sometimes "no."

When yes, the effect is to exclude religious people from benefits available to others—to produce discrimination against religion, not protection for religious freedom.

In one recent case, a public radio station was denied funding

Michael W. McConnell is a professor at the University of Utah College of Law in Salt Lake City. He has briefed or argued a number of establishment clause cases before the U.S. Supreme Court.

On the Docket

Cases being argued before the U.S. Supreme Court this term include:

• **Clinton v. Jones**, No. 95-1853 (argued Jan. 13).

Key issue: Does a court order requiring a sitting president to defend a civil lawsuit alleging misconduct before he was in office violate the doctrine of separation of powers?

Facts: In 1994, Paula Corbin Jones sued President Clinton, alleging that he sexually harassed her in 1991, when he was governor of Arkansas and she was a state employee. While denying the allegations, Clinton has sought to postpone the litigation until after he leaves office.

Prior holding: A U.S. District Court judge postponed the litigation but ordered discovery, including Clinton's deposition, to proceed.

The 8th U.S. Circuit Court of Appeals based in St. Louis reversed, in effect ordering the case to proceed toward trial even if Clinton is in office.

To Follow the Court



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The Supreme Court stayed that ruling pending its decision in the case.

• **Layer v. Department of Justice**, No. 95-2024 (argument date to be determined).

Key issue: Can a federal court submit a voting redistricting case to mediation, and approve the mediated result, without a finding

that the challenged district was unconstitutional?

Facts: A federal and state legislative redistricting plan developed by Florida officials in 1992 was never implemented after the U.S. Department of Justice denied the necessary federal pre-approval under Section 5 of the Voting Rights Act.

In the wake of the impasse, the Florida Supreme Court adopted a redistricting plan that created state Senate District 21, whose voting-age population was 45 percent black.

In 1994, District 21 was challenged in a federal lawsuit alleging that race was the overriding motive in its creation.

Prior holding: Without an admission of liability by Florida and without holding a hearing on liability, the District Court submitted the case to mediation, which resulted in a redrawn District 21 with a black voting-age population of some 36 percent. A U.S. District Court approved the redrawn district.

—L. Anita Richardson

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because it broadcast a weekly one-hour church service; in another case, a blind man was denied vocational benefits because he chose to study for the ministry; in yet another, an educational choice plan was restricted to secular private schools.

In all these cases, a strong argument can be made that the exclusion of religion violates the free speech clause or the free exercise clause. *Lemon* thus creates a conflict between the various provisions of the First Amendment.

The "entanglement" part of the *Lemon* test is the most mysterious. Generally, it means that, when the government and a religious institution interact to assure that benefits are used for their proper purposes, the relationship is "entangling." But since every religious institution necessarily has numerous contacts with government, there is no way to tell whether the entanglement is excessive. The cases are all over the map.

Looking to the Court for Relief

The result of these three ambiguous principles is a jurisprudence of confusion and inconsistency—with a heavy dose of hostility to religion thrown in.

For example, the Court has held that religious colleges may receive general purpose government grants, but religious high schools may not; that government may subsidize bus transportation to religious schools but not bus rides for their students on field trips; that government may pay for books but not maps or film projectors; that it may reimburse schools for the cost of state-mandated standardized tests but not state-mandated safety maintenance; and that it may pay for diagnostic, but not therapeutic, services to students at religious schools.

Constitutional historian Leonard Levy of Southern Oregon State College in Ashland has commented that the Court "managed to unite those who stand at polar opposites on the results that the Court reaches." He notes that "a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the justices."

The Court is obviously aware of these problems. Four of the current justices have written concurrences or dissents in various cases calling for re-examination of *Lemon* and replacement with a more appropriate

test. A majority opinion described the interaction between the effects and entanglement tests as a "catch-22." Justices Anthony M. Kennedy and Sandra Day O'Connor, the decisive swing votes in religion cases, have both called for replacement of *Lemon*.

Many scholars think the Court already has abandoned the test.

Lower courts remain mired in the inconsistencies, ambiguities and bias of the three-part test, which the Supreme Court simply ignores.

With one minor exception, the Court's last six establishment clause cases were decided on other theories, without citation to *Lemon*. Even the dissenters have conspicuously neglected to cite *Lemon*, leading to the suspicion that the test has no supporters left.

To be sure, in 1993 a majority opinion in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, included one sentence citing the three-part test in the course of explaining why a unanimous free speech decision did not violate the establishment clause.

This inspired Justice Antonin Scalia to write, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence." Then-Justice Byron R. White (himself an opponent of *Lemon*) crisply replied for the majority that "there is a proper way to inter an established decision" and that *Lemon* "has not been overruled."

The problem is that the Supreme Court is free to ignore its precedents when it chooses, but the lower courts are not. All 12 of the federal courts of appeals and almost all of the state supreme courts have concluded in the past two years that *Lemon* remains the constitutional standard. Thus, they remain mired in the inconsistencies, ambiguities and anti-religious bias that the Court avoids by ignoring *Lemon*.

Since most cases are finally resolved by the lower courts, that means establishment clause cases continue to be decided by reference to a test that no longer commands the support of the Supreme Court.

Beginning with filings by the

U.S. solicitor general during the Reagan administration in the mid-1980s, the Court has repeatedly been asked to reconsider the *Lemon* test. In two cases, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), lower courts held that the results

compelled by *Lemon* conflicted with free exercise or free speech rights. (Both courts held that *Lemon* trumped the conflicting requirements of the First Amendment.)

This should have been a clear message to the Court that the lower courts needed guidance. Yet in no case did the Court expressly affirm or overrule *Lemon*, inform the lower courts what to do with the *Lemon* test, or even allude to the conflict between *Lemon* and the rest of the First Amendment.

The Court apparently has decided to dispense with the *Lemon* test for its own purposes, without expressly saying so.

It may be that the Court is undecided about what approach to take in lieu of *Lemon*, and it may be that the Court can decide individual cases fairly and wisely without tackling the *Lemon* issue.

But the function of the Supreme Court in our system is not just to decide individual cases. It is to interpret the law so that individuals, religious institutions, legislators and lower courts may know what is demanded of them. If the Court still retains faith in the *Lemon* test, it should say so. But if the Court no longer adheres to *Lemon*, it should say that, too.

In the context of abortion rights, Justices O'Connor, Kennedy and David H. Souter proclaimed, "[L]iberty takes no refuge in a jurisprudence of doubt." Yet for almost a decade, the jurisprudence of the establishment clause has been in doubt.

Continued confusion benefits no one. The Supreme Court should take the next opportunity to resolve this issue. Five simple words would do the trick: "The *Lemon* test is overruled." ■

In all its variations, the fathers' rights movement is saying one thing ...

Make Room *for* Daddy

BY STEPHANIE B. GOLDBERG

Stuart Miller is a resident of Vienna, Va., but also of a country that, for many of us, is as ephemeral as Brigadoon. In this strange, topsy-turvy world, men, not women, are the objects of gender bias in the courts, and deadbeat dad Jeffrey Nichols, the man who lived in palatial splendor while his children were left wanting, is more likely to get sympathy than the members of the First Wives Club.

Miller, who is now federal lobbyist for his own organization, the American Fathers' Coalition, admits that he is "an angry guy, and justifiably so." At 40, he lives in his par-

Stephanie B. Goldberg, a lawyer, is a senior editor with the ABA Journal.

Stuart Miller, with his son, Blaine, knows all about post-divorce woes



Riley Endorses New Look At Title I Ruling In *Aguilar*

Education Secretary Richard Riley thinks it's time to take a new look at a key U.S. Supreme Court ruling on providing Title I services to religious school students.

In a statement released yesterday during a Senate hearing, Riley said he would support "reconsideration" of the Court's 1985 decision in *Aguilar v. Felton* (473 U.S. 402).

In *Aguilar*, the Court barred public school teachers from providing Title I services for disadvantaged students in religious schools.

With his statement, Riley added his voice to a chorus of those troubled by the decision's impact. Already, five current Supreme Court justices have signaled their interest in re-evaluating the ruling.

"We must make more effective use of Title I dollars to support our neediest students in both public and private schools. [*Aguilar*] stands in the way of our doing so," Riley said.

U.S. Assistant Attorney General Walter Dellinger referred to the secretary's statement as he testified before the Senate Judiciary Committee on religious liberty issues.

Riley did not attend the hearing.

Education Department officials are not aware of any pending litigation on the Title I issue, an ED spokesman said yesterday.

Difficult Balance

While some view *Aguilar* as a victory for church-state separation principles, others cite the tangled and costly provisions it inspired.

Today, many of the public school systems

responsible for delivering Title I services to disadvantaged students have parked vans near religious school grounds for classes.

Riley cited a 1989 General Accounting Office study that estimated schools have spent "hundreds of millions of dollars on non-instructional costs" to comply with *Aguilar*.

New York City school officials have budgeted \$16 million for *Aguilar* costs for school year 1995-96, he noted. New York administrators support a repeal of *Aguilar*.

"This decision has caused continuing problems in the Title I program for both public and private school children who need extra help," Riley wrote. It "does not ... pass the test of good common sense."

After the hearing, a spokesman for a conservative legal organization applauded Riley's statement.

"It's wonderful that [Riley] recognizes that that case was wrongly decided and we ought to overrule it," said Greg Baylor, assistant director of the Christian Legal Society's Center for Law and Religious Freedom.

"*Aguilar* is an example of what's wrong with Establishment Clause jurisprudence," Baylor said, referring to the Constitution's provisions on government establishment of religion.

But an official of the group that filed *Aguilar* said she was disheartened by Riley's statement and equated it to a step away from support for church-state separation.

The High Court's ruling does not burden schools, said Lisa Thureau, executive director of the National Committee for Public Education and Religious Liberty. Rather, school systems fritter away money by trying to circumvent it, she said. —Mary-Ellen Deily



UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

February 29, 1996

Dear Superintendent:

In 1985, the Supreme Court held in Aguilar v. Felton that instructional services under Part A of Chapter 1 of the Education Consolidation and Improvement Act of 1981 could not be provided in religiously affiliated private schools. While I have expressed support for reconsideration of that decision in an appropriate case (see enclosure), the decision continues to apply to Part A of Title I of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's Schools Act (Title I), the successor to the Chapter 1 program.

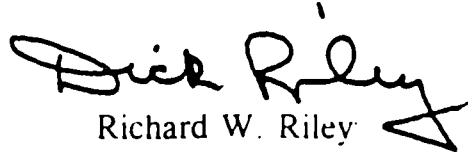
I am writing to reaffirm the view of the Department of Education, originally articulated in 1985, that the Felton decision need not have the effect of prohibiting on-premises services to religiously affiliated private school children in other federal programs. The Supreme Court has recognized that the implications of one decision under the Establishment Clause are not always clear for other cases presenting different facts and circumstances.

The special statutory schemes and problems relating to other programs were not before the Supreme Court when it decided Felton. In Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993), for example, the Supreme Court subsequently has held that the Establishment Clause did not prevent a school district from providing sign language interpreter services for a deaf student on the premises of a religious high school under a program funded by the Individuals with Disabilities Education Act. With respect to other programs such as the Bilingual Education Act, a prohibition of on-premises instructional services may make it impossible to provide authorized programs involving bilingual instruction in a wide range of academic subjects.

For these legal reasons and because of the educational concerns summarized in the enclosed statement, the Department of Education does not believe that the Felton decision need be applied beyond the circumstances clearly addressed by that case. I shall keep you advised of further legal developments in this area. If you are aware of

any controversy, including litigation, in which it is contended that Felton extends to other educational programs, please inform Judith Winston, my General Counsel. The Department intends to review any effort to apply Felton beyond its specific circumstances.

Yours sincerely,


Richard W. Riley

Enclosure

cc: Chief State School Officers
State Directors of Special Education



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

STATEMENT BY SECRETARY RILEY ON AGUILAR v. FELTON

In 1985, the Supreme Court held in Aguilar v. Felton that it is unconstitutional for public school personnel to provide instruction in religiously-affiliated private schools under Title I of the Elementary and Secondary Education Act. This decision has caused continuing problems in the Title I program for both public and private school children who need extra help. I therefore support reconsideration of the Felton decision in an appropriate case. In my opinion, Felton does not advance the progress of education or pass the test of good common sense. At a time when school budgets are under increased scrutiny, Felton places an additional undue burden on them.

The Felton decision has had a significant negative impact on Title I services for the neediest children in both public and private schools. Importantly, the costs of compliance with Felton are taken off the top of the school district's total Title I allocation, prior to providing funds for comparable instructional services for public and private school children. Therefore, compliance with Felton reduces the amount of Title I funds available for public school children, as well as private school children. Also, in the years immediately following the decision, there was a dramatic decrease in the number of private school children participating in the Title I program. Although the number has increased in subsequent years, the underlying problems caused by the Felton decision continue. Instead of having Title I services in their own school buildings, as public school children generally have, religious school children must go to another location to receive instruction from a teacher. This creates not only logistical problems, but significantly increases costs (for such things as transportation or the purchase or rental of mobile vans) which adversely affects both public and private school children. I believe we must make more effective use of Title I dollars to support our neediest students in both public and private schools. Felton stands in the way of our doing so.

Based on a 1989 study by the General Accounting Office, we estimate that school districts have expended hundreds of millions of dollars on non-instructional costs in order to comply with Felton. For example, for the 1995-96 school year, New York City alone is budgeting \$16 million for these costs. It is estimated that \$10 million of this amount will come from a special Title I

appropriation, but the remaining \$6 million will have to come off the top of New York City's regular Title I grant. This \$6 million could be used to serve 5600 additional needy students in both public and private schools, or alternatively to improve services for the thousands of children already being served under Title I in New York City. However, until Felton is reconsidered, New York City and other school districts must continue to comply with that decision.

As demonstrated by the facts of the original case, we believe that Title I services can be provided in private schools without aiding religion or creating excessive entanglement between government and religion. This Department has also supported and defended in litigation a variety of alternative arrangements for providing Title I services for private school children, including providing computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property. There has been criticism, however, that even the alternative arrangements that have developed as a result of Felton are not the most educationally effective methods for providing Title I services. In addition, the Felton decision at times has caused unnecessary tension between public and private school officials concerning how and where Title I services should be provided for private school children.

In light of these continuing problems, I support efforts to have the Felton decision reconsidered in an appropriate case.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

APR 24 1996

Mr. Douglas Otis
4805 Tumblewood Way
Paso Robles, CA 93446-4216

Dear Mr. Otis:

I have been asked to respond to your recent electronic mail inquiry about "religious release time." I am sorry for the delay in responding.

We have provided some information on this issue in guidance issued by the U.S. Secretary of Education on August 10, 1995, to all local superintendents of education on the extent to which religious expression and activity are permitted in our public schools. I have enclosed a copy of that guidance.

The enclosed guidance, on page 5, indicates that "[s]ubject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that the schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day."

You may also wish to review the decisions in Zorach v. Clausen, 343 U.S. 306 (1953) (release of students to receive religious instruction at another location upheld) and McCollum v. Board of Education, 333 U.S. 203 (1948) (striking down a law allowing a classroom in a public school to be used for religious instruction during the regular school day). The application of the legal principles in these decisions and in the guidelines to the specific factual situations described in your letter are issues that you may want to discuss with local school and other community officials and local attorneys and others in your community.

Page 2

I appreciate your interest in this subject and in education, and hope the information I have provided is helpful to you.

Sincerely,

A handwritten signature in black ink that reads "Philip Rosenfelt". The signature is written in a cursive style with a large, prominent "P" and "R".

Philip Rosenfelt
Assistant General Counsel
for Elementary, Secondary,
Adult, and Vocational
Education

Enclosure

'Troubled' Clinton Backs Religion's Place in Schools

Calls Any Outright Ban a Misuse of Constitution

By TODD S. PURDUM

WASHINGTON, July 12 — President Clinton declared today that the First Amendment "does not convert our schools into religion-free zones," and ordered the Government to distribute national guidelines explaining the wide degree of religious expression allowed in schools under current law.

"I am deeply troubled that so many Americans feel that their faith is threatened by the mechanisms that are designed to protect their faith," Mr. Clinton said in a carefully worded speech aimed at outflanking Republican proposals for a constitutional amendment on school prayer.

"When the First Amendment is invoked as an obstacle to private expression of religion, it is being misused," he said. "Religion has a proper place in private and a proper place in public, because the public square belongs to all Americans."

The President outlined his views in Vienna, Va., a Washington suburb, during a 45-minute speech to students and parents at James Madison High School, named for "the master builder of the Constitution." It was the third in a series of speeches in the last week in what Mr. Clinton has described as an effort to find "common ground" in American civic and political life. Aides have said the speeches are part of an effort to portray the President's own ideas as a moderate alternative to more extreme ones across the American political landscape.

In a number of decisions dating from the 1960's, the Supreme Court has barred organized prayer in the public schools. Now conservative Christian groups are pushing for Congressional votes on a constitutional amendment that would allow more latitude for group prayer in the schoolhouse. While Congressional Republicans are divided on that proposal, and while there is little sign that it will be taken up soon, school

prayer has been an intense issue for years, and a number of Republican Presidential contenders have made defense of "traditional values," like school prayer, an important part of their campaigns.

Mr. Clinton has long supported "voluntary" prayer in public schools and, as Governor of Arkansas, signed a measure providing for a "moment of silence" there.

Administration officials said the directive that Mr. Clinton disclosed today — about 25 specific points in a memorandum to the Attorney General and the Secretary of Education — was meant not to break new legal ground but to summarize and clarify existing law and principles.

Education Secretary Richard W. Riley said the memo would form the backbone of the guidelines that Mr. Clinton has ordered him to send to

the nation's 15,000 school districts before classes resume this fall.

A wide range of civil liberties and religious groups expressed general support for Mr. Clinton's order, although some conservative groups derided the effort as too little, too late and said a constitutional amendment was needed to reverse a long trend toward judicial limitations on organized religious activity in public schools.

Mr. Clinton, who briefly taught constitutional law at the University of Arkansas 20 years ago, waded into this decades-old debate today by recounting the quest for religious tolerance that drove many early settlers to America. He went out of his way to emphasize the protection already afforded by the First Amendment, noting that the same clause that bars "establishment" of a state religion also prohibits the Government's impeding "the free exercise" of religion, a truth he said had been obscured by recent political debate.

The President's memorandum to the Attorney General and the Education Secretary said, "While the Government may not use schools to co-

erce the consciences of our students, or to convey official endorsement of religion, the Government's schools also may not discriminate against private religious expression during the school day." The memo said the Constitution "permits and protects a greater degree of religious expression in public schools than many Americans now understand."

The President and Mr. Riley said such activities could include individual private prayer, or group prayer by students on school grounds but outside the classroom; bringing a Bible to school or writing a book report on a religious work, or religious clubs' advertising their meetings on school bulletin boards or public address systems, just as any

other student group is permitted to do.

"Students can also pray to themselves — preferably before tests, as I used to do," Mr. Clinton said in his speech, prompting laughter from his listeners.

But, the memo said, any efforts at coercion, or teacher-led prayers in classrooms, or proselytizing so invasive that it "constitutes harassment aimed at a student or a group of students," is forbidden under existing law or prevailing interpretation of court rulings.

The President's directive was broadly consistent with his own long-time views as a practicing Baptist who composed and delivered a prayer at his high school graduation in

The President acts to outflank calls for a constitutional amendment.

1984, before Supreme Court rulings made prayers at school-sponsored ceremonies problematic.

The directive was based largely on a manifesto — agreed to this spring by a diverse coalition of religious and civil liberties groups, including the American Civil Liberties Union — that summarized existing law on religion in the schools.

More...

CLINTON BACKS RELIGION'S PLACE, continued... (2)

Today such groups generally praised the President, in sharp contrast to their distinctly negative reaction to Mr. Clinton's suggestion — made after last fall's Republican electoral sweep, then swiftly withdrawn — that it might be possible to draft a constitutional school-prayer amendment that could pass muster.

The American Civil Liberties Union has represented student religious groups barred from using school buildings after hours, as well

as families whose children were hounded because they refused to pray in class. Laura Murphy Lee, director of the A.C.L.U.'s national legislative office, said today that the organization was heartened by the President's ringing defense of the First Amendment and was "guardedly optimistic" about the guidelines.

But Ms. Lee added that "the devil is in the details." She said she would await the specific language of Mr. Riley's guidelines.

"Clearly," she said, "this whole document is being sold by the White House as pro-prayer-in-school, and the marketing of it has already created some anxiety among parents. There's some ambiguity about what is meant by 'voluntary prayer.'"

In contrast, the Rev. Lou Sheldon, chairman of the Traditional Values Coalition, a church-lobbying organization based in Anaheim, Calif., that has led the drive for a so-called religious freedom amendment, said Mr. Clinton's comments were "too little, too late."

"He came on at the level of the caboose," Mr. Sheldon said, "and we're up here at the engine driving this thing."

"We've already revealed the level of hostility" against prayer in the schools, "and we need an amendment," Mr. Sheldon added. "His is only an initiative, and it will be inadequate."

The Administration said the bitter political debate and misguided caution had led some schools to overreact by barring religious activity that is, in fact, protected, like an individual student's saying a prayer over lunch.

Mr. Riley said that the Government needed to "do a better job at getting schools the kind of information they need" but that he was still unsure precisely what advice, beyond the President's memo, would be included in information packets to be sent to school districts.

Text of President Clinton's Memorandum on Religion in Schools

Following is the text of President Clinton's memorandum to Attorney General Janet Reno and Secretary of Education Richard W. Riley about religious expression in public schools:

Religious freedom is perhaps the most precious of all American liberties — called by many our "first freedom." Many of the first European settlers in North America sought refuge from religious persecution in their native countries. Since that time, people of faith and religious institutions have played a central role in the history of this nation. In the First Amendment, our Bill of Rights recognizes the twin pillars of religious liberty: the constitutional protection for the free exercise of religion, and the constitutional prohibition on the establishment of religion by the state. Our nation's founders knew that religion helps to give our people the character without which a democracy can not survive. Our founders also recognized the need for a space of freedom between government and the people — that the government must not be permitted to coerce the conscience of any individual or group.

In the over 200 years since the First Amendment was included in our Constitution, religion and religious institutions have thrived throughout the United States. In 1993, I was proud to reaffirm the historic place of religion when I signed the Religious Freedom Restoration Act, which restores a high legal standard to protect the exercise of religion from being inappropriately burdened by government action. In the greatest traditions of American citizenship, a broad coalition of individuals and organizations came together to support the fullest protection for religious practice and expression.

Religious Expression in Public Schools

I share the concern and frustration that many Americans feel about situations where the protections accorded by the First Amendment are not recognized or understood. This problem has manifested itself in our nation's public schools. It appears that some school officials, teachers and parents have assumed that religious expressions of any type is either inappropriate, or forbidden altogether, in public schools.

As our courts have reaffirmed, however, 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 conscience of our students or to convey official endorsement of religion, the government's schools also may not discriminate against private religious expression during the school day.

I have been advised by the Department of Justice and the Department of Education that the First Amendment permits — and protects — a greater degree of religious expression in public schools than many Americans may now understand. The Departments of Justice and Education have advised me that, while application may depend upon specific factual contexts and will require careful considera-

tion in particular cases, the following principles are among those that apply to religious expression in our schools:

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. 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 nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order

More...

CLINTON BACKS RELIGION'S PLACE, continued...(3)

as apply to other student activities and speech. Students may also speak to and attempt to persuade their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before- or after-school events with religious content, such as 'see you at the flag pole' gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities are representatives of the state and are prohibited by the Establishment Clause from soliciting or encouraging religious activity and from participating in such activity with students. Teachers and administrators also are prohibited

from discouraging activity because of its religious content and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature and social studies. Although public schools may teach about religious holidays, including their religious aspects and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based

on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable state laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the student's parents on religious or other conscientious grounds. School officials may neither encourage nor discourage students from availing themselves of an excusal option. Under the Religious Freedom Restoration Act, if it is proved that particular lessons substantially burden a student's free exercise of religion and if the school cannot prove a compelling interest in requiring attendance, the school would be legally required to excuse the student.

Released time: Subject to applicable state laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Students may display religious messages on items of clothing to the same extent that they are permitted to display

other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages. When wearing particular attire, such as yarmulkes and head scarves, during the school day is part of students' religious practice, under the Religious Freedom Restoration Act schools generally may not prohibit the wearing of such items.

I hereby direct the Secretary of Education, in consultation with the Attorney General, to use appropriate means to ensure that public school districts and school officials in the

United States are informed, by the start of the coming school year, of the principles set forth above.

The Equal Access Act

The Equal Access Act is designed to insure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the act, the Department of Justice has advised me of its position that the act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercises.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media — including the public address system, the school newspaper and the school bulletin board — to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

I hereby direct the Secretary of Education, in consultation with the Attorney General, to use appropriate means to insure that public school districts and school officials in the United States are informed by the start of the coming school year of these interpretations of the Equal Access Act.

Clinton backs some religion in schools

He tried to counter conservative criticism. He ordered guidelines to explain what is permitted.

By Mary Otto
and Robert A. Rankin
INQUIRER WASHINGTON BUREAU

VIENNA, Va. — President Clinton yesterday defended the right of students to carry Bibles and wear yarmulkes and offer up quiet prayers in the nation's public school classrooms.

At a time when conservatives are saying that government is hostile toward religion, Clinton tried to counter both their position and their politics. He insisted that the First Amendment's separation of church and state did not inhibit Americans' freedom to practice religion, and in fact was essential to safeguard it.

"The First Amendment does not — I will say again — does not convert our schools into religion-free zones," insisted Clinton, standing in the auditorium of a suburban Virginia high school named for James Madison, a father of the Constitution.

To prove it, he ordered the Education Department to send a four-page directive clarifying students' religious rights to every public school district in the country.

"Students can pray privately and individually whenever they want," Clinton said in his speech. "They can say grace to themselves before lunch. There are times when they can pray out loud together. Student religious clubs in high schools can and should be treated just like any other extracurricular clubs. They can advertise their meetings, meet on school grounds, use school facilities just as other clubs can."

"When students can choose to read a book to themselves, they have every right to read the Bible or any other religious text they want. Teachers can and certainly should teach about religion and the contributions it has made to our history, our values, our knowledge, to our

music and our art in our country and around the world, and to the development of the kind of people we are."

In a nod to conservative concerns, Clinton acknowledged that court decisions sometimes have misinterpreted the Constitution to abridge religious liberties unjustifiably. To ensure that those liberties are protected, he directed the Justice Department to act aggressively in defense of student religious liberties.

Drawing on his own sense of the law — and his own Baptist heritage — the President insisted that the state has no place promoting or establishing religion.

"The Constitution protected the free exercise of religion, but prohibited the establishment of religion," Clinton said. "It's a careful balance. It's uniquely American. It is the genius of the First Amendment."

Conservatives' criticism

The speech was applauded by religious moderates and civil libertarians but criticized by cultural conservatives. They are aggressively pushing the Republican Party to put the force of government and law behind their causes, from restricting abortion to permitting prayer in schools.

Clinton refused to cede the ground of government activism on questions of religion to those cultural conservatives. "It is crucial that government does not dictate or demand specific religious views, but equally crucial that government doesn't prevent the expression of specific religious views," he said.

In assembling the directive that will be sent to the nation's schools, the President acknowledged help from a wide range of religious and civil liberties groups.

Yet, because the speech fell short of conservative demands for a constitutional amendment that might narrow the separation of church and state, it did not please Andrea Sheldon, a spokeswoman for the Traditional Values Coalition, a conservative church lobbying group, who was present for the speech.

"He's an eloquent speaker," she said, but quickly added, "The President doesn't understand the issues."

Ralph Reed, executive director of the powerful Christian Coalition organization headed by Republican television evangelist Pat Robertson, issued a statement saying: "The President has now agreed with our long-standing position that public schools should not be religion-free zones. This eloquent rhetoric must now be backed by reality."

Both groups renewed the call for a "Religious Equality Amendment." They say such a change to the Constitution is needed to curb government "hostility" toward religion by making broader allowances for such activities as prayer and other religious expression in schools and other public facilities.

Holding hearings

This summer, conservative Republican leaders are holding hearings that discuss the proposed amendment, which some expect to be submitted to Congress in the next few months.

Civil libertarians and religious moderates contend that, however it is worded, such an amendment could erode or destroy government neutrality toward religion, which they see as guaranteed by the Constitution.

"We embrace the President's rejection of the need for a constitutional amendment on school prayer or religious expression," said leaders of the Baptist Joint Committee, an umbrella group of Baptist organizations. "We must not turn the sacred act of prayer into a political football."

In his speech yesterday, Clinton weighed in on the debate, but never mentioned the amendment and never denounced his opponents. "I am deeply troubled that so many Americans feel their faith is threatened by the very mechanisms designed to protect their faith," said Clinton.

More...

Religious expression defended

Continued...

And on the debate over school prayer, he added: "This is always kind of inflammatory. I want to talk about it in a noninflammatory way."

In that vein, he spoke of high constitutional principles in an earnest conversational tone, consistent with his recent political posture toward Republicans. He portrays them as extreme and himself as moderate, asserting that he shares the same broad concerns, but suggesting that his answers are more thoughtful and measured than theirs.

Clinton followed the same political strategy earlier this year when he embraced the GOP crusade to balance the budget and cut taxes — only less aggressively than they would.

Similarly, on the question of religious freedom, Clinton identified himself with the broad public concern that religion is essential to American life, but drew the line at how far government authority should go toward promoting it.

Clinton Says Schools Can't Bar Religion

Statement Ordered Sent to All Districts

By John F. Harris
Washington Post Staff Writer

Asserting that the Constitution "does not require children to leave their religion at the schoolhouse door," President Clinton yesterday said his administration will distribute to every school district in the country a written statement explaining what types of religious expression are allowed.

"I am deeply troubled that so many Americans feel that their faith is threatened by the mechanisms that are designed to protect their faith," Clinton told a group of educational and religious leaders at James Madison High School in Vienna.

The threat comes more from misguided public perceptions than from Supreme Court decisions separating church and state, Clinton said. Rejecting claims of many conservatives that a constitutional amendment is needed to protect religious freedom, he said people already have considerably more leeway to practice their religion in public than many suppose.

"When the First Amendment is invoked as an obstacle to private expression of religion it is being misused," Clinton said in a speech woven with personal reflections on his faith. "Religion has a proper place in private and a proper place in public because the public square belongs to all Americans."

Many school leaders, Clinton speculated, hear about court decisions rejecting officially sanctioned public school prayer and wrongly assume they must root out even expressions of faith practiced by individuals and private groups. For example, Clinton said, some students have been wrongly prohibited from saying grace before lunch,

something the Supreme Court plainly protects.

In his directive ordering the statement to schools, Clinton said Justice Department lawyers have assured him the law gives students the right to pray privately or to express religious views in homework assignments, and schools are obligated to give religious gatherings the same meeting privileges that they do other extracurricular groups. But his statement also reiterated the current Supreme Court view that "school officials may not mandate or organize prayer at graduation," an area that has inspired vast protest and litigation in recent years.

Clinton's statements follow a theme of recent months during which, on issues from the budget to affirmative action, he has presented himself as sympathetic to concerns of moderate and conservative voters yet cautioned against the more extreme alternatives offered by Republicans.

"He's trying to re-create himself once again," complained Rep. Ernest J. Istook Jr. (R-Okla.), who said he will continue to push for a constitutional amendment protecting public prayer. "He's saying let's focus on what religious liberties we have left rather than what we have lost."

The president said his speech—in which he proclaimed his belief "in the constancy of sin and the constant possibility of forgiveness, the reality of redemption and the promise of a future life"—was part of a series of addresses he has given in recent weeks on the need for greater civility in public life.

But administration officials said its timing was not accidental, coming while congressional Republicans are pushing a so-called Religious Equality Amendment to the Constitution.

Reaction to the speech reflected the controversial nature of the subject.

The Baptist Joint Committee, which opposes a prayer-in-school amendment, hailed Clinton's speech in a state-

ment that declared, "we must not turn the sacred act of prayer into a political football."

But Andrea Sheldon, a top official with the Traditional Values Coalition, said the amendment still is needed be-

cause "a directive from the White House is not going to overturn bad court decisions."

"It's a political document," Sheldon said of the statement Education Secretary Richard W. Riley plans to dis-

tribute to schools by the start of classes this fall. "Do we really want the secretary of education telling the schools in Keokuk, Iowa, what they can and cannot do."

More...

CAN'T BAR RELIGION, continued...

As Riley and Assistant Attorney General Walter Delinger explained it yesterday, the statement would be advisory, carrying no power of law. They said the statement will be a neutral recital of current law, not an attempt to advocate new policies or push constitutional interpretations beyond what the Supreme Court has done.

Clinton in the past has fumbled in explaining his views on a school-prayer amendment. Last November, shortly after the Republican sweep in congressional elections, he said on an overseas trip that he was open to the idea of an amendment. But the next day, aides hurriedly rejected the idea of an amendment, saying their boss was referring only to legislation that would allow "a neutral moment of silence."

Although he occasionally disagrees with the Supreme Court's rulings in particular cases, Clinton said yesterday he generally supports the balance this country has struck between the sometimes conflicting principles of protecting individual religious freedom and strictly barring anything that hints of an official religion.

He recounted his history growing up in Arkansas, where a daily prayer in public school "was as common as apple pie in my hometown."

"Now, you could say, well, it certainly didn't do any harm; it might have done a little good," Clinton said.

But Clinton said at the time he gave little thought to how Catholics and Jews in his class might have been uncomfortable with a Protestant prayer, or to the hypocrisy of public schools avowing themselves on the side of piety at the same time they were segregating blacks.

"I do believe that on balance, the direction of the First Amendment has been very good for America and has made us the most religious country in the world by keeping the government out of creating religion, supporting particular religions . . . and interfering with other people's religious practices," he said.

M. Te - 2/15/95
FYI -
From today's
school program by
Bill

Religious Liberty, Public Education, and the Future of American Democracy

A S T A T E M E N T O F P R I N C I P L E S

Bill: h.
when do we
start on the
letter.
MA

Religious Liberty, Public Education, and the Future of American Democracy

A S T A T E M E N T O F P R I N C I P L E S

For more than one hundred and fifty years, most Americans have learned to live with deep differences in our nation's public schools. Today, increasingly bitter disputes in public schools over educational philosophy, school reform, and the role of religion and values divide many communities and threaten the cohesion and strength of American democracy. Regardless of which side may "win" a given dispute, the truth is that all parties lose, because such controversies generate ever-greater distrust and hostility and undermine efforts to improve public education.

Our nation urgently needs a reaffirmation of our shared commitment, as American citizens, to the guiding principles of the Religious Liberty clauses of the First Amendment to the Constitution. The rights and responsibilities of religious liberty provide the civic framework within which we are able to debate our differences, to understand one another, and to forge public policies that serve the common good in public education.

In the spirit of the First Amendment, we propose the following principles as civic ground rules for addressing conflicts in public education:

I FREEDOM OF CONSCIENCE FOR ALL

Religious liberty, or freedom of conscience, is an inalienable right of every person.

As Americans, we all share the responsibility to guard that right for every citizen. The Constitution of the United States with its Bill of Rights provides a civic framework of rights and responsibilities that enables Americans to work together for the common good in public education.

II THE MEANING OF CITIZENSHIP

Citizenship in a diverse society means living with our deepest differences and committing ourselves to work for public policies that are in the best interest of all individuals, families, communities and our nation.

The framers of our Constitution referred to this concept of moral responsibility as civic virtue.

III SCHOOLS BELONG TO ALL CITIZENS

Public schools must model the democratic process and constitutional principles in the development of policies and curricula.

Decisions by officials or governing bodies should be made only after appropriate involvement of those affected by the decision and with due consideration for the rights of those holding dissenting views.

IV RELIGIOUS LIBERTY AND PUBLIC SCHOOLS

Public schools may not inculcate nor inhibit religion. They must be places where religion and religious conviction are treated with fairness and respect.

Schools uphold the First Amendment when they protect the religious liberty rights of all students. Schools act in the spirit of the First Amendment when they ensure that the curriculum includes study about religion, where appropriate, as an important part of a complete education.

V THE RELATIONSHIP BETWEEN PARENTS AND SCHOOLS

Parents are recognized as having the primary responsibility for the upbringing of their children, including education.

Parents may delegate to public school educators some of the responsibility for their children's education. In so doing, parents acknowledge the crucial role of educators without abdicating their parental duty. Parents may also choose not to send their children to public schools and have their children educated at home or in private school. However, many private citizens, business leaders and others also have the right to demand that public education give students the tools to live in a productive democratic society. All citizens must have a shared commitment to offer students the best possible education. Parents have a special responsibility to participate in the activity of their children's schools. Children and schools benefit greatly when parents and educators work closely together to shape school policies and practices and to ensure that public education supports the societal values of their community without undermining family values and convictions.

VI CONDUCT OF PUBLIC DISPUTES

Civil debate, the cornerstone of a true democracy, is vital to the success of any effort to improve and reform America's public schools.

Personal attacks, name-calling, ridicule, and similar tactics destroy the fabric of our society and undermine the educational mission of our schools. When our differences are deep, all parties engaged in public disputes should treat one another with civility and respect, and should strive to be accurate and fair. Through constructive dialogue we have much to learn from one another.

This Statement of Principles is not an attempt to ignore or minimize differences that are important and abiding, but rather a reaffirmation of what we share as American citizens across our differences. Democratic citizenship does not require a compromise of our deepest convictions. We invite all men and women of good will to join us in affirming these principles and putting them into action. The time has come for us to work together for academic excellence, fairness, and shared civic values in our nation's schools.

FREEDOM FORUM INITIATIVE

1.HAVE AGREED TO SIGN DOCUMENT

co-authors -- Freedom Forum
co-authors -- National Association of Evangelicals
co-authors -- Assoc. for Supervision and Curriculum Development

Citizens for Excellence in Education -- Bob Simonds
Carnegie Foundation for Advancement of Teaching -- Ernie Boyer
ACLJ --Pat Robertson legal group

2.STRONGLY LEANING TOWARD SIGNING

Christian Coalition
American Jewish Congress
National School Boards Association
National Council of Churches -- Buzz Thomas
Christian Legal Society -- Steve McFarland

3.CURRENTLY REVIEWING DOCUMENT

Religious Action Center -- David Sapperstein
PTA
People for the American Way
AFT
National Assoc. of Catholic Educators -- Sister Lourdes Sheehan
Southern Baptists

4.WILL NOT SIGN

Eagle Forum
ACLU

THE TRINITY FORUM



February 14, 1995

The President
The White House
Washington, DC 20510

via fax: 202-456-6703
(hard copy to follow)

Dear Mr. President,

Thank you so much for the signed copy of the State of the Union address. It was a real privilege for me to be part of the discussion at Camp David and I am encouraged to see that you are addressing the issue of "restoring the civil society" so consistently.

This letter is to follow up that discussion, and also my proposal to you of last September 13: "An American Covenant." I am writing to invite you to take the lead in a significant initiative on behalf of religious liberty in public education—the presentation of the enclosed statement on "Religious Liberty, Public Education, and the Future of American Democracy."

As you know, there is at present a flurry of initiatives being prepared to address the contentious place of religious liberty in public life. Some are legislative, including at least five proposed amendments to the Constitution, and others are educational, including a summary of the present state of the law on the subject of religion and public education.

The statement of principles is unique among these proposals in several ways. First, it has been carefully developed to transcend the divisiveness of the "culture warring" and shift the focus from law and litigiousness to rebuilding the common vision for the common good—or, more practically, a civic framework of shared values in which deep and important differences can be resolved. In other words, it gives substance to a key aspect of the "new covenant" at the grass roots level.

Second, the statement has been drafted by a broad, bipartisan coalition of groups and is now supported by an even wider spectrum. It is therefore genuinely all-American and allows you to support something that is substantive, constructive, and unifying. Among major organizations who are enthusiastically supporting it are the Association for Supervision and Curriculum Development (ASCD), the National Association of Evangelicals (NAE), Citizens for Excellence in Education, and the Carnegie Foundation for the Advancement of Teaching (Dr. Ernest Boyer).

The proposal is that you invite to the White House a representative audience of American leaders, predominantly from the religious and educational communities, and that you give a major address on the subject after which the statement is launched with the support of Secretary Riley and the major educational leaders who endorse the statement. The occasion would be further enhanced if you were to symbolize the bipartisan leadership by inviting leading

Republicans to join you in supporting this initiative—especially Majority Leader Dole and Speaker Gingrich.

Ideally, the event should take place in the next three to six weeks (in order for you to seize the momentum) and the timing should coincide with some date of symbolic significance (for example, March 31 is the 503rd anniversary of the infamous expulsion of the Jews from Spain).

I would be only too happy to work with Don Baer on making your speech one that could have wide interest to the press or be made into a chapter for a book, as suggested in the original "American Covenant" proposal.

This letter comes on behalf of Dr. Charles Haynes of the Freedom Forum's First Amendment Center, who has spearheaded this important initiative. We both believe strongly that many of the other proposals are quite inadequate to lift the national debate beyond the fruitless controversies of the culture wars. And some of them are likely only to make things worse. You have a unique opportunity to lead the nation toward much-needed healing. As you stated at the signing ceremony of the Religious Freedom Restoration Act, we need to heal our land.

I look forward to hearing your response.

With warmest regards as ever,

Sincerely,



Dr. Os Guinness

Enc.: "Religious Liberty, Public Education, and the Future of American Democracy"
"An American Covenant"

School Prayer Is Already Allowed

With the first 100 days out of the way, social revolutionaries of the right in Congress are pressing for enactment of their deferred social agenda, especially the political prize of school prayer. They want to weaken and circumvent the First Amendment, which the Supreme Court rightly has held to forbid government-sponsored devotional expression as a coercive intrusion on individual beliefs. The aim is a radical reduction in the religious liberty Americans have long known.

All Americans, in school or wherever they may be, are free now to pray by themselves and express their faith. There is no need to bring officially sanctioned prayer back to schools or to lower other barriers that separate church and state.

House Speaker Newt Gingrich says he is not out to topple Supreme Court decisions three decades old that struck down state-composed and state-compelled classroom prayer and Bible reading. He says he wants only to take care of complaints that students are forbidden to pray in a lunchroom or told they cannot draw religious objects in art class.

These anecdotes, some unproved and others remediable by existing law, are cited by Mr. Gingrich's House troops as reason to draft a constitutional amendment. Language under consideration might nominally be addressed to student-led or voluntary prayer. But any governmental insertion of prayer into the schools beyond the current permissible boundaries will inevitably become a guise for imposing the majority religion on others forced to sit through its celebration.

The Gingrich team, led by Representative Ernest Jim Istook of Oklahoma, has yet to settle on specific language. One proposal under consideration came from a group of eight conservative and evangelical denominations. It would permit student-led prayers in any circumstances in which students can make non-religious statements, a loophole so broad it might allow student-led prayer virtually anywhere in school. It would also open the door for

government aid to parochial schools. It might even force local governments to let worshipers erect creches and other devotional objects on public space.

The measure is unnecessary and divisive. All students can now pray voluntarily — over lunch, before a test, before or after class — so long as they do not commandeer a captive audience of students. Students can also gather voluntarily outside the classroom to use school space for religious exercise on an equal basis with other extra-curricular activities. The Gingrich forces want more: group prayer scenes in schools that can be brandished as a political trophy on the nightly news.

The eight evangelical and conservative organizations declared flatly that student prayer authorized by the amendment "shall not constitute an establishment of religion," a direct overturning of 30-year-old precedents.

Another provision would give any person or group, presumably parents and visitors and not just students, the right to pray in schools "in circumstances in which expression of a non-religious character would be permitted." Still another would safeguard government "benefits" to all regardless of the religious character of their speech or ideas, which quickly leads back to government aid for religious schools.

The Supreme Court has forthrightly declared that the establishment clause forbids more than the creation of a state church. It also bars laws that prefer one religion over another or that aid all religions evenhandedly, because such laws can be sources of religious coercion on nonbelievers or devout believers in different faiths.

The Court's rule leaves all Americans free of legal or majoritarian pressure to bow to any majority's god in public display of piety. It is the American way of safeguarding everyone's liberty of conscience, and it needs no new amendment.