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REPORT from the CAPITAL

Will Mr. Jefferson's wall survive?

"At stake in **Lee v. Weisman** *is far more than commencement prayer. The Court is being asked to jettison the historic principle of government neutrality toward religion."*

— Oliver S. Thomas

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REPORT from the CAPITAL

". . . a civil state 'with full liberty in religious concernments' "

Vol. 47, No. 1 **January 1992**

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Cover: Photographs of news conference following oral arguments in the *Lee v. Weisman* case at the U.S. Supreme Court are by Pam Parry.

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Defining freedom

(EDITOR'S NOTE: This article is provided by former Baptist Joint Committee Director of Information Services W. Barry Garrett of Bethesda, Md., a member of Kensington (Md.) Baptist Church.)

In 1958 I attended a luncheon in downtown Washington. I sat by a lady who was a stranger. After introducing ourselves, she asked, "What do you do in Washington?" I explained that I worked for the Baptist Joint Committee on Public Affairs, which deals with issues of church-state relations and with religious liberty. "Oh, don't we have religious freedom in the United States?" she exclaimed. We had no lack of something to talk about for the remainder of the time.

If this were to happen today, we would have even more to talk about.

In the early 1950s while editor of the Arizona *Baptist Beacon*, I wrote an editorial advocating, defending and promoting separation of church and state. The next Sunday at church one of the deacons came to me and said, "I read your editorial but I don't understand separation of church and state. Would you explain it to me?"

Suddenly it dawned on me that my own understanding of the concept was fuzzy and that to the average person in the pew it was even fuzzier.

Separation of church and state is a political device to help preserve the more basic principle of religious liberty. Both concepts are suffering more distortion today than at any time during my memory.

After coming to the Baptist Joint Committee it was helpful to discover that Dr. C. Emanuel Carlson, the executive director, had been at work on a definition. In 1959 both the American Baptist Convention and the Southern Baptist Convention favorably received from the Baptist Joint Committee this definition of separation of church and state:

1. Church and State have separate "reasons for being." Each is distinct from the other with separate purposes and objectives.

2. The Church and the State have separate publics and citizenry. People are born or are naturalized as citizens. Church members are voluntary participants in a spiritual fellowship.

3. Separate methods. The State uses powers of law, force, police, etc. The Church uses methods of the Spirit, of love, of prayer, of voluntarism.

4. Separate administrations. The Church does not control the affairs of the State, nor does the State govern the affairs of the Church.

5. Separate sources of support. The State is supported by taxes. The Church is supported by the voluntary contributions of its members.

6. Separate educational programs. The general education of the public is not the mission of the Church. The religious education of the people is not the responsibility of the State. The two must be kept separate.

To this end and for the purposes of religious liberty the Baptist Joint Committee is dedicated. □

—W. Barry Garrett

THIS MONTH THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA) is expected to be introduced in the Senate by Sens. Joseph Biden, D-Del., and Orrin Hatch, R-Utah. This important bill corrects the result of the Supreme Court's unfortunate decision in *Employment Division v. Smith* and restores the compelling interest test for all free exercise of religion cases.

Senators need to hear from their constituents on this crucial piece of legislation. The Coalition for the Free Exercise of Religion continues to work toward passage of RFRA (H.R. 2797) in the House of Representatives. The bill now has 124 co-sponsors. Hearings will be held in early 1992 before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee.

Although the coalition remains united in its efforts, Rep. Chris Smith, R-N.J., and a handful of others have introduced another version of the restoration bill. This bill (H.R. 4040) is similar to RFRA but exempts three particular free exercise claims from the protection it seeks to restore. The bill would exclude free exercise claims to seek an abortion, to challenge a church's tax exempt status and to contest the spending of public funds for religious purposes. None of the three is needed. Under the law before *Smith*, these claims were unsuccessful under the free exercise clause. Each of these exemptions would be divisive and probably lead to the bill's defeat. The restoration of religious liberty is too important a matter to be jeopardized by self-interest and denominational pork barrel. (KHH) •

THE BUSH ADMINISTRATION CONTINUES to press for its America 2000 education reform package and the idea of "parental choice." The most objectionable feature of the proposal is that it provides for tax dollars to be spent for religious instruction. This is something of an about face for George Bush. Listen to what he said shortly after being elected: "I think everybody should support the public school system. And if on top of that parents want to shell out, in addition to tax money, tuition money, that's their right. But I don't think they should get a (tax) break for that." (*Washington Times*, March 30, 1989) We think the president had it right the first time. Church schools have a definite place in our system of education, but they should be paid for by parents, not the taxpayers. (JBW) •

THE SENATE'S MAJOR EDUCATION REFORM BILL (S. 2) probably will reach the floor for a vote in late January. Several amendments are expected that would allow a variety of public financial aid to church schools. In its current form, S. 2 provides for *public* school choice, but would not permit tax dollars to be spent on parochial education. It appears that the vote will be close (JBW) •

Changing boundary?

High court weighs new church-state test

In Boston, New Orleans and San Antonio, public school students and their parents gather for commencement exercises that open with a Roman Catholic Mass.

In Salt Lake City, the state legislature designates the Church of Jesus Christ of Latter-day Saints as the "state religion" of Utah.

In Memphis and Virginia Beach, federal and state tax dollars are used to provide tuition vouchers for parents of students attending Baptist academies, a benefit also enjoyed by parents of Catholic school students in Philadelphia and Chicago.

In Peoria, the city council erects a nativity display at City Hall and in Oklahoma City, the city council sponsors a community-wide Easter sunrise service.

All of these hypothetical instances of government support for religion would be divisive in a pluralistic society. More importantly, they are constitutionally out of bounds under existing court precedent.

But the boundary may be changing. In a Rhode Island commencement prayer case, the U.S. Supreme Court is being asked to move the line demarcating how far government can go in supporting religion.

The existing line drawn by the high court requires governmental neutrality toward religion. In the pending commencement prayer case (***Lee v. Weisman***), justices are being asked to erase that line and replace it with one that would permit all sorts of government participation in religion, including the hypothetical cases listed above.

At issue is how the court interprets the First Amendment's requirement that "Congress shall make no law respecting the establishment of religion." Settled court doctrine holds that the neutrality required by the no establishment clause is not only binding upon Congress, but also upon all state and local governmental entities, including public schools.

For two decades, the court has used the ***Lemon*** test to ensure governmental neutrality toward religion. First articulated in ***Lemon v. Kurtzman*** in 1971, the test was distilled from earlier decisions. As it has been applied in recent years, the test asks whether the purpose or primary effect of a governmental action endorses or inhibits religion and whether it creates excessive entanglement between government and religion.

In its place, Providence, R.I., school officials and the Bush administration want the Supreme Court to substitute a so-called "coercion" test that would permit wide-ranging government involvement in religion as long religious belief or practice is not coerced.

The Providence case reached the high court after Daniel Weisman and his daughter, Deborah, challenged the inclusion of an invocation and benediction in a Providence middle school commencement program. Two lower federal courts sided with the Weismans, holding that the practice violates the ***Lemon*** test because it has a primary effect of advancing religion.

During oral arguments Nov. 6, members of the Supreme Court gave no firm indication about how or when they will resolve the issues at stake in ***Lee v. Weisman***. The court could affirm or strike the Providence district's commencement prayer practice under either the ***Lemon*** test or proposed coercion standard.

Four of the nine justices previously have expressed support for a coercion standard. But the Nov. 6 hearing left unresolved the question of whether a fifth justice is likely to help form a majority in favor of abandoning the governmental neutrality principle embodied in ***Lemon***.

The high court's newest member, Justice Clarence Thomas, could well be the pivotal vote in the case, according to BJC Associate Counsel J. Brent Walker.

Three justices — Chief Justice William H. Rehnquist and Justices Byron R. White and Antonin Scalia — joined Justice Anthony Kennedy in his 1989 dissent in ***Allegheny v. American Civil Liberties Union*** in which Kennedy proposed a coercion test that would uphold governmental involvement in religion that did not coerce belief or participation and that did not establish a national church.

"If Justice Souter joins Justices (Sandra Day) O'Connor, (Harry A.) Blackmun and (John Paul) Stevens in resisting the coercion test, then the decisive vote will be cast by Justice (Clarence) Thomas," Walker said.

Thomas made no comments during oral arguments.

Lee v. Weisman facts

Although the Baptist Joint Committee does not oppose all forms of ceremonial prayers, the ***Lee v. Weisman*** commencement prayers were unconstitutional:

- The graduates were young (middle school) students.
- The ceremony was planned and organized by the faculty and held on school property.
- The rabbi was selected by the school and given written guidelines to follow in preparing the prayers.
- The audience was captive. Although attendance was not required to graduate, it is unfair to force a student to choose between missing graduation and protecting conscience.

These prayers were clearly school-sponsored, resulting in state promotion of religion and excessive entanglement between church and state.

Moreover, praying in this way is not biblical. The Old Testament prophets railed against hollow, ceremonial religion. Jesus strongly condemned "practicing piety before men" and "praying on the street corner." Rather, he counseled his followers to "go to your closet and shut the door." (Matthew 6:1-8).

Corporate prayer should be voiced in a worship service attended by persons who have chosen to be there for that purpose. The constitutionally permissible solution is to reserve graduation prayers for a private, voluntarily attended baccalaureate service off campus.

—J. Brent Walker

"Although he (Thomas) took a fairly separationist stance at his confirmation hearings, his vote will be hard to predict," Walker said.

Walker noted that the oral arguments revealed that there is little agreement about how the coercion test would work and that it is not a "bright-line" test that would be easier to apply than *Lemon*.

During oral arguments, school district attorney Charles Cooper told Justice O'Connor that it would be permissible under the proposed coercion test for a state to adopt a state religion if it were done in a purely non-coercive manner.

While obviously favoring a coercion test as the proper judicial framework for judging establishment clause cases, Kennedy expressed some discomfort with the level of coercion in the Providence school's commencement programs.

Kennedy said it is difficult to accept the proposition that it is not a "substantial imposition" on young graduates to present them with a choice of hearing commencement prayers or not attending their graduation.

U.S. Solicitor General Kenneth W. Starr argued that the court frequently has looked at history for constitutional interpretation and said that Rabbi Leslie Gutterman's prayers at the Providence ceremonies were "a far cry" from what the nation's founders intended to prevent with the establishment clause.

Both Cooper and Starr said the prayers delivered by Gutterman would be unconstitutional if delivered in a classroom. Neither is asking the court to overturn its 1962 decision that banned school-sponsored classroom prayer.

Starr argued that commencement exercises are similar to other public ceremonies, such as a presidential inauguration. Justice David Souter countered that argument, saying commencement programs are more similar to a classroom setting than an inaugural event.

When Starr suggested that prayers with which some children might disagree are part of a free society that values the exchange of ideas, Souter responded that prayer is not an element in a dialogue between people but an element in a dialogue between people and God and is not analogous to public debate.

Sandra Blanding, attorney for the Weismans, told justices that if the court were to adopt the proposed coercion standard graduation ceremonies could open with a Roman Catholic Mass and no one could stop an official from standing up and announcing that the United States is a Christian nation.

Blanding said *Lemon* has stood the test of time. She acknowledged that it has been tough to apply, but argued that application of the coercion standard also would prove difficult.

See **Boundary**, Page 14

Deborah Weisman (right) and her father, Daniel, respond to reporters' questions as National Public Radio correspondent Nina Totenberg (from left), Weismans' attorney Sandra Blanding and BJC General Counsel Oliver S. Thomas listen. (Pam Parry photo)

Wall, or picket fence?

Who would have thought we would be commemorating the Bicentennial of the Bill of Rights by fending off attempts to weaken one of its most precious liberties, religious liberty? The Supreme Court in *Employment Division v. Smith* already has rendered the free exercise clause toothless. Today, the Court is being asked to work similar mischief on the establishment clause.

At stake in *Lee v. Weisman* is far more than commencement prayer. The Court is being asked to jettison the historic principle of government neutrality toward religion. The proposed replacement would allow government to sponsor, endorse and support religion in non-coercive ways. In a word, the petitioner and the solicitor general seek to replace Mr. Jefferson's wall of separation with Justice Kennedy's picket fence.

Religion does not want or need the help of government. As one of our Baptist forebears, John Leland, remarked more than 200 years ago: "The fondness of magistrates to foster Christianity has done it more harm than all the persecutions ever did."

Now more than ever we need the separation of church and state. In this nation of several thousand religious sects and denominations, government promotion of religion could only cause disharmony and strife.

Whether a minister or rabbi can give a brief ceremonial prayer once a year at a public event may be a trifle. The dismantling of Mr. Jefferson's wall of separation is not.

—Oliver S. Thomas

What role will government play?

Lee v . Weisman is not just a graduation prayer case. The more serious issue involves the government's attempt to change the standard by which most establishment clause cases will be decided. The solicitor general has asked the Supreme Court to abandon the stringent *Lemon* test for a watered down coercion test. The fundamental principle embodied in the *Lemon* standard is governmental neutrality toward religion while the proposed coercion standard would allow much more government promotion of religion.

Lemon test

Under the *Lemon* standard, a law or governmental action is considered constitutional if it:

1. Has a **secular purpose.**
2. Has a **primary effect** that neither advances nor inhibits religion.
3. Does not involve **excessive entanglement** between church and state.

Under *Lemon*, government can:

- Teach *about* religion in schools
- Provide students the right to meet before and after school for religious reasons (equal access)
- Release students from class for off-campus religious instruction at nearby churches
- Provide textbooks and transportation for parochial students
- Hire legislative chaplains
- Erect holiday displays that reflect cultural diversity
- Extend construction grants and revenue bond funding to religiously affiliated colleges

Under *Lemon*, government cannot:

- Discriminate in favor of or against religious groups
- Give financial aid to churches, parochial schools and other "pervasively sectarian" organizations
- Sponsor prayers or devotional readings in public schools
- Require the teaching of creationism or prohibit instruction about evolution
- Erect exclusively religious displays

Coercion test

Under the proposed coercion standard, a law or governmental action is considered constitutional if it:

1. Does not threaten to establish an official church.
2. Does not coerce people to participate in religious exercises against their beliefs.

Under the coercion test, government could:

- Hold or sponsor worship services as long as attendance is not compelled
- Subsidize religious education
- Erect sectarian displays
- Sponsor prayer meetings and religious indoctrination in public schools
- Become entangled in church affairs through regulation of schools and day-care centers

Under the coercion test, government could not:

- Force church attendance or compel belief
- Establish by law an official state church

The First Amendment built "a wall of separation between Church and State."—Thomas Jefferson

VIEWS OF THE WALL

Oliver S. Thomas
General Counsel

The banner over the door read, "Christian Coalition." I swallowed hard and went inside.

Several thousand ministers and lay persons had gathered to pay tribute to three giants of the Religious Right — Pat Robertson, Jesse Helms, and Vice President Dan Quayle — and to plot their strategy for the '92 elections. The auditorium was draped in red, white and blue. The band played a medley of military, patriotic and religious songs.

I had been invited to address the lawyers in the crowd on the prohibition against partisan political activity by tax-exempt organizations. The rule of thumb is that churches and other tax-exempts may speak out on political issues but may not endorse or oppose candidates for public office.

"Identifying the Kingdom with any political party or candidate is as presumptuous as it is foolhardy. There is no genuine 'Christian coalition' on political matters. ... Question anyone who implies God is his campaign manager."

Ralph Reed, the executive director of the Christian Coalition, was on the platform proclaiming the victories of the past year. Eight incumbent Democrats had been ousted from the Virginia Senate alone. In their place were pro-life, pro-family Republicans, most of whom were at the luncheon. Praise the Lord, said Reed. They were just three votes shy of a Republican majority in a state senate that had been Democratic since the Flood. The attenders were given sophisticated handbooks on how to be elected as delegates to the Republican National Convention.

When it came time for me to speak to the lawyers, I commended the sponsors for their gracious hospitality and then chided them for confusing the Kingdom of God with the Republican Party.

"My brother is a Democratic officeholder and a fine Christian layman," I said. "I am sure there are thousands more like him."

Dead silence.

As I was returning to Washington that evening, I pondered the day's events. Apart from the prohibitions in the Internal Revenue Code, there are reasons — good ones — for churches to refrain from partisan political activity.

Identifying the Kingdom with any political party or candidate is as presumptuous as it is foolhardy. There is no genuine "Christian coalition" on political matters. Who can claim he or she knows the mind of God on the budget, S&L crisis, Gulf war, Central America or any other complex political issue? Would Jesus be a Democrat or a Republican? Probably neither. Question anyone who implies God is his campaign manager.

Blurring the lines between the temporal and spiritual in political matters sets people up for disappointment and disillusionment. Humans are frail. They rarely live up to our expectations. If people are led to believe a particular candidate is God's vicar, hopes soar. When the candidate-turned-officeholder demonstrates (sometimes graphically) that he, too, is flawed, faith in the church's spiritual as well as political judgment may be the casualty.

Electioneering by religious organizations also divides the community of faith. If a church identifies one party or candidate as representing God's side, those who disagree will feel excluded from the household of faith. Endorse enough candidates, and eventually everyone in the church will feel excluded.

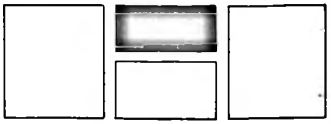
The fundamental flaw in the social gospel movement has been resurrected in the Religious Right. Mortals cannot, through political activism and lives of good works, usher in the Kingdom. Even the most devout of the devoted carry their blind spots into the political arena. Christians have perpetrated war, slavery, Jim Crow and sexism. Tomorrow's prophets will elucidate today's blind spots.

The framers were wise enough to recognize that standing in the political community should not be contingent upon one's religion. Baptists, Jews, Catholics, Mormons or Muslims — none has a monopoly on good citizenship.

Acculturated Christianity and Christian commonwealths give me the willies. Neither religion nor government is served by the marriage of church and state. God is not the mascot of the Republicans, Democrats or, for that matter, Americans. God transcends all national and political affiliations. His precinct is the universe.

The hype of a presidential election year is upon us. We do well to remember that the mixture of religion and partisan politics is a dangerous brew.

Caveat Emptor. □



RFRA attracts broad support

Religious bodies in the United States stand remarkably united today in their call for federal legislation that would make it harder for government to restrict religious freedom.

Legislation is needed, religious groups say, to counter the impact of a 1990 U.S. Supreme Court decision that allows government to restrict religious freedom for almost any reason as long as religion is not singled out for adverse treatment.

In *Employment Division of Oregon v. Smith*, the high court held that government no longer need demonstrate a "compelling interest" to justify a restriction on religious practice.

What has united religious groups is the harsh reality of the high court's abandonment of its long-held "compelling interest" test: Religious groups challenging governmental actions as an infringement on their free exercise rights almost always lose.

Testing that rare consensus among religious organizations, however, is the insistence by some groups — most notably the U.S. Catholic Conference — that the legislation exempt religiously based challenges to abortion restrictions, to the use of tax funds by religious groups and to the tax status of religious groups.

Most other U.S. religious bodies, which have joined with a number of civil liberties groups in forming the 47-member Coalition for the Free Exercise of Religion, have resisted special treatment of any particular free exercise claim. These groups seek a legislative remedy to the *Smith* decision that would restore the compelling interest test but would not single out specific types of religiously based claims for enhanced or diminished protection.

The fracture among religious groups over whether specific types of claims should be singled out is now reflected in two legislative proposals designed to counter the *Smith* decision:

- The Religious Freedom Restoration Act (H.R. 2797) was introduced June 26 by Rep. Stephen J. Solarz, D-N.Y. Backed by the 47-member coalition and co-sponsored by 124 House members, RFRA would prevent government from interfering with religious practice unless the governmental action represents the least restrictive means of advancing a compelling governmental interest.
- The Religious Freedom Act of 1991 (H.R. 4040) was introduced Nov. 26 by Rep. Christopher H. Smith, R-N.J. It generally mirrors the Solarz bill but includes the specific exemptions proposed by the Catholic Conference. The Smith bill also lacks a provision contained in RFRA stating that the legislation, targeted at enhancing free exercise protection, does not affect establishment clause requirements.

> ***"The Religious Freedom Restoration Act (H.R. 2797) is scrupulously neutral on all free exercise issues. This bill (H.R. 4040) is denominational pork barrel."***
>
> **— Oliver S. Thomas**
> **BJC General Counsel**

While Rep. Smith and the Catholic Conference contend that the exemptions are necessary to ensure that the legislation neither creates a religiously based right to abortion nor affects churches' tax status or ability to participate in government social programs, coalition leaders say the exemptions are unnecessary and would jeopardize support for legislation.

"The Religious Freedom Restoration Act (H.R. 2797) is scrupulously neutral on all free exercise issues," said Oliver S. Thomas, general counsel of the Baptist Joint Committee and coalition chairman. "This bill (H.R. 4040) is denominational pork barrel."

Smith said language excluding religiously based challenges to abortion restrictions is considered essential by the National Right to Life Committee, Americans United for Life, the U.S. Catholic Conference and the Lutheran Church — Missouri Synod.

"The bill I am introducing has a specific provision that makes it clear that the legislation cannot be used to secure a right to abortion or abortion funding," Smith said. "It also explicitly protects the tax status of religious organizations."

Members of the broad coalition supporting RFRA range from civil liberties organizations such as the American Civil Liberties Union and People for the American Way to conservative groups that oppose abortion, including the Southern Baptist Christian Life Commission, the National Association of Evangelicals and Beverly LaHaye's Concerned Women for America.

In a Nov. 22 letter asking members of Congress to co-sponsor RFRA, representatives of these and other organizations that oppose abortion said the abortion language supported by the Catholic Conference "is unnecessary and would jeopardize passage of this legislation. This bill (RFRA) is neutral on the abortion issue, as it is on every other particular claim including peyote use, tax exemptions and landmarks preservation. It must remain so."

When Smith's bill was introduced, four members of Congress — Reps. Robert K. Dornan, R-Calif., Bill Emerson, R-Mo., Mel Hancock, R-Mo., and Harold Volkmer, D-Mo. — dropped sponsorship of the Solarz bill to sign on as co-sponsors of H.R. 4040. Rep. Robert J. Lagomarsino, R-Calif., remained a co-sponsor of RFRA while also agreeing to co-sponsor Smith's bill.

Hearings on H.R. 2797 are expected to be held soon after Congress returns in January, according to J. Brent Walker, BJC associate counsel. Walker said Sens. Joseph R. Biden, D-Del., and Orrin G. Hatch, R-Utah, chairman and ranking minority member of the Senate Judiciary Committee, are committed to introducing RFRA in the Senate when Congress returns. □

Accrediting agency's approval challenged

Government recognition of an agency that accredits fundamentalist Christian colleges should be rescinded because it opens the door for such schools to receive federal aid, according to Americans United for Separation of Church and State.

In a letter to Education Secretary Lamar Alexander, the organization said that schools accredited by the Transnational Association of Christian Schools (TRACS) exist primarily to teach religion. By approving that agency, Americans United said, the government has made the schools it accredits eligible to receive federal grants and loans for students, thus violating church-state separation.

The House Subcommittee on Human Resources and Intergovernmental Relations is conducting an investigation into the Education Department's endorse-

ment of the agency. A departmental advisory board had voted against endorsing the group three times, noting that the agency's standards are not recognized nationally by any other accrediting body. □

School board allows religious groups to meet

The Pittsburgh Board of Public Education has voted to allow religious activities in its schools outside class hours in response to an order by a federal district judge.

The judge's order was based on an appeal from Youth Opportunities Unlimited Inc., a Christian organization that had been allowed to operate a summer program in the city's public schools for more than 20 years.

This year the school board notified the group that it would not be allowed to use school facilities because of the religious content of the programs. The board said it had not been aware of the religious aspects of the programs, which violated a 1979 policy prohibiting the use of public schools for "religious or sectarian purposes."

In his order, Judge William L. Standish said the board's revocation of the permits to the Christian group unconstitutionally restricted free speech. He also noted that public schools in Pittsburgh have been used by Christian, Jewish and Muslim groups. □

Appeals court rehears ban of Christmas display

In a rare move, a federal appeals court is reconsidering its earlier decision upholding a ban on a series of paintings depicting the life of Christ at an Ottawa, Ill., public park.

The entire 7th U.S. Circuit Court of Appeals in Chicago is re-examining a split decision by a three-judge panel of the court announced May 28. That decision affirmed a lower court's ruling that the Christmas-season display violated the First Amendment's ban on an establishment of religion. The full court heard arguments in the case, ***Doe v. Small***, in December.

The 16 paintings, each more than 8 feet tall, depict various events in the life of Christ, including three related to his birth. Display of the paintings, which were first erected in 1956, was discontinued during the 1970s due to public criticism.

In 1980 the paintings were discovered in a municipal storage area, and later that year the Ottawa Jaycees requested and received permission to become the official "caretakers" of the paintings.

At issue in the case is the city's role in reintroducing and supporting the display of the paintings.

Writing for the majority of the three-judge panel, Judge Walter J. Cummings said, "The City encouraged, authorized and endorsed the Jaycees' display of these paintings in a public park, thus offending the core of the Establishment Clause's essential prohibition of state endorsement of religion."

Cummings said the city's involvement in the display can be seen in its role in soliciting a private group to display the paintings, in providing some of the labor necessary to erect the paintings, in a city council resolution endorsing the activities of the Jaycees and in granting the Jaycees permission to erect permanent structural support for the paintings.

Cummings upheld the lower court's conclusion that the display violated the first two prongs of the so-called *Lemon* test established by the U.S. Supreme Court to preserve governmental neutrality toward religion. That test requires government actions to have a secular purpose, neither advance nor inhibit religion and avoid excessive entanglement with religion.

In a dissenting opinion, Judge John L. Coffey disagreed with the majority's use of the *Lemon* test to decide the case.

"In applying the Lemon test to private speech in a quintessential public forum, the majority is instituting a dangerous and novel precedent of far reaching import," Coffey wrote. "If this decision stands, private religious speech will be banned from public forums. Rather than demonstrating neutrality toward religion, a policy of banning private religious speech from a public forum clearly demonstrates hostility."

Coffey also disagreed with the majority's view of city involvement in the display.

"The record is void of any evidence that the City took action to find a private sponsor for the display (or that the City has helped the Jaycees in any way other than allowing them to display the paintings)," he wrote.

The panel majority, however, held that the display sponsorship has never been wholly private.

"The City has identified itself with the display to so great an extent that the display cannot be viewed as a case of purely private expression in a public forum," Cummings wrote.

After rehearing the case, the full court of appeals could issue an opinion consistent with either the majority opinion or the dissent of the three judge panel. The appeals court could also put off a decision until the U.S. Supreme Court decides a case that could have a sweeping impact in the establishment clause field.

In a graduation prayer case (***Lee v. Weisman***), the high court is being asked by the Bush administration and Providence, R.I., school officials to replace the *Lemon* test with a more lenient standard that would permit government promotion of religion as long as coercion is not involved.

In a footnote in his dissent, Coffey stated his support for using a coercion test that asks whether the government has engaged in overt or subtle coercion that "presents a realistic danger that the government is attempting to establish a particular religion. Without such coercion, I doubt that there can be a governmental establishment of religion." □

Prosecutors told not to quote Bible in court

The Pennsylvania Supreme Court has overturned a death sentence against a convicted murderer because the prosecutor quoted the Bible in asking that the man be executed.

The trial took place four years ago, when Karl S. Chambers, now 28, was convicted of fatally beating 70-year-old Anna May Morris while robbing her of her Social Security money. District Attorney H. Stanley Rebert told the jurors, "Karl Chambers has taken a life. As the Bible says, 'And the murderer shall be put to death.'"

In voiding the death sentence, Justice Nicholas P. Papadakos wrote for the Pennsylvania Supreme Court that prosecutors could be subject to disciplinary action if they use the Bible or any other religious work in support of the death penalty.

"I don't know of any God-fearing prosecutor that has not used some scriptural or religious reference in arguing to a jury," Rebert said. "God's law is the basis for Pennsylvania law and all law." □

Compiled from staff and news service reports, including Religious News Service, American Baptist News Service, Associated Baptist Press and European Baptist Press.

After *Smith*

Is religious freedom a real right?

There is no more important item on the agenda than the resolution on the Religious Freedom Restoration Act (H.R. 2797). It speaks to the very survival of the freedom of the churches to act on the matters they view as the fulfillment of their religious duty. The U.S. Supreme Court has put that freedom in jeopardy by virtually nullifying the free exercise clause of the First Amendment in *Oregon Employment Division v. Smith.*

This board (of the National Council of Churches) expressed its distress at that decision in May 1990 and directed that the Religious Liberty Office report to it the damage done by *Smith* in subsequent cases. (A summary of the report titled, "Report on Religious Freedom Cases Controlled by Smith," appears on Page 11.) You can see in that report the variety and scope ot religious practices that have been burdened without the government's having to justify such burden.

This year we celebrate the bicentennial anniversary of the ratification of the Bill of Rights. The Supreme Court has its own unique way of celebrating that event: by cutting back on the protections it provides to individuals and minorities against the powers of government. One area of greatest damage was the free exercise clause of the First Amendment.

Over the years the Supreme Court has developed a high threshold that government actions must meet if accused of violating the Bill of Rights. It is called strict scrutiny. That means that the government must prove that it is serving a compelling state interest to justify infringing on such rights. The court uses an intermediate level of scrutiny to test some other rights that are not as clearly protected, such as gender discrimination. Ordinary private interests, such as commercial concerns, command only a minimal level of scrutiny. If the government interferes with a company's making a profit, the court will only ascertain that the government's action is a rational means for attaining a legitimate end of government, such as regulating interstate commerce.

> ***"But what the court has done in one single decision to the free exercise of religion is not just whittling away. It is virtually 'clear-cutting' the entire terrain."***
>
> **—Dean M. Kelley**

What the Supreme Court did in *Oregon v. Smith* was to demote the free exercise of religion from the threshold of strict scrutiny to the level of minimal scrutiny, the level that applies to interests not protected by the Bill of Rights. The only time that strict scrutiny would apply is if a law expressly targeted religion or religious practice as such — an unlikely occurrence. The court explained in *Smith* that on those occasions in the past when it had seemed to be protecting religious freedom, it was really protecting "hybrid rights," where claims of free exercise were combined with other rights, such as freedom of speech. In other words, freedom of speech is a real right, and freedom of religion counts only when combined with it (or some other real right), making the free exercise clause mere surplusage! That is certainly not what the Founders had in mind when they wrote the First Amendment 200 years ago. They wanted to protect the free exercise of religion in its own right, whether combined with free speech or not.

The court's actions seem to show a contempt for religious liberty. In the past weeks Congress has finally approved a new Civil Rights Act designed to repair the damage done to the civil rights of Americans by our radically "activist" conservative Supreme Court in several recent decisions. That act was the result of wide protests that the court was "whittling away" at the protections against discrimination built up by its predecessors. But what the court has done in one single decision to the free exercise of religion is not just whittling away. It is virtually "clear-cutting" the entire terrain. And there has been no comparable tide of protest to impress the members of Congress with the urgency of this issue. Where are our good church people when their freedom of religion is being excised from the Constitution?

Many of them are simply unaware that anything has happened. Some who may have noticed think it involved only a couple of Indians on the West Coast who wanted to smoke pot in their church or something. Others may realize that its implications are broader, but think it may affect at most a few small, unpopular groups like the "Hare Krishnas" and the "Moonies." They do not realize that it affects all religions in this country, because there is no religious group, however large, that is not a minority somewhere, and needs protection there from hostile majorities and repressive governments. That protection is precisely what the free exercise clause was supposed to provide — until it was gutted in 1990.

We have not aroused our constituents from their "I'm all right, Jack" complacency. We have not energized them to tell their representatives and senators, "You cannot allow this to go unremedied."

And it is not a peril alone for despised minorities. It is that, to be sure, and that is bad enough. But that doesn't seem to arouse our people in the pews, who do not realize that their own ox is also being gored. Look at the list of cases controlled by *Smith*. Who have been victimized by it? Not only individuals and minority faiths, but the Quakers in Philadelphia and the Jesuits in Boston, for Christ's sake!

Yes, it was precisely for the sake of Christ that the Jesuits wanted to reconfigure their sanctuary to put the eucharistic altar in the midst of the congregation in conformity with the teaching of Vatican Council II, but the Boston Landmarks Preservation Commission said, "No, you can't do that. We have made the interior of your church a landmark, and you can't modify it without our permission." The Jesuits went to court to protect their right to carry out their worship arrangements as they saw fit. But the city attorney and the historic preservationist said, "Tough luck! The landmark law is a 'neutral law of general

Editor's Note: Dean M. Kelley is counselor on religious liberty for the National Council of Churches. His annual report to the NCC was presented at a Nov. 15 meeting in Indianapolis and is reprinted with permission.

application' that doesn't target religion, so if it works a hardship on religious practice, that is simply an incidental effect that the government doesn't have to justify." Fortunately — and no thanks to the Supreme Court of the United States — the Massachusetts Supreme Judicial Court said that the Jesuits' freedom of worship was protected by the Massachusetts state constitution even if it wasn't by the federal. But that only holds in Massachusetts.

It was for the sake of Christ that the Philadelphia Friends — who are members of this body — refused to act as an arm of the Internal Revenue Service in collecting income tax from two of their employees who were war tax resisters. The Friends advanced a claim of free exercise of religion against the IRS, but the federal district court — reluctantly — had to follow *Smith*. Read what Judge Norma Shapiro wrote about that rule:

> It is ironic that here in Pennsylvania, the woods to which Penn led the ... Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so. More than 300 years after their founding of Pennsylvania ... it would be a "constitutional anomaly" to the Supreme Court (quoting *Smith*) if the Friends were allowed to respect decisions of its employee-members bearing witness to their faith.

These cases are alarming, but even more ominous are the cases that will not be listed because they will never be brought. Churches will discover that the bulwark provided for them by the free exercise clause has now been removed. In the past many a minor conflict between churches and municipal authorities was quietly resolved because the latter had a dim awareness that churches must be treated with some delicacy because they could take the town to court if it interfered with their practice of religion. No more. The town officials are coming to realize that they don't have to make those little accommodations. The free exercise clause isn't there now as a silent guardian standing in the background that most of the time didn't even need to be invoked.

What difference does it make for our churches? Suppose your congregation decides that — for the sake of Christ — it needs to set up a shelter for the homeless, a soup kitchen, food pantry or clothing closet on its premises. Or it opens a senior citizens' center that provides a gathering place and a hot

See **RFRA**, Page 14

Losses under *Smith*

Following are some key cases of the nearly three dozen decided in which the free exercise claim was denied under the *Smith* rule.

Montgomery v. County of Clinton: A federal court in Michigan denied Orthodox Jew's claim that medical examiner's autopsy on her son violated her free exercise rights.

Munn v. Algee: A federal appeals court ruled against argument that the refusal of a Jehovah's Witness to have a blood transfusion could not be used against him in a lawsuit seeking damages for wrongful death.

American Friends Service Committee v. Thornburgh: A federal appeals court rejected Quakers' argument that the employer sanction provisions of the immigration laws violate their free exercise rights.

Peyote Way Church of God v. Thornburgh: A federal appeals court denied religious practitioners (other than Native Americans) the right to use peyote in religious worship.

Friend v. Kolodzieczak: A federal appeals court turned away prisoner's challenge to a ban on the possession of rosaries and scapulars.

Salvation Army v. Department of Community Affairs: A federal appeals court disallowed Salvation Army's religiously based claim to an exemption from a law regulating boarding houses.

Cornerstone Bible Church v. City of Hastings: A federal appeals court denied church's free exercise objection to zoning ordinance (excluding churches from commercial and industrial zones) but noted the possibility of recovery if other constitutional rights were also violated.

Southridge Baptist Church v. Industrial Commission of Ohio: A federal appeals court denied church's claim that application of workers' compensation law violated free exercise clause.

Welsh v. Boy Scouts of America: A federal court in Illinois denied Boy Scouts' claim that forcing the organization to admit those who did not believe in God violated its free exercise rights.

Lukaszewski v. Nazareth Hospital: A federal court in Pennsylvania ruled against Catholic hospital's free exercise argument that it should be exempt from the federal age discrimination law.

St. Bartholomew Church v. City of New York: A federal appeals court rejected Episcopal church's free exercise argument against the application of historical landmarking ordinance to building owned by the church.

Vandiver v. Hardin County: A federal appeals court required home-school transfer student to take an equivalency exam despite free exercise claim.

NLRB v. Hanna Boys Center: A federal appeals court rejected Catholic school's free exercise argument that the National Labor Relations Act should not be applied to its non-teaching employees.

U.S. v. Philadelphia Yearly Meeting: A federal court in Pennsylvania upheld IRS levy for taxes of two Quaker employees who refused to pay taxes because of religious opposition to war.

Hope Evangelical Lutheran Church v. Iowa: An Iowa court denied Lutheran church's free exercise objection to payment of taxes on consumer items purchased from out-of-state employers.

State of Florida v. Jackson: A Florida court upheld subpoena seeking records from a minister involved in charitable contributions despite free exercise argument.

Seminary funding cut stands

By a margin of two to one, trustees of the Southern Baptist Foreign Mission Board voted Dec. 11 not to restore funding to a seminary in Switzerland, despite the advice of the board's attorney and the objections of Baptists at home and abroad.

A motion to "take no further action" on the Baptist Theological Seminary at Ruschlikon, Switzerland, passed 54-27 during the trustees' meeting in Richmond, Va., Dec. 9-11. The vote was by a much wider margin than the initial 35-28 decision Oct. 9 to cut the FMB's 1992 allocation to Ruschlikon of $365,000, which represents about 38 percent of the seminary's budget.

The December vote came after two months of public debate about the seminary, and after two days of negotiations between leaders from Europe and the FMB failed to resolve the dispute.

Trustees said defunding the tiny school was necessary to maintain the FMB's commitment to conservative theological education abroad.

But the dispute — which generated protests from most Baptist bodies in Europe, at least nine state Baptist conventions and hundreds of individual Baptists — came to symbolize not just the fate of one seminary but the future of relationships between Southern Baptists and their Baptist counterparts in Europe.

The FMB's Dec. 11 decision immediately sparked dire predictions about relationships in Europe and beyond.

"I do not see a way for a new building up of trust and confidence, although ... we dearly want this," Karl-Heinz Walter, general secretary of the European Baptist Federation, told trustees after the vote.

Board President Keith Parks said the decision "seriously jeopardizes" FMB work in Europe and reflects a different approach to missions than previously practiced by the board.

Ruschlikon President John David Hopper, himself an FMB missionary, told reporters the decision signals the "exportation" of Southern Baptists' biblical controversy "to all countries where Southern Baptists have work, and that is a disaster."

Trustees projected no such picture of doom, however. Although many acknowledge relationships with Baptists in Europe will suffer, they insist the defunding action is necessary to protect the theological integrity of the board and to make the most efficient use of the unparalleled opportunities for outreach in Europe.

Students listen as a professor lectures at the Baptist Theological Seminary in Ruschlikon, Switzerland. (Photo courtesy of Southern Baptist Convention Foreign Mission Board)

During the debate, trustees seemed ready to settle the dispute.

"We now need to move on," said trustee Terry Harper of Colonial Heights, Va., who made the motion that won approval. "Any further ... discussion would be counterproductive."

Harper's motion was a substitute for one from Paul Brooks of Missouri, who asked trustees to make a one-time gift of $365,000 to the seminary.

Brooks' original motion would not have restored the FMB's previous funding agreement, which promised to continue financial support for up to 15 more years but with a gradual reduction. Instead, it would have provided funding for 1992 only.

"We made a promise to pay the $365,000 next year and we ought to keep our promise," Brooks said. "Remember, Ruschlikon is not our seminary any more. ... It belongs to our brothers in Europe."

The 48-student seminary, founded by the FMB soon after World War II, became a symbol of post-war cooperation among European Baptist groups and between European Baptists and their stateside brethren.

But critics say the school is too heavily influenced by neo-orthodox or liberal theology and not representative of many — perhaps most — European Baptists. Because the school is expensive to operate and inaccessible to many Europeans, they say, it is not suited to lead a major thrust in outreach through the "open doors" of Eastern Europe and the former Soviet Union.

The debate on Harper's motion focused on broken promises. But trustees could not agree on who had been unfaithful — the trustees themselves, whose vote in October nullified a 1988 agreement to continue funding the seminary, or Ruschlikon's leaders, who FMB trustees say promised in 1988 to make the school more conservative.

Trustee Ron Wilson, who in October said the temporary hiring of controversial Southern Baptist professor Glenn Hinson to teach at Ruschlikon demonstrated the school's liberal bent, said seminary administrators had broken their word.

Other trustees said they were "deceived" or "betrayed" by Ruschlikon's promises. But Ruschlikon President Hopper, who did not speak during the debate, earlier denied he made a promise to make the school more conservative.

Trustee Jack Bledsoe of Fordyce, Ark., said regardless of other criticisms of the school, Southern Baptists "expect us to live up to our commitments."

After their October vote, trustees asked the FMB staff to seek a legal opinion on whether the budget cut violated their 1988 agreement to continue funding for Ruschlikon. The board's attorney, Lewis Booker of Richmond, told FMB administrators the board likely would lose if Ruschlikon's trustees brought a lawsuit to recover the money.

Before their vote, however, trustees had been told by European leaders that no lawsuit would be filed.

After the vote, trustees agreed to hear responses from two European Baptist leaders, who had witnessed the debate but had not been asked to speak.

"We regard ourselves as Christians who deeply love God and the Bible," said Wiard Popkes of Germany, chairman of Ruschlikon's trustees. "We do not regard ourselves as liberals."

Despite the defunding, Popkes said, "we shall not forget the generosity that Southern Baptists have shown to us."

After founding the school and funding it for 43 years, the FMB transferred ownership of the institution, valued at more than $12 million, to the European Baptist Federation as part of the 1988 agreement.

Walter of the EBF expressed his pessimism about restored relationships between European Baptists and Southern Baptists.

Meanwhile, FMB leaders are concerned the riff over Ruschlikon will produce a major shortfall in the Lottie Moon Christmas Offering, which provides about half of the FMB's annual $184 million budget. □

Chinese government cracks down on believers

HONG KONG

The Chinese government has begun a nationwide crackdown on Chinese Christians, according to reports from news agencies and Christian organizations working in nearby countries.

The Chinese government hopes to "eliminate all religious activities in this Communist country," according to Gospel for Asia, which supports 18 native Chinese missionaries who are working covertly in mainland China.

Missionaries who have traveled to Hong Kong report large-scale arrests of believers in the provinces of Zhejiang, Anhui and Jiangsu, and the cities of Guangzhou, Shanghai and Shenzhen since the end of summer.

The chief of China's secret police has ordered security officials nationwide to crack down on "illegal" religious activities, according to an official Chinese news report quoted by Baptist Press. Police should "effectively prevent and wage a struggle against nationalist (dissenters) and criminals who carry out sabotage in the name of religion," a Chinese security official reportedly told a police conference.

Cooperative Services International, a Southern Baptist aid organization, has 46 Southern Baptist teachers working in Chinese schools and universities, but none of them has reported any change in relationships with Chinese students or teaching colleagues.

"Our policy for teachers is to abide by rules and regulations and operate within guidelines set down by host units," said Charlie Wilson, CSI educational resources coordinator. "Our Chinese friends and cooperative units know we are Christian and we respect Chinese laws. We also respect and support the Chinese church.

"Our religious activities are confined to responding to individual questions in personal conversations and regular church attendance in recognized churches," he added. "This comes under the normal religious activities protected by the Chinese constitution." □

Israelis drop last barrier to sea scrolls research

KANSAS CITY, Mo.

Confronted with the recent publication of a facsimile edition of the Dead Sea Scrolls that makes them available to all scholars, the Israeli Antiquities Authority has dropped the last official barrier to free use of the ancient manuscripts.

Emanuel Tov of Hebrew University, editor-in-chief in charge of the scrolls, announced at a recent news conference that the Israeli government authority will begin allowing scholars to publish their work on the scrolls.

Israeli authorities had generated intense controversy by attempting to maintain a monopoly on the scrolls. For decades, the government had restricted access to a small international group of scholars. In October, the deadlock was partially broken when the government said qualified scholars could examine the scrolls but could not quote them in full.

For four decades after the scrolls were discovered in 1947 in what was then Jordanian territory, scholars around the world have locked horns over the right to study the documents. □

NEWS-SCAN

Reidar Lindland, a staff member of the American Baptist Churches, announced his retirement, effective Dec. 31. Lindland was ABC International Ministries' area secretary for the Caribbean and special assistant to IM's executive director. Prior to joining the IM staff, Lindland and his wife, Sigrid, served as ABC missionaries in Zaire, where they were involved in pastoral training, education and church administration. ... **Claus Meister,** retired professor at the Baptist Theological Seminary, Ruschlikon, recently died at his home. He was 65. Meister had taught Greek, Latin and New Testament studies at the school since its founding in 1949. ... **Hungarian Baptists** announced their plans to hold the First World Congress of Hungarian Baptists Living in Different Countries of the World, scheduled Aug. 22-23, 1992, in Budapest. ... A newly-furbished **Moscow Bible House** was recently dedicated. An American Bible Society report hailed the event as "a watershed of historic dimensions in a nation where atheism was the official ideology for seven decades." ... **Liberia's churches** have brought "some semblance of peace" to the country after two years of civil war, according to the Rev. J.K. Levee Moulton, president of the Liberia Baptist Missionary and Education Convention Inc. Moulton said Liberia's churches have played a major role in "bringing together the warring factions ... on common ground." The convention and other members of the Liberian Council of Churches have been advocates for peace through an Interfaith Mediation Committee, which has facilitated talks between representatives of the Doe government and rebel leaders. ... **Peruvian evangelicals** are continuing their campaign to pressure authorities in their country to respect the civil rights of its citizens. The National Evangelical Council of Peru recently published a pronouncement in the form of a paid-advertisement to members of a tribunal responsible for securing constitutional guarantees for the public. The document called on the tribunal to "set a precedent in the affirmation of life, as well as the values and principles of defense and respect of human rights, which are consecrated by our Constitution." □

Compiled from staff and news service reports, including Religious News Service, American Baptist News Service, Associated Baptist Press and European Baptist Press.

RFRA

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meal at midday for the elderly. Or it organizes weekly cluster meetings in each neighborhood at the home of one of the members for prayer and Bible study. These seem rather ordinary extensions of the church's mission and would not be thought to need to evoke the free exercise clause, except for a new trend emerging in our society — the "Nimby" factor.

Our churches are often surrounded by good folk who are all in favor of halfway-houses, group homes, shelters for the homeless but "not in my back yard." From their point of view, the church on the corner is in their backyard, and they don't like to have it bringing undesirables thronging around the neighborhood at all hours, or traffic and parking congestion to infest the otherwise peaceful streets (where they seem quite able to endure block-parties, yard sales, weekly bridge tournaments and similar secular disturbances without protest). So the Nimby neighbors mobilize the taxpayers' association to complain to the municipal authorities about the church's disruptive activity, and the zoning board discovers that it is indeed a "non-conforming use" of the church's religious property and must be discontinued. The church seeks a variance on grounds that *it* should be the determinant of what "religious use" is.

But the zoning board replies that the zoning ordinance is not directed against religion. It simply prohibits running a hotel, a restaurant or a "cabaret" in a residential zone or using a private home as a place of assembly. (Yes, the New York City Fire Department claimed a church was in violation of the Cabaret Code because it had entertainment at its monthly fellowship suppers.)

If the church were to take the matter to court, as it used to be able to do, to compel the government to show that it had a compelling interest in burdening religious practice that could be served in no less burdensome way, the corporation counsel for the city would need but say that the zoning ordinances are "neutral laws of general application that advance by rational means a legitimate purpose of government" and do not require any further justification — or "*S-M-I-T-H*" for short — and the court would say, "Case dismissed."

Churches would soon discover that they didn't have a leg to stand on legally, and would quit wasting money and energy in futile efforts to defend their religious practices. And the receptiveness of minor bureaucrats to compromise and accommodation of religious needs would soon evaporate as they discovered that they didn't need to make exceptions for churches any more. That is the unspectacular but pervasive harm of ***Smith***, and we will all be feeling it unless something is done.

What needs to be done is the passage of the Religious Freedom Restoration Act before the current session of Congress ends in 1992, because it will be harder to remedy the damage the longer it goes on and becomes entrenched in precedent. Needless to say, the effect of ***Smith*** will be welcomed by government bureaucrats, most of whom are not yet aware of it. As they become aware, they will increasingly oppose the effort to give mere citizens a federal cause of action requiring government to justify the burdening of their religious practice by a compelling state interest that can be served in no less burdensome way.

This bill has the support of an amazingly broad coalition, from Concerned Women for America at one end to the American Civil Liberties Union at the other, with virtually every religious group in between, including the National Association of Evangelicals and the Church of Jesus Christ of Latter-day Saints. Everyone that is, except the Roman Catholic Church, which says it wants a "stronger" bill and seeks three amendments that do not strengthen it: one to make it "abortion-neutral," one to prevent anyone from using it to challenge a church's tax exemption and one to prevent anyone from challenging any government grant to a church.

That last "improvement" looks like an end-run around the establishment clause and would divide the coalition down the middle, dooming the bill's chances of passage.

We have but a few months in which to mobilize support for the Religious Freedom Restoration Act. It has 117 sponsors in the House, but it needs many more. Is your Congressman a sponsor yet? If so, praise him or her. If not, press her or him to join the throng. A companion bill is expected to be introduced in the Senate early this year by Sens. (Joseph) Biden and (Orrin) Hatch. Hearings will be held soon when the leaders of the churches should be heard in support of RFRA. At the very minimum, every member of this board should personally let her or his representative and senator know that this is a matter of vital importance for the churches, and then go on to alert your friends and colleagues to the danger we face. We have but a brief window of opportunity that we must not let pass without a maximum effort to defend religious liberty for all. ☐

Reviews

Continued from Page 16

considerable criticism for abandoning the compelling governmental interest test that it used for determining whether or not government could burden one's religion. Though this change was unexpected and generally perceived as a drastic measure in Supreme Court jurisprudence, Ivers shows that previous cases may have indicated a shift in that direction.

As the title suggests, Jefferson's metaphorical "wall of separation" may no longer accurately reflect the court's view of the proper relation between church and state. "The period from 1980-1990 will be remembered as one in which constitutional doctrine interpreting the meaning of the First Amendment religion clauses underwent profound and important alteration." (p. 99)

For those who are interested in understanding these changes, this book is enjoyable and helpful reading. ☐

— **K. Hollyn Hollman**
BJC Legal Assistant

Boundary

Continued from Page 5

The Providence district, Blanding said, is saying that prayer is a preferred practice and that the school does not belong to the non-believer in the same way it belongs to the believer.

U.S. religious groups, including Baptists, are divided over the case. The Baptist Joint Committee joined a coalition of religious and civil liberties groups in filing a friend-of-the-court brief on behalf of the Weismans. Other groups, including the Southern Baptist Convention Christian Life Commission, the National Association of Evangelicals and the U.S. Catholic Conference have filed briefs in support of a coercion test or in defense of commencement prayers.

The day before the arguments People for the American Way released a letter to President Bush signed by more than 230 clergy asking the president to uphold the principle of governmental neutrality. Among the signers was Rabbi Gutterman. ☐

— **Larry Chesser**

It takes work in our pluralistic society to sort out fair and consistent application of First Amendment principles.

REFLECTIONS

James M. Dunn
Executive Director

The nutty notion abounds that one must choose between separationists and champions of free exercise in the church-state debate. Where did that idea originate?

The religion parts of the First Amendment hang together. Those 16 words are a piece of whole cloth. The phrase "no law respecting an establishment of religion" is not set over against "or prohibiting the free exercise thereof." Rather, the two sides of the coin go together.

We would, if left alone without the advice of polemicists, have sense enough to see that attempts to make the first 10 words of the First Amendment contradict the following six words are frivolous. It would seem unnecessary to argue against such patent silliness. It *would* be a waste of time were not so many otherwise intelligent people caught in the "tar baby" of petty argument.

When the twin goods of separation of church and state and the free exercise of religion commend themselves to common sense so persuasively, why is there so much confusion? Several reasons surface.

There's a popular misunderstanding about religion in American life. It is widely claimed that this is a "Christian nation." Many folks believe that there is a national mandate for some sort for "Judeo-Christian values." The metaphor of a "wall of separation between church and state" has been maligned, misused and minimized.

Then, it is hard not to hold the court in contempt as the culprit behind the confusion when Justices Scalia and Rehnquist, of all people, aggressively attack the central meanings of the Constitution's guarantee of religious liberty. In April 1990, Mr. Scalia in his *Oregon v. Smith* opinion — an outburst of judicial activism unworthy of a conservative judge — gutted the free exercise clause of the First Amendment. The very idea! He said that government does not need to demonstrate "a compelling state interest" before limiting the freedom of religion. A broad-based coalition of dozens of religious and civil liberties organizations are still at work to correct that foolish aberration by passing the Religious Freedom Restoration Act (H.R. 2797).

On the other hand, Mr. Rehnquist consistently works to undermine the principle of church-state separation. He declared war on the concept in his *Wallace v. Jaffree* dissent saying, "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." Many of us prefer to remain Jeffersonian rather than turn Rehnquistian.

Beyond those factors, however, it is fair to admit that one sees tensions between a separation of church and state that denies majoritarian manipulation of public institutions and the absolutely unrestrained exercise of anything "religious." Government cannot remain neutral regarding religion and endorse religious activity at the same time. The state is appropriately secular, that is non-religious, when facing sectarian pressures.

It takes work in our pluralistic society to sort out fair and consistent application of First Amendment principles.

It takes thought to overcome the easy dualism, the ready "this or that," "good or bad," "black and white" false alternatives often recommended.

It takes compassion and sensitivity to work through complex implications of government neutrality while allowing the maximum religious freedom.

It takes faith to put into practice the spirit of freedom. It takes spiritual maturity to find the openness and humility to allow others to practice their religion, to deny and despise our religion or to fight all religion.

The challenge then is by working, thinking, caring and believing to hold in creative tension *both* the separation of the governmental institutions from religion and the dedication to the fullest possible exercise of religious liberty. The strictest separationist is also the strongest defender of a faith freely exercised. The most passionate champions of the right to express and exercise their religious convictions in every public setting see most clearly the need to keep church and state separate. Human beings, being human, are sure to misuse the inherent power of government. Anytime and every time we permit religion to take control of the machinery of the State we blow it.

It is a distortion of the First Amendment's radicality to play like it simply guards against the ensconcement of one national church or religion. The principle at the heart of the Bill of Rights is individual liberty. The founders who prevailed in amending the Constitution took drastic measures to see to it that the old world way of doing things would not creep back into the American experiment.

Nearly 50 years ago Justice Hugo Black defined in practical terms the meaning of the First Amendment. I much prefer his interpretation to those of the latter day revisionists. He wrote in the 1947 *Everson* case:

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

No outmoded metaphor!

Without the separation of church and state, the free exercise of religion would not be possible. Without the free exercise of religion separation of church and state would be pointless.

It's not either but both we must have. □

REVIEWS

Church Schools & Public Money

By Edd Doerr and Albert J. Menendez
Promethus Books
Buffalo, 1991, 156 pages.

The controversy about whether public tax money should be used to fund church schools (parochiaid) continues to rage. Whether it takes the form of vouchers or tax credits, or is couched in terms of parental "choice," parochiaid is bound to generate a firestorm of debate among educators and constitutional scholars.

Ed Doerr and Albert Menendez have jumped in with both feet in their new book *Church Schools and Public Money: The Politics of Parochiaid*. They have fought parochiaid battles for years steadfastly maintaining that it is "wrong for government to compel people through taxation to contribute to the support of religious teachings, programs, or institutions which they do not individually choose to support voluntarily." (p.132) Their book explicates that proposition from every conceivable angle.

The authors sketch out the history of public schools in America and describe the emergence of church-run schools. They then chronicle the various parochiaid battles in the states, particularly with respect to transportation, textbooks, health care and lunch programs, and shared time and reverse shared time programs. Especially illuminating here is a state-by-state analysis of the politics of various parochiaid referenda from the mid- 1960s to present.

Then, the authors provide a running commentary on the "federal battle," starting with President John F. Kennedy's resistance to the historic "Catholic strategy" through the struggle surrounding the passage of the Elementary and Secondary Education Act of 1965, through the Packwood-Moynihan parochiaid plans of the late 1970s.

The book moves from politics to the courts and examines the major school funding cases of the Supreme Court since its seminal *Everson* decision in 1947. Then, in a concluding chapter, Doerr and Menendez focus on the current parochiaid debate (i.e. parental choice). They set up and then knock down the major arguments advanced in support of the school choice movement.

Everyone interested in public education and religious liberty should read this book. Baptists in particular will read it with enjoyment. The authors remind those modern descendents of John Leland, who argue for parochiaid, of the 1961 Southern Baptist Convention resolution commending Kennedy "for his insistence that the Constitution of the United States be followed in the matter of not giving federal aid to church schools." (p.95) And we would do well to remember the words of Leland's contemporary, Thomas Jefferson, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." (p.132) It is no less true today. □

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Lowering the Wall

By Gregg Ivers
Anti-Defamation League
New York, 1991, 108 pages.

What has happened to the First Amendment's religion clauses? This question is on target for those who have followed the Supreme Court's church-state decisions in recent years. In *Lowering the Wall: Religion and the Supreme Court in the 1980s*, Professor Gregg Ivers tackles that question by examining the court's recent decisions and the political forces that have shaped the current status of the First Amendment's two religion clauses.

He finds that though traditionally the Supreme Court has been "strongly countermajoritarian in its treatment of the First Amendment religion clauses ... (the court) has assumed a new role in the separation of powers that places respect for the will of legislative majorities above the vigorous protection of the rights of religious minorities." (p. 10) Ivers shows that the trends that have emerged in the 1980s indicate that religious minorities may no longer be able to count on such protection and that majoritarian religions may receive greater accommodation in public life.

Ivers begins with an examination of religion and politics in the 1980s. He finds that the decade marks a time when "conservatives rose to an influential position in American politics, one that went far beyond their newly-found power in the electoral process." (p. 5) Religious conservatives increasingly began using the courts to advance their agenda and pushed Congress to begin legislating in an area in which it had historically deferred to the states. The results included the Adolescent Family Life Act of 1981, the school prayer debates of 1983-84, and the Equal Access Act of 1984.

With concise, carefully documented case summaries, Ivers analyzes church-state relations in several important contexts. He looks first to establishment clause jurisprudence and reviews cases dealing with the public schools, government aid to religion, and religion in the public domain (display of religious symbols on public property, celebrations of religious holidays and legislative chaplaincies).

On religion and the public schools, he says, "The public schoolhouse has been at the center of the debate over the meaning of the religion clauses from the dawn of the modern constitutional era; indeed, the decisions of the Court over the last four decades that have attempted to explicate the larger meaning of the establishment clause have, with some notable exceptions, often turned on the constitutional limits of sectarian influence in public education and government financial assistance to religious schools." (p. 15) Ivers finds that the religion and public school debates of the '80s focused on the issues of prayer, equal access and curriculum reform. The cases summarized in this chapter offer compelling evidence indicating the court's move away from its historically strict separationist views toward greater accommodation for religion in public schools.

Lowering the Wall also addresses the Supreme Court's free exercise jurisprudence. Since its April 1990 decision in *Employment Division v. Smith*, the court has received

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