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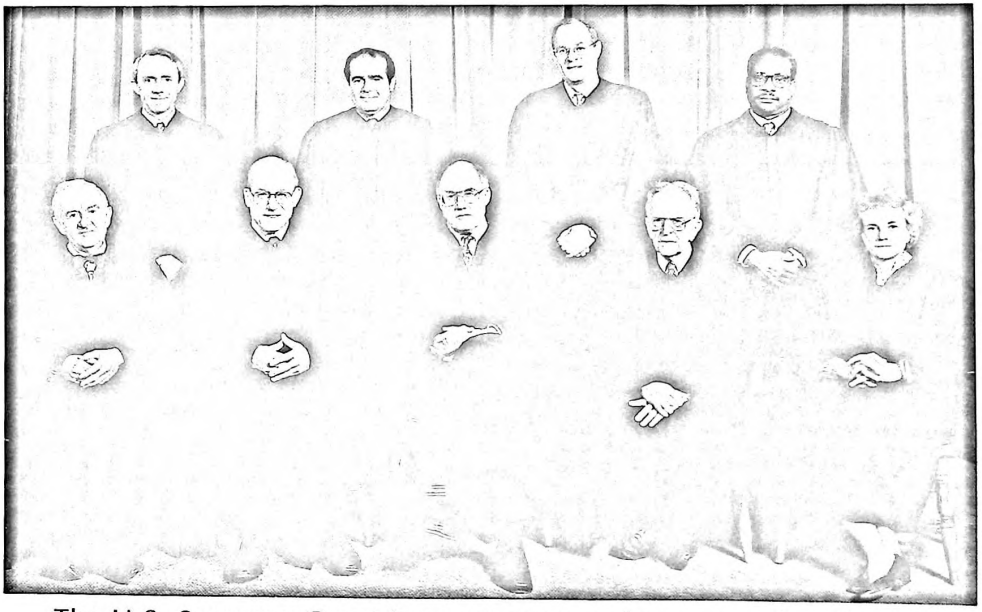
REPORT from the CAPITAL

Mr. Jefferson's wall stands — for now



The U.S. Supreme Court is one vote away from accepting the Bush administration's invitation to rewrite the First Amendment establishment clause and let government become a major player in American religion.

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REPORT from the CAPITAL

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

Vol. 47, No. 7 **July-August 1992**

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Cover: Current Supreme Court justices are (seated from left) John Paul Stevens, Byron R. White, William H. Rehnquist (chief justice), Harry A. Blackmun and Sandra Day O'Connor; (standing from left) David H. Souter, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. Photo courtesy of National Geographic Society.

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Infamy in Indianapolis

(EDITOR'S NOTE: This commentary was provided by Stan Hastey, executive director of the Alliance of Baptists and former Baptist Joint Committee staff member.)

I'll admit it. I didn't think I'd care what the Southern Baptist Convention did in Indianapolis earlier this month. Yet in reading news accounts of the proceedings, I discovered I still cared, at least about some of what happened.

I care that the largest body of Baptists in this country has turned its back on four centuries of our common history by rejecting the one social principle that has distinguished Baptists—insistence on a free church in a free state. Some might believe the convention's final severing of ties with the Baptist Joint Committee in favor of entrusting its church-state portfolio to the Christian Life Commission has to do with nothing more than changing personnel.

It has to do with much more than that. What the series of actions against the BJC that culminated in Indianapolis signifies is that Southern Baptists have rejected separation of church and state. They have turned away from the legacy of all those noble ancestors who agitated and lobbied and were beaten and went to prison so that Jesus' own maxim to render to Caesar that which is rightly the emperor's—but no more—would be the way church and state are related in this nation.

The SBC has severed a half-century tie with the Baptist agency that consistently has taken on the hard church-state issues and addressed them with courage, credibility and integrity. In so doing, this new and hardly recognizable convention has denied the very Scriptures it claims to revere.

But the convention did more than cut loose the BJC. It could not even bring itself to release the $300,000 allocated earlier to the BJC for the purchase of a building. Not even an appeal from the BJC to submit the dispute to binding arbitration could sway the Executive Committee from extracting its pound of flesh. For a religious body with assets of several billions of dollars, surely $300,000 could have been surrendered, even to an agency seen now as the enemy (cf. Matt. 5:40).

Contrast the parsimonious and unbiblical treatment of the BJC to the tumultuous welcome received in Indianapolis by Vice President Dan Quayle as a ready point of reference for the values being espoused by the new SBC. A quick check of resolutions adopted attests to the sad truth that this value system, strangely fixated on sexual matters, has little place for the weightier issues of justice and peace.

Quayle's 11 standing ovations during his brief and overtly political remarks apparently symbolize the new relationship between the nation's largest Protestant body and the national Republican party. Far from demanding of government leaders a high standard established by the prophetic demands of the gospel, what we have now is political cuddling designed to ingratiate.

I wonder what our noble ancestors would think today about the new denominational order? □

—Stan Hastey

THE RELIGIOUS FREEDOM RESTORATION ACT, a bill seeking to restore significant protections for religious freedom, has been introduced in the Senate (S. 2969). The bill already has 25 bipartisan co-sponsors. The Coalition for the Free Exercise of Religion is seeking expeditious treatment by the Senate Judiciary Committee. The companion bill in the House (H.R. 2797) has been approved by the Subcommittee on Civil and Constitutional Rights, with all proffered amendments turned away. The bill is awaiting consideration by the full Judiciary Committee in the House. The Religious Freedom Restoration Act would restore the compelling interest test virtually abandoned by the U.S. Supreme Court in *Employment Division v. Smith* (1990). • (JBW)

THE CITY OF BERKELEY, CALIF., has adopted an ordinance imposing a minimum license fee and a non-profit business tax on gross receipts of all non-profit organizations, including churches and religious organizations. The only exemption is for charitable organizations with no salaried employees. While constitutional authority for tax exemption is rather weak -- particularly after *Employment Division v. Smith* -- it is outrageous to think that a municipality would tax the collection plate of a local church. Happily, at a July 15 council meeting, the city suspended enforcement of the ordinance after hearing a unified voice of protest from clergy and church members in the Berkeley area. While churches have dodged this bullet, the issue will no doubt come up again, not just in Berkeley but around the country. As state and local governments become more strapped for funds, they will continue to whittle away at tax exemption wherever politically feasible. A united, active and vocal religious community is the best counter to this prospect. • (JBW)

PRESIDENT GEORGE BUSH HAS UNVEILED HIS so-called "G.I. Bill for Children." It would provide a $500 million package offering low- and middle-income families up to $1,000 per child to help pay for the costs of the private, parochial or public school of their choice. This is a warmed-over version of President Bush's America 2000 school choice proposal that was rejected by the Congress earlier this year. The new bill is spruced up in the rhetoric of the popular G.I. Bill for colleges, but it suffers from the same defects that doom all parochial aid plans. The Supreme Court long has distinguished between aid to religiously affiliated colleges and pervasively sectarian primary and secondary schools. Aid to the former does not provide precedent for aid to the latter. Government should not be spending tax dollars to finance religious education at the primary and secondary school level. • (JBW)

Close call

High court keeps Mr. Jefferson's wall

By a single vote, the U.S. Supreme Court has reaffirmed its view that school-sponsored religious exercises in public schools violate the U.S. Constitution.

The 5-4 ruling announced June 24 held that prayers by clergy at public school graduation and promotion ceremonies violate the First Amendment's ban against governmental establishment of religion.

The court's ruling upheld lower court decisions against the Providence, R.I., school district's practice of including clergy-delivered invocations and benedictions at the ceremonies.

Besides issuing a ruling consistent with its landmark 1962 and 1963 school prayer decisions, the court—for the time being—said "no" to the Bush administration's request to use the case to discard its three-part test that requires governmental neutrality toward religion.

That test, announced in *Lemon v. Kurtzman* in 1971 and known as the *Lemon* test, requires that government's actions have a secular purpose, neither advance nor inhibit religion and avoid excessive entanglement between church and state.

The Justice Department asked the high court to replace the *Lemon* standard with a new test that would permit government involvement in religion as long as coercion is not present.

The ruling left unclear how current members of the court would view governmental promotion of religion in a non-school setting. It also offered a stark reminder that four justices are ready to scrap *Lemon* and permit broad government involvement in the nation's religious life.

Nonetheless, the decision striking the commencement prayer policy and refusing to reconsider the *Lemon* test surprised many court watchers.

Three Reagan-Bush appointees—Associate Justices Anthony M. Kennedy, Sandra Day O'Connor and David Souter—joined colleagues Harry T. Blackmun and John Paul Stevens to form the court's majority in the case, *Lee v. Weisman*.

Kennedy, who wrote the majority opinion, may have played the most surprising role. In a dissenting opinion three years earlier, Kennedy had proposed that the court replace *Lemon* with a "coercion" standard.

But in the *Weisman* ruling, Kennedy said the commencement prayer policy violated the First Amendment's ban against a state establishment of religion because the prayers involved were state-directed and coercive.

The state, Kennedy wrote, "in a school setting, in effect required participation in a religious exercise."

In a strongly worded dissent, Associate Justice Antonin Scalia, joined by Chief Justice William H. Rehnquist and Associate Justices Byron R. White and Clarence Thomas, accused the majority of ignoring "a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding tradition of nonsectarian prayer to God at public celebrations generally."

The Providence policy was challenged by Deborah Weisman, a student at Nathan Bishop Middle School, and her father, Daniel Weisman.

In affirming lower court rulings that sided with the Weismans, the high court majority called government's involvement in the religious exercises "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."

School officials decided, the majority said, that prayers would be included in the ceremony and who would deliver the prayers and then "directed and controlled the content of the prayer" by issuing guidelines and advising the minister that the prayers should be nonsectarian.

Citing the 1962 and 1963 school prayer decisions, the majority noted that "prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there."

Kennedy and the majority rejected claims that no coercion is involved because attendance at the ceremony was not required to receive a diploma.

"The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction," Kennedy wrote. "This pressure, though subtle and indirect, can be as real as any overt compulsion."

The level of school involvement, Kennedy wrote, "made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position."

In his dissent, Scalia argued that direct coercion, not merely subtle and indirect pressures, is required to violate the First Amendment's establishment clause when the religious activity involved is non-sectarian.

"There is simply no support for the

Dunn: It wasn't free exercise

I sympathize with those who see in this decision the awesome specter of all religion being banned from public life. However, I cannot imagine why anyone would defend rituals that divide, trivialize and balkanize. I don't hanker to protect and perpetuate "non-religious prayers." What an oxymoron! Watered-down, lowest-common-denominator, state-sponsored religion is worse than worthless. It could mislead impressionable youth to believe such civil religion ritual is actually prayer.

Justice Kennedy in his decision explains the carefully targeted basis for the ruling. The principal, a state employee, (1) decided that there would be a prayer, (2) chose who would pray and (3) told him how to pray with guidelines. That cannot be called free exercise of religion.

Religious leaders can complain and carry on or be constructive. I hope pastors, priests and rabbis will see the ruling as a positive development, an opportunity for public witness.

We can advance ecumenical cooperation, promote voluntary baccalaureate services, celebrate shared values and demonstrate the faith we profess. The Baptist Joint Committee will try to lead the way.

— James M. Dunn

proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi (Leslie) Gutterman—with no one legally coerced to recite them—violated the Constitution," Scalia wrote.

Kennedy said the court need not reconsider the *Lemon* standard because the courts' earlier school prayer decisions "compel the holding" that the Providence practice is unconstitutional.

Scalia nonetheless argued that in basing its ruling on the earlier school prayer decisions, the court "demonstrates the irrelevance of *Lemon* by essentially ignoring it, ... and the interment of that case may be one happy byproduct of the Court's otherwise lamentable decision."

A federal district court decision upheld by the 1st Circuit Court of Appeals held that the commencement prayers violated the second prong of the *Lemon* test by creating "an identification of the state with a religion, or with religion in general."

In a concurring opinion joined by Stevens and O'Connor, Blackmun reiterated his support of the court's past church-state separation rulings, including the *Lemon* test.

"The Court holds that the graduation prayer is unconstitutional because the State 'in effect required participation in a religious exercise,'" Blackmun wrote. "Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."

In another concurring opinion, Souter, joined by Stevens and O'Connor, wrote that the establishment clause does not permit government sponsorship of nonsectarian religious practices and that the state does not have to go as far as coercing religious conformity to violate the establishment clause.

"On balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some," Souter wrote.

The *Weisman* case provided the first opportunity for the court's two newest members—Souter and Thomas—to participate in an establishment clause decision.

Souter's concurring opinion amplified his 1990 Senate confirmation testimony that the Jeffersonian concept of a wall of separation between church and state is a better interpretation of the First Amendment than Rehnquist's view that government may aid religion generally as long as it does not single out one or more religions for preferential treatment.

Thomas, who assured the Senate Judiciary Committee during his 1991 confirmation hearings that he had "no personal disagreement" with the *Lemon*

See **Prayer**, Page 14

No winking at endorsement

Excerpts from June 24, 1992, concurring opinion in *Lee v. Weisman* by Associate Justice David H. Souter:

I join the whole of the Court's opinion, and fully agree that prayers at public school graduation ceremonies indirectly coerce religious observance.

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that "aid one religion ... or prefer one religion over another," but also those that "aid all religions." Today we reaffirm that principle, holding that the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be.

"The state may not favor or endorse either religion generally over nonreligion or one religion over others."
—David H. Souter

Some have challenged this precedent by reading the Establishment Clause to permit "nonpreferential" state promotion of religion. ... While a case has been made for this position, it is not so convincing as to warrant reconsideration of our settled law; indeed I find in the history of the clause's textual development a more powerful argument supporting the Court's (modern) jurisprudence.

On balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.

In many contexts, including this one, nonpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the inquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.

Nor does it solve the problem to say that the State should promote a "diversity" of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each.

Petitioners rest most of their argument on a theory that, whether or not the Establishment Clause permits extensive nonsectarian support for religion, it does not forbid the state to sponsor affirmations of religious belief that coerce neither support for religion nor participation in religious observance. I appreciate the force of some of the arguments supporting a "coercion" analysis of the Clause.... But we could not adopt that reading without abandoning our settled law, a course that, in my view, the text of the Clause would not readily permit.

Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement.

Our precedents may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.

A literal application of the coercion test would render the Establishment Clause a virtual nullity, as petitioners' counsel essentially conceded at oral argument.

While one may argue that the Framers meant the Establishment Clause simply to ornament the First Amendment, ... that must be a reading of last resort. Without

See **Souter**, Page 14

Separating church and state

Key Supreme Court establishment clause rulings

Religion in Public Schools

- *McCollum v. Board of Education* (1948): "Released time" for religious instruction on school premises not permitted
- *Zorach v. Clauson* (1952): "Released time" for religious instruction off school premises permitted
- *Engel v. Vitale* (1962): State-written prayer in public schools unconstitutional
- *Abington v. Schempp* (1963): Public school-sponsored Bible reading and prayer in classroom not permitted
- *Epperson v. Arkansas* (1968): Ban on teaching of evolution is unconstitutional
- *Stone v. Graham* (1980): Classroom posting of Ten Commandments is unconstitutional
- *Wallace v. Jaffree* (1985): Moment of silence designed to promote prayer prohibited
- *Edwards v. Aguillard* (1987): Law mandating teaching of creation science is unconstitutional
- *Board of Education v. Mergens* (1990): Student religious groups guaranteed equal access
- *Lee v. Weisman* (1992): Public school-sponsored commencement prayers unconstitutional

Financial Aid to Religion

- *Bradfield v. Roberts* (1899): Use of federal funds for religious hospital construction permitted
- *Cochran v. Louisiana State Board of Education* (1930): Purchase of books for parochial school students permitted
- *Everson v. Board of Education* (1947): Transportation for all (including private school) students permitted
- *Board of Education v. Allen* (1968): Free lending of textbooks to parochial schools permitted
- *Lemon v. Kurtzman* (1971): Teacher salary supplements, instructional materials for parochial schools not permitted
- *PEARL v. Nyquist* (1973): Maintenance funds, tuition reimbursements for parochial schools not permitted
- *Meek v. Pittenger* (1975): Parochial school textbook loans approved but not "auxiliary services" and equipment loans
- *Wolman v. Walter* (1977): Parochial school textbook loans, testing & counseling approved but not equipment, field trips
- *Mueller v. Allen* (1983): State tax deduction for tuition, textbooks and transportation in parochial schools permitted
- *Aguilar v. Felton* (1985): State-provided remedial instruction in parochial schools not permitted
- *Grand Rapids v. Ball* (1985): State-provided remedial instruction in parochial schools not permitted
- *Bowen v. Kendrick* (1988): Religiously affiliated groups (but not churches) may use tax funds to fight teen pregnancy

Higher Education

- *Tilton v. Richardson* (1971): Construction grant for non-sectarian purposes at church-related colleges upheld
- *Hunt v. McNair* (1973): Use of tax-free bonds for non-sectarian purposes at church-related colleges upheld
- *Roemer v. Board of Public Works of Maryland* (1976): General grants to private colleges for secular purposes upheld
- *Widmar v. Vincent* (1981): State universities must provide religious groups "equal access" to facilities
- *Bob Jones University v. U.S.* (1983): Denial of tax-exempt status to religious school over interracial dating ban upheld
- *Witters v. Washington* (1986): State vocational assistance to blind ministerial student permitted

Ceremonial Religion & Displays

- *Marsh v. Chambers* (1983): Long-standing custom of paid legislative chaplains upheld
- *Lynch v. Donnelly* (1984): City-maintained Nativity scene accompanied by secular holiday trappings upheld
- *Allegheny County v. ACLU* (1989): Creche at entrance to county courthouse banned because it "endorsed" religion

Churches & Taxation

- *Walz v. Tax Commissioner* (1970): Property tax exemptions for churches and other non-profit groups permissible
- *Texas Monthly v. Bullock* (1989): Sales tax exemptions for only religious publications not permitted
- *Swaggart v. Board of Equalization* (1990): Generally applicable tax law may be applied to religious organizations

VIEWS OF THE WALL

Oliver S. Thomas
General Counsel

What is a non-sectarian prayer? Justice Antonin Scalia said the Rhode Island commencement prayer in *Lee v. Weisman* was one, but it didn't look non-sectarian to me. And, if it were, what good would it be? A car without wheels has more use than a non-religious prayer.

I confess I've never really understood either side of the commencement prayer debate. It's the people, not the arguments, that bother me.

For those who challenge such practices, aren't there bigger battles to fight? A 30-second, once-a-year ceremonial prayer seems a trifle. We impoverish our public debate by tilting at windmills.

On the other hand, what person would want to force others to listen to or, even worse, to participate in a prayer? Baptist great Roger Williams said that coerced religion on its best days produces hypocrites. On its worst days, rivers of blood.

Weisman is a school prayer decision, pure and simple. It does not mandate a "naked" public square where religion is unwelcome, as some have suggested. The court makes clear that student-initiated religious activities (upheld just two years ago) are left undisturbed. *Weisman* does mean that we do not have a "sacred" public square where religious orthodoxy is promoted by the state. It is none of the business of government to compose prayers or direct religious exercises said the high court in 1962. Ditto said the *Weisman* majority.

What does *Weisman* mean for the future of church-state relations in America?

Mostly, it means that a majority of the justices still take church-state separation seriously. Mr. Jefferson's wall is, after all, more than a strand of barbed wire. In 1947 a unanimous Supreme Court called it "high and impregnable."

"Whatever legal standard the court employs in future cases arising under the establishment clause, whatever one thinks of commencement prayer, we should take heart that a majority of the justices still takes the establishment clause seriously."
—Oliver S. Thomas

Recall that the Bush administration had asked the court in *Weisman* to knock down the hallowed wall and erect a picket fence in its place. The attorney for the local school board went even farther. In oral argument, he suggested that government should be able to establish an official state church so long as no one was coerced to support it. Even Justice Scalia swallowed his quid on that one.

On the other hand, we are not out of the woods. Justice Anthony M. Kennedy, who cast the critical vote in *Weisman*, has been a long-standing critic of the so-called *Lemon* test that mandates government neutrality toward religion. Writing for the majority, Kennedy refused to strike down *Lemon*, but he did ignore it. His opinion speaks of the impropriety of coercing school children to participate in religious exercises. We have no guarantee that *Lemon* will be applied to the next establishment clause case occurring outside public schools.

Whatever legal standard the court employs in future cases arising under the establishment clause, whatever one thinks of commencement prayer, we should take heart that a majority of the justices still takes the establishment clause seriously.

Taking heart does not mean taking ease. Remember there are four justices, including the chief, who believe the establishment clause does little more than prohibit the designation of a single national church. For these justices, tuition tax credits, vouchers, even teacher-led prayer are permissible under most circumstances. In short, the court is teetering. One more vote and we turn back the clock 30 years.

For those who grieve the end of the long-standing American tradition of commencement prayer, there is something positive you can do. Organize an annual baccalaureate service for your community. The service should be held off campus, be sponsored by local religious organizations rather than the school and be attended only by those students who wish to participate. Such a service can be overtly "sectarian" and will accomplish much more for these graduates than a brief ceremonial prayer.

Justice Kennedy is not a "secular humanist." He is a devout Catholic. Maybe those who might otherwise rush out to condemn the court for being hostile to religion will hear the wisdom contained in Justice Kennedy's opinion: "The religion clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state." □

"The religion clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state."
—Anthony M. Kennedy

News in Brief

Bush team unveils 'new' voucher plan

Calling for revolution in education, the Bush administration unveiled June 25 a new version of an old plan to provide parents tax money to send their children to public, private or religious schools.

The proposal would provide $500 million in fiscal year 1993 for $1,000 scholarships to help low- and middle-income families send their children to schools of their choice.

During a June 26 press briefing, administration officials said Congress probably will not approve the measure this year, but they said educational choice would be a top priority in a second Bush term.

Bush has been pushing school choice since April 1991 when he announced his America 2000 strategy. While several elements of America 2000 were lauded, the choice proposal drew fire from congressional, educational and religious circles.

A centerpiece of America 2000, Bush's choice proposal was rejected by the U.S. Senate and a House education committee. The Senate approved a major education bill (S. 2) allowing only public school choice. The House Education and Labor Committee approved a bill rejecting all educational choice proposals.

A choice battle is expected when the bill (H.R. 4323) comes to the House floor. Rep. Dick Armey, R-Texas, has vowed to offer an amendment to add school choice in the bill.

James M. Dunn, executive director of the Baptist Joint Committee, called Bush's new program "an election-year stunt."

"The American people have in repeated referenda rejected the idea of spending public money for private and parochial schools, either directly or indirectly through some voucher scheme," Dunn said. "There is a certain cruelty in suggesting such a plan which would in no way help the poorest parents and in many ways would damage public education."

Administration officials called the new plan the most ambitious choice proposal ever on the federal level. Education Secretary Lamar Alexander said the new plan is more sophisticated than last year's proposal, likening it to a new and improved 1992 automobile next to the Model T.

Alexander said the plan borrows a popular concept, the G.I. Bill. The administration called the new plan a "G.I. Bill for Children" because it said the G.I. Bill gave World War II veterans opportunity and consumer power to help create the best colleges and universities in the world.

Education Secretary Lamar Alexander speaks for educational "choice" at a recent press conference during which Rep. Dick Armey, R-Texas, announced his plan to add choice to a pending House education bill. The Bush administration also unveiled a new choice plan that would channel tax dollars into religious and private schools.

The administration claims the bill would give young students the same opportunity and their parents the consumer power to create the best elementary and secondary schools in the world.

In addition, Alexander said the administration has tried to anticipate concerns with the new proposal and incorporate responses to them within the bill.

For example, some have criticized choice proposals because they fear it will create "David Duke academies," he said. But the new bill incorporates anti-discrimination provisions, he said.

Another concern—that choice plans violate the constitutional principle of church-state separation—is not valid, Alexander said.

In a ceremony announcing the new plan, President Bush said opponents of government money going to religious schools are wrong: "This is aid to the families, not aid to institutions. And, again, if you set the clock back to the creation of that original G.I. Bill, no one told the G.I.s that they couldn't go to SMU or Notre Dame or Yeshiva or Howard."

An administration document defending the plan said, "The assistance can be used at a broad range of schools, and participation in the program is in no way based on religion, or on attendance at a religious school. It is unquestionably constitutional under the Supreme Court precedents."

The administration points to two cases to support the argument that choice plans are constitutional. The first, *Witters v. Washington Department of Services for the Blind*, upheld public funding of a blind student to attend a Christian college. The second, *Mueller v. Allen*, upheld a state tax deduction for certain educational expenses, even for parents whose children attend religious schools.

A Baptist church-state specialist said the administration is relying on dubious precedents to speculate that the court might now approve a choice plan.

"Without overruling its decisions invalidating tax credit programs, *Mueller* permitted tax deductions, not payment of public funds to parochial schools," said J. Brent Walker, BJC associate general counsel. "*Witters* involved educational assistance for a college student, not primary and secondary children.

"The G.I. Bill and Pell Grants are different," he continued. "Federal assistance to post-secondary education has historically been treated differently from aid to pervasively sectarian primary and secondary schools."

Because parochial schools do not and cannot separate their educational purpose from their religious mission, tax support for them violates constitutional principles, he added. □

Religious liberty bill introduced in Senate

Legislation designed to restore a high standard of protection for religious practice was introduced July 2 in the U.S. Senate.

The Religious Freedom Restoration

Act (S. 2969) would restore the strict "compelling interest" standard the U.S. Supreme Court formerly required government to meet before restricting religious liberty.

That test permitted government to restrict the First Amendment's guarantee of religious exercise only to further a compelling governmental interest and if the least restrictive means of safeguarding that interest had been employed.

The high standard, articulated by the court in 1963, virtually was abandoned in the 1990 *Oregon Employment Division v. Smith* decision. Under *Smith*, generally applicable laws and policies that burden religion need only be reasonable.

"Religious liberty is damaged each day the *Smith* decision stands," said Sen. Edward Kennedy, D-Mass. "Since *Smith*, more than 50 cases have been decided against religious claimants, and harmful rulings are likely to continue."

Chief sponsors Kennedy and Sen. Orrin Hatch, R-Utah, are joined by 19 bipartisan co-sponsors. A companion bill (H.R. 2797) has been approved by the House Civil and Constitutional Rights Subcommittee and awaits action by the Judiciary Committee.

Kennedy said the *Smith* decision "was a rare, serious and unwarranted setback for the First Amendment's guarantee of freedom of religion."

The bill simply would restore the compelling interest standard, he said.

"The act creates no new rights for any religious practice or for any potential litigant," Kennedy added. "Not every free exercise claim will prevail. It simply restores the long-established standard of review that had worked well for many years and that requires courts to weigh free exercise claims against the compelling-state-interest standard."

Hatch said that a legislative response to *Smith* is important for the preservation of the full range of religious freedom, particularly for minority religious beliefs.

The Baptist Joint Committee and the Southern Baptist Christian Life Commission are members of a broad coalition of religious and civil liberties groups that support RFRA.

"We are delighted that the bill is moving in the Senate and are pleased at the broad, bipartisan support it has among its co-sponsors," said J. Brent Walker, associate general counsel for the Baptist Joint Committee, which chairs the coalition. "The coalition will call upon the Judiciary Committee and Senate leadership to expedite its passage.

"The restoration of religious liberty cannot await the next Congress." □

Supreme Court strikes St. Paul hate crimes law

In a unanimous decision, the U.S. Supreme Court struck down a St. Paul, Minn., statute that bars cross burning and other hate crimes.

While all nine justices concluded that the law violates the First Amendment's free speech guarantees, the unanimous result barely masked the sharp disagreement evident in the harsh criticism leveled by four justices at the rationale used by the majority to topple the 1987 measure.

Writing for the majority, Justice Antonin Scalia said the ordinance is unconstitutional because it discriminates on the basis of speech content and viewpoint.

Scalia said the law is discriminatory because, while it barred the use of "fighting words" that insult or provoke violence "on the basis of race, color, creed, religion or gender," it permitted hostile expression in such areas as political affiliation, union membership or homosexuality.

"The First Amendment does not permit St. Paul to impose special prohibitions on speakers who express views on disfavored subjects," Scalia wrote in an opinion joined by Chief Justice William Rehnquist and Justices Anthony Kennedy, David Souter and Clarence Thomas.

The key question, Scalia wrote, "is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interest; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.

"In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out."

Scalia concluded that while "burning a cross in someone's front yard is reprehensible, ... St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."

In a concurring opinion joined by Justices Harry A. Blackmun and Sandra Day O'Connor and joined in part by Justice John Paul Stevens, Justice Byron R. White criticized the majority for protecting "narrow categories of expression long held to be undeserving of First Amendment protection—at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. ... Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words."

White and his colleagues who disagreed with the majority's rationale in deciding the case would have struck down the St. Paul ordinance by holding that it "is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment."

White labeled the majority's opinion a "radical revision of First Amendment law."

"The decision is mischievous at best and will surely confuse the lower courts," he wrote. "I join the judgment, but not the folly of the opinion."

In a separate concurrence, Blackmun said he sees "no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community."

Blackmun nonetheless agreed with White that the St. Paul ordinance went beyond fighting words to speech protected by the First Amendment.

In yet another concurring opinion, Stevens criticized the majority for giving fighting words, previously considered outside the scope of First Amendment protection, the same or higher protection than that afforded political or commercial speech.

While the court's ruling is expected to have sweeping consequences in the free speech area, a Baptist church-state attorney said it is too early to predict precisely its effects.

J. Brent Walker, associate general counsel at the Baptist Joint Committee, sees a stark contrast in the court's June 22 free speech decision and its 1990 decision sharply limiting free exercise rights.

"I find it strange that the court took a near absolutist position on the enforcement of the free speech clause while it is perfectly willing to write the free exercise clause out of the First Amendment altogether," Walker said, referring to the high court's 1990 opinion that significantly lowered the standard government must meet to restrict religious exercise.

"The common denominator is the majority's apparent willingness to depart from settled precedent in order to advance its novel constitutional philosophy," Walker said. □

Clearing the deck

High court rejects church-state separation cases

At its first opportunity after rejecting the Bush administration's request to adopt a new church-state separation test, the U.S. Supreme Court disposed of a dozen establishment clause cases, mostly by refusing to review them.

The high court issued orders June 29 in more than 200 cases as it wrapped up its 1991-92 term.

Among the church-state separation cases were those dealing with an elementary teacher's use of the Bible and Christian books, a university professor's interjection of religious views into classroom lectures, the use of religious symbols in municipal seals and a city's sponsorship of a Roman Catholic Mass.

In most cases, the high court left standing lower court decisions that the practices involved violated the First Amendment's ban on governmental establishment of religion.

Church-state specialist J. Brent Walker, associate general counsel at the Baptist Joint Committee, said that had the Justice Department's request for a more lenient church-state separation standard been granted, the court probably would have returned the cases to the lower courts for reconsideration under the new test.

"Some of them, no doubt, would have come out differently," Walker said.

In urging the high court to reverse lower court rulings against a Rhode Island school district's commencement prayer practice, U.S. Solicitor General Kenneth Starr asked that the strict "*Lemon* test" be replaced with a new "coercion" standard that would permit government to sponsor religious activities as long as coercion is not present and the activity did not tend to establish a national church.

To be constitutional under the more stringent test formulated in *Lemon v. Kurtzman* in 1971, a government practice must have a secular purpose, a primary effect that neither advances nor inhibits religion and avoid excessive entanglement with religion.

Court watchers generally were surprised when Justice Anthony Kennedy, who had proposed a coercion standard in a 1989 case, helped form a 5-4 majority in *Lee v. Weisman* that declined to reconsider the *Lemon* test and held the commencement prayer practice invalid under the principles of the court's 1962 and 1963 school prayer rulings.

The only case of the 12 accepted by the Supreme Court was another commencement prayer case, this one out of Texas. The 5th U.S. Circuit Court of Appeals had upheld the Clear Creek Independent School District's policy of allowing student-delivered, non-sectarian commencement prayers that were approved by school officials. But the high court vacated that ruling and returned the case, *Jones v. Clear Creek Independent School District*, for further consideration in light of its latest commencement prayer ruling.

In another graduation prayer case, the high court left standing a ruling by the Supreme Court of California that religious invocations and benedictions in the Morongo Unified School District impermissibly conveyed an endorsement of religion. The top California court was divided over the case, *Morongo Unified School District v. Sands*, with two of the justices urging the U.S. Supreme Court to re-examine the applicability of *Lemon* in commencement prayer cases.

The high court also left standing lower court rulings in two other cases involving school settings.

In one, the 10th U.S. Circuit Court of Appeals upheld a Colorado school district's order preventing a fifth-grade teacher from reading a Bible at his desk and from displaying the Bible and two Christian books in the classroom. The appeals court held in *Roberts v. Madigan* that the school district's action did not violate the establishment clause or the teacher's free speech rights.

In the other, *Bishop v. Delchamps*, the 11th U.S. Circuit Court of Appeals ruled that the University of Alabama's directive barring health professor Philip Bishop from interjecting his religious beliefs during instructional periods and from conducting optional classes to present a Christian perspective did not violate the First Amendment's free speech, free exercise or establishment clauses.

The high court also declined to review a lower court ruling striking down a federal labor law provision that exempts from compulsory union membership members of religious groups that historically have maintained conscientious objections to union participation. The 6th U.S. Circuit Court of Appeals ruled in *Wilson v. National Labor Relations Board* that the exemption violates the establishment clause by giving preferential treatment to some religious groups.

In most cases, the high court left standing lower court decisions that the practices involved violated the First Amendment's ban on governmental establishment of religion.

The Supreme Court also left standing two decisions by lower courts that invalidated religious practices in public places.

In *Crestwood, Ill., v. Doe*, the 7th U.S. Circuit Court of Appeals held that a city-sponsored Mass during a week-long Italian festival violated the establishment clause. A Roman Catholic Mass spoken in Italian was one of many festival activities. Its inclusion would be permissible, the court said, except for city sponsorship.

In *Constangy v. North Carolina Civil Liberties Union Legal Foundation*, the 4th U.S. Circuit Court of Appeals ruled that a state judge's practice of opening court each morning with prayer violates the Constitution. The appeals court said Judge H. William Constangy's practice violated all three prongs of the *Lemon* test and is not comparable to the long-standing tradition of legislative prayer upheld by the Supreme Court in 1983.

The high court also let stand a ruling by the 2nd U.S. Circuit Court of Appeals that a private group's display of a menorah in the Burlington, Vt., City Hall Park violates the establishment clause. In *Chabad-Lubavitch of Vermont v. Burlington, Vt.*, the court held that locating a religious display in a park with close association to city government communicates a message of endorsement.

Conflicting results in three cases involving religious images on municipal seals were allowed to stand. The 7th U.S. Circuit Court of Appeals held that municipal seals containing Latin crosses and other religious images in Zion and Rolling Meadows, Ill., violate the establishment clause. The cases were *Rolling Meadows, Ill., v. Kuhn* and *Zion, Ill., v. Harris*. But in *Murray v. Austin, Texas*, the 5th U.S. Circuit Court of Appeals upheld Austin's inclusion of a Christian cross in its municipal insignia.

In another instance of a governmental policy surviving First Amendment scrutiny, the high court left standing the 9th U.S. Circuit Court of Appeals decision that a Hawaii law declaring Good Friday to be a legal holiday does not violate the establishment clause. In *Cammack v. Waihee*, the appeals court held that the law's primary purpose was to create more legal holidays, not endorse religion. □

Split decision

Supreme Court upholds leafletting, strikes solicitation

Government officials may ban in-person solicitation of funds but not distribution of literature in airport terminals, a sharply splintered U.S. Supreme Court ruled June 26.

At issue were bans on both activities transportation officials sought to impose at the New York City area's three major airports. The regulations were challenged by members of the Hare Krishna faith.

The court voted 6-3 to uphold the Port Authority of New York and New Jersey's ban on solicitation and 5-4 to strike its ban on the distribution and sale of literature.

The case hinged on whether airport terminals are considered public forums where free speech activities can be restricted only for compelling reasons.

Five justices, led by Chief Justice William H. Rehnquist, held that airport terminals are not public forums and local officials needed to show only that their regulations were reasonable and not designed to suppress a particular viewpoint.

"In my view the airport corridors and shopping areas outside of the passenger security zones, areas operated by (airport officials), are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles."
— Anthony M. Kennedy

Rehnquist, joined by Associate Justices Byron R. White, Sandra Day O'Connor, Antonin Scalia and Clarence Thomas, held that the regulation imposed by New York airport officials "reasonably limits solicitation."

The majority concluded it is reasonable to find that solicitation activity may be disruptive for airport customers.

While joining the Rehnquist-led majority in holding that airport terminals are not public forums and that New York's solicitation ban is reasonable and constitutional, O'Connor joined the court's four other members—Associate Justices Anthony M. Kennedy, Harry A. Blackmun, David Souter and John Paul Stevens—in holding that the ban on literature distribution is unconstitutional.

O'Connor said that "while the difficulties posed by solicitation in a nonpublic forum are sufficiently obvious ..., the same is not necessarily true for leafletting."

Noting that airport officials had leased space to banks, restaurants, retail stores and other commercial businesses, O'Connor wrote that the range of activities promoted by airport officials is "no more directly related to facilitating air travel" than those pursued by the Hare Krishnas.

"Because I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the ... airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction 'preserves the property' for the several uses to which it has been put."

In a concurring opinion, Kennedy reached the same results as O'Connor in upholding the ban on solicitation while striking the airport's rule against literature distribution and sales. But unlike O'Connor, Kennedy insisted airport terminals are public forums.

"In my view the airport corridors and shopping areas outside of the passenger security zones, areas operated by (airport officials), are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles," Kennedy wrote.

Kennedy criticized the majority's conclusion that airports are nonpublic forums as "flawed."

"It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of government," he wrote.

A dissenting opinion written by Souter and joined by Blackmun and Stevens agreed with Kennedy that airport terminals are public forums. But the three dissenters would have held that both the solicitation ban and the literature distribution prohibition are unconstitutional. □

Senate bill encourages charitable giving

Three members of the Senate Finance Committee introduced July 2 a bill that would encourage charitable giving by changing tax laws governing non-profit institutions and their donors.

The Charitable Contribution Tax Act (S. 2979), introduced by Sens. Daniel Moynihan, D-N.Y., John Danforth, R-Mo., and David Boren, D-Okla., would amend the tax code to encourage charitable donations and improve compliance with tax laws governing deductible contributions.

One provision would make all gifts of appreciated property fully deductible on a permanent basis. Appreciated property includes real estate, stocks and tangible items such as collectibles whose value increased after being purchased.

The 1986 tax act subjected the appreciated portion of charitable gifts to the alternative minimum tax, precipitating a decline in large gifts to universities, hospitals, museums and other charitable institutions.

The bill would permanently repeal the provision subjecting the appreciated portion of charitable gifts to the alternative minimum tax so that all donors will receive a deduction equal to the property's fair market value.

See **Tax bill**, Page 14

Yeltsin: Communism gone for good

The idol of communism that spread strife, enmity and brutality everywhere has collapsed never to rise again, the president of the new Russian Federation assured the U.S. Congress.

Russian leader Boris N. Yeltsin recently addressed a joint session of Congress during his first formal summit with President George Bush.

"The experience of the past decades has taught us: Communism has no human face," Yeltsin said. "Freedom and communism are incompatible. ... It is in Russia that the future of freedom in the 21st century is being decided. We are upholding your freedom as well as ours."

Yeltsin expressed pride in the ordinary citizens of Russia who fought for freedom, as well as appreciation of Bush and the American people "for their invaluable moral support."

"There is no people on this earth who could be harmed by the air of freedom ...," he added. "Liberty sets the mind free, fosters independent and unorthodox thinking and ideas.

"But it does not offer instant prosperity or happiness and wealth to everyone."

Speaking about the past economic conditions that led to the previous totalitarian regime, Yeltsin said, "History must not be allowed to repeat itself. That is why economic and political reforms are the primary task for Russia today."

If Soviet reform fails, there will be no second try, Yeltsin said, making a plea for Congress to approve aid for Russia. He promised not to renege on those reforms, recognizing their impact reaches beyond Soviet borders to the United States and the rest of the world.

Yeltsin said Russia is determined to move forward on those reforms, pointing to an arms reduction agreement that he and Bush signed as an example.

The Soviet leader also vowed to return any American servicemen who may have been transferred and detained in his country during the Vietnam War. His announcement that some U.S. servicemen may have been secretly sent to Russia and may still be alive shocked the Washington establishment.

Yeltsin said the archives of the KGB and the Communist Party Central Committee are being opened and that Russia is inviting the United States and other nations to help it in "investigating these dark pages."

Yeltsin said if this investigation verifies the existence of such servicemen that he will return them to their families.

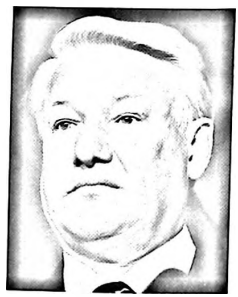
"Today free and democratic Russia is extending its hand of friendship to the people of America," Yeltsin said.

"Acting on the will of the people of Russia, I am inviting you and, through you, the people of the United States, to join us in partnership in the name of a worldwide triumph of democracy, in the name of liberty and justice in the 21st century."

He concluded by adding a phrase to lyrics by Irving Berlin, an American of Russian descent: "God bless America and Russia." □

"The experience of the past decades has taught us: Communism has no human face. Freedom and communism are incompatible. ... It is in Russia that the future of freedom in the 21st century is being decided."

— Boris Yeltsin



Jerusalem must remain unified, says U.S. Senate

The U.S. Senate recently approved a resolution noting the 25th anniversary of the reunification of Jerusalem and stressing that the city must remain undivided.

The resolution (S. Con. Res. 113) congratulated the people of Israel on the milestone and expressed the Senate's conviction that an undivided Jerusalem is essential for preserving the religious rights of every ethnic and religious group. It also called on the president and secretary of state "to issue an unequivocal statement in support of these principles."

The Jewish community was driven out of Jerusalem and denied access to holy sites in the area occupied by Jordan from 1948 to 1967. Jerusalem was reunited in 1967 during the Six Day War.

The Senate resolution notes that since Jerusalem had been reunited "persons of all religious faiths have been guaranteed full access to holy sites within the city." The resolution also asserts that Israel's concern that the United States might support a divided Jerusalem inhibits lasting peace in the region.

Sen. Daniel P. Moynihan, D-N.Y., said Israel's concern stems from U.S. support of two United Nations Security Council Resolutions (681 and 726) that describe Jerusalem as "occupied Palestinian territory." Resolution 726 "strongly condemns" Israel, Moynihan added.

"We were far too passive in May 1948 when the Jordanian Arab Legion drove the once flourishing Jewish majority out of the Old City at gunpoint," Moynihan said. "We were too passive when Jerusalem was divided by barbed wire, mine fields and cinder-block walls."

Sen. Bob Packwood, R-Ore., said, "Supporting an undivided Jerusalem is smart, stable policy. For the past 25 years, observers of all religions have had free access to their places of worship. Arabs, Jews and Christians overlap each other in places of worship, commerce and rest." □

Congress urges Iran to respect Baha'is faith

If Iran wishes to join the international community, it must respect the religious freedom of all citizens.

That message was embodied in a resolution recently approved by the U.S. House of Representatives, calling on Iran

to recognize the rights of its largest religious minority — the Baha'i community.

The House approved H. Con. Res. 156 by a voice vote, marking the fifth time in a decade the U.S. Congress has passed resolutions concerning human rights conditions in Iran. The Senate approved a similar resolution earlier in the year.

Concurrent resolutions must be approved by both houses; they represent the sentiment of Congress but do not carry the force of law.

The resolution noted that Congress:

- Continues to hold the government of Iran responsible for upholding the rights of all citizens, including members of the Baha'i faith;
- Notes that Iran summarily executed a prominent Iranian Baha'i, Bahman Samandari, in March 1992 — the first such execution in more than three years;
- Expresses concern that some recent improvements in the treatment of individual Baha'is have not led to legal recognition of the Baha'i community;
- Urges the government of Iran to extend to the Baha'i community the rights guaranteed by the Universal Declaration of Human Rights and the international covenants on human rights, including the freedom of religion, thought, conscience and equal protection under the law;
- Calls upon President George Bush to continue to urge Iran to emancipate the Baha'i community; to emphasize that the United States regards Iran's human rights practices, particularly its treatment of religious minorities, as a significant element in developing its relations with Iran; and to cooperate with other governments and international organizations in efforts to protect the religious rights of the Baha'is and other minorities.

Rep. William Broomfield, R-Mich., said, "Freedom of religion is enshrined not only in our Constitution, but also in the Universal Declaration of Human Rights, which has been signed by virtually every nation in the world.

"Since it came to power in 1979, however, the self-styled Islamic government of Iran has constantly persecuted the Baha'i religious community ...," he continued. "The truth of the matter is that the Baha'is were singled out for persecution solely on the basis of their religious beliefs."

Rep. Wayne Owens, D-Utah, added, "Iran is attempting to work its way back into the civilized world. But satisfying the West outside of its borders, while depriving its citizens of their fundamental human rights inside its borders, is unacceptable." □

Religious freedom is welcome in new country

Religious freedom apparently will play a part in the democratization of the former Soviet republic of Azerbaijan, according to an American journalist who recently returned from there.

Thomas Goltz, the first foreign correspondent to live in Baku, Azerbaijan, offered a first-hand account of Azerbaijan's democratic development at a recent briefing sponsored by the Helsinki Commission. (The Helsinki Commission, an independent agency created by Congress, monitors and encourages compliance with human rights accords.)

Goltz said the "public face" of the government has been to welcome "informed religion" into Azerbaijan society because it provides a moral underpinning. Although the new country has a decidedly Muslim influence, the government appears to welcome other religions, he added.

Goltz covered the country's first democratic presidential election June 7, noting most interested observers agreed the election was largely free, fair and democratic.

Abulfez Elchibey, chairman of the country's Popular Front, won the election, gaining approximately 60 percent of the vote, according to the Helsinki Commission.

Goltz said he was excited to see a democratic process proceed, but at the same time, he is pessimistic about how long it will last. He said the new government has several enemies, making Azerbaijan unstable. □

Religious officials warn of major African famine

The worst drought to hit eastern and southern Africa in 100 years threatens millions of lives, according to religious and secular relief officials.

"It's like a runaway train just before it smashes into the station," said Kenny Nyati, a former Zimbabwean diplomat who directs the Mozambique program of the Lutheran World Federation.

Nyati gave that assessment to a small team of Lutheran officials who traveled in drought-stricken parts of Africa in May. □

NEWS-SCAN

Clergy are having their say in Canada's debate on national unity, thanks to the efforts of a rabbi in Ottawa. Rabbi Reuven Bulka, spiritual leader of Orthodox Congregation Machzikei Hadas, has become concerned about the growing acrimony over Canadian unity during the past year. Some time this fall, Quebec residents will vote on whether their predominantly French-speaking province should separate from the largely English-speaking country. Bulka favors Canadian unity and believed that most clergy would agree. So early this year, using private donations, he decided to ask all clergy in the country to express their views on the issue. In a mass mailing, he asked the clergy to let him know their views on the issue and urged that those who favor keeping the country together should write directly to their politicians to let them know. The result: more than 28,500 clerics received the mailing, and more than 4,400 positive responses have come back. According to Bulka, only 50 clerics, mostly from Quebec, have responded negatively so far. ... **Forgive Czech church leaders** accused of collaborating with the Communists was the plea of a Czechoslovakia church leader. Bishop Pavel Uhorskai, who had been jailed for years by the Communists and stripped of his clergy credentials, made the plea during a recent meeting with American religious leaders in Bratislava, Czechoslovakia. ... **The World Council of Churches** is calling for continued pressure on South Africa, including economic sanctions, in the wake of the killings recently of more than 40 residents of Boipatong township south of Johannesburg. The council's general secretary, Emilio Castro, expressed "deep shock and dismay" at the June 17 killings and urged that several steps be taken by the South African government—including bringing to trial persons responsible for the Boipatong killings and the appointment of an international arbitrator to facilitate peace negotiations between the government and representatives of the black majority. □

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

Souter

Continued from Page 5

ompelling evidence to the contrary, re should presume that the Framers ieant the Clause to stand for something iore than petitioners attribute to it.

While the Establishment Clause's concept of neutrality is not self-revealing, ur recent cases have invested it with pecific content: the state may not favor r endorse either religion generally over ionreligion or one religion over others. ... This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community ... and protecting religion from the demeaning effects of any governmental embrace. Now, as in the early Republic, "religion & Govt. will both exist in greater purity, the less they are mixed together." (Letter from James Madison to E. Livingston, 10 July 1822). Our aspiration to religious liberty, embodied in the First Amendment, permits no other standard.

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings.

Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. ... Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief. By these lights one easily sees that, in sponsoring the graduation prayers at issue here, the State has crossed the line from permissible accommodation to unconstitutional establishment.

Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, "burden" their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings about it before and after the ceremony. They may even organize a privately sponsored baccalaureate if they desire the company of likeminded students. Because they accordingly have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion and, in this instance, of Theistic religion.

Petitioners would deflect this conclusion by arguing that graduation prayers are no different from presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to the captive audience of public school students and their families.

Madison himself respected the difference between the trivial and the serious in constitutional practice.... But that logic permits no winking at the practice in question here. When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However "ceremonial" their messages may be, they are flatly unconstitutional. □

Tax bill

Continued from Page 11

Two other provisions would require more disclosure and substantiation of charitable contributions.

One specifies that a taxpayer cannot deduct any contribution of $100 or more without receipts from the church or charity receiving the donation. Previously, the administration proposed that taxpayers who gave $500 annually would have their names reported to the IRS by the charity. This new proposal involves single contributions of $100 or more and requires only that the taxpayer attach a receipt to his return.

The other involves disclosure requirements related to "quid pro quo" contributions, payments made partly as a contribution and partly for goods and services provided by the church or charity.

The quid pro quo disclosure requirement stipulates the church or charity must inform the donor that the deductible amount is limited to how much the gift exceeds the value of goods or services provided. The church or charity also must provide the donor with a "good faith estimate of the value of such goods or services."

Both disclosure provisions would result in churches dealing exclusively with the donor, not the government.

"These new substantiation and disclosure requirements are a substantial revision of a disclosure proposal made by the administration in the president's budget for fiscal year 1993, released last February," Moynihan said. "They are the product of extensive discussion and work with affected organizations by the Treasury Department and congressional staff."

The charitable community, including Baptists, objected to the original reporting requirement that would have required churches to report directly to the government, thus making them something of a tax enforcement agent of the IRS.

J. Brent Walker, associate general counsel of the Baptist Joint Committee, said, "It's a vast improvement over the administration's proposal. The across-the-board reporting requirement is out. Under this bill, the donors not the churches will deal with the IRS.

"The co-sponsors have attempted to tailor bill language to discourage tax evasion while preserving the autonomy of churches and other charities."

James M. Dunn, BJC executive director, noted, "We are continuing to probe and ask questions about the bill. While the proposal looks rather reasonable, I've never seen one that couldn't be improved upon."

The House of Representatives approved July 2 another tax bill affecting non-profit organizations. The Revenue Act of 1992 (H.R. 11), approved 356-55, would provide full deduction of gifts of appreciated property for 18 months. The House dropped proposals to extend beyond 1995 or make permanent the 3 percent floor of itemized tax deductions.

Present law limits itemized deductions, including charitable contributions, for higher income individuals. Itemized deductions for high-income taxpayers are reduced by an amount equaling 3 percent of their adjusted gross income of more than $100,000. □

Prayer

Continued from Page 5

test, joined the Scalia dissent that criticized the test as irrelevant.

The differences between the two Bush-appointed justices reflect the broad division among justices over the degree to which the Constitution requires church-state separation.

And while the court remains sharply divided over the issue, it signaled a few days after its commencement prayer ruling—by refusing to review 11 pending church-state separation cases—that it may not be anxious to wade into those controversial waters anytime soon. □

t ceasing for a free church in a free state.

LECTIONS

James M. Dunn
Executive Director

ave asked. Or even if you personally are not one of
askers, you're entitled to know. I will try to tell you.
s the Baptist Joint Committee doing in the midst of
haos? Are you going to survive? Can we help?
questions we hear most often.

the situation. In 1991 the Southern Baptist Convention
ts official, unified budget support, nearly $400,000
, more than half of our budget. In 1992 that same
ion voted to redirect to other causes our only
endowment, a capital needs fund of $300,000 from
e had received the interest for nearly 30 years. Add
blows the *costs* of doing business in Washington, the
of the *recession* on contributions, the initiation of a
ent program to restructure our financial base and, alas,
d-raising failure of the marvelous but largely unbought
leritage Calendar, and we're having a tough time.

n many ways the work of the BJC has never been more
nd vital. We are the *only* national church lobby that
nly for religious liberty and church-state separation.
lanta Constitution calls the BJC "the nation's leading
s lobby on behalf of church-state separation."
s the BJC, as the *Richmond Times-Dispatch* reported on
5, that "was the first Washington religious lobby to
e proposal in the Bush administration's 1993 budget
that would have required "each of the nation's
es, synagogues and temples to report to the Internal
ue Service the names of donors who give them more
500 per year."
n the aggressive reporting of BJC's Larry Chesser and
bbying follow up of others on the staff, this invasive,
gling, bad idea was exposed and defeated. Maybe we
d our keep that week.
v Knox of the *Western Recorder* editorialized in June that
ern Baptists in turning away from the BJC "cut off the
that saved our missions effort millions in tax dollars."
as referring to the BJC's pivotal role in correcting flawed
ation regarding overseas earned income that taxed
onaries both "here and there." The SBC Foreign Mission
estimates a saving of $2 million annually from that one
ative initiative.

, "what have you done for us recently?," you may ask.
now Buzz Thomas, BJC general counsel, chairs both
oalition supporting the Religious Freedom Restoration
nd the ad hoc advisory group of church lawyers that
ides counsel for the Internal Revenue Service. And if you
regular reader of *REPORT,* you are aware of the wide
e of other issues dealt with educationally, journalistically
as advocates of religious freedom by this small but busy
ncy. You see the names of Larry Chesser, Pam Parry,
at Walker, and Buzz Thomas in secular and religious
ia every week. Sometimes you also hear about the other
of us on the staff who fuel the financial furnace, promote
program and process the words.

ow have you survived with such budgetary blows?

ood question. Here's how. The other Baptist bodies that
k this venture have been faithful, generous and strong.
ob Ricker and the Baptist General Conference leadership
only love one another, they love and understand their
otist roots and are not forsaking them.
ohn Binder and a brave band of North American Baptists
rman Baptists) would make Rauschenbush proud.
Our chairman, Tyrone Pitts, and Progressive National
otist Convention President Charles G. Adams are leading
gressive Baptists to new heights.
The perceptive Marvin Griffin and President E.E. Jones
ow their history and have consistently reminded the
ational Baptist Convention of America of the African-
nerican stake in soul freedom.

Seventh Day Baptists do not need to be reminded of the fragility of their freedom to practice Sabbatarian Christianity and the BJC's role in defending that freedom.

Other National Baptists including S.M. Wright of the new National Missionary Baptist Convention have taken their place as defenders of Baptist distinctives.

What a wonderful, pervasive tide of support has come from the American Baptist Churches in the U.S.A. General Secretary Dan Weiss, National Ministries' "Ace" Wright-Riggins, Bob Tiller, ABC seminaries, the leaders in Regions, States and Cities, and not least the incomparable M & M Board stand by the BJC.

Beyond that, Southern Baptists — the people — not the captive convention support the Baptist Joint Committee.

They do it through state conventions that include the cause of religious liberty in their missions priorities: Texas, Virginia, New England, (and soon Kentucky). They give through the newly formed Cooperative Baptist Fellowship (looks like about $100,000 for 1991-92).

They support the BJC through the front-edge and prophetic Alliance of Baptists and the advisory/development board of the BJC, the Religious Liberty Council.

Baptists of all breeds and brands also have the BJC in their local church budgets — to the tune of 200 churches. That's important for awareness and consciousness raising as well as fund raising. Maybe you can "go and do likewise."

The gifts of over 1,000 individuals also are essential to maintain the Baptist voice for freedom. Genevieve Hardman of Orlando, Fla., has made a generous gift to be managed by the North Carolina Baptist Foundation to sustain our student intern program. You can add to it.

LaGrande and Cassandra Northcutt of Longview, Texas, have begun a significant endowment fund for the BJC with the Baptist Foundation of Texas. It's styled as #5619 and can receive additional gifts to be used for endowment only. The James Bryants of St. Louis have designated a living trust for the BJC with the Missouri Baptist Foundation — a great idea. The BJC has been notified of one will in which the agency is the principle beneficiary, and Grady Cothen has set aside a royalties from an upcoming book for the BJC and the Baptist World Alliance.

With an annual budget of $800,000 and urgent unmet needs for equipment, publishing of educational materials, conference planning and staff support, the BJC is having a tough time. But the staff and the board (the committee) are moved and humbled by the overwhelming affirmation of Baptists for our work. We are determined and confident that we'll continue to do this job.

The BJC has not moved, has not changed, has not shifted from the principles of her founders. We stand as we have stood for religious liberty *and* its essential corollary the separation of church and state. We don't need government-prescribed religious exercises, public funds for religious purposes or fuzzy civil religion that mixes piety with politics.

Some Baptists have wandered from that path. They have left us. We haven't left them.

You can help, too.

Tell us about foundations that might offer support. Write "Letters to the Editor" holding up real religious freedom. Send suggestions for this magazine and encourage others to subscribe. Join the band of Baptists and others who give to the Baptist Joint Committee.

Pray without ceasing for a free church in a free state. Friend court and Congress, church and culture, religious entrepreneurs and reporters who oversimplify stories about sch prayer but don't have a prayer, there are threats to religi liberty.

You've never been more needed. □

REVIEWS

The Moral Imagination and Public Life: Raising the Ethical Question

By Thomas E. McCollough
Chatham House Publishers, Inc.
Chatham, N.J., 1991,
149 pages.

"The Moral Imagination and Public Life" represents Thomas E. McCollough's blueprint for doing ethics within the public sphere. It is bold; some might even call it courageous. It goes beyond the usual rehearsals of ethical abstractions and tries to offer a vision of how citizens together can sort through the concerns that matter to them.

McCollough's controversy is with all those who would separate fact (or knowledge) from value. Where that happens, McCollough argues, fact and knowledge become the domain of a bureaucratic and technical elite. Value then becomes no more than opinion and preference, and ethics is emptied of all power except as rules handed down by specialists and policy makers.

In contrast, McCollough seeks to uncover the internal link between what "I" as an individual know and do and what goes on in the public sphere. If that link is established, then value is not merely opinion and preference. Likewise, if value is not so radically "subjectivized," fact is reunited with value. Ethics, in turn, becomes possible as public discourse.

The core ethical question that summarizes this internal relation can be expressed as, "What is my personal relation to what I know?" This question, asked by individuals within the public sphere, calls into being the sort of mutual accountability that McCollough takes as the bedrock for moral discourse. By asking about a personal relation to knowledge, the self must bring together both fact (or knowledge) and value. This assumes the sort of wholeness McCollough believes to be essential for public, ethical discourse.

How adequate this core question is will largely determine how the book is received. To his credit, McCollough perceived the question to be more nuanced than it first sounds. The question, "What is my personal relation to what I know?," expresses an ethical dialectic of three polarities: (1) the relation of the individual and the group, (2) subjectivity and objectivity and (3) tradition and situation. To resolve the tension of the dialectic in favor of any one of the polarities would sever the link between fact and value. The possibility of a genuinely public moral discourse would then be irretrievably lost.

Given the dialectic of the question, however, McCollough believes he has designed the entryway into the public sphere for discourse about what matters most, what is proper and right, what is valued. The public (and this may be his most interesting definition) is "the space in which as citizens we hold one another accountable for what we know and value." (p. 79) This mutual accountability serves as both the basis and the method for ethics in the public sphere. When McCollough would have us ask, "What is my personal relation to what I know?", he is actually requiring us to determine what value we will assign, as expressed by what we do, to that which we know. The dialectic of the question means we must necessarily ask and answer the question in the public sphere of mutual accountability.

James Gustafson once complained that students did not pay enough attention to the prefaces of books. That complaint makes for excellent advice in this case. For those wanting some inkling of how this core ethical question works concretely, re-read McCollough's preface. He describes a four day/four night student/faculty demonstration for racial justice at Duke University in 1968. Students and faculty rallied, spoke, waited. Their experience was the gestation and birthing of a common moral vision that in time moved the university administration to make substantive policy changes. Read this account as a concrete example of how the core ethical question will function.

For all the laudable effort to uncover the internal relation between fact and value, however, I am not convinced McCollough's oft-repeated question really achieves its purpose. For one thing, the question as posed needs significant clarification in order to move it to the levels on which McCollough intends it to function. That may well suggest that, for all the nuances that McCollough tries to describe, a single formal question simply cannot bear the weight of uncovering that internal link which makes ethics possible in the public sphere.

It also has to be noted that McCollough's core ethical question is posed exclusively in terms of the self. McCollough tries valiantly to incorporate community and society into the boundaries of the question, but the formal terms of the question do not require anyone to follow him at that point. A person can always answer the question quite happily without substantive reference to any other person. That may not make for good morals in McCollough's opinion, but it could be consistent with his ethical method.

My greatest reservation comes at the point of McCollough's easy assumption that this question asked and answered in good faith will naturally produce a unified moral vision that will naturally create a coherent moral order. I think he begs the question here. A unified way of life commended by a moral community, as McCollough supposes, may be extremely difficult, even impossible to achieve. If the Duke rally in 1968 exemplified McCollough's dream, then Wichita in the summer of 1991 must be his nightmare. It was not the case in Wichita that moral communities did not seek a personal relation to what they knew (or thought they knew). It was the case that, instead of a common moral vision emerging, moral visions competed, even warred. Asking about our own relation to knowledge does nothing to bridge that kind of gap.

If McCollough is not the prime architect of a new moral community and a new way of moral discourse, he at least understands its importance. In that, he helps us on the quest. □

—**Dana B. Martin, Pastor**
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