

REPORT from the CAPITAL

Supreme Court nominee



“My approach, I believe, is neither ‘liberal’ nor ‘conservative.’ Rather, it is rooted in the place of the judiciary — of judges — in our democratic society. The Constitution’s preamble speaks first of We, the People, and then of their elected representatives. The judiciary is third in line, and it is placed apart from the political fray so that its members can judge fairly, impartially, in accordance with the law and without fear about the animosity of any pressure group.”

— Judge Ruth Bader Ginsburg
July 20, 1993

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Prayer: Don't ask, don't tell

Suppose that's one way to characterize Jesus' attitude about where we pray. As far as I can tell, the only time he wants people in the closet is when they are praying.

And yet, I see on the front page of our newspapers these days that graduates are standing with bowed heads reciting "The Lord's Prayer" at their commencement ceremonies. They've come out of the closet! Nothing unusual about that, except it's against the law. And it's not a very Baptist thing to do.

But here's a Baptist preacher who's opposed to prayer in the public schools, because I take my Baptist heritage and the proper relationship between church and state seriously.

Please note, I'm not against students saying prayers. They can pray any time they like. Nobody can prohibit anybody from praying anyway, because, like Jesus said, it's a privacy



matter. It's the prayers of the ceremonial kind where the public is required to attend that I'm opposed to; the prayers of a proscribed state- or school-board-sponsored kind. Why? Because it is wrong to force others to observe my faith.

Freedom of religion also means freedom from religion. And just as Christians would not support a public ceremony denouncing religious faith or praising the faith of a Muslim, neither should we impose our Protestant brand of faith on those who may not buy into it.

These days the Religious Right is on a roll. They managed to get "In God we trust" printed on our dollar bills and think they've delivered a mortal blow to the powers of darkness. Now they're infiltrating local school boards, hopping all over the place trying to find loopholes, so they can legislate prayers at graduation. It isn't enough that their own houses of faith recognize the graduates in the local church. What's being advocated are "politically correct" prayers that would offend nobody. It would be perfectly legal to hold a prayer meeting before school or after. But some religious leaders would have it during the graduation ceremony, where other students are required to be present. That's the rub. What is at issue is not the appropriateness of prayer, but what can be properly said and done as a part of an official ceremony.

Jesus preferred that if we prayed any place, it was in the closet (Mat. 6:6) and reminded us, "Don't cast your pearls before the swine." That is, there is a time to promote religious faith and a time when it may be counterproductive. The time is at home, in church or any time you like alone. Not in a public school ceremony. It does religion no service to put it under the control of government or the tyranny of the majority. That makes as much sense as lacing a string of pearls around a pig's neck. Δ

— Dan Ivins
Pastor, First Baptist Church, Silver Spring, Md.

THE RELIGIOUS FREEDOM RESTORATION ACT is rounding third and heading for home. This crucial legislation has passed the House of Representatives and has cleared the Senate Judiciary Committee (S.578). The Senate committee report—detailing the history behind and rationale for the bill—is being circulated in the committee. After the report's final publication, the bill is eligible for floor action. President Bill Clinton has made it clear that he's prepared to sign the bill into law. The main hold up over the past several months is related to prisons.

Several state attorneys general have called for an amendment that would exclude free exercise claims by prisoners from the protections afforded by RFRA. Sen. Harry Reid, D-Nev., has said he will introduce such an amendment. In early July, at a meeting of the National Association of Attorneys General (NAAG), its Civil Rights Committee was postured to consider a resolution calling upon the Senate to adopt Reid's amendment. In large measure as a result of the good work of the Coalition for the Free Exercise of Religion (composed of groups supporting RFRA), the votes were not there to pass the resolution, and it was neither proposed nor adopted. Nevertheless, several attorneys general—notably from Florida and Nevada—are persisting in their efforts. They have circulated yet another letter to the senators urging support for the amendment.

The amendment, if offered, must be defeated. There is no room for a double standard when it comes to religious liberty. The courts have and will continue to defer in close cases to the expertise of prison officials where order and discipline potentially are compromised. We agree with Attorney General Janet Reno, who oversees the nation's largest prison system, that the amendment is unwarranted. As a practical matter, a successful prison amendment would open the door to other weakening amendments.

Time is short. Call your senators and urge them to join the present 57 bipartisan co-sponsors in supporting RFRA and to oppose any weakening amendments. • (JBW)

High court cautious, restrained

Church-state law largely intact after 1992-93 term

Although some justices favored a more radical overhaul of church-state law, a cautious and restrained U.S. Supreme Court barely nudged the wall separating church and state during its 1992-93 term.

Justices sided with religion in three cases near the end of the term but did so on narrow grounds. Left intact were the court's much-maligned legal tests for determining when government unconstitutionally establishes religion or interferes with its free exercise.

In disputes involving religion, the Supreme Court ruled:

- Hialeah, Fla., officials wrongly singled out religion for adverse treatment by enacting laws that barred animal sacrifice but did not address killing of animals for non-religious reasons (*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*);

- The First Amendment's requirement of church-state separation does not bar state and local school officials from providing a sign-language interpreter for a deaf student at a religious school (*Zobrest v. Catalina Foothills School District*);

- A New York church could not be denied after-hours use of school facilities to show a film addressing family issues when the school district permitted other community groups to address the same topic from non-religious perspectives (*Lamb's Chapel v. Center Moriches Union Free School District*).

The Supreme Court left for another day resolution of one other church-state dispute — prayers at public school commencement programs. A year after the high court struck down a Rhode Island school district's practice of providing clergy-delivered prayers at graduation programs, it declined to review a federal appeals court's approval of student-initiated, student-led prayers at a Texas school district (*Jones v. Clear Creek Independent School District*).

The court's rejection of the *Jones* case prompted some court watchers to conclude that the justices would accept

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

Ruling: Hialeah, Fla., ordinances that ban animal sacrifice violate the free exercise clause.

Vote: Unanimous result but split rationale.

Excerpts of opinion by Associate Justice Anthony M. Kennedy:

Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. ... The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.

[Our] inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

[E]ach of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." This precise evil is what the requirement of general applicability is designed to prevent.

A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void. Δ

Zobrest v. Catalina Foothills School District

Ruling: The establishment clause does not bar the state from providing an interpreter for a deaf student at a religious school.

Vote: 5-4

Excerpts of majority opinion by Chief Justice William H. Rehnquist:

We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." ... [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. ... [A] government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. ... [B]ecause the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. ... When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," it follows under our prior decisions that provision of that service does not offend the Establishment Clause. Indeed, this is an even easier case ... in the sense that, under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers.

The extension of aid to petitioners does not amount to "an impermissible 'direct subsidy.'" For [the school] is not relieved of an expense that it otherwise would have assumed in educating its students. And, any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to "the private choices of individual parents." Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries.

[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. ... [T]he Establishment Clause lays down no absolute bar to placing a public employee in a sectarian school. Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance. ... The sign-language interpreter ... will neither add to nor subtract from [a pervasively sectarian] environment, and hence the provision of such assistance is not barred by the Establishment Clause. Δ

student-initiated, student-led prayers at commencement exercises. Others said the court's refusal to hear the case has no significance, given the thousands of cases rejected each term by the court.

"I don't think the court wants to face a controversial establishment clause case every year," said American University political science professor Gregg Ivers. "It doesn't allow the previous decision to take effect in the lower courts."

The closest the court came to altering the church-state boundary was in its decision that the establishment clause did not bar the provision of an interpreter for a parochial school student.

In a dissenting opinion, Associate Justice Harry A. Blackmun warned that the court for the first time authorized a public employee to participate directly in religious indoctrination.

The extent to which the church-state line was redrawn depends upon how broadly *Zobrest* is interpreted.

Some interpret it to permit government-provided vouchers to attend private and parochial schools as long as the aid goes to the student and not the school.

"Not necessarily," said Baptist Joint Committee General Counsel Oliver S. Thomas. "The court was careful to point out that the program in *Zobrest* created no incentives or inducements to attend parochial schools. That would not be the case with a tuition voucher.

"Also *Zobrest* was a 5-4 decision. The likely replacement of Byron White with the more separationist Ruth Ginsburg could mean the case would go the other way."

Surviving the court's term were:

- The *Lemon* test — a legal standard formulated in 1971 that ensures governmental neutrality toward religion. Under *Lemon*, governmental policies and actions must have a secular purpose, neither advance nor restrict religion and avoid excessive entanglement between church and state.

- The *Smith* rule — a relaxed standard adopted by the court in 1990 that made it easier for government to restrict religious practice. In most cases under *Smith*, government does not need a compelling reason to restrict religion. Generally applicable laws that burden religion need only be rational; they are not subject to the strict scrutiny of the compelling interest test used by the court before *Smith*.

While they survived the court's 1992-93 term, these legal tests remain under attack by foes on and off the court.

Five justices — a majority — have been critical of *Lemon*, but the court to this point has failed to toss out the test.

The court's use of *Lemon* in the *Lamb's Chapel* case sparked a strongly worded protest from Associate Justice Antonin Scalia, who argues that the test should be buried.

"Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District," Scalia wrote in a concurring opinion joined by Associate Justice Clarence Thomas.

In holding that the establishment clause did not bar the state from providing a sign-language interpreter for a Catholic student, the court did not specifically apply *Lemon* but cited cases based on *Lemon*.

Like the high court itself, U.S. religious bodies are divided over the *Lemon* test.

Church groups seeking greater accommodation of religion in the public arena, including public schools, want

Lemon scuttled or modified.

Groups including the Southern Baptist Christian Life Commission, the National Association of Evangelicals and the Christian Legal Society tried unsuccessfully in *Zobrest* to get the court to modify *Lemon*.

"I think *Zobrest* reaffirms that the *Lemon* ship is sinking, but no one can find an acceptable lifeboat (to replace it) said CLS attorney Steve McFarland. "*Lemon* needs some surgery but does not need to be buried."

Others say the neutrality embodied in *Lemon* has served both church and state.

"When *Lemon* is properly applied, it tends to ensure that government remains neutral and prevents unwholesome meddling by the state in church affairs," said BJC Associate General Counsel J. Brent Walker. "Both the church and the state are better off for it."

While *Lemon* survived the just-concluded term, it does not carry the punch it once did, Ivers said.

"I don't think the court views *Lemon* as quite the rigorous test that the courts of 10 to 15 years ago did," he said, noting that the court has weakened the test without discarding it, much like it has with the *Roe v. Wade* abortion ruling.

Despite that, Ivers does not think the court will go farther in approving a larger role for government in religion.

The court, he said, "will frown on cases that ask it to affirm teaching religious doctrine in public schools but will welcome cases touting access to public places and in some cases, public funds."

Division among religious groups over *Lemon* contrasts sharply with their united opposition to *Smith's* weakened protection for religion.

Virtually all U.S. religious bodies are supporting a bill in Congress to restore the strict scrutiny level of protection for religious exercise. The Religious Freedom Restoration Act is backed by a the 65-member Coalition for the Free Exercise of Religion and is expected to clear Congress this summer,

according to Thomas, who chairs the coalition.

Even under *Smith's* weakened standard, the high court had no trouble finding that Hialeah's ban on animal sacrifice violated the Constitution.

The court said Hialeah's actions were neither neutral nor generally applicable, leaving them subject to the strict scrutiny. Under strict scrutiny, they could survive a constitutional challenge only if they are the least restrictive means of achieving a compelling governmental interest. The high court said they were not.

In the Hialeah ruling, six justices agreed the case was governed by *Smith*, one more than the five justices who joined the original *Smith* opinion.

Encouraging to the religious groups who oppose *Smith* was a 20-page concurring opinion by Associate Justice David Souter arguing that the court should reconsider *Smith* in a future case.

"In the meantime," Souter said, "we are left with a free-exercise jurisprudence in tension with itself."

One of *Smith's* supporters and *Lemon's* opponents, Associate Justice Byron R. White, left the bench at the end of the term. His replacement is expected to be Ruth Bader Ginsburg, a centrist judge on the U.S. Court of Appeals for the District of Columbia.

Walker said Ginsburg's elevation to the high court could make a difference in establishment clause cases, which frequently have been decided by a 5-4 vote.

"Justice White consistently voted in ways that weakened both clauses," Walker said. "And while she doesn't have an extensive church-state track record, Ginsburg's coming to the court is bound to make things better. The only question is how much better and how fast."

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Lamb's Chapel v. Center Moriches Union Free School District

Ruling: Policies governing after-hours use of school facilities cannot discriminate against religion.

Vote: Unanimous result but split rationale.

Excerpts of opinion by Associate Justice Byron R. White:

With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."

[T]he critical question [is] whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family

issues and child-rearing except those dealing with the subject matter from a religious standpoint.

The film involved here no doubt dealt with a subject otherwise permissible, and its exhibition was denied solely because the film dealt with the subject from a religious standpoint. ... "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."

The District [argues] that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. ... [T]he posited fears of an Establishment Clause violation are unfounded. The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The property had repeatedly been used by a wide variety of private organizations. Under these circumstances, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. Δ



Oliver S. Thomas
General Counsel

VIEWS OF THE WALL

The Supreme Court is a lot like E.F. Hutton. When it speaks, people listen.

This year the Supreme Court had three religion cases on its agenda. Interestingly, each case involved a different clause of the Constitution.

The first, *Lamb's Chapel v. Center Moriches School District*, was a ho-hum decision though it received a great deal of publicity in the press. For several years, lower courts had been requiring public schools to allow religious groups to rent their facilities if other community groups were given similar privileges. Yet, a New York school district refused to allow a local church to show a religious film series after school hours despite a policy of granting other groups access to its facilities. The school district even conceded in oral argument that anti-religious speech would be permitted under the school's policy. The Supreme Court, in a unanimous opinion, held that the free speech clause forbade such viewpoint discrimination against religious speech.

More interesting than the holding was that six of the justices cited the much maligned decision of *Lemon v. Kurtzman* as the controlling precedent under another key constitutional provision—the establishment clause. *Lemon* requires, among other things, that government be neutral in matters of religion—neither encouraging nor discouraging religious faith. This arrangement—referred to as the separation of church and state—has come under fire in recent years particularly by some religious conservatives. Among the six justices citing *Lemon* were Chief Justice William Rehnquist and Associate Justice Byron White, two of *Lemon's* leading critics. Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas filed separate opinions complaining about their colleagues' reference to *Lemon*.

The significance of this seemingly esoteric reference is hard to overstate. It means that Mr. Jefferson's wall separating church and state has survived. We will not slide toward theocracy.

The second case, *Church of the Lukumi Babalu Aye v. City of Hialeah*, also involved discrimination—this

time against religious conduct.

When faced with the prospects of a local Santaria church that practiced animal sacrifice, the city fathers—mothers too—gerrymandered some ordinances to stamp out the practice. Seems it was OK to kill a chicken and eat it after church, but not during church. Hunting and fishing are constitutional rights in Florida. No kidding.

The Supreme Court, in another unanimous opinion, held that targeting religiously motivated conduct for special burdens violates the free exercise clause of the First Amendment.

Recall that three years ago the court in *Employment Division v. Smith* had ruled that the free exercise clause prohibits *only* laws targeting religion for special burdens. Laws of general application that have the effect of prohibiting religious exercise are no longer prohibited. Previously such laws were forbidden unless necessary to achieve a "compelling" interest of the state, such as public health or safety.

The bad news is that six of the justices affirmed their commitment to *Smith*. The court's newest justice, Clarence Thomas, also signed on to this cramped view of free exercise rights despite expressing support for traditional protections for religion in confirmation hearings. Justice David Souter, on the other hand, along with Justices Harry Blackmun and Sandra Day O'Connor filed a separate opinion indicating disagreement with *Smith*.

What does all this mean?

Lukumi is a hollow victory for religion. The court remains committed to an interpretation of the free exercise clause that guarantees nothing more than equal protection. This dumbed-down view of religious rights treats churches like General Motors and leaves them vulnerable to a host of intrusive government regulations. The decision underscores the necessity of the Religious Freedom Restoration Act, now pending in the United States Senate.

Finally, the court in *Zobrest v. Catalina Foothills School District* ruled that the establishment clause *permits* a school district to provide sign interpreters to deaf students who wish to attend parochial schools. The school

district previously had provided such interpreters to students attending public and non-sectarian private schools.

Some have said *Zobrest* opens the door for tuition vouchers and other forms of aid to parochial schools. Nonsense. The program in *Zobrest* did not defer the cost of tuition and created no inducements or incentives to attend parochial schools. To the contrary, it was a benefit to the handicapped child alone, much like a hearing aid or diagnostic testing. Moreover, there was no evidence that large numbers of disabled students would be taking their interpreters into parochial schools. In contrast, a tuition voucher system would divert substantial public funds to private and parochial institutions.

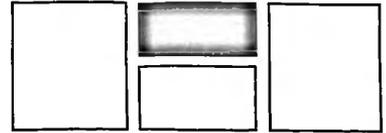
Besides, the vote in *Zobrest* was 5-4 with one of the justices in the majority being Justice White. His likely replacement, Judge Ruth Bader Ginsburg, is reported to be a strong believer in church-state separation who could very well have voted the other way. In short, the decision breaks no new ground and is likely to have little effect outside programs assisting the disabled. And remember, the court held the aid was *permitted*, not required.

The church-state action of the court receiving the most attention, however, was a non-decision.

The justices declined to review *Jones v. Clear Creek School Independent District*, the Texas graduation prayer case. Recall that just a year ago the justices voted to strike down vocal prayers at school-sponsored graduation ceremonies. Less than a year later, the Fifth Circuit Court of Appeals upheld a graduation prayer where it was 1) student led; 2) student initiated (they voted) and 3) "non-sectarian and non-proselytizing".

The appeals court couldn't have gotten it more wrong. First, substituting a student for a minister does not change the fact that this is a state-sponsored religious exercise at a public school event. Second, constitutional rights are not subject to majority vote. And third, it's no business of school officials or even judges to peruse the prayers of others to determine whether they are

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High court wraps up 1992-93 term

Wrapping up its 1992-93 term, the U.S. Supreme Court underscored government's power to restrict lottery advertisements, approved enhanced penalties for hate crimes and split sharply over the legal standard to be applied in job discrimination lawsuits.

In an opinion written by retiring Associate Justice Byron R. White, seven justices said the First Amendment's guarantee of free speech is not violated by a federal statute that bars the broadcast of lottery advertisements by television and radio stations in non-lottery states.

The law was challenged by a North Carolina radio station seeking to air Virginia lottery advertisements. The Elizabeth City, N.C., station argued that more than 90 percent of its listening audience resides in Virginia.

Lower courts sided with the station, saying that North Carolina's purpose of shielding residents from gambling was not advanced because residents of the listening area are exposed to lottery advertisements from Virginia media.

The Supreme Court reversed, saying the federal government has a substantial interest in supporting the policy of non-lottery states such as North Carolina without interfering with the policy of lottery states such as Virginia.

In a dissenting opinion joined by Associate Justice Harry A. Blackmun, Associate Justice John Paul Stevens said the government's ban in this case "is in no way proportionate" with its asserted interest in protecting the policies of non-lottery states.

Noting that 34 states plus the District of Columbia now sponsor lotteries, Stevens said hostility toward state-run lotteries "is the exception rather than the norm."

State and federal governments, Stevens wrote, "simply do not have an overriding or 'substantial' interest in seeking to discourage what virtually the entire country is embracing, and certainly not an interest that can justify a restriction on constitutionally protected speech as sweeping as the one the Court today sustains."

In another free speech case, the

Supreme Court unanimously upheld a Wisconsin law that allows stiffer punishment for certain crimes if the victim was selected because of race, religion, sexual orientation or other protected status.

The statute had been challenged by a defendant who received twice the normal two-year sentence for aggravated battery after a jury found the victim was selected because of race.

The Wisconsin Supreme Court had struck down the statute, saying it violated defendants' free speech rights.

Chief Justice William H. Rehnquist, writing for the court, said the Wisconsin statute is aimed at conduct not protected by the First Amendment.

Courts traditionally have considered a variety of factors, including a defendant's motivation, in setting sentences, Rehnquist wrote.

In a third free speech dispute, the Supreme Court declined to review a federal appeals court ruling that upheld a Postal Service regulation prohibiting political campaigning on postal property.

The appeals court said that while the ban is not content-neutral, it is a reasonable restriction and does not violate the First Amendment.

The high court's ruling in a job bias dispute provoked a strongly worded dissent from four justices. The majority insisted that to win their legal challenge, workers must prove that an employer illegally discriminated on the basis of race.

The majority opinion, written by Associate Justice Antonin Scalia, rejected a federal appeals court's conclusion that a fired halfway house employee won his case because he proved the reasons for his treatment offered by the employer proved to be false.

Scalia said the worker must show that the reason provided by the employer is false and that discrimination is the real reason.

In a dissent joined by three colleagues, Associate Justice David Souter criticized the majority for abandoning two decades of court precedent.

A tribute to Leo Pfeffer

Leo Pfeffer had no peers in the field of religion and the law. From 1948 to 1988 he served as counsel of record or "friend of the court" in every church-state case to come before the U.S. Supreme Court.

He died June 5 at the age of 82, but not before leaving his mark on the American understanding of religious freedom. His court victories were landmarks.

In *Flast v. Cohen*, he won an exception to the general rule that taxpayers may not challenge government expenditures in court. Leo managed to convince the justices that the rule should not apply when a taxpayer alleged that the expenditure amounted to an unconstitution-

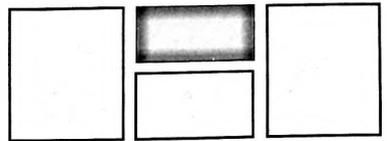
al subsidy for religion.

In *Abingdon School District v. Schemp*, Leo brought an end to the practice of state-sponsored devotions (specifically prayer and Bible reading) in public schools.

And, in *PEARL v. Harris* (later *Aguilar v. Felton*), he persuaded the court that public school employees should not be paid to teach even secular subjects in parochial schools.

Brilliant, outspoken, prickly at times, Leo Pfeffer was mentor to a generation of civil libertarians. His eight books and hundreds of former students will ensure that the great man's vision lives on.

— Oliver S. Thomas



The requirements imposed by the majority, Souter predicted, promise to be unfair and unworkable.

Interpretation of anti-discrimination laws, Souter wrote, should not "be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent."

In another discrimination case, the high court declined to review lower court decisions upholding the firing of a St. Louis auto worker for excessive absences. The worker, a Seventh Day Adventist whose religious beliefs required him not to work from sundown Friday to sundown Saturday, filed suit contending he was terminated because of his religion.

A federal appeals court said that while U.S. civil rights laws require an employer to reasonably accommodate the religious beliefs and practices of workers, accommodating Jesse Cook's requests to have Friday nights off would have infringed on other employees and resulted in an undue hardship on the employer. Δ

U.S. Senate confirms Flynn as ambassador to Vatican

The U.S. Senate recently confirmed Boston Mayor Raymond L. Flynn as the next U.S. ambassador to the Vatican.

Flynn will be the third person to fill the post since President Ronald Reagan appointed William A. Wilson in 1984 after Congress repealed a legislative ban on U.S.-Vatican ties in 1983.

Flynn's nomination by President Bill Clinton has been criticized by Baptists and others who oppose formal ties between the United States and the Holy See.

One Baptist senator, Jesse Helms, R-N.C., spoke against the post of ambassador to the Vatican, but not the nominee, himself.

"I judge him to be an intelligent and personable man ...," Helms said of Flynn. "Just the same I remain persuaded that the United States has no



J. Wesley Forsline (left), a retired American Baptist pastor from Minneapolis, addresses the Biennial Meeting of American Baptist Churches after receiving the J.M. Dawson Religious Liberty Award from BJC Executive Director James M. Dunn. Forsline, pastor of Calvary Baptist Church in Minneapolis for 18 years and former BJC chairman, is the first American Baptist and fourth person to receive the award. (Photo by Pam Parry)

business sending an ambassador to any religious entity, be it Baptist or Methodist or, as is the case here, the seat of the Catholic Church."

Helms said he wanted his opposition on the record because Flynn was confirmed by voice vote. He also put in the Congressional Record a resolution opposing diplomatic ties with the Vatican that was approved by the Southern Baptist Convention in its recent annual meeting in Houston.

The resolution acknowledged Southern Baptists' commitment to religious liberty and the separation of church and state. The resolution urged senators to reject the nomination and the president to reconsider it.

The Baptist Joint Committee, a Washington, D.C.-based religious liberty agency, led the fight against re-establishing the U.S. Vatican ties in 1983 and remains steadfast in its opposition, according to Oliver S. Thomas, BJC general counsel.

Thomas said, "This action confers special privileges on and grants special access to one particular denomination. Both President Clinton and the Senate ought to know better."

During his testimony before the Senate committee, Flynn said he intends to advance human rights, democracy and social justice as ambassador to the Holy See.

"In my opinion, and I feel strongly about it," he said, "government is society's tool for balancing the scales of social and economic justice.

"In my view, we are elected to public office to become stewards of society's nobler impulses: to create economic and social justice where injustice prevails, and to look out for the sick, the hungry, the needy and the victims of discrimination." Δ

Compiled from staff reports.

Smooth sailing

Nominee meets little opposition, offers views

The public record of Judge Ruth Bader Ginsburg indicates she has a high regard for the First Amendment, but her four days of testimony before the Senate Judiciary Committee yielded little insight beyond that written record.

The first Democratic nominee to the nation's high court in a quarter of a century, she is likely to be confirmed as the 107th justice and second woman to sit on the U.S. Supreme Court.

Asked numerous constitutional questions, including her views on the First Amendment, Ginsburg declined to give many specific answers on issues that might come before the court. But she did affirm the First Amendment's right to free speech as one of the greatest things about America.

Senators also asked her about the First Amendment's establishment clause — specifically, whether or not she supports the *Lemon* test that requires government neutrality toward religion. The test used by the high court for more than two decades to decide establishment clause cases has been under fire in recent years.

Sen. Howard Metzenbaum, D-Ohio, read a dissenting opinion by Justices Antonin Scalia and Clarence Thomas in a recent church-state case that described the *Lemon* test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."

This issue may well come before the high court in many cases, she said, declining to give her view of *Lemon*. However, she said that the two justices' criticism was disrespectful. She added that she would be the kind of justice who would not discard a time-honored test, such as *Lemon*, without a better alternative.

Ginsburg's First Amendment views are encouraging, a Baptist church-state attorney said after reviewing some of her writings as an appeals court judge.

"Judge Ginsburg appears to have an expansive view of the Bill of Rights and a keen interest in protecting individual liberties," said J. Brent Walker,

"A judge is not a politician. A judge rules in accordance with what the judge determines to be right ... in accordance with the application of law and precedent no matter what the home crowd wants."

— Judge Ruth Ginsburg



associate general counsel of the Baptist Joint Committee. "But she's not a knee-jerk ideologue. She is balanced and fair."

In a number of church-state cases decided during her term on the D.C. Circuit Court, Ginsburg has shown a commitment to religious liberty, Walker said.

"She has not hesitated to hold government accountable when it seeks to deny someone's free exercise of religion," he said. "Her Jewish heritage probably heightens her sensitivity to the rights of religious minorities."

When asked about discrimination against homosexuals, Ginsburg responded that "rank discrimination against anyone is against the tradition of the United States and is to be deplored. Rank discrimination is not part of our nation's culture. Tolerance is."

Sen. William Cohen, R-Maine, asked her to define rank discrimination.

Such discrimination is arbitrary and unrelated to a person's ability or worth but is based on the circumstances of their birth, such as race or gender.

"What about sexual orientation which at this very moment is before the court?" Cohen asked.

"I cannot say one word on that subject," she said, emphasizing she could not give any hint or preview as to how she might rule in a particular case.

"Rank discrimination is unAmerican for whatever reason," she added.

She also affirmed that abortion is a fundamental right. It is essential to a

woman's equality that her choice be controlling, Ginsburg said. If the state imposes restraints, a woman is disadvantaged because of her sex, denying her full autonomy and full equality.

Her abortion rights statement is perhaps the most definitive one made during recent confirmation hearings in which nominees have avoided disclosure of abortion views.

Ginsburg's criticism of the landmark 1973 *Roe v. Wade* decision legalizing abortion has confused some advocates on both sides of the issue. Ginsburg said abortion rights may have been stronger and more enduring if they had been secured gradually.

Admitting that she is speculating, she said that *Roe* caused a vigorous movement to relax and gave another one a single target around which to rally.

"It's a matter of speculation (but that's) my view of 'what if.'"

Ginsburg said her judicial approach is neither liberal nor conservative but is rooted in the place of the judiciary in a democratic society. Quoting former Justice Benjamin Nathan Cardozo, she said, "Justice is not to be taken by storm. She is to be wooed by slow advances."

She added, "A judge is not a politician. A judge rules in accordance with what the judge determines to be right ... in accordance with the application of law and precedent no matter what the home crowd wants."

Ginsburg's nomination has met

See GINSBURG, Page 14

'Ultimately untenable'

Justice Souter makes case to reconsider *Smith*

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Oregon, v. Smith* (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion, I do not join (the part) where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that in a case presenting the issue, the Court should re-examine the rule *Smith* declared.

A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids. ... A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.

The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality,

This article consists of excerpts of Associate Justice David Souter's concurring opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.



*"It seems to me difficult to escape the conclusion that, whatever *Smith's* virtues, they do not include a comfortable fit with settled law."*

— Justice David Souter

which as a free-exercise requirement would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. ... If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal neutrality.

The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition is not at issue in this case, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable. This case, rather, involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for the free exercise constitutionality.

We are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed ... by re-examining the *Smith* rule in the next case that would turn upon its application.

We have applied the same rigorous scrutiny to burdens on religious exercise resulting from enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, I am not persuaded. ... And the distinction *Smith* draws strikes me as ultimately untenable.

In sum, it seems to me difficult to escape the conclusion that, whatever *Smith's* virtues, they do not include a comfortable fit with settled law.

This is not the place to explore the history that a century of free exercise opinions have overlooked, and it is enough to note that, when the opportunity to re-examine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause. ... There appears to be a strong argument ... that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the state. Δ



Commission seeks Yeltsin's help

Top officials of the U.S. Commission on Security and Cooperation in Europe (Helsinki Commission) have urged President Boris Yeltsin to decline to sign a bill imposing new restrictions on religious liberty in Russia.

The Russian Parliament recently approved an amendment to Russia's 1990 law on "Freedom of Conscience and Religious Organizations" that would require foreign religious workers to become affiliated with Russian churches or gain state accreditation.

In addition to reaction from the U.S. Helsinki Commission, the religious freedom restrictions have been criticized by U.S. religious bodies, including Baptist missions officials.

The Helsinki Commission is an independent agency created by Congress to monitor and encourage compliance with the Helsinki Accords, a series of agreements among North American and Eastern and Western European nations protecting a spectrum of human rights, including religious liberty.

In a letter to Yeltsin, Sen. Dennis DeConcini, D-Ariz., chairman of the commission, and Rep. Steny Hoyer, D-Md., co-chairman, reminded Yeltsin that "freedom of religion is one of the most basic human rights" enshrined in Helsinki Accords and other international agreements.

Parliament's amendment, the letter said, "undercuts this basic freedom for the citizens of Russian and limits their options."

DeConcini and Hoyer praised the 1990 law as "a milestone in ending the anti-religious discrimination of the communist period and guaranteeing freedom of religion in Russia.

"Over the past few years decades of religious oppression have been washed away, and individuals have been permitted religious freedom, a fundamental right."

The letter calls the new restrictions a "setback" because they would deprive Russian citizens of their freedom to pursue their faith and would punish

foreign religious organizations seeking to "attend to the spiritual needs of a population that was for so long bereft of information about religion or outlets for their spiritual yearnings."

Additionally, the restrictions would deprive Russian citizens of the charitable and philanthropic benefits at a time when economic reforms are causing hardship for many citizens, the letter said.

DeConcini and Hoyer praised Yeltsin for his role in opening the political process in Russia, inviting participation by numerous political parties.

"It would be most unfortunate if this healthy and necessary pluralism ceased to apply in the religious sphere," they wrote Yeltsin.

With the breakup of the former Soviet Union, itself a participant in the Helsinki Accords, the Russian Federation and other former Soviet republics became individual signers of the Helsinki agreements.

"It is especially significant that the Helsinki Commission has spoken to the proposed change since the focus of the Helsinki Accords has been largely on the free flow of ideas and communications, including religious thought, across national boundaries," said James M. Dunn, executive director of the Baptist Joint Committee, a Washington, D.C.-based religious liberty agency.

"Baptists should be pleased that once again an active Baptist champion of religious liberty, Congressman Steny Hoyer, is in the forefront of this battle for religious freedom," he said.

Two U.S. Baptist missions officials are among religious leaders communicating to Yeltsin their concerns about the new restrictions.

"Freedom loving people everywhere urge President Boris Yeltsin to reject the proposed amendment of the Freedom of Conscience legislation," R. Keith Parks, global missions coordinator of the Cooperative Baptist Fellowship, said in a communication to Yeltsin.

"This amendment would be a rever-

sal of President Yeltsin's progressive leadership," Parks said. "It would be a return to the oppression of the communist Soviet Union. We urge this amendment to be rejected."

Don Kammerdiener, executive vice president of the Southern Baptist Foreign Mission Board, also urged Yeltsin to reject the restrictions in a statement to be sent to both Yeltsin and President Clinton.

"We are praying he (Yeltsin) will discern that religious liberty is at stake in Russia," Kammerdiener said. "These restrictive amendments to Russia's freedom of religion law are actually a step back toward the totalitarian control of the communist era."

Kammerdiener also warned that "those who seek to blow out the flames of religious liberty often discover that rather than extinguishing them, they fan them into greater intensity. We do not quake at opposition. Baptists have lived throughout our history with it." Δ

Global human rights at risk, says Amnesty report

Governments across the globe continue to put politics ahead of people, resulting in human rights catastrophes in 1992, according to an annual report recently released here by Amnesty International.

The 1993 report, released in the wake of the first United Nations World Conference on Human Rights in 25 years, chronicles carnage on a terrifying scale with thousands of men, women and children tortured, killed, imprisoned or unaccounted for in several countries.

And while giving lip service to human rights, the report says, most governments' responses to the tragedies have been marked by "a conspicuous lack of political integrity."

"Self-interest has guided governments' responses to human rights crises and has prevented or hindered



— NEWS SCAN —

action in many countries where it is desperately needed," report says.

The grim, 350-page report details human rights violations in 161 countries—the most in the peace movement's 32-year history.

Some human rights violations listed:

- Killings by official security forces occurred in 45 countries.

- More than 4,400 prisoners of conscience — those imprisoned for peaceful exercise of their basic rights — were held in 62 countries. At least 300,000 political prisoners were jailed without charge or trial in more than 60 countries.

- More than 1,500 political prisoners were incarcerated after unfair trials in about 30 countries.

- In at least 110 countries, victims were tortured or treated badly, with more than 500 people apparently dying from this treatment in some 48 countries.

- After being arrested, at least 950 people were reported to have "disappeared" in some 25 countries.

- Amnesty International opposes the death penalty and continues to work for its total abolition. The report says that 1,708 prisoners are known to have been executed in 35 countries and another 2,697 were sentenced to death in 62 countries.

- Women were victims of a range of violations in at least 45 countries.

The 1993 report also notes that the growing number of refugees reached crisis proportions. In Europe, particularly the former Yugoslavia, horrific abuses led to hundreds of thousands of people fleeing and seeking safe haven. Civil wars, religious persecutions, coups and uprisings prompted hundreds of thousands to flee countries in Asia, Africa, the Americas and the Middle East. Δ

Religious activists upset with court refugee ruling

Religious groups reacted with dismay to a recent U.S. Supreme Court ruling allowing the government to send Haitians seeking political asylum

back to their country without a hearing.

"We're very disappointed in the court ruling," said Ralston Deffenbaugh, executive director of Lutheran Immigration and Refugee Service.

"It seems we're in an atmosphere where we want to be protected from refugees rather than to protect the refugees from the dangers they face," he said.

United Methodist Board of Global Ministries officials involved in Haitian refugee issues also expressed disappointment. "Haitian refugees continue to be treated differently from others," said Lilia Fernandez, executive secretary for refugee concerns of the United Methodist Committee on Relief.

"In 1979, when the Vietnam boat people were being turned back by Thailand, the U.S. called a world conference to persuade Thailand to grant them entry," she noted. "We are not willing to do that here."

Religious groups have been deeply involved in resettling most of the 11,000 Haitian refugees who have been admitted to the United States.

The Supreme Court, in an 8-1 ruling, upheld Bush and Clinton administration policy of intercepting fleeing Haitians at sea and returning them to Haiti without asylum hearings.

Aristide's ouster in 1991 in a military coup set off a mass exodus from Haiti of mostly poor people who had been Aristide supporters.

Abraham Foxman, national director of the Anti-Defamation League, said he was disappointed in Clinton's decision to keep Bush's policy in place.

Both the Methodist and Lutheran bodies have long been on record opposing the policy of forcible return of the fleeing refugees.

Deffenbaugh said that even Justice John Paul Stevens, author of the majority opinion in the case, acknowledged the U.S. policy of interdiction "may even violate the spirit" of the United Nations treaty on refugees.

Stevens' decision turned on the fact that the Haitians were interdicted and returned to Haiti while on the high seas rather than in U.S. territorial waters. Δ

In a strong show of support for churches in Hong Kong, a worldwide organization of Lutherans has voted to hold its international meeting there in July of 1997 — the same month the British crown colony will become part of China. Leaders of the Lutheran World Federation voted to hold the federation's ninth assembly in Hong Kong, rejecting bids for Canada, Germany, Norway and Sweden. It will make the group one of the first to hold a major international meeting in Hong Kong following the political shift and mark the first time ever that the federation has held its assembly, the top policy-making body, on Asian soil. ... In the days after Guatemala's outwardly devout Christian president fired the country's Congress and suspended constitutional rights of its citizens, Roman Catholic leaders have taken a leading role in condemning the action and working to restore a fragile democratic process. President Jorge Serrano, a conservative evangelical, dissolved the Congress and Supreme Court, fired the human rights ombudsman and attorney general and suspended most individual rights guaranteed in the country's 1986 constitution. Although the actions were praised by Serrano's evangelical supporters as an anti-corruption move, they provoked widespread denunciation. ... Guatemala has long been a hostile environment for journalists, but since President Jorge Serrano suspended the constitution and fired members of Congress, the harassment has intensified. Several journalists have been targets of death threats or bullets, though so far there have been no reports of injuries. The families of several reporters have received phone calls inquiring if they need funeral services. ... Four nuns who lived in the controversial Carmelite convent at Auschwitz moved recently to another convent built across the road and off the grounds of the former death camp in Poland. Δ

Compiled from staff and news service reports.

COURT

Continued from Page 6

Confirmation hearings for Ginsburg were held July 20-23.

Ivers said the addition of Ginsburg to the court would not necessarily transform the court's thinking on *Smith*. Souter's lengthy call for reconsideration of *Smith* is encouraging, he said, but the facts remain that a working majority on the court remain comfortable with *Smith*.

"It seems to me that the court has sort of said that the bed in *Smith* is made and we're going to lie in it."

Walker agreed.

"Even though we have every reason to think Ginsburg would vote with those justices critical of *Smith*, it wouldn't alter the balance of power," he said. "It would simply restore it to its 5-4 alignment."

Walker said the court's failure to retreat from *Smith* "will be made less important by the passage of the Religious Freedom Restoration Act. It will accomplish by legislative enactment what it may take the court years to do."

McFarland said the court's Hialeah decision "makes it all the more clear why we need the Religious Freedom Restoration Act."

Hialeah was an "easy and narrow case of transparent" discrimination that provides little comfort for the large majority of instances in which government restricts religion through generally applicable laws," McFarland said. Δ

GINSBURG

Continued from Page 10

with little opposition — a stark contrast to the hearings of Justice Thomas who was confirmed amidst televised charges of sexual harassment. In fact, the record of Clinton's first nominee to the high court is so distinguished that committee members have simultaneously fended off comments that the hearings are a mere formality while talking about her confirmation almost as if it has happened.

Sen. Howell Heflin, D-Ala., said, "While it remains to be seen if this climate of goodwill will last, for now, at least, we are scaling the heights of bipartisan cooperation. Judge

Ginsburg, you deserve much of the credit for this fresh new atmosphere — the excellence of your record has itself made your nomination a source of consensus."

Ginsburg, 60, pioneered the battle for women's rights in the 1970s, leading some to herald her the "Thurgood Marshall of the women's movement." As a litigator she won five of the six women's rights cases she argued before the high court.

She has been on the U.S. Court of Appeals for the District of Columbia Circuit— referred to as the second highest court in the land — for 13 years, writing some 700 opinions.

Her nomination received the highest possible rating of the American Bar Association — a unanimous judgment by a 15-member panel that she is "well qualified" for the highest bench in the land. That ABA rating means the nominee is among the best available for appointment.

No one has ever failed to be confirmed after receiving such a high rating. Δ

IEWS

Continued from Page 7

"non-sectarian and non-proselytizing".

What religious person would be satisfied with a "non-religious" prayer anyway?

The court's refusal to hear the case does not "clear the way for students nationwide to pray and speak out about God during graduation ceremonies" as suggested by Pat Robertson's new Center for Law and Justice. It means only that the court cannot hear all of the thousands of cases that are docketed with it each year. To the contrary, less than 5 percent are granted a hearing.

Besides, isn't there something more important to fight about? Why not do something significant for religion by having a church-sponsored baccalaureate instead. Such a service could be attended by those who wish to participate, and there could even be *real* prayers. Think about it. Δ

REVIEW

Continued from Page 16

the use of Christian terminology in the political arena. Mott himself has argued that God's Reign can take place

without the visible sacred signs of God's presence. Perhaps secular signs of God's presence (the absence of religious language) in politics keep a nation of religious people from idolatry. After all, Christianity is not just another religion, but a witness to a transcendent reality that cannot be limited to the terminology of a particular religious tradition.

At the very least, political theories that use Christian terminology should be permeated with a self-imposed humility. Such an approach would be consistent with the teachings of Jesus on both justice and servanthood, encouraging political involvement without tyrannical domination in the name of religion. To that end, Mott has aspired and to a large degree, has arrived. Δ

— Patrick N. Horn
B/JC Development Associate

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* Seems to me that the sin appraisal business is reserved ultimately for One Judge.

REFLECTIONS

James M. Dunn
Executive Director



Why not let the righteous rule? If for no other reason, than that they are so damned certain they're right, that's why! And before you get exercised over my use of that word, it was intentional, not accidental, and theological, not colloquial. Let me explain.

There is ample evidence in the biblical revelation that rightness with God comes not by wisdom, see poor old Solomon; or strength, alas there's Saul; or sacrifice, hear Samuel (I Sam. 15:22). The prophets of the shared holy book of Christians, Muslims and Jews lift up a spiritual path to a proper relationship to God. "Not by might, nor by power, but by my spirit, saith the Lord of hosts" (Zec. 4:6).

Our common scriptures focus on faith as the way to religious rightness not any other scheme: not superior understanding and interpretation, not political correctness, not strenuous discipline, not meritorious service and hard work! Religious freedom rests in the confidence that we connect with God's undeserved favor by faith. And the greatest threats to religious freedom always come from those who are eager to rule as God would if God only understood the situation ... just too certain of themselves.

It was so in ancient times when the children of Israel suffered under rulers who took into their own hands the prerogatives of the Divine. It was so in the early church when the apostle Paul had to remind the followers of Christ that Habakkuk's message was still operative, "the just shall live by faith" (Hab. 2:4). Paul went on to say that actual righteousness was "from faith, to faith, (and) by faith" (Rom. 1:17) and that "it was for freedom that Christ had set us free" (Gal. 5:1).

Freedom suffers. It has ever been so with theocracies and those who push for the "rule of God" wind up trying to be Theocrats themselves. Reconstructionism in all its manifestations is so flawed.

One overwhelming mark of the Religious Right (so-called) is their lack of faith in fellow believers to interpret scripture for themselves. The self-consciously righteous possess the inerrant interpretation. A distinguishing characteristic is the certainty with which they hold their views. Their reading of scripture leaves little room for faith and therefore no space for the humility that recognizes it could be wrong. These rigidities result in a lovelessness that seems, without being too judgmental, to be foreign to compassionate religion.

There are those who take delight in setting themselves apart from the picture of human depravity found in the last half of Romans chapter 1 and assume the responsibility of identifying the 1990s counterparts of those first century sinners. Problem is: the most careful catalogers usually stop short of the scriptural punch line for Romans 1: Romans 2. Romans 2: 1, reads "Therefore thou art inexcusable ... whosoever thou art that judgest: for wherein thou judgest another, thou condemnest thyself; for thou that judgest doest the same things."

One of the fairly popular ways of trying to deal with the awful universality of human sin and weakness is to say, "We must love the sinner and hate the sin." There's a certain usefulness in that motto. It properly doesn't let us off the hook when it comes to caring for persons of all sorts no matter what their plight. Yet, it plays right into the hands of the rigid righteous by failing to take seriously enough our own limitations.

Hate is hard to handle. Once the evil genie gets out of the

bottle even "righteous indignation" tends to take on a life of its own. Hating sin may lead to killing a doctor at a clinic or setting up the suicide of a teen-ager struggling with sexuality.

The writer of the book of James warned (James 3:9ff) of our incapacity to handle both blessing and cursing. "Can a fountain send forth sweet water and bitter." Most folks, believers or not, have real difficulty understanding the incredible head of hatred that builds in the name of Christianity by those who claim to be loving sinners but hating sins. That sort of thinking can lead to "destroying the village in order to save it," as an American officer reported doing to the Vietnamese village Ben Tre in 1968.

Michael Smith makes the point in a *Columbia Missourian* commentary, "Thou shalt not hate ... theoretically." He says, "Hell hath no fury like the wrath the fundamentalists have toward homosexuals. Joe McCarthy dealt with Alger Hiss with more Christian charity."

It's so easy to love in theory and hate in fact because none of us are above sin. We are all sorry sinners simply plying different paths. One problem with "loving sinners, hating sin" is found in our own disqualification to be sin sizers. Seems to me that the sin appraisal business is reserved ultimately for One Judge.

Unqualified compassion for people just because they are created in God's image is a high standard. My major professor for the Th.D. in social ethics, T.B. Maston, insisted that the love taught by Jesus, caught from Jesus, "loves folks just because they are folks." At first I did not understand what he meant. Then when I caught on, I didn't agree. It is impossibly idealistic. I'm afraid he was right, literally afraid.

Wasn't it interesting after the recent tragedy outside Waco how we all lamented the death of the children? Officially, publicly, conversationally, it was "oh, the children; how sad; the poor children who never had a chance!" What of the others? Were they any less made like God, loved of God, valued by God?

The Jesus story suggests that he loved the "one lost sheep" more, not less; that the father had plenty of love for the prodigal son and on and on. It's pretty tough to get in the judgment business. Most of us don't qualify.

Why is the certainty possessed by the Theocrats who would institute their "godly rule" damning?

Because it diminishes the role of risky faith. It relieves one of the burden of faith and leaves religion locked in a code or a creed. When knowledge is so satisfying there's little room for faith.

Because it rules out freedom of decision, private interpretation, however, subtly. After all when you know exactly what to hate and whom to pity, you're at liberty to bless and curse out of the same mouth. You assume to see sin from God's perspective. Big leap!

Because it makes life together with other believers very difficult. Certainty, arrogance, presumption, exclusivity, judgmentalism leave little space for humility, compassion and the freedom to exercise the individual gifts of God.

Because the certainty smothering the confident righteous brings deafness, one longs to hear the voice of God. "Where the Spirit is, there is freedom." See why I say we rule out rule by the righteous? Δ



A Christian Perspective on Political Thought

Stephen Charles Mott, Oxford University Press, New York, N.Y., 1993, pp. 338.

Treachorous hazards abound for those who would offer a Christian perspective on political thought. This feat, especially of late, seems to be reserved mostly for fools or fanatics. But Stephen Charles Mott, a respected evangelical scholar and biblical ethicist who worries about the dangers of Christian non-involvement in politics, cautiously proceeds into an area where angels fear to tread. The result is neither foolish nor fanatical.

Mott makes two preliminary assertions. The first is that politics is about theology. A person's idea of good public policy, says Mott, is influenced by his or her religion as well as other factors. The second assertion is that politics is about power. Mott contends that recent abuses of power have brought us to a crisis in which the validity of power itself is at stake. Given this crisis and his two assertions about politics, Mott attempts to validate the use of political, social and economic power from a Christian perspective.

Laying the groundwork for validating the use of power, Mott stresses the importance of *intervening power* as a positive force in the life of a Christian who seeks to do justice. He does not equate power with lethal force, yet it is unclear how far he would go in using power to restore justice.

Having established the importance of using power, Mott evaluates the nature of the players and the framework for wielding power. His primary thrust at this point is the recognition that people, groups and government have enormous potential for both good and evil. These chapters are teeming

with cautions about the dangers of power, while affirming the importance of groups and the universal need for government. This permanent need for politics, says Mott, demands that power continuously be controlled and redistributed.

Mott particularly is concerned that the use of power conform to biblical notions of justice such as the assumption that a person is a creature of God with unique value. This biblical idea is the measuring principle for establishing justice in a community. In addition, he indicates that while the Bible offers numerous warnings about power, it explicitly affirms the use of power on behalf of the weak and powerless.

The most interesting aspect of the book concerns those individuals who hold to a biblical standard of justice without knowing the Bible or Christ. Mott states that the Reign of God may be present even where the sacred signs of God's presence are not visible and where God is not named. He says that a prophetic awareness is needed to recognize this presence. Such a concept has exciting implications for a pluralistic and secular society. It reminds us that God's work can be accomplished without all our God-talk and tribalisms and gives us hope for building a just society in our pluralistic nation.

The second half of Mott's book is a Christian critique of the major political theories in modern Western thought: traditional conservatism, liberalism, democracy, laissez-faire conservatism, marxist socialism and socialism. He offers a fair, balanced viewpoint with an eye for both strengths and weaknesses and takes what is best about each theory and shows how it relates to or can be transformed by a Christian perspective. For example, he affirms the realistic appraisal of human nature offered by traditional conservatism and the commitment of liberalism to the dignity of the individual.

Mott's book profoundly challenges those of us who are suspicious of any attempt to link Christianity with a particular way of doing politics. The responsibility for helping to create a just community means that a Christian must not avoid involvement in the political process. He is quick to indicate many of the potential pitfalls, though his teetering on the edge of them will make a strict separationist uncomfortable.

Almost all the potential pitfalls of Christian involvement in politics concern this fundamental question: Is ultimacy (the will of God) ascribed to that which is not ultimate?

Mott notes in the introduction his heavy dependence upon the work of Paul Tillich. It is not insignificant that Tillich is among the most vociferous theologians in regard to the danger of giving ultimacy to that which is not of ultimate concern, a form of idolatry that is particularly prevalent among political systems. Christian perspectives on political thought are doubly susceptible to this idolatry because they attempt to combine the ultimate concerns of Christianity, and the accompanying terminology, with the means of politics. When this happens, the language that one chooses to use becomes an important element in the approach and effectiveness.

The nagging problem of language assails this book, though Mott does not deal directly with it. How does one avoid idolatry when using language about ultimate concern (the will of God) in conjunction with a particular political theory that is not itself ultimate? Even though Mott is a church-state separationist, it is apparent that he is quite comfortable with the use of religious language in politics. Citizens should be free to use such language, but perhaps we are better off without

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