NEWSLETTER OF THE BAPTIST JOINT COMMITTEE

PROCLAIM LIBERTY

# REPORT from the CAPITAL

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## NEWS MAKERS

**Judge Jose M. Lopez** ruled June 29 that District of Columbia voters may have the opportunity to decide whether or not to allow prayer at public school functions. The initiative, challenged by People For the American Way and the American Civil Liberties Union, would permit non-sectarian, non-proselytizing, student-led prayer. While the judge did not rule the initiative constitutional, he said, "In exercising its discretion the Court must be mindful of not interfering with the legislative process."

**Sen. Edward M. Kennedy**, D-Mass., and **Rep. Gerry Studds**, D-Mass, introduced June 23 legislation designed to prohibit workplace discrimination based on sexual orientation that includes an exemption for religious organizations. The bill's exemption covers religious corporations, associations, societies and educational institutions. Taxable, for-profit activities are the only activities not covered by the religious exemption. The Baptist Joint Committee takes no position on the merits of the bill, said **J. Brent Walker**, BJC general counsel, but will remain involved to ensure the exemption for religious organizations stays in the bill.

**Arthur J. Kropp**, president of People For the American Way, called "offensive and untruthful" a recent advertisement in *USA Today* placed by **Pat Robertson's** legal organization, The American Center for Law and Justice. Kropp's organization said the ad compares church-state separation with the Berlin Wall and asserts that "in America, there is a new wall of oppression and intolerance," Kropp called on the ACLJ to "stop using rhetoric clearly designed to fan fears." Δ

# *High court to states: Maintain neutrality*

New York lawmakers crossed the line separating church and state when they established a special public school district for a religious community, the U.S. Supreme Court ruled June 27.

The 6-3 ruling struck down the school district formed to provide special education for students in the village of Kiryas Joel, whose 8,500 inhabitants are members of the Satmar Hasidic Jewish sect.

New York created the new district encompassing Kiryas Joel after Hasidic parents found that their children — accustomed to the insular lifestyle of the Hasidic village — were traumatized by attending classes in the Monroe-Woodbury public school system.

***States must "pursue a course of 'neutrality' toward religion."***

**Justice David Souter**

The high court said New York could have provided special education in a number of permissible ways, but not the way it chose.

Six justices agreed that the district violated the church-state separation required by the First Amendment but did not all agree about why.

The majority opinion written by Justice David Souter said the New York legislature allocated political power on a religious basis and did not ensure governmental impartiality toward religion.

The First Amendment bars government from enacting laws that either establish religion or prohibit its free exercise.

"A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, ... favoring neither one religion over others nor religious adherents collectively over nonadherents," Souter wrote, citing past court rulings.

Souter said the New York legislature had crossed the line from permissible accommodation of religion to impermissible establishment of religion.

The Constitution permits states to accommodate religious needs by lifting special burdens but "accommodation is not a principle without limits," Souter wrote.

The Supreme Court, he wrote, has "never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation."

Souter's opinion was joined by Justices Harry A. Blackmun, John Paul Stevens and Ruth Bader Ginsburg and in most parts by Justice Sandra Day O'Connor.

Justice Anthony Kennedy wrote separately to say he would invalidate the district solely because "New York created it by drawing political boundaries on the basis of religion."

Three dissenting justices, — Chief Justice William H. Rehnquist, along with Justices Antonin Scalia and Clarence Thomas — would have upheld the school district. Δ

**See Related Articles, Pages 2 & 4**

## Baptists react to decision on Hasidic school district

The U.S. Supreme Court's June 27 ruling in a dispute over New York's creation of a special public school district for a Hasidic Jewish community represents a major victory for religious freedom, according to two Baptist church-state specialists.

A 6-3 high court majority ruled June 27 that New York's establishment of a public school district to provide special education for students in the all-Hasidic village of Kiryas Joel violated the church-state separation required by the First Amendment.

The court majority said the creation of the district encompassing Kiryas Joel crossed the line from permissible accommodation of religion to impermissible establishment of religion.

"The 6-3 decision is a victory for religious liberty and its essential shield, the separation of church and state," said James M. Dunn, executive director of the Baptist Joint Committee.

Dunn's agency had joined other religious and civil liberties groups in asking the court to maintain its stance requiring governmental neutrality toward religion and to reject appeals to abandon the neutrality embodied in its long-held but controversial *Lemon* test.

"It is a ringing reaffirmation of the principle that government cannot favor one religion over another religion or religion over irreligion," Dunn said. "The basic elements of the *Lemon* test stand."

*Lemon* requires government actions to have a secular purpose, neither advance nor inhibit religion and avoid excessive entanglement with religion.

BJC General Counsel J. Brent Walker said the ruling supports governmental neutrality toward religion.

"Giving a religious group its own public school district to run is hardly neutral," he said. "Enforcing the Establishment Clause here is not hostile, particularly since the village's students can be accommodated in constitutionally permissible ways."

The courts' decision to review this case prompted speculation that justices might use it to reconsider *Lemon* and redefine the wall separating church and state. But the high court did not specifically address Kiryas Joel's request to reconsider *Lemon*.

While *Lemon* was not directly applied in the majority opinion, Walker noted that Justice David Souter based his reasoning on a previous case that relied on *Lemon*.

"But *Lemon* is only a guide, not a magic formula," he said. "I'm more interested in enforcing the neutrality principle embodied in *Lemon* than insisting upon *Lemon* being cited as specific precedent. By whatever name, the Court came out right."

Walker said the BJC brief argued that the court did not have to use *Lemon* to decide the case.

"The school district was clearly unconstitutional under core Establishment Clause principles," he said. "Employing *Lemon* to decide this case would be like using a jeweler's scale to weigh a truckload of gravel." Δ

## Congressional measure targets EEOC guidelines

The U.S. House of Representatives overwhelmingly approved June 27 a measure that would prevent the Equal Employment Opportunity Commission from implementing guidelines on religious harassment in the workplace as proposed.

But the move has little practical value, according to a church-state specialist.

J. Brent Walker, general counsel of the Baptist Joint Committee, said the measure is "more a statement of principle than anything else. As a practical matter, the EEOC has no intention of promulgating the original guidelines. They will be changed to some extent."

An amendment, offered by Reps. Charles Taylor, R-N.C., and Frank Wolf, R-Va., was attached to a bill providing appropriations for various federal agencies, including EEOC. It stipulates that none of the funds available in the bill may be used to implement the guidelines as proposed. Those guidelines are in the process of being changed so the amendment really accomplishes nothing, according to Walker.

"We continue to believe the religion guidelines should be improved but not removed," he said.

The House approved the amendment by a 366 to 37 vote. Δ

## Supreme Court rejects First Amendment cases

On the same day it decided the most significant church-state case of the 1993-94 term, the U.S. Supreme Court declined to review three other disputes raising First Amendment questions.

Without comment, the high court refused June 27 to review lower court rulings that:

— upheld a Des Plaines, Ill., zoning law that permits churches to operate day-care centers in residential zones without obtaining special use permits;

— refused to exempt an Oklahoma Baptist church's boarding academy from state licensing requirements; and

— dismissed a Louisiana man's objection to including the words "so help me God" in a state bar admission ceremony.

That day, the high court struck down New York's creation of a public school district to provide special education for a Hasidic Jewish community.

The Des Plaines zoning ordinance left standing was challenged by a day-care operator who was denied a special-use permit and contended that the ordinance's treatment of churches violated the First Amendment's ban on governmental establishment of religion.

Applying a three-part legal standard, known as the *Lemon* test, the 7th U.S. Circuit Court of Appeals upheld the law. Under *Lemon*, the ordinance had to have secular purpose, neither advance nor inhibit religion and avoid excessive entanglement with religion.

The appeals court said the ordinance served the secular purpose of minimizing governmental meddling in religious affairs and is permissible as long as the church-run day-care centers are nonprofit operations.

In the Oklahoma case, Calvary Baptist Church in Pittsburg County had sought to have its Christian boarding academy exempted from state licensing requirements. A lower court sided with the church, but a state appeals court said a state law that exempts part-time and day-care facilities operated for educational purposes does not apply to full-time boarding facilities.

In the Louisiana case, the 5th U.S. Circuit Court of Appeals dismissed the challenge to the religious oath as moot because the plaintiff had been admitted to the bar. Δ

## PEW, PULPIT & the LAW

**Q:** *I've heard that churches, like other charities, can't be sued. Is this true?*

**A:** Historically, the doctrine of charitable immunity provided almost all benevolent and religious organizations with protection from civil claims filed against it. This is no longer true in the majority of states. Today, many states view charitable immunity as archaic and inappropriate, having completely removed any remnants of the doctrine, and permit churches to be sued like anyone else. Other states have maintained vestiges of the doctrine, providing immunity in very limited circumstances. And only a handful have kept charitable immunity in toto. The concept of charitable immunity as it applies to churches will be discussed in an upcoming "Views of the Wall." As always, please consult an attorney with specific questions about your state.

— **Daniel Weiss Jr.**



REFLECTIONS

# How to mix religion and politics


**JAMES M. DUNN**
**Executive Director**


The separation of church and state does not require separation of religion from politics.

Every authentic act of worship is pregnant with political possibilities. Every true theological belief has public policy implications. Every ethical outgrowth of religious experience makes demands on stewardship of influence in a democracy.

In fact, part of the reason for a clear-cut distinction between religious and political institutions is to allow the church to speak to the state prophetically. Religion rightly resists the totalitarian and theocratic tendencies of government. Organized religion dare not allow herself to be held in a bear hug by politics. People of faith need swinging room to act on principalities and powers.

Yep, religion and politics do mix. Have to!

Yet, how does the mixing it up take place? There's the rub.

We learn by negative example. One sees how not to relate religion and politics in the Falwell model. The only word accurate in the name of the Rev. Jerry Falwell's "Old Time Gospel Hour" is the word "hour." If some poor lost soul should tune in hoping to hear a word of amazing grace, she would go away hungry. It is political propaganda, little if any gospel.

A few years ago Jerry Falwell was pictured in *Newsweek* holding up a copy of *Politics: A Guidebook for Christians*, edited by yours truly. Alas, for any part I may have had in energizing and engaging Mr. Falwell in politics I repent.

Yes, Christians should be in politics up to their gills . . .

but not in a politics of personal destruction. The spirit of engagement, the attitude, the tone of voice are important when a person of faith practices politics. A measure of humility, honesty, helpfulness and honor for the person, the process and the office are essential marks of any Christian critic of a public official. Conducting an overt hate campaign against the president of the United States is out of bounds. Falwell's "Circle of Power" video implies that President Clinton is complicit in murder. As E.J. Dionne Jr. says, "Falwell is apparently willing to spread sleaze but not to take responsibility for it." The scandal entrepreneurs offer no evidence for any of their accusations.

but not in a politics that makes political doctrine a test of faith. Rep. Vic Fazio takes a stab at defining this problem saying no one "should have a corner on defining religion and politics in the same breath." That phrase focuses on human fallibility, always an appropriate exercise. Carl F.H. Henry has held for years that there is "no direct route from the Bible to the ballot box."

One apologist for the religious right insists that these religious extremists simply stand where "most Americans stood 30 years ago." He may be right. Maybe that's the problem.

It is dangerous to elevate political platforms to the level of biblical ethics.

but not in a politics of irresponsibility. The moment that a religious figure crosses the line between biblical exposition, interpretation and application and plunges into the political fray, he should expect at that very moment to be open to criticism. If any religiously motivated citizen cannot stand the heat of rigorous examination of his motives, proposals and arguments perhaps he or she should stay out of the kitchen. It is downright silly to hear these folks, who are themselves so ready to libel by label, howling "anti-Christian bigotry."

but not in a politics of balkanization. We have rejected the European model of "Christian parties." And for good reason. Examine the way they work in Italy or Germany. Look at religion-driven politics in Northern Ireland.

No, there is certain failure of faith by those who would do by political power what they have despaired of being done by the power of God. The Divine Spirit alone can bring about much that Christians seek and only by the free and faithful followers whom heaven desires.

Christians should be involved in politics, but with Christian goals, methods, attitudes . . . and preparation. We should do our homework, speak out in a Christian tone of voice and be prepared to live with the consequences of joining the debate. Δ

The question is whether the Act creating the separate school district violates the Establishment Clause of the First Amendment, binding on the States through the Fourteenth Amendment. Because this unusual act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, we hold that it violates the prohibition against establishment.

... "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion," ... favoring neither one religion over others nor religious adherents collectively over nonadherents.

... Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. Not even the special needs of children in this community can explain the legislature's unusual Act, for the State could have responded to the concerns of the Satmar parents without implicating the Establishment Clause, as we explain in some detail further on. We therefore find the legislature's Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden "fusion of governmental and religious functions."

... In finding that (the Act) violates the requirement of governmental neutrality by extending the benefit of a special franchise, we do not deny that the Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"

... But accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance.

... In this case we are clearly constrained to conclude that the statute before us fails the test of neutrality. It delegates a power this court has said "ranks at the very apex of the function of a State, ... to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism. It therefore crosses the line from permissible accommodation to impermissible establishment.

**Justice David Souter**
Majority Opinion
*Board of Education of Kiryas Joel Village School District v. Grumet*
June 27, 1994

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