



SOUTHERN BAPTIST HISTORICAL
LIBRARY AND ARCHIVES
Historical Commission, SBC
Nashville, Tennessee

REPORT from the CAPITAL

Volume 49, Number 15

July 26, 1994

NEWS MAKERS

Judge Stephen Breyer won the unanimous endorsement of the Senate Judiciary Committee July 19 to become the 108th justice of the U.S. Supreme Court. Breyer, chief judge of the U.S. Court of Appeals for the First Circuit, would replace retired Justice Harry A. Blackmun if confirmed by the Senate. During confirmation hearings, Breyer expressed a keen desire to make the "law work for people" and endorsed a wall of separation between church and state. Sen. Orrin Hatch, R-Utah, said that Breyer "has distinguished himself on the U.S. Court of Appeals" and "has earned a reputation as a moderate pragmatist." Hatch said Breyer's testimony before the committee demonstrated a commitment to the free exercise of religion and a pragmatic approach to church-state separation. Sen. Arlen Specter, R-Pa., said he was encouraged by Breyer's testimony embracing the wall of separation between church and state, which he called vital in today's society.

Sen. Daniel K. Inouye, D-Hawaii, recently reintroduced a bill designed to protect Native Americans' free exercise of religion. Since the initial bill was introduced last year, Inouye said hearings and meetings have helped to refine the measure. The Native American Cultural Protection and Free Exercise of Religion Act (S. 2269) would provide protection for sacred sites, the sacramental use of peyote, and the use of eagle feathers and plants for religious ceremonial purposes. The bill also is designed to ensure that Native American prisoners have the same right to practice their religion as other inmates. The Baptist Joint Committee adopted a resolution supporting the original bill. A

Gore, religious leaders affirm religious liberty

Vice President Al Gore joined a diverse group of religious and civil liberties leaders July 14 in affirming that both church-state separation and free exercise of religion are indispensable parts of the American experiment in religious liberty.

The vice president commended the group for its joint statement reaffirming religious liberty.

The "Shared Vision" statement was signed by more than 80 individuals and six religious and civil liberties organizations. James M. Dunn of the Baptist Joint Committee, A. James Rudin of the American Jewish Committee and Oliver S. Thomas of the National Council of Churches of Christ presented the statement to Gore.

The statement rejects both the view that the nation's Founders did not intend to separate church and state and the view that religion has a small or no role to play in public life.

"As individuals and organizations committed to religious liberty as well as a robust role for religion in public life, we share a different vision about the future: a vision that avoids the theocratic tendencies on one side and the hostility toward religion associated with the other," the statement declares.

Gore told about 50 religious and civil liberties leaders that the statement "reaches to the heart of the American people and indeed to the soul of the entire American experiment."

The statement "recognizes the dangers of state intrusion, intervention and involvement in religious institutions,"

Gore said. "By the same token, you know that government must allow the free exercise of religion to flourish."

Gore said church-state separation and religious liberty have been good for America.

It's no accident, he said, that the United States is "by far the most religious of the industrial democracies around the world, with rates of religious affiliation, of belief in the Divinity that are five and 10 times higher among our population than in many European countries."

"I don't believe it's an accident that we have that distinction, on the one hand, and simultaneously the First Amendment protections and tradition of tolerance on the other hand."

The statement encourages an active role for religious people in government and politics but

discourages making religious affiliation a campaign issue, invoking divine authority for policies and platforms and characterizing political opponents as ungodly — sentiments echoed by Gore.

"I'm so troubled, always, when I see people who are sure that they know exactly what God's plan for the world is, what political party God belongs to, what God's ideology is, what God's position on particular cases and controversies might be," he said. "They seem to know where God stands on term limits, the balanced budget amendment and farm price supports," Gore said. A



Gore: America's religious vitality no accident

Religious liberty principles cited at press conference

Religious leaders at a July 14 press conference affirmed the right and obligation of religious people to enter public life but to do so with humility, never claiming to know the "absolute will of God" in public policy.

The speakers — including Baptist Joint Committee board member Phil Strickland of Texas — announced the release of a "Shared Vision" statement signed by more than 80 individuals and six religious and civil liberties organizations. The statement, presented later that day to Vice President Al Gore, affirms church-state separation and the free exercise of religion as essential to the American experiment of religious liberty.

Strickland, director of the Christian Life Commission, Baptist General Convention of Texas, said that nothing could be more natural for Baptists than to reaffirm support of religious liberty.

"For more than 300 years Baptists have been in the thick of the fight to protect our God-given religious liberty and to insist upon a wall of separation between church and state to help guard that liberty," he said. "Baptists, like many in this room, have felt the sting of persecution that inevitably results when government gets into the business of promoting or hindering religion."

He added, "However, even some

Baptists have on occasion forgotten their history as they covet government cash, ask government to sponsor religious exercises in the schools or fail to cry 'foul' when government interferes with someone else's right to practice their religion."

But Baptists stand with others to announce the "Shared Vision" for religious liberty, he said, calling it a "positive, pro-active statement to guide our thinking and conduct us into the 21st century."

Strickland said the signers of the statement believe both religion clauses must be rigorously enforced on behalf of the weak and strong in society. They also envision public schools that teach about religion without seeking to inculcate sectarian beliefs.

"We support public money being used solely for public purposes ...," he said. "We are committed to free churches, synagogues, temples and mosques — free to worship and practice their faith without governmental interference."

"And we are committed to a free state — where government is never used to force the God of the majority on the consciences of the minority."

Joan Brown Campbell, general secretary of the National Council of Churches of Christ, said, "We are here because we recognize that true religious freedom is always a risk, always an experiment. And because it is an experiment, naysayers fear that faith

itself will falter. But it will not — between the theocrats of the right and the nihilists of the left, there are multitudes of good citizens. Multitudes who appreciate the role religion plays as the salt, light and heaven of our society, yet who do not seek to impose their faith on others through the power of the state."

She added, "We envision a nation where God is worshiped but Caesar is not. Where the state secures peace and stability but never aspires to holiness. A place of liberty and justice for all — not a select few, be they Christian, Judeo-Christian or otherwise."

Alexander Schindler, president of the Union of American Hebrew Congregations, said the statement expressed the views of the majority of Jews. For American Jews, church-state separation is a "gut issue," he said.

"Everywhere else in our wandering through the ages we have suffered persecution. Never here. ... This is why we prize the First Amendment as the cornerstone of our liberties in this land," Schindler said.

A. James Rudin, director of the inter-religious relations department of the American Jewish Committee, said that religious liberty is "the most fevered issue of the 1990s."

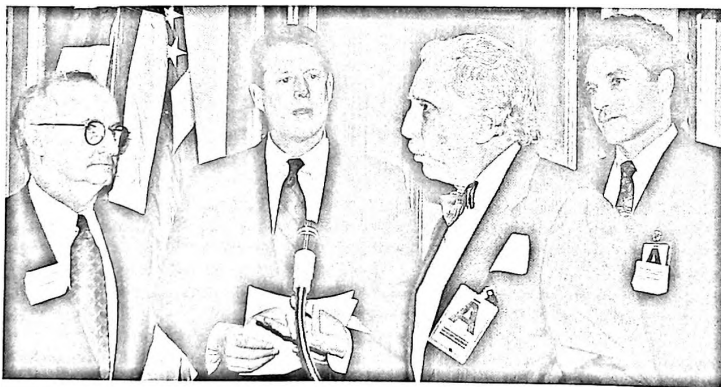
"I predict for the rest of this decade the issues that are raised in 'A Shared Vision' will in fact be the most fevered, the most debated and most important domestic issue here in the American Republic."

Participants said the statement's principles have broad support among the religious groups they represent.

"As I look at our history of speaking to this issue, you would find some statements that would be incompatible but for the most part our history, and I think our people, would be very comfortable and supportive of the principles articulated in this document," Strickland said.

James M. Dunn, BJC executive director, said the statement is not a reaction to a document signed earlier this year by Catholic and evangelical leaders. Shared Vision was about five years in the making, he said, and "has nothing to do with a responsive modality."

Dunn said the supporters plan to use it as an educational tool within their respective faith groups. Δ



BJC Executive Director James M. Dunn introduces the "Shared Vision" statement after presenting it to Vice President Al Gore. Also addressing the statement at the Old Executive Office Building were Rabbi A. James Rudin (left) of the American of Jewish Committee and Oliver S. Thomas (right) of the National Council of Churches of Christ.

A SHARED VISION

RELIGIOUS LIBERTY IN THE 21ST CENTURY

We join in issuing this statement at a time when America has reaffirmed its commitment to religious freedom through the Religious Freedom Restoration Act and is again recognizing the vital moral and spiritual role religion plays in both our public and private lives.

Yet, at the same time, we are confronted by two strikingly different views about the proper role of religion in public life. One portrays America as a Christian or Judeo-Christian nation. This view wrongly suggests that the Founders never meant to separate the institutions of church and state or to prohibit the establishment of religion. Such a view is historically inaccurate and endangers our common welfare because it uses religion to divide rather than unite the American people. This view of religion in public life, inaccurate and dangerous as it is, has gained credence in reaction to another inaccurate and equally damaging view of the proper role of religion in public life. The other view sees religion and religious groups as having a minimal role in — perhaps even being barred from — the vital public discourses we carry on as a democracy. It sees faith-based involvement in the democratic process as violating the principle of church-state separation. It regards religious arguments as naive and seeks to embarrass any who profess religious motivation for their public positions on political issues. This view denies our country the powerful moral guidance of our religious heritage and discourages many of our brightest and most committed citizens from actively participating in our public life.

As individuals and organizations committed to religious liberty as well as a robust role for religion in public life, we share a different vision about the future: a vision that avoids both the theocratic tendencies on one side and the hostility toward religion associated with the other. Now more than ever, the United States must maintain its commitment to freedom for persons of all faiths or none. We are beset by religious and ethnic conflict abroad. Exploding pluralism challenges us at home. At such a time, we must reaffirm our dedication to providing what Roger Williams called a “haven

for the cause of conscience.” We agree with Williams that conscience is best guarded by maintaining a healthy distance between the institutions of religion and government.

But it is not enough to reaffirm these truths. We must incorporate them into our private lives as well as into our public policies. This statement is a call to action. We must apply these principles in practical ways whether we are electing a school board member or the President, whether we are debating aid to parochial schools or prayer in public schools.

The Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

The first sixteen words of the First Amendment form the backbone of the American experiment. Together they guarantee religious liberty for Americans of every faith as well as for those who affirm no faith at all. A profound belief in the free exercise of religion motivated the decision of the Founders to disestablish religion in the new nation. The connecting link between the two clauses is freedom of conscience.

While not divorcing religion from public life, the establishment clause separates the institutions of church and state. Grounded in the belief that (1) government should serve all citizens regardless of their religious belief or disbelief, and (2) authentic faith must be free and voluntary, the separation of church and state has been good for religion. This “lively experiment” has allowed American religions to flourish with unparalleled strength and diversity. The religious and ethnic diversity of the United States makes the constitutional prohibition against laws respecting an establishment of religion more important than ever. No one wants government taking sides against their religion in favor of someone else’s. That principle cuts both ways. In matters of faith, government must not take sides at all.

Critics of the establishment clause argue that the phrase “separation of church and state” does not appear in the Constitution and that society cannot sur-

vive without government support of religion. As to the former, they are correct. "Separation of church and state," like "separation of powers," "fair trial" or even "religious freedom," does not appear in the Constitution. Yet, Article VI's prohibition against religious tests for public office and the establishment clause's prohibition against laws even "respecting" an establishment of religion make clear that government is to be neutral in matters of faith. As to the latter, government support has proven a hindrance, not a help, to religion. History is replete with wrecked governments and wrecked churches brought down by the unhealthy union of church and state.

Some suggest that government support for religion should be permitted as long as no religion is favored over another and no citizen is forced to participate. The weight of the evidence suggests the Framers considered and rejected this approach. Even benign, non-coercive endorsements of religion make outsiders of those who are nonadherents of the prevailing faith. A proper interpretation of the establishment clause ensures that one's standing in the political community is not affected by one's standing in the religious community.

In practical terms, the separation of church and state requires that government refrain from promoting or inhibiting religion. Neutrality — by which religion is accommodated but never advocated by the state — should be the touchstone for interpreting both religion clauses.

The free exercise clause was designed to safeguard the inalienable right of Americans to believe, worship and practice any faith we may choose without government interference. Subsumed in this right is the freedom to change our religious beliefs as we may see fit and to live according to our individual and communal beliefs. All faiths must be free to order their own internal affairs without governmental intrusion. No faith can ever be prohibited, penalized or declared heretical by the government. All must be equally secure, minority as well as majority.

Like most constitutional rights, the free exercise of religion is not absolute. It cannot extend to practices that harm other human beings or threaten public safety and welfare. Absent some compelling reason, however, government should not be able to restrict religious exercise.

The free exercise clause can be only as vital and vibrant as the spirit of liberty abroad in the land. If that spirit is squelched or submerged, for whatever reason, the rights and freedoms of all citizens are at risk. In the words of the 1988 Williamsburg Charter: "A right for one is a right for another — and a responsibility for all."

Unfortunately, the Supreme Court's enforcement of the free exercise clause has been uneven over the years. While the Court has frequently reaffirmed the value of full and robust religious expression, it has occasionally failed to protect these important principles when faced with claims by unpopular or politically weak groups. For some, the protections promised under the free exercise clause have been all

too fleeting.

Tragically, the Supreme Court's decision in *Employment Division v. Smith* (1990) weakened the free exercise clause even further. Describing the traditional legal protections for religion as a "luxury," the Court rolled back a half century of legal precedent. After *Smith*, the government in most cases was no longer required to demonstrate a compelling reason for restricting religious exercise.

Smith has been applied in dozens of free exercise cases around the country. The regrettable — though not unexpected — result has been that the citizen has lost almost every one of these cases. Orthodox Jews and Hmongs have been subjected to mandatory autopsies, violating their deeply held religious beliefs. Evangelical churches have been zoned out of residential areas, severely impeding their ability to worship. Churches have been subjected to historical landmarking laws as local governments attempted to dictate the configuration of their buildings. The rights of prisoners to freely exercise their religion have been routinely denied. After *Smith*, our "First Liberty" was not only no longer first, it was barely a liberty.

We applaud the passage of the Religious Freedom Restoration Act, which restores the protections for religious liberty stripped away by *Smith*. Thankfully, our system of checks and balances allows Congress to enact laws providing more protection for the exercise of religion than was recognized by the Supreme Court in *Smith*. Still, we long for the day when the Court again recognizes the exercise of religion as a fundamental constitutional right entitled to the highest level of legal protection.

Religion and Politics

As concerned citizens, religious people should and do seek public office. As a conscience in society, religious organizations should and do seek to influence public policy. Separation of church and state does not mean the separation of religion and politics or, for that matter, of God and government.

While religious groups serve an important role in holding government accountable for its actions, that role can be maintained only when religion maintains a healthy distance from government.

Any attempt at affecting public policy should be tempered by a tolerance for differing views and a recognition that a multiplicity of voices is crucial for the success of a democratic society. Neither church nor state may control, dominate or subjugate the other. Article VI of the Constitution wisely provides that no religious test shall be required for public office. Portraying America as a "Christian nation" violates the American commitment to both democratic government and religious liberty. Where religion is concerned, no person should be made to feel an outcast in his or her own land.

Accordingly, we must:

- Defend the right of religious individuals and organizations to speak, debate and advocate openly in the public square;
- Stand firm by the principle that government

action with a primary purpose or effect that advances religion violates the separation of church and state.

Similarly, we should:

- Discourage efforts to make a candidate's religious affiliation or nonaffiliation a campaign issue;
- Discourage candidates from invoking divine authority for their policies and platforms or from characterizing their opponents as sinful or ungodly.

Religion and Public Education

One of the most critical issues facing our country is how best to educate our children. While recognizing the usefulness of private education, we affirm the particular importance of the public school system in accomplishing that task. Public schools belong to all citizens regardless of their faith perspectives. Public schools have the difficult task of equipping children for citizenship and transmitting to them our civic values.

The primary goal of the public schools is the education of children in an increasingly diverse society, not to provide a captive audience for the transmission of sectarian values. As a result, schools must not allow the public trust to be manipulated for religious goals. Schools are not to sponsor any religious exercises or to allow religious ceremonies at school-directed events. Public schools must remain neutral toward religion. As agents of the state, they must not promote or endorse any religion, or even religion in general. Nevertheless, public schools should accommodate the religious rights of students when that can be done without disrupting the learning process or interfering with the rights of others.

Applying these general principles, schools may teach about religion so long as it is accomplished from an academic, objective perspective that eschews all forms of proselytizing. Teaching about religion should occur when the subject naturally arises in the curriculum. We oppose interjecting religious beliefs into the curriculum at inappropriate points, such as attempting to teach creationism in biology class under the guise of science. Schools may not sponsor or encourage prayer or other devotional activities in the public classroom. They should not take sides in religious disputes or suggest one religious tradition is superior to others. They should not teach in a way that undermines the student's sense of citizenship because he or she does not conform to a prescribed religious norm.

Nevertheless, schools should accommodate the free exercise rights of students. Private devotion or religious exercise on the part of the students, including private prayer, Bible reading or other religious activities, is permitted so long as they do not interfere with other students' rights or with the educational process. Schools should not discourage students from discussing their faith with other students except for reasonable time, place and manner restrictions. While some of us disagree on the advisability of doing so, schools are generally free, under Supreme Court precedent, to permit a voluntary student religious group to meet and to allow release time programs off

campus for religious studies without academic credit.

In sum, public schools should not advance religion, but should accommodate the free exercise of religion. They may not confer a benefit on religion but may lift governmentally imposed burdens on the free exercise of religion. They may not promote a religious perspective but may protect the religious exercise of students.

Aid to Religious Institutions

We agree with Jefferson and Madison that it is wrong to tax citizens to support the teaching of religion. In the words of the Virginia Statute for Establishing Religious Freedom: "No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever" Therefore, we oppose direct or indirect government funding of parochial schools at primary and secondary levels and of pervasively sectarian colleges and universities.

On the other hand, government aid to certain social service programs sponsored by religious organizations, such as homes for children and the elderly and hospitals, enjoys a long history. Aid to religious institutions that provide manifestly secular services (e.g., hospitals) does not pose a threat to religious liberty, if services are provided on a nondiscriminatory basis. However, if an institution indoctrinates its clients with religion, or discriminates based on religion in its admission policies, it should be deemed ineligible for government aid.

Some services are at the margins between education and social services and may require safeguards to protect church-state separation. Other questions arise when funded social services (e.g., foster homes or homes for the elderly) are residential in nature. In such cases government must arrange for residents' religious needs to be met, where possible, through access to existing ministries in the community.

Several broad and unifying principles should be applied in determining when it is appropriate for religious social services providers to receive government aid. Reference should be made to the types of institutions and services involved; the constituency to whom the services are provided; and the adequacy of church-state safeguards. Further, government's partnership with religious institutions for purposes of facilitating the availability of social services should recognize the nonfunded programs in those institutions need not operate under the same standards as publicly funded programs. Religious institutions receiving governmental funds for secular programs should be permitted, consistent with constitutional principles, to maintain their religious identities.

Conclusion

Our heritage of religious liberty and church-state separation must be reaffirmed. The increasing religious pluralism in our country beckons us to turn this heritage into a legacy. The aspirations of the Founders — that religion should involve a voluntary response and that government should remain neutral toward religion — must be converted into practical reality.

Daniel Carroll of Maryland said it well over 200 years ago when he declared that "the rights of conscience are ... of particular delicacy and will little bear the gentlest touch of governmental hand." Carroll's lofty

view of conscience captures our understanding of our past and guides our vision of the future. We commit ourselves to making this ideal a reality as we approach the 21st Century. Δ

Signers

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Shared principles

I agree that the New York statute under review violates the Establishment Clause of the First Amendment. I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman*. The opinion of the Court relies upon several decisions, including *Larkin v. Grendel's Den, Inc.*, that explicitly rested on the criteria set forth in *Lemon*. Indeed, the two principles on which the opinion bases its conclusion that the legislative act is constitutionally invalid essentially are the second and third *Lemon* criteria. ... I remain convinced of the general validity of the basic principles stated in *Lemon*, which have guided this Court's Establishment Clause decisions in over 30 cases.

Justice Harry A. Blackmun
Concurring Opinion
Board of Education of Kiryas Joel Village School District v. Grumet



J. BRENT WALKER
General Counsel

the American Jewish Committee. Later, the National Council of Churches of Christ became a third central participant. In time, numerous organizations and individuals joined in the project.

"A Shared Vision" is a statement of principle on church-state relations. It supports the argument that religious values and speech play critical roles in public life and recognizes the need for the institutional and functional separation of church and state. It accords the First Amendment's Free Exercise and Establishment clauses equal weight. Both of these clauses exist side by side in the service of religious liberty. We say "no" to those who want to enforce either clause to the detriment of the other or to compromise both clauses to promote their majoritarian values. After making that point, we show how those principles inform specific policy positions on religion and politics, public education and aid to religious institutions.

Readers of this column have heard us extol the unprecedented 68-group Coalition for the Free Exercise of Religion that came together to help pass the Religious Freedom Restoration Act. As you can see from the final page of this statement, the group of signers does not cut nearly as broad a swath in the religious and civil liberties communities as the RFRA coalition did.

I hope that you will take time to read the enclosed "Shared Vision" statement on religious liberty in the 21st century. This statement is the culmination of several years' work. It was a brainchild of the Baptist Joint Committee and

Why not? RFRA was an across-the-board, lowest-common-denominator statutory remedy to the disastrous *Smith* decision that threatened everyone's religious liberties. Thus, one could expect a massive coalition to agree on the need for that legislation. And while all 68 groups would support much of what we say in "A Shared Vision," some of them could not support all of it — particularly the parts dealing with the Establishment Clause. For example, several Catholic leaders were asked to sign the statement, but they choked on the section dealing with "Aid to Religious Institutions." Catholics have long sought vouchers and other forms of public aid to parochial schools. Some evangelicals would take issue with our statement on "Religion and Public Education" because of our stand against state-sponsored prayers in the public schools and the teaching of creationism in biology. Finally, those who harbor theocratic leanings would never support our firm position against the argument that the United States is a "Christian nation."

Someone once said that Christians (including Baptists) should have a hard center and soft edges. Yes, we should hold tenaciously to our fundamental convictions but be gentle and pastoral in the way we relate to others and respond to their views. This is good advice. It's important to cooperate with as many people in the religious community as we can. That's what we did in the RFRA coalition. But it's also important to stand firm for your beliefs.

This is our vision for religious liberty into the next century. We share it with many, but not everyone. We work with others when we can, but never at the expense of forsaking our core principles. To paraphrase Martin Luther's bold declaration at Worms before the emperor and the Reichstag over 450 years ago, "Here we stand. We cannot do otherwise." Δ

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BOOK REVIEW

School Prayer: The Court, the Congress, and the First Amendment

Robert S. Alley. Prometheus Books.
Buffalo, New York: 1994. 271 pp.



Robert Alley's new book, *School Prayer*, deftly reviews the history behind and the dynamics of the school prayer debate that has raged in the United States for more than 30 years.

In the 12 chapters of his book, Alley traces the historical development of the First Amendment's religion clauses as they are sometimes threatened by the demands of secular conscience, political agendas and political camps of religious activists. Alley quotes from correspondence of James Madison and his colleagues and supplies excerpts from both Supreme Court and congressional proceedings. The author explores the Christian nation thesis, discusses former President Ronald Reagan's "Year of the Bible" and

describes the phenomenon of "God-voting."

To support his argument, Alley asserts the importance of the Bill of Rights' purpose to protect the rights of the minority from, in Madison's words, the "tyranny of the majority." When the Supreme Court has sought to uphold this objective, it has come under endless fire. *School Prayer* keenly reveals the propaganda that has confused the public's perception of these prayer cases and chronicles the unexpected involvement of evangelical figures.

The book's most important feature is its chronological format that allows the reader to step back and view the issue of religion and government from a panoramic perspective. The author analyzes the fluctuating interests and motives that have influenced America's understanding of the First Amendment. This format allows the reader to see common misconceptions that work against the intention of the Founders and the true meaning of the religion clauses.

School Prayer's appendices are also helpful. They contain Madison's *A Memorial and Remonstrance*, testimonies before the Senate by Alley and Norman Redlich of the American Jewish Congress and a section titled "The Free Exercise Crisis." Alley's position against state-sponsored prayer is clear. Nevertheless, trusting the readers' ability to think for themselves, he includes a selected bibliography pointing to other works on school prayer, some of which come to "quite different conclusions."

Readers will appreciate Alley's straightforward presentation of issues surrounding the school prayer debate. His book is a valuable resource that will expand understanding of the school prayer controversy. This work is recommended reading for anyone wrestling with this timely church-state issue.

Helen Harper
BJC Intern

REPORT from the CAPITAL

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REPORT (ISSN-0346-0661) is published 24 times each year by the Baptist Joint Committee.

Established in 1936

Baptist Joint Committee on Public Affairs
200 Maryland Avenue, N.E., Washington, D.C. 20002
202-544-4226

Supporting bodies: Alliance of Baptists • American Baptist Churches in the U.S.A. • Baptist General Conference • Cooperative Baptist Fellowship • National Baptist Convention of America • National Baptist Convention U.S.A. Inc. • National Missionary Baptist Convention • North American Baptist Conference • Progressive National Baptist Convention Inc. • Religious Liberty Council • Seventh Day Baptist General Conference • Southern Baptist state conventions and churches.

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