



# REPORT FROM THE CAPITAL

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## NewsMakers

◆ NAACP President and CEO Kweisi Mfume joined People For the American Way President Carole Shields to launch the Partners for Public Education Campaign. The campaign, which opened with a rally at New Shiloh Baptist Church in Baltimore, opposes the use of tax dollars for private schools. At the kickoff gathering, Baptist Joint Committee Executive Director James M. Dunn said 80 percent of church schools belong to one church. "That's fine," he said. "These schools have done much good, but all Americans should not be taxed to support them." He added that "school choice" proposals are aptly named because "it is the school that has the choice, not the parents or the pupils."

◆ Senate Majority Leader Trent Lott, R-Miss., is organizing a Republican task force that will develop policy initiatives to address global religious persecution. Sen. James Inhofe, R-Okla., will chair the group.

◆ Richard Suhre of Haywood County, N.C., lost his bid to have the Ten Commandments text removed from a county courtroom wall. A federal district judge ruled that the display does not "constitute an unwelcome religious exercise or the assumption of a special burden sufficient to establish standing" for Suhre to bring the suit. Δ

## High court weighs requests to reverse parochial aid ruling

The U.S. Supreme Court is being asked to redraw the boundary separating church and state.

Justices heard arguments April 15 that they should reverse the high court's 1985 ruling that barred tax-funded remedial education at parochial school campuses. That ruling said on-site instruction creates excessive entanglement between government and religion.

Asking the high court to reopen and reverse its *Aguilar v. Felton* ruling, lawyers for New York City school officials and a group of parents argue that providing off-campus remedial instruction in subjects such as math and reading has proven costly and less effective. They said compliance with *Aguilar* has cost the New York district \$100 million.

New York officials may be "preaching to the choir" in the sense that five justices have openly criticized the *Aguilar* reasoning. But it is unclear whether justices will use this case to reverse the 1985 ruling or, as the Christian Legal Society and other religious groups have asked, make wholesale changes in legal tests dealing with church-state separation.

A majority must first agree that it is appropriate to revisit the 1985 decision under a little-used procedure known as Rule 60 (b). That rule allows courts to relieve a party from a previous ruling if the judgment upon which it is based is reversed or if "it is no longer equitable that the judgment" should be applied.

Acting Solicitor General Walter Dellinger told justices that *Aguilar* should be reversed and that Rule 60 (b) was an appropriate mechanism to get the case before the high court.

Several justices, however, expressed doubts about this use of the rule.

If the case is used to redraw the line separating church and state, where should it be drawn, justices asked lawyers for both sides.

Dellinger said a "bright line" does

not exist but insisted that on-site remedial instruction at parochial schools should be permitted. *Aguilar*, he said, is no longer consistent with the court's church-state rulings and continues to impose burdens on the remedial instruction program.

New York Corporation Counsel Paul Crotty told justices the school district's on-site instruction proposal is far short of the broad-based direct funding of religious schools banned by the First Amendment. It is limited to secular instruction and made available only to students who need it, Crotty said.

Stanley Geller, attorney for taxpayers opposed to on-site remedial instruction, wants *Aguilar* preserved. Justice Antonin Scalia asked Geller whether asking parents of religious school students to forego access to remedial instruction burdens their free exercise rights.

"I don't believe religious school students have a free exercise right to receive public funds," Geller responded. Δ



*Religious school students don't have a free exercise right to receive public funds.*

— Stanley Geller

# Conservatives who conserve

Name-calling and partisan labeling is commonplace in Baptist circles these days. As one Texas Baptist pastor said recently, we label one another "Moderates, Liberals, Conservatives, Fundamentalists, etc. *ad infinitum, ad nauseum.*" Well said.

This name-calling trend is somewhat ironic because certainly most Baptists, in terms of their commitment to the Christian faith, are pretty conservative. If we are talking about the deity of Christ, the resurrection, the Second Coming or the importance of evangelism, few Baptists are anything but conservative. And those who believe these basic doctrines have the right to call themselves conservatives, since they wish to *conserve* historic Baptist beliefs; they can hardly be called liberals because they seek to *change* nothing, which is what usually characterizes the liberal viewpoint.

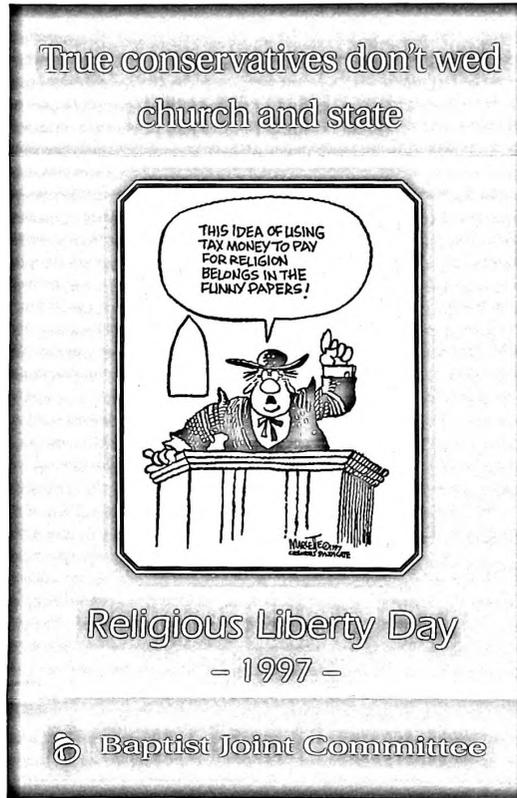
Among Baptists, one might become a "liberal" for many reasons, but all too frequently one is *accused* of being a liberal because of an unwillingness to seize governmental power to propagate basic biblical truths. The basic agenda of the religious right, in fact, may be described as an effort to wed the forces of faith with political power in order to "claim our culture for Christ," as one of the movement's leaders put it. And because of this agenda's identity with a conservative theology, those subscribing to it readily call themselves conservatives. But are they the real conservatives? Among Baptists, an important historic commitment to be *conserved* is the belief that religious liberty is the birthright of all persons — Baptists as well as non-Baptists — and is a freedom best preserved through the separation of church and state. Baptists who join the religious right's ignoble crusade to use political power to convey a spiritual message violate these principles and therefore are the true liberals. Unfortunately, it is the Baptist Joint Committee and like-minded Baptists who believe deeply in religious liberty and church-state separation that are often saddled with the "liberal" label.

So just what are some of the most pressing religious liberty issues in the contemporary scene? And among Baptists addressing these issues, who are the real conservatives and who are the true liberals?

Consider the current proposal to amend the Constitution to allow school-sponsored prayer and public funding of religious activities. Some members of the religious right support an amendment that would recognize "the right to pray or acknowledge religious belief, heritage or tradition on public property, including public schools," and would not allow government to "discriminate against or deny a benefit on account of religion." This proposal is championed as one that promotes true religious liberty because it would allow *all* religious groups to advance their own religious ideas in public forums and to receive government benefits. But if passed, its consequences would be something else entirely. Majority religions (principally Christianity) would benefit the most, since in most cases the majority voice would be able to silence the minority voice and promote its own religious agenda at government's expense. This backdoor method of "claiming the culture for Christ" is neither a conservative nor a traditionally Baptist strategy. Never have traditional Baptists sought govern-

ment's blessing or monies for religious causes or attempted to establish a framework in which the "tyranny of the majority" would force minority religious groups to fend for themselves. It would be the one who would alter the traditional Baptist approach, the one who would ride the back of government to put forward a religious initiative, who would be the real liberal.

Last year Congress passed a new welfare reform law. While the legislation may have laudatory goals, it revolutionizes U.S. church-state law by allowing state governments to contract with churches and other houses of wor-



# Church-State Intersection

**J. Brent Walker**

General Counsel



The Baptist Joint Committee, along with other religious, civil liberties and education groups, filed a friend-of-the-court brief in *Agostini*

*v. Felton* — dealing with the constitutionality of public school teachers offering low-income students remedial instruction in parochial schools. (See lead story, Page 1) Here's a quick summary of the points that we made in that brief.

- ◆ The Supreme Court should not have granted review in the first place. The petitioners seek to justify rehearing of a 12-year-old final judgment on their belief that the vote count of the court has now changed. Allowing the petitioners a second bite at the apple would establish an unfortunate precedent and open the floodgates of efforts to re-litigate the final judgments in other cases.

- ◆ If the court decides the case on its merits, the Federal Title I program can operate on parochial school premises without necessarily violating the Establishment Clause. That is, there is no constitutionally significant difference between teaching remedial reading in a classroom and a van across the street. But, we suggested to the court that it order the following safeguards: (1) personnel should be selected and supervised by public authorities, (2) the curriculum must be controlled by the public school authorities, (3) access to the program should be dependent on objective criteria selected by the public school authorities, and (4) classrooms should be under the public school's control and free of all religious symbols. In short, the Title I classroom must be an "embassy" on parochial school property under the flag of public schools.

- ◆ The court should not eliminate or water down the Establishment Clause's prohibition on undue entanglement between government and religion. This rule of law exists to protect religion from

corrupting influences of government. Eliminating it would thwart, not advance, religious liberty. The *Lemon* test's entanglement prong need not inevitably lead to a "Catch-22" situation (i.e., the monitoring needed to make sure public dollars are not used to advance religion *itself* violates the Constitution by entangling church and state). Only *excessive* entanglement is prohibited. Rational and non-invasive guidelines need not lead to excessive entanglement.

- ◆ Finally, it would be a grave mistake for the court to overrule the prohibition on using public funds to finance religious enterprises. Slavish adherence to "equal" treatment between religion and non-religion would ignore the need sometimes to treat religion differently in order to protect religious liberty. Government funding of religion would lead to intrusive governmental regulation, make religion weak and dependent, and result in unhealthy rivalries among religion and religious denominations. In any event, the court could easily decide this case without revisiting the salutary principles of law that government should not finance religion with tax dollars.

In sum, we urged the court to recognize that proper procedure does not allow the reopening of this case. But if the court decides to go forward, it should decide the case narrowly without impugning or damaging subtle legal principles that, for the last 200 years, have protected religious liberty in this country.

After reading the briefs and listening to oral argument, I'll go out on a limb and make the following prediction: There is a good chance that the court will refuse on procedural grounds to consider the merits of the case. If it does rule on the merits, the court will reverse *Aguilar*. But, it will be a narrow ruling that does not perform radical surgery on the First Amendment and settled Establishment Clause jurisprudence. Δ

## Quoting

By disestablishing the Church, the First Amendment went far toward preventing state interference with the internal affairs of the church, and concomitantly preventing the church from dominating the state. Avoiding entanglement does not merely protect the liberties of the churches ... It ensures the rights of all citizens.

Equal treatment of religious and secular causes is an element of the Establishment Clause, but it cannot be allowed to trump the central principle that informs the Clause: Government may provide incidental financial aid to religious instruction, but aid which by its scope and predictability shifts the burden of funding such instruction to the public fisc is unconstitutional.

— Amicus brief joined by the Baptist Joint Committee in *Agostini v. Felton*

# Religious Liberty Day (continued from Page 2)

## Baptist Joint Committee

### 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/churches

### REPORT FROM THE CAPITAL

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Book Reviews

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ship to administer welfare programs. Churches have always administered soup kitchens, drug and alcohol rehabilitation centers and child-care programs, but without government dollars. The new arrangement is certain to lead to unwarranted proselytization activities on unsuspecting welfare recipients, not to mention a new era of government monitoring of churches made necessary by the churches' use of government dollars. This entanglement of church and state is inconsistent with traditional, conservative Baptist views. Yet the Baptist Joint Committee and other faith groups who are now working to revise some of the law's problematic provisions are often called liberals because they oppose the "spiritual" ends of the legislation.

The BJC is also supporting legislation that will protect the religious rights of all persons in the work place. This legislation will place new limitations on employers who seek to unreasonably restrict the religious needs of employees. In keeping with traditional Baptist thinking, the law would protect all religious persons, not just Christians, to permit them to incorporate religious practices into their own routines at reasonable times and under reasonable conditions.

"The philosophy of the BJC," notes Executive Director James M. Dunn, "is Bible-based, doctrinally rooted in Baptist distinctives and passionately dedicated to conserving the values of the Constitution and the Bill of Rights." Unfortunately, adds Dunn, "some of the folks who label us 'liberal' are the ones who have changed. We ... are exactly where Baptists have always been."

Thank you Dr. Dunn, and all of those

who work tirelessly for religious liberty for conserving our Baptist beliefs.

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Many Baptists celebrate Religious Liberty Day on the first day of worship in June. Whenever, however your church commemorates this event, join with Baptists everywhere in maintaining our traditional Baptist tradition. Limited quantities of the BJC's 1997 Religious Liberty Day poster are available for \$1, including shipping and handling.

Religious Liberty Council members,  
friends of the Baptist Joint Committee  
are invited to attend the

Religious Liberty  
Council Luncheon

12:15 p.m. Friday, June 27  
Cochran Room, Galt House  
Louisville, Kentucky  
Tickets \$15

Contact Karen McGuire at the  
BJC to purchase or reserve tickets



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