LIBERTY

A Magazine of Religious Freedom
Vol. 90, No. 6
November/December
1995

LIBERTY

Clarence E. Hodges
Chairman, Editorial Board

Clifford Goldstein
Editor

Loleta Thomas Bailey
Associate Editor

James A. Cavil
Copy Editor

Leo Ranzolin
Robert S. Folkenberg
A. C. McClure
B. B. Beach
John Graz
Consulting Editors

Vernon Alger
Karnik Doukmetzian
Richard Fenn
Samuel Green
Darrel Huenergardt
Ted Jones
Alan Reinach
Lewis Stout
Adrian Westney, Jr.
Consultants

Wintley A. Phipps
U.S. Congress Liaison

Mitchell A. Tyner
Legal Advisor

Harry Knox
Designer

Meade C. Van Putten
Treasurer

Liberty (ISSN 0024-2055) is published bimonthly by the North American Division of the Seventh-day Adventist Church, 12501 Old Columbia Pike, Silver Spring, MD 20904-6600.

Printed by the Review and Herald Publishing Assn., 55 West Oak Ridge Drive, Hagerstown, MD 21741-1119. Subscription price: U.S. $6.95 per year. Single copy: U.S. $1.50. Price may vary where national currencies differ.
Vol. 90, No. 6. November/December 1995.

Printed in U.S.A.

A Perfect Example of Why There *Mustn't* Be Legislated Prayer in School

I must agree with the thrust of your May/June issue. We *must* have school prayer in America—just as long as it is clearly stated with no reservations that ALLAH is GOD and Muhammad is his prophet! *We need all American children praying to ALLAH five times a day!* As you know there are many make-believe gods—Jesus, Odin, Loki, Satan, Jehovah, Shiva, Confucius, and so many more. We all know that the only true god is Allah and his prophet was Muhammad.

Thank you for insisting that Allah be prayed to mandatorily by *all* American students.
TIMOTHY DEVILLE
Royal Oak, Michigan

Clifford Goldstein's editorial "Why Children Should Pray in School" would have been more appropriately titled with the addition of one word—"NOT!" I shouldn't be too critical, though. At one time I held the same view, and perhaps would oppose a prayer amendment today if it were injudiciously composed.

Goldstein should understand that the state's proscription of prayer is not a neutral position. It is an anti-theistic position. Should the state abandon this position and adopt a neutral position (e.g., a moment of silence) or a pro-theistic position (such as a student-led prayer), the state's position would then be congruent with (or, at least, not opposed to) Goldstein's valid reasons why students should pray in school.

Allow me to simplify this by abstracting Goldstein's reasons: Prayer helps the student to resist temptation (presumably through the help of God), sense the divine Creator, experience God's holiness, understand God's love, accept God's equality in human creation, and create a consciousness of God's presence.

Well, every one of these reasons is negated by the non-existence of God. And the idea of the non-existence of God is reinforced by the state's anti-theistic posture of school prayer proscription.

Although the state cannot legislate heartfelt prayer, it can legislate a body of laws that do not militate against the schema of the Sacred. This it should do.
ROBERT W. GRAVES
Woodstock, Georgia

Couldn't Have Said It Better Ourselves

Liberty is a consistently first-rate magazine and its editorial point of view is refreshing—and sound. More than one radio talk show host in America must be putting its nuggets of wisdom into the public conversation.
JOHN WRISLEY, Host
John Wrisley Program WSCQ
W. Columbia, South Carolina

Let Them Eat Cake

I am surprised that J. Brent Walker ("Feeding the Hungry—July/August) believes that the government attempted to interfere with their desire to "be salt and light" to the world. First, being salt and light has to do with being an example to the world by how you love others and reflect your love of the Lord as well as being able to exhort others to the faith of Christ and admonishing and rebuking those you love. Let us not only equate giving with love but with charity and realize that there are those who can give but have not love.
AMY FLORES
Los Angeles, California

The Right to Be Wrong

I find it of particular importance that a denomination devoted to conveying the message of love and rest found in keeping Saturday as the Sabbath, is able to print an article exclusively devoted to preserving the rights of those who believe that Christ's resurrection on Sunday somehow changed the solemnity from the seventh day of the week to the first. I just wonder whether an adherent to a believer in the keeping of Saturday as the Sabbath would be treated in the same fashion by Wal-Mart or the Wisconsin Labor and Industry Review Commission. Or is the problem that there are not enough devout Seventh-day Adventists

COVER PHOTOS BY DENNIS CREWS

seeking such positions to make it easier to accommodate the religious beliefs of devout Sunday-keeping Christians?
JOHN L. ODELL, Esq.
Glendora, California

[Religious freedom is religious freedom, even for those who want to keep holy a day that has no biblical foundation whatsoever—Ed.]

Amen

I feel that I must support your article "Honor the Emperor" (July/August). It was blunt but necessary!

Your observation is correct: The Religious Right is not changing the world, rather it is being changed by its own worldly words and methods. The only means that can accomplish the agenda it holds therefore is force, and that means that some will suffer!

I am sure that the vast majority of those supporting the movement are totally unaware of the direction in which it is taking them. Let us hope that they awaken out of their stupor before it is too late.

One can appreciate more readily the significance of Proverbs 29:18: "Where there is no vision the people perish." The counsel of God is against the union of church with the state. It can only end in disaster.
GOMER EVANS
Holly, Michigan

I have just finished reading "Honor the Emperor," and I must say that you sure hit the nail. Unfortunately, it was your own finger upon which you hammered so eloquently. While you appeared to be talking about one individual, you were successful in questioning the credibility of all Christians who feel a very real call to speak out in politics. Not only that, but you seemed to overlook the entire ministry of John the Baptist. You seem to forget that he lost his head while speaking out against the wickedness of the king, and not the poor leadership skills that he possessed, but the immoral behavior in which he was engaging. I seriously doubt that John was privy to the immoral act, but he was willing to speak out on the issue of incest because he felt that he was led to do so by the leadership of God. You would probably not agree with his tactics of using his pulpit, but I find no reference to Jesus telling John that he was in error by doing so.

In one very telling confession, you stated that you would have no problem with the Republican Party speaking out on these matters, but you believe that Jerry Falwell is not in the proper position to make such accusations, nor is he in any position to say what others have already stated. Well you have a most curious opinion of the responsibilities of a preacher. If we as preachers are not free to call sin by its real name, and if we are not free to speak out concerning issues that are current and important to the day, I would like to hear your ideas on what we are free to speak to. Most of the people who attend church look for knowledge, wisdom, strength, truth, leadership, and direction. The main audience of *Old Time Gospel* is not lost people, but Christians who are looking for leadership.

Also, I would like to know your opinion of the preacher's responsibility concerning church and family. Are we to remain silent in these areas as well? Just as God ordained the church and the family, He ordained the government to preside over social interaction. I believe that it is incumbent upon us to preach the truth in all that the church, the family, and the government does, and if any one of these institutions of God fall in some manner from the original intent of God, we must point out the wrong.

I hope that you reconsider your view on these issues. If you continue to hammer on your own nails at this rate, you will soon find that you haven't any good fingers left with which to point.
Rev. KIRK JORDAN
Sweetwater, Tennessee

Servility

DO NOT send me anymore issues of your anti-American publication you call *Liberty*. A better name for your magazine would be *Servility* since it is propaganda like yours that is prefactory to the citizens of this country coming under subjugation to an owner or master.
LOWELL PAJARI
Sandstone, Minnesota

Readers can E-Mail the editor on CompuServe #74617,263.

DECLARATION OF PRINCIPLES

The God-given right of religious liberty is best exercised when church and state are separate.

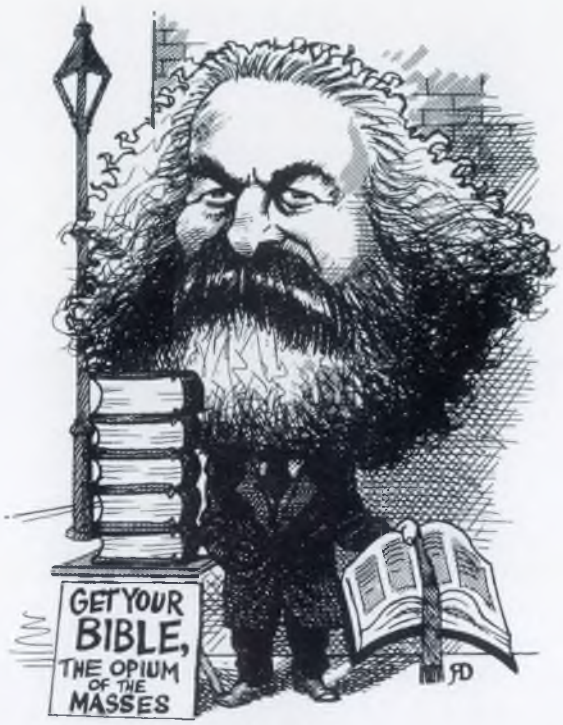
Government is God's agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice and promulgate religious beliefs or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen's duty but the essence of the Golden Rule—to treat others as one wishes to be treated.

"THERE IS NO GOD, AND MARY IS HIS MOTHER!": The collapse of Soviet and European Communism proved that Marx's political theories were about as viable as Ptolemy's astronomical ones. But talk about kicking a poor theory when it's already down . . . ! Last year Italian ex-Communists published a six-volume set of the New Testament. Street sales of *L' Unita*, the daily newspaper of the former Italian Communist party, doubled when one of the New Testament volumes (approved, of course, by Italian bishops) accompanied the newspaper. The ex-Communists are promoting Christianity, they say, "to stimulate national discussion on the political and cultural level, revolving around values." If, as Karl Marx said, religion is the opium of the people, *L'Unita's* New Testament supplement shows that opium sells.

BROAD IS THE "ROAD TO VICTORY" AND MANY ARE THOSE WHO GO THEREIN: Any doubts about the New Right's growing political gravitas should have been dispelled after the Christian Coalition's fifth annual "Road to Victory" conference. The appearance of almost all Republican presidential hopefuls at the gathering this September in the Capital proves that even if the 1.7 million-member Christian Coalition (CC) doesn't control all American politics, it's



getting an iron grip on the GOP, which is exactly what it wants (at least for a short-term goal). During his address to the conference, Robertson cited an article in *Campaigns and Elections* that says "the Christian Coalition, and I'm quoting them, these are not my words, Is quote 'dominant in Republican Parties in 18 states and substantial in 13 more.' That's 31 states." Robertson stressed that they have more work to do because he wants control of all 50. This politicking, of course, is all done under the veneer of Christianity. Ralph Reed, CC executive director, said at the conference "we do not march beneath the name of Ronald Reagan or Bob Dole, but under Him whose name is above all names." That "Him," apparently, is Jesus Christ. Even the *Washington Post*, hardly a bastion of theological or spiritual sensitivity, noticed the strange mixing of the sacred with the profane. "Reed," the *Post* said, "who has made the Christian Coalition a major player in Republican campaigns and in business-led lobbying drives, can say in one breath that 'our place is not in the smoke-filled room but in the mission field,' and in the next breath explain that he is gunning for more power in the GOP than 'the AFL-CIO or the radical feminists have over the Democratic Party.'" Didn't the One "under whose name" they march say something about rendering to Caesar what is his and to God what is His? That's a truth the Christian Coalition seems to have thoroughly discarded. Adherents had better take a good, prayerful look at what they're doing or, one day, standing before the Lord they profess to be serving—some of these activists will say, "Lord, Lord, have we not won elections, and gotten electoral power, in Your name," to which He will reply, "Depart from me, ye that work iniquity, for I know you not."

"THEREFORE WE ARE BURIED WITH HIM BY BAPTISM INTO DEATH": Though Christians haven't been too successful over the centuries in baptizing Jews, the Mormons had a better idea: baptize them after they're dead, that way they can't refuse (Mormon theology teaches that the dead can be "saved" if someone else is baptized in their place). When Jewish leaders learned that proxy baptisms had been performed for 380,000 Holocaust victims, they expressed outrage to the Mormon Church, which said that the baptisms had been unauthorized and agreed to purge the names from its records. However insulting the procedure to the Jews, and however nonsensical and unbiblical baptism for the dead is, at least the immersions weren't done on behalf of the thousands of Jews murdered for—refusing baptism.

THE SEPARATION OF KIRCHE UND STADT: Germany's highest judicial body, the constitutional court, struck down a law that mandated the placing of crucifixes in all public schools in the Roman Catholic enclave of Bavaria. Though Bavarian officials claimed

ILLUSTRATION BY RAY DRIVER

that the crucifixes were symbolic of piety and Western values, the court said that public schools throughout all Germany must reflect the state's neutrality toward religion, and that crucifixes—clearly a Roman Catholic symbol—don't meet that legal standard. Sounding like some eminent American jurists, Bavarian Governor Edmund Stroiber echoed the insensitive argument that "the mere presence of a cross doesn't force anyone to accept Christian beliefs." Of course, the tens of thousands of non-Christian school children in Bavaria (the only German state that places crucifixes on the walls of classrooms) might not be forced by the "mere presence" of the crucifixes to accept Christian beliefs, but these children, primarily Muslims, are nevertheless made to feel like religious outsiders in a system that supposedly doesn't discriminate on the basis of religion. State education guidelines in Bavaria stress that children should be taught to "respect the Lord." Fine. But didn't the Lord they want children to respect say, "Do unto others as you would have others do unto you"?

LOWER COURT OVERTURNS HIGHER (AND WE MEAN HIGHER) LAW: Ignoring 3,000 years of history, the Colorado Supreme Court stripped the Ten Commandments (the law of God written on stone at Mount Sinai amid thunder and lightning) of their religious significance. Reversing a lower court—which concluded that the Ten Commandments were religious in nature and thus their placement in a Denver state park violated the Establishment Clause—the high court said that the monument was, basically, secular. The original suit, filed by the Freedom from Religion Foundation, claimed that the model of the Ten Commandments, erected by the Fraternal Order of Eagles Aerie 2036 in 1956 (see *Liberty*, July/August 1994) violated the separation of church and state. The trial court found for the state, but the court of appeals, applying the three-part *Lemon* test, reversed. The state supreme court, however, said that the Ten Commandments served as a "historical, jurisprudential cornerstone of American legal significance" and should remain. This ruling proves what separationists have been saying all along, that using the state to promote religion ultimately denigrates religion. At least the court didn't order a plastic reindeer to be erected next to the monument.

GOOD-BYE GOOD FRIDAY: Since 1941, Good Friday has been an Illinois state holiday, a day "charged with special meaning to multitudes throughout the Christian world." Though rescinded as a state holiday in 1989, it remained a paid one for elementary and secondary schools. That is until a schoolteacher sued the state, arguing that as a taxpayer she shouldn't be required to fund a religious holiday. After legal wranglings, the Seventh Circuit Court of Appeals ruled that the holiday violated the Establishment Clause. The court argued that, unlike Christmas, Thanksgiving, and even Easter, Good Friday has no secular rituals associated with it (no bunnies or elves), but remained a day of "solemn religious observance" for Christians. It ruled, too, that closing the schools on that day accorded special recognition to Christianity, another violation of the Constitution. The court noted that they could circumvent the decision simply by adopting a "spring weekend" rationale for Good Friday instead of keeping the religious one. In other words, rather than just doing it yourselves out of sincere religious convictions, the state will gladly help you along, but only after you do to Good Friday what Colorado did to the Ten Commandments. Sadly enough, some so-called Christians would find that exchange agreeable.

THE EDUCATION OF WAL-MART: Theology student Scott Hamby recently preached one powerful sermon to Wal-Mart regarding religious liberty. The 23-year-old reached an out-of-court settlement with the nation's largest retailer, whom he had sued for $5 million in November 1993 because of religious discrimination. Hamby had worked in the electronics department of a Wal-Mart store in Bolivar, Missouri, and was forced to work on Sundays, despite asserting that Sunday work violated his religious principles. Wal-Mart denied any wrong-doing in the case, and said that it was an honest mistake by a local store manager.

Though the amount of money he received was undisclosed, the settlement also calls for Wal-Mart to educate its 2,000 store managers and regional trainers about religious discrimination and the accommodation of employees' religious rights. This wasn't the first time that Wal-Mart had been taken to court—and lost (see *Liberty*, July/August 1995) over the issue of Sunday work for employees who won't work on Sunday. Maybe now the chain will catch on: employees have religious rights.

Moving?

Please notify us 4 weeks in advance

Name

Address (new, if change of address)

City

State Zip

To subscribe to *Liberty* check rate below and fill in your name and address above. Payment must accompany order.

❑ 1 year $6.95

Mail to:
Liberty subscriptions, 55 West Oak Ridge Drive, Hagerstown, Maryland 21740

ATTACH LABEL HERE for address change or inquiry. If moving, list new address above.
Note: your subscription expiration date (issue, year) is given at upper right of label. Example: 0395L1 would end with third (May-June) issue of 1995.

"QUIS CUSTODIET IPSOS CUSTODES?"

An Alabama Judge's Tangle With the First Amendment Rekindles the Old Roman Question "Who Guards the Guardians Themselves?"

BY LAURIE L. LATTIMORE

Judge Roy S. Moore—under fire in Alabama for displaying the Ten Commandments in his courtroom and offering a prayer before jury selection—could not contain his adrenaline as he talked of the religious influences on America's Founding Fathers. He flipped through a thick, black three-ring binder full of documents that contributed to the framing of American democracy. With ease and authority, the judge rapidly recalled quotes from Thomas Jefferson, James Madison, and George Washington. He recited numerous references to the Almighty from important court cases, proclamations, and speeches. And, of course, he quoted the Bible.

Laurie L. Lattimore is a graduate student in journalism at the University of Alabama in Tuscaloosa.

"Washington actually issued a national day of prayer and thanksgiving to . . . God for His guidance in forming a government," the Etowah County circuit judge said, striking his fist across the page as though he had historical, if not divine, support for his position.

Quoting the first U.S. president, Moore read, "'Whereas it is the duty of all nations to acknowledge the providence of . . . God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor'. . . . For me to acknowledge God in my courtroom is not a violation of my duty—it *is* my duty."

Moore's insistence on doing his "duty" has made him the target of a lawsuit by the American Civil Liberties Union of Alabama, which claims that Moore's acknowledgment of God in the courtroom violates the First Amendment protection against the establishment of religion. The ACLU, in conjunction with the Alabama Free-Thought Association and three Etowah County citizens, filed suit against Judge Moore in federal district court March 31. The plaintiffs claimed their First Amendment rights are violated because the courtroom prayers and Ten Commandments displayed on the courtroom wall represent an establishment of religion.

Their suit didn't go far. A federal judge in Birmingham ruled in July that the plaintiffs supported by the ACLU who brought suit were not in legal standing, meaning they had not shown imminent injury to justify a legal complaint. Judge Robert Propst had dismissed the case without prejudice, ruling against the plaintiffs but not against the merits of the case.

Moore held a press conference July 7 to celebrate this small victory in his legal battle to continue courtroom prayers and allow Moore's hand-carved Ten Commandments to remain above his bench. The simple wood plaque occupies an empty wall next to the Alabama state seal.

Following the ruling, Judge Moore's courtroom—adorned with copies of the Declaration of Independence and the Mayflower Compact of 1620, plus portraits of Washington and Abraham Lincoln—was packed with supporters. Sporting a Ten Commandments button and waving an American flag, one gentleman yelled from the back of the room, "It's Good Friday!"

"We sent the ACLU a strong message today. They have bitten off more than they can chew," Dean Young, media coordinator for Moore's defense, told the crowd. "Judge Moore is a man who stands on principles. The ACLU has made a big mistake."

Judge Moore at a press conference: "It is never wrong to acknowledge God in public, in private, or anywhere, and those who think it is are clearly wrong."

Moore was more direct in his condemnation of the ACLU's position. "It is never wrong to acknowledge God in public, in private, or anywhere, and those who think it is are clearly wrong," he said. "People have been deceived."

The ACLU is deciding whether to appeal Propst's decision or to find new plaintiffs who will satisfy the judge.

"Moore won the first round, but there are eight more innings to go," said Martin McCaffery, vice president of the ACLU of Alabama.

No matter what the ACLU does, Moore and his team are ready for the fight. In fact, he invites the challenge.

"The ACLU can find all the plaintiffs they want. We will fight this all the way to the Supreme Court, and I think we will be success-

The Ten Commandments on the wall of Judge Moore's courtroom: An establishment of religion?

ful," Moore said. "People everywhere should be standing up and saying, 'This is not establishment of religion.' We are one nation under God. . . . In God we trust. These are not things we just say."

Anyone close to Moore knows better than to second-guess his resolve to fight. He shrugs his shoulders at the thought of this court battle being a magnificent testimony to his religious convictions.

"When you do what you believe, you are going to run into problems," the judge said.

Problems don't deter the three-year judge, who has made a career out of overcoming disappointments. It's the setbacks in his life that give Moore the will to stand up for God—in his home, in his church, and most definitely in his courtroom. As a West Point Academy graduate, a Vietnam veteran, and a trained professional in full-contact karate, Moore is no stranger to conflict. But this court battle is not just about prevailing in another conflict. To Moore, it is about standing up for the God who has stood by the judge even at his lowest moments.

Growing up in a poor Christian home in Gallant, Alabama, Moore became accustomed to working hard. Wearing mostly hand-me-downs and cleaning tables to earn money for his high school lunches, Moore took his work ethic to West Point Military Academy. Upon graduation in 1969, he shipped off to Vietnam.

Not a particular fan of war, Moore noted that fighting was his sworn duty, and there was no room for argument. When he returned from Vietnam, Moore attended the University of Alabama Law School, where he graduated in 1977. Moore became the first full-time deputy district attorney for Etowah County, a post he held for five years.

In 1982 Moore lost the bid for Etowah County circuit judge, a campaign race that went beyond the usual political mudslinging. Moore publicly attacked the incumbent judges with ads promising an end to favoritism and corruption in the Etowah County court system. Four circuit judges filed a complaint with the disciplinary commission of the Alabama State Bar Association, charging Moore with slander.

Although Moore eventually won his case and retained his license to practice law, he was despondent—out of a job and deplete of savings. He moved to Galveston, Texas, for nine months to study full-contact karate under Ishmael Robles, the Professional Karate Association U.S. welterweight champion at the time. After a 1984 victory in his first "kick boxing" match in Gadsden, Alabama, Moore tried a new adventure. He trekked through the outback of Australia for five months.

When Moore returned to the United States, he began a private law practice. He also started writing religious and inspirational poetry, an extracurricular activity that introduced him to his wife, Kayla, during a poetry reading at her church. The two have four children: Heather, 11; Roy, 7; Caleb, 4; and Micah, 21 months.

In 1986 Moore lost another election for district attorney but got a political career boost in 1992 when then-governor Guy Hunt appointed Moore successor to the late county circuit judge Julius S. Swann, Jr. In November 1994 Moore was reelected to the judgeship. It was his 1994 campaign in which Moore made an issue of displaying the Ten Commandments in his courtroom.

"I was out, and God brought me back to the top of the system. I didn't do it," Moore said, recalling the recent past. "God simply put me here, and I'm not afraid to acknowledge Him."

Reflecting on the case in his chambers following the press conference, Moore was agitated by what he considers to be the moral degradation of America.

"The real problem we face in society is groups like the ACLU who have led people to

believe the acknowledgment of God is improper, is a violation of the First Amendment or of the doctrine of the separation of church and state," Moore said. "They don't even know what that is, and they have led others to believe it is something it is not. We have to stand up and say we know that without God we are going to lose this country."

Moore contends that God has been pushed out of His rightful place in American society. But while Moore considers it his duty to proclaim God's influence in American democracy, his opponents argue for religious liberty that neither prohibits nor promotes religion. They don't deny Moore's right to his religious beliefs, but they protest his endorsement of religion while serving in an official government role.

McCaffery of the Alabama ACLU said the case against Moore is simply to stop the government from telling people when, where, and how to pray. When the judge invites a member of the clergy into the courtroom to pray, he represents government endorsement of religion to a captive audience—a clear violation of the First Amendment protection against government establishment of religion. Likewise, the ACLU contends that the jurors have no choice in their exposure to the Ten Commandments plaque on the courtroom wall.

Joel Sogol, a private attorney in Tuscaloosa, Alabama, who is a cooperating attorney with the ACLU in the case against Moore, said the ACLU became aware of courtroom prayers in Alabama through citizen complaints. In 1994 Alabama Supreme Court chief justice Sonny Hornsby sent a letter to all circuit judges warning them of potential lawsuits for prayers in the courtroom. The ACLU filed suit in March against Judge Moore when he made a campaign issue out of acknowledging God from the bench. Governor Fob James, Attorney General Jeff Sessions, and the Alabama legislature have publicly stated their support for Judge Moore's stand. The governor also approved the state paying $85 an hour to offset the legal fees of Albert L. Jordan, Moore's attorney.

After the ACLU filed suit in federal district court, the state of Alabama filed for a declaratory judgment in state court. Such judgment is requested by the state to seek the court's position on the issue of prayers in the courtroom. That case is still pending in the Montgomery circuit. McCaffery noted that the ACLU is less confident of the outcome there because state court justices are more susceptible to public opinion than to previous case law, Sogol said.

But while both sides await the Montgomery circuit judgment and the next move in the federal case against Judge Moore, each party maintains it can win on the merits of its position. McCaffery and Sogol point to recent federal cases that have ruled on similar religious liberty cases. Moore and Jordan maintain that two 1995 Alabama cases are more controlling. They also consider cases supporting the tradition of prayers in U.S. Congress and state legislatures to have bearing on this case.

J. Brent Walker, general counsel for the Baptist Joint Committee on Public Affairs in Washington, D.C., stated that the initial debate exists in deciding which standard the court uses to determine whether the First Amendment Establishment Clause has been violated. In the 1971 Supreme Court case *Lemon v. Kurtzman*, the Court established a three-part test to determine if a government establishment of religion existed. Walker said while the Supreme Court has based a recent religious liberty cases on the *Lemon* test principles without officially invoking the test, most lower federal courts and state courts follow the three-pronged test.

"According to the *Lemon* test," said Walker, "the action is unconstitutional if it serves a religious purpose; if it advances or inhibits religion; and if there is excessive government entanglement with religion. If an action fails any part of the test, it is considered to be unconstitutional."

Two federal circuit courts have recently applied the Lemon test to similar religious liberty cases, both of which the ACLU argues are controlling in the case against Judge Moore. In 1991 the Eleventh Circuit—of which Alabama is included—ruled a North Carolina judge violated the Establishment Clause when he opened each court session with a prayer. More recently, the Fourth Circuit found in 1993 that the Cobb County (Georgia) courthouse failed the second prong of the *Lemon* test and violated the First Amendment by hanging a framed panel of the Ten Commandments in the building.

Albert Jordan cited two pending state cases that separately consider the same issues as the suit against Moore. The outcome of those would have more control on the judgment of Moore's state court case, Jordan hypothesized. But even if the federal case eventually goes to court, Jordan said they will argue for the court to apply the historical test. In the 1983 *Marsh v. Chambers* case, the Supreme Court upheld the Nebraska legislature's practice of opening each day's session with a voluntary prayer. The

Court determined that sessions of Congress had been opened with prayer for more than 200 years and the Nebraska Legislature had done so for more than 100 years. This tradition of prayer, the Court said, represented a "tolerable acknowledgment of beliefs widely held among the people of this country."

However, the state legislature is different from a court, rendering the *Marsh* standard less appropriate. At the statehouse, everyone present is an adult and has voluntarily chosen to listen to the prayer. People in court are there under compulsion. In *Stone v. Graham*, the Supreme Court ruled against a Kentucky statute requiring schools to post the Ten Commandments. Similar to a courtroom, school attendance is required.

Judge Moore supporters celebrating an early victory: "We have sent the ACLU today a strong message."

Although the issue is not clear-cut for prayers or the display of the Ten Commandments, prayers in the courtroom are more problematic when it comes to religious liberty. The Ten Commandments have many secular attributes because they represent one of several influential documents on law and order in the world. People must often physically go read them and there is no obvious state endorsement of those laws. Prayers in the courtroom, however, are a major concern.

"Part of me says the prayers are part of who these public officials are, but a judge—a person with life and death powers, sitting at the bench wearing a robe and acting on the authority of the state—who gives a prayer or delegates one to be given is a problem," Walker said.

Jordan and Moore feel that even if the *Lemon* test is applied to their case, they should prevail.

"I don't think the *Lemon* test is valid," Moore said. "If I tell someone there can be no references to God, I have just established a religion—atheism. If we exclude God, we are establishing religion, and the *Lemon* test excludes God."

Walker maintains that a zone of neutrality toward religion can be accomplished.

"I disagree 100 percent with the idea that the *Lemon* test excludes God. It ensures neutrality," he said. Walker added that in spite of the references to God in the Declaration of Independence, the Constitution and Bill of Rights, which govern the United States, are decidedly secular. The only mention of religion in the Constitution falls under Article VI, where it prohibits any religious requirement for public office. In the Bill of Rights, prohibition of state-imposed religion in the First Amendment is the only reference to religion.

McCaffery of the ACLU chides Moore for referring to the preamble of the Alabama constitution, which mentions the favor and guidance of God invoked in the process of drawing up a state constitution. "But he doesn't say anything about Section III. There it says no one is compelled by law to be in a place of worship. When Moore invites clergy to pray, he has made the courtroom a place of worship," McCaffery said.

Despite the strong convictions from those who disagree with Moore's crusade, the judge can't deny his equally strong convictions that the acknowledgment of God has been wrongfully shut out from society and illegally banned from places such as his courtroom for too long. As he rattles off Proverbs 3:5, 6: "Trust in the Lord with all your heart and lean not on your own understanding; in all your ways acknowledge him, and he will make your paths straight" (NIV),* the judge notes in the same breath that people should memorize the Declaration of Independence.

"The Framers turned to God in a time of crisis in America," Moore said. "God created us. He gave us life, liberty, and the pursuit of happiness. How can we say that to acknowledge God is establishment of religion?"

*Texts credited to NIV are from the *Holy Bible, New International Version.* Copyright 1973, 1978, 1984, International Bible Society. Used by permission of Zondervan Bible Publishers.

Legal QUIRK

The ACLU Versus Judge Thomas Quirk Over Sentencing Defendants to Church

BY JOE COOK

On a Friday night in Lake Charles, Louisiana, Gregory Thompson was pulled over in his pickup for doing 67 in a 45 mph zone. His slurred speech and bloodshot eyes made the officer suspect that Gregory was drunk, and when he failed a field sobriety test, Gregory spent the night in jail on his first DWI charge. He never dreamed, however, that escapade would, 10 months later, prompt a judge to mete out a "sentence to church" for additional punishment.

Jail was one thing. But church? That was another.

"The sentence Judge Quirk imposed upon me to attend church was unreasonable considering that I'm not a member of any denomination," said Gregory. "I think this violates my constitutional rights for freedom of religion."

So does the American Civil Liberties Union, which went to court to fight against church attendance as a form of court-imposed punishment.

"The issue is the oath that lawyers and judges take to uphold the Constitution," said Walter Sanchet, one of the ACLU lawyers that handled the case. "Though church attendance is a benefit of a free society, one of the reasons we've been successful in maintaining that freedom is we don't give government the power to control it."

Joe Cook is executive director of the American Civil Liberties Union of Louisiana.

At first, church attendance wasn't an issue in the case of the *State of Louisiana v. Gregory Thompson.* In his first encounter with Judge Thomas P. Quirk, Gregory—facing the DWI charges—stood before the bench as the judge looked down and explained the options. Based on what he heard, Gregory pleaded no contest and hoped for mercy and leniency, though he didn't get much of either: a year's probation with conditions that included a $400 fine plus costs, defensive driving class, substance abuse counseling, community service, and loss of driving privileges for 12 months.

As a recently divorced 23-year-old bricklayer, temporarily living with his parents in Sulphur, Gregory needed a driver's license, but hitching rides would have to suffice. He didn't think doing this much "time" fit the crime, because, "I didn't, after all, hurt anybody." Nevertheless, free world restrictions would beat life behind bars.

Gregory resolved to do his best and get off probation by October of 1994. The Safety Council of southwest Louisiana, across the street from the courthouse, acted as an officer of the court in administration of the sentence. Gregory reported to the Safety Council, which

sent him to the sewage treatment plant to do cleanup work as part of his community service sentence.

Though he was getting his money for the fine in on time, the Safety Council advised the court in June of 1994 that Gregory hadn't completed his defensive driving or substance abuse courses. Gregory was a construction worker and sporadic winter work left him short on cash; therefore, he didn't have the money to pay for the courses. Thus, in June of 1994, Gregory found himself again before Judge Quirk for probation violation.

Gregory told Judge Quirk about his financial problems, then the transcript tape picks up with Judge Quirk's remarks:

THE COURT: If you can't pay the fine, you do the time. It's that simple. This is your first time back also. You've heard my comments about the rest. I don't think I need to add anything to it other than I give everybody the alt—the choice. Y'all make the choice. Not me. I know a lot of people blame me because you've got the choice to do or not to do. All that I do is send people to jail if they don't do it.

I'm going to let you resign today, and I'm going to add the requirement of church once a week. Where do you go?

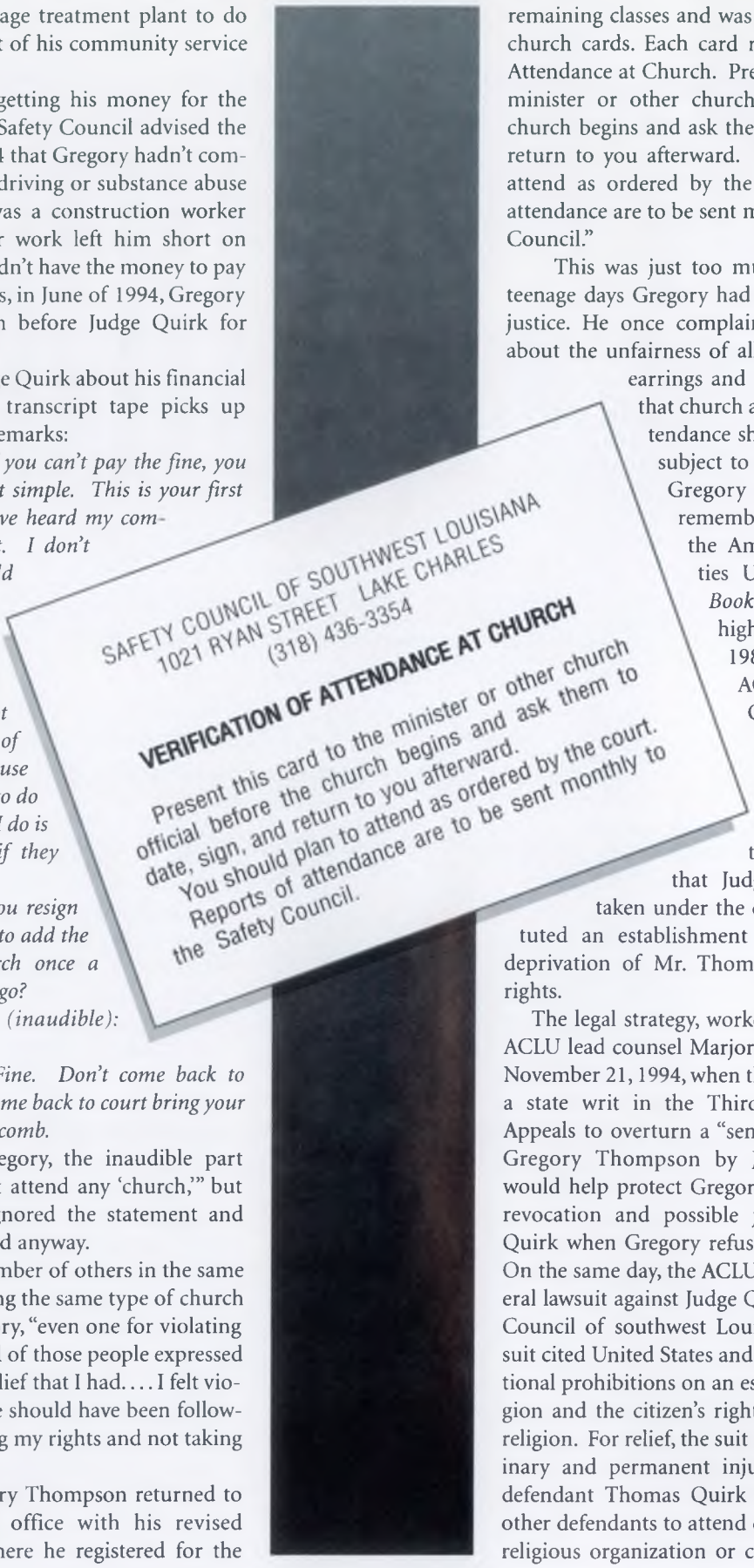
DEFENDANT (inaudible): church.

THE COURT: Fine. Don't come back to court and if you do come back to court bring your toothbrush and your comb.

According to Gregory, the inaudible part should state "I don't attend any 'church,'" but that Judge Quirk ignored the statement and ordered him to attend anyway.

"There were a number of others in the same court session receiving the same type of church sentence," said Gregory, "even one for violating the leash law. Several of those people expressed to me the same disbelief that I had.... I felt violated because a judge should have been following the law, defending my rights and not taking them away."

Frustrated, Gregory Thompson returned to the Safety Council office with his revised marching orders, where he registered for the remaining classes and was given six months of church cards. Each card read "Verification of Attendance at Church. Present this card to the minister or other church official before the church begins and ask them to date, sign, and return to you afterward. You should plan to attend as ordered by the court. Reports of attendance are to be sent monthly to the Safety Council."



This was just too much. Ever since his teenage days Gregory had had a sense of civil justice. He once complained in high school about the unfairness of allowing girls to wear earrings and not guys. Knowing that church attendance or nonattendance should be a right, not subject to a judge's discretion, Gregory fought back. He remembered reading about the American Civil Liberties Union in his *World Book Encyclopedia* as a high school freshman in 1984. He called the ACLU office in New Orleans a few days after the court hearing. The ACLU took the case, at no cost to Gregory, arguing that Judge Quirk's actions, taken under the color of law, constituted an establishment of religion and a deprivation of Mr. Thompson's free exercise rights.

The legal strategy, worked out by pro bono ACLU lead counsel Marjorie Esman, began on November 21, 1994, when the ACLU sponsored a state writ in the Third Circuit Court of Appeals to overturn a "sentence to church" of Gregory Thompson by Judge Quirk. This would help protect Gregory from a probation revocation and possible jail time by Judge Quirk when Gregory refused to go to church. On the same day, the ACLU commenced a federal lawsuit against Judge Quirk and the Safety Council of southwest Louisiana. The federal suit cited United States and Louisiana constitutional prohibitions on an establishment of religion and the citizen's right to free exercise of religion. For relief, the suit asked "for a preliminary and permanent injunction prohibiting defendant Thomas Quirk from ordering any other defendants to attend church or any other religious organization or ceremony, or in any

way imposing religion on anyone who appears in his courtroom." By the time of the writ, as many as 400 other defendants had been sentenced to church by Judge Quirk.

The ACLU suit also requested injunctive relief "prohibiting Defendant Safety Council from enforcing any sentences or orders which require individuals to attend church or any other religious organization or ceremony, or in any way enforcing the imposition of religion on anyone whose sentence it enforces." Furthermore, the complaint revealed that when Gregory had asked an employee of the Safety Council what kinds of churches would be acceptable to the terms of the sentence, the employee responded, "It had better be a Christian church."

Eight days after the legal action against Judge Quirk, he called Gregory back into court and advised him that he had successfully completed his probation a month earlier on October 26, 1994. That effectively ended his "sentence to church," even though the Safety Council had sent him an additional supply of church attendance cards to last through April 1995. Curiously, the cards showed a postmark of October 21, 1994—five days before the date set by Judge Quirk as the end of his probation.

Essentially, Judge Quirk had wriggled out of the state writ and the federal suit by using an obscure article of the Code of Criminal Procedure that allows the court of jurisdiction to "correct an error or deficiency" in the record. The so-called error came to light only after the ACLU filed suit.

Then, six days after he ended Gregory's sentence to church, Judge Quirk sent a letter to hundreds of defendants who had received an "alternative of attending church in lieu of other penalties." In the letter he said that "in view of the recent controversy, the court is affording anyone who has an objection to church attendance the opportunity to be resentenced" (it's not likely that anyone responded, because resentencing could entail jail time or an additional fine).

The letter from Judge Quirk tacitly acknowledges that he had no legal authority to mandate church attendance in the first place. State and federal law showed clearly that he had erred. A 1984 First Circuit Court of Appeals decision (*State v. Morgan*) said, ". . . probationary term, requiring defendant to regularly attend an organized church of his choice, violated the establishment clauses of the United States and Louisiana constitutions."

By the time of the writ, as many as 400 other defendants had been sentenced to church by Judge Quirk.

Despite the legal precedence prohibiting a "sentence to church," the threat of further legal action should another plaintiff come forward, and a pending complaint before the Judiciary Commission of the Louisiana Supreme Court, Judge Quirk proceeds to coerce defendants to church by "offering" an alternative of a sentence to church. The "quirky" judge—who once owned a bar called The Reef, and who has a sign on his door that reads "God's law has no loopholes"—has apparently found a few loopholes in man's instead.

"I'm not going to stop," he said about the unusual offer of church as punishment, "until the courts tell me I've got to."

The ACLU of Louisiana wants a judge to do just that, to tell Judge Quirk that he has "got to" stop using the power of the state to coerce people into going to church. But that doesn't appear likely to happen any time soon. In a setback for the ACLU, the federal court granted immunity to the Safety Council as an officer of the court and dismissed all claims in the ACLU suit except the mandate for a "Christian church" and the mailing of additional cards for use after the revised expiration of probation. That case is pending.

For now Judge Quirk can continue to use church as an option for sentencing. He's convinced that he's doing right, even if the defendants don't really want to attend church.

According to Judge Quirk, described by the *New York Times* as a "friendly, sad-featured plug of a man," the idea of church came to him as he was trying to decide what to do with some repeat drunk-driving defendants who faced his bench.

Churches, he said, "are always there, they meet regularly, and they teach moral values."

Whatever his motives, the Louisiana ACLU finds Judge Quirk's actions repugnant to the rule of law and religious freedom—a matter of conscience and a fundamental right not subject to majority vote. Not willing to let the matter die, the Louisiana ACLU persists in seeking another plaintiff with standing (Gregory Thompson's case was moot because his probation had ended)—one under a "sentence to church" by Judge Thomas Quirk, through whom the ACLU can continue to challenge this violation of both the Free Exercise and Establishment Clauses of the First Amendment.

Attendance at church should be a free and voluntary choice of the faithful, not coerced or required by a judge as punishment for a crime.

A Church-State Expert Warns About the Danger of Trying to Relieve the Underlying Tension Between the Religion Clauses

BY DEREK H. DAVIS

A few years ago, when the New York state legislature created a special school district for a sect of Hasidic Jews in order to allow them to receive aid for children with special education needs, two New York School Board members filed suit, claiming that the creation of the district violated the Establishment Clause. The village contended, however, that the school district merely accommodated the secular needs of its children with disabilities, was essential to preserving the village's cultural and religious distinctives, and was therefore protected by the Free Exercise Clause.[1]

This case illustrates the basic tension, or conflict, between the competing claims of the First Amendment's two religion provisions: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment Clause prohibits government from advancing or endorsing religion; the Free Exercise Clause prohibits government from placing restraints on the free exercise of religion. One clause expresses a tradition of freedom *from* religion, the other one of freedom *of* religion. Though the underlying tension has always existed, rulings over the past few decades—in which the Court has broadly interpreted both clauses—have exacerbated the clash between the two. How can government successfully achieve both requirements?

The conundrum of the clauses surfaced more than three decades ago. In 1963, in *Abington School District v. Schempp*,[2] the Supreme Court announced two guidelines for evaluating whether a state action violates the Establishment Clause: if the state action either (1) has no secular purpose, or (2) has the primary effect of advancing or inhibiting religion. In *Schempp*, the Court used these guidelines to invalidate teacher-led Bible reading and reciting of the Lord's Prayer in public schools. These guidelines sealed for the Court its broad interpretation of the Establishment Clause, because the Court said that the state acting as a purveyor of religion in general, not just a particular form of religion, violates the Establishment Clause.

Seven years later, in *Walz v. New York Tax Commission*,[3] the Court added a third guideline: if a state action creates "excessive entanglement" between religion and government, the Establishment Clause is violated. In 1971, in *Lemon v. Kurtzman*,[4] the Court affirmed its commitment to these guidelines by formally combining them into the

Derek H. Davis is editor of the* Journal of Church and State, *Baylor University, Waco, Texas.

FREEDOM

FOR
or
FROM

RELIGION

"*Lemon* three-part test." Though not always consistently applied, the *Lemon* formula undeniably rests on a broad interpretation of the Establishment Clause and has been repeatedly used to proscribe governmental advancements of religion.

Ironically, it was also in 1963 that the Supreme Court settled on a broad interpretation of the Free Exercise Clause. The Court held in *Sherbert v. Verner*[5] that government can restrict religious freedom only when it has a compelling interest and when there is no less intrusive alternative available to achieve the state's goals. In *Sherbert* the Court found that the state of South Carolina failed to show a compelling state interest in denying unemployment compensation to a Seventh-day Adventist whose employment required her to work on Saturdays.

YET THESE BROAD READINGS OF BOTH CLAUSES HAVE UNQUESTIONABLY CONTRIBUTED TO THE CONFLICT BETWEEN THE RELIGION CLAUSES THAT IS APPARENT TODAY IN MANY CHURCH-STATE CONTROVERSIES.

Since 1963 the Supreme Court has followed the *Schempp* and *Sherbert* precedents (albeit with several exceptions) by giving broad interpretations to both clauses. Yet these broad readings of both clauses have unquestionably contributed to the conflict between the religion clauses that is apparent today in many church-state controversies.[6]

By most accounts, the Establishment Clause's purpose is to prevent government from advancing or endorsing religion, the Free Exercise's to protect the practice of religion from government interference. These are the core values of the religion clauses. The Supreme Court's aim to fully implement these purposes led to the broad interpretation of the two clauses, which culminated in *Lemon* and *Sherbert*. This development has created a paradox that several of the justices and a host of legal scholars have since sought to resolve by giving narrow constructions to one or both of the religion clauses.

Chief Justice William Rehnquist, for example, has proposed a solution by giving narrow constructions to both clauses. In *Thomas v. Review Board of Indiana Employment Security Division*,[7] the Court required the state of Indiana to pay unemployment compensation to a Jehovah's Witness who quit his job for religious reasons after being transferred to a department that made turrets for military tanks. The Court upheld the worker's free exercise claim, held that there was no establishment of religion in doing so, and justified its holding on the basis of "neutrality in the face of religious differences."[8] Rehnquist dissented, complaining that the decision "adds mud to the already murky waters of First Amendment jurisprudence."[9]

For Rehnquist, the Court's ruling was wrong for fundamental reasons: "The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment. Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs and recognizes the 'tension' between the two clauses, it does little to help resolve that tension. . . . Instead it simply asserts that there is no Establishment Clause violation here and leaves tension between the two Religion Clauses to be resolved on a case-by-case basis. . . . I believe that the 'tension' is largely of this Court's own making, and would diminish almost to the vanishing point if the clauses were properly interpreted."[10]

Regarding the Free Exercise Clause, Rehnquist found no violation because the state of Indiana—in the interest of legitimate secular goals—had enacted an unemployment statute that provided no exemptions for religious reasons. Thomas was not singled out in the statute, and there was no reason for the Court now to single him out for special exemption. The state had the right to make its own judgments, according to Rehnquist, about any exemptions it would or would not grant.

As far as the Establishment Clause goes, Rehnquist wondered why the Court had not applied *Lemon* to the case. "If Indiana were to legislate what the Court today requires—an unemployment law which permits benefits to be granted to those persons who quit their jobs for religious reasons—the statute would plainly violate the Establishment Clause."[11]

It is apparent that Rehnquist is simply calling for a narrower interpretation of both religion clauses. It is an approach in which governmental authority may legislate aid to religion without violating the Establishment Clause, provided the aid is granted nonpreferentially or there is a valid secular purpose behind the legislation. Any resulting conflict

BY UNDERVALUING FREE EXERCISE VALUES, IMPORTANT DIMENSIONS OF RELIGIOUS LIBERTY ARE DRAMATICALLY FORFEITED.

with free exercise would likely be resolved in favor of governmental authority.

Rehnquist's narrow interpretation of the Free Exercise Clause was actually implemented in *Employment Division of Oregon v. Smith*, when the Supreme Court ruled that the state of Oregon is not required to exempt the sacramental use of peyote from criminal sanction. In the process, the Court overruled the *Sherbert* "compelling state interest test" in favor of one that subordinates religious liberty claims to neutral laws of general applicability. Thus *Sherbert*'s broad interpretation of the Free Exercise Clause was replaced with *Smith*'s narrow interpretation. Fortunately, Congress recognized that *Smith* placed religious practices, especially those of religious minorities, at the mercy of legislative authority, and it reinstated the *Sherbert* standard by passing RFRA in 1993.

Smith was also a victory for those who sought to relieve the tension between the religion clauses by a second means, that is, by giving a narrow construction to the Free Exercise Clause. A number of constitutional scholars[12] contend that the Establishment Clause prohibits legislatures from granting exemptions from generally applicable laws, but also that courts should not grant religious exemptions. Their interpretation of the Establishment Clause strongly protects against legislative advancements of religion, but their interpretation of the Free Exercise Clause is unsympathetic to religious groups seeking relief from neutral laws. By undervaluing free exercise values, important dimensions of religious liberty are dramatically forfeited. Interestingly enough, no Supreme Court justice has ever officially said that the Free Exercise Clause should be subordinated to the Establishment Clause, although it may occasionally appear that way.[13]

With the passage of RFRA, which essentially requires courts to interpret the Free Exercise Clause broadly, the option of reconciling the conflicts between the religion clauses by devaluing the Free Exercise Clause is realistically unavailable. But the reverse, the devaluation of the Establishment Clause, remains another option.

The strategy of reconciling the conflict between the religion clauses by narrowly construing the Establishment Clause is best illustrated by the "coercion test." This approach, adopted in recent years by several Supreme Court justices, claims to reconcile the two clauses; in fact, however, it all but nullifies the Establishment Clause, leaving the Free Exercise Clause alone to achieve religious liberty.

The "coercion test" was introduced by Justice Anthony Kennedy in his dissenting opinion in a 1989 case, *County of Allegheny v. ACLU*.[14] The majority in the case ruled that a life-sized crechè prominently displayed inside the county courthouse in Pittsburgh violated the Establishment Clause because it endorsed Christianity. Kennedy was joined by Justices Rehnquist, Scalia, and White in the view that, since no passersby were "coerced" to adhere to the religious message of the crechè, there was no constitutional violation. In a subsequent case, *Lee v. Weisman*, in which clergy-led commencement prayers in public secondary schools were struck down, Justice Clarence Thomas seemed also to adopt the coercion test. The coercion standard is offered by these justices (Justice White has since resigned) as a replacement for the *Lemon* test, which they feel is too harsh in its results. Although the coercion test has not been officially adopted by the Court, its endorsement by four of the Court's justices suggests that it could become the new standard for measuring Establishment Clause violations.

However reasonable it might sound, the coercion test is flawed for at least two reasons. First, the coercion approach makes the Establishment Clause redundant because any gov-

ernment coercion should be already protected by the Free Exercise Clause. As one commentator observed: "Coercion to observe someone else's religion is as much a free exercise violation as is coercion to abandon my own."[15] If the Free Exercise Clause adequately protects coercive government action, then the Establishment Clause is effectively stripped of its independent meaning. If the Establishment Clause was not intended by the Founding Fathers to protect against government actions not covered by the Free Exercise Clause, then why did they bother even to write an Establishment Clause?

A second problem is that a coercion test would permit what almost everyone agrees should be prohibited: the establishment of a state church, so long as no one was "coerced" into joining.

These attempts to rectify the tension between the two clauses nullify, in some way, the core values of the Free Exercise Clause, which is to protect the free exercise of religion, and of the Establishment Clause, which is to preserve the integrity and autonomy of religion by prohibiting institutional links between religion and government. The maximization of free exercise protection ends up assisting religion; the refusal to assist religion according to the mandate of the Establishment Clause sometimes restricts its free exercise. Thus, there is no way to harmonize the tension between the clauses without doing disservice to one clause or the other. Broad readings of both clauses, irrespective of the merits of such an approach, have unquestionably contributed to the conflict between the religion clauses that is apparent today in many church-state controversies.[16]

What, then, is the answer, especially if the courts should not attempt to forfeit the core values of either the Free Exercise Clause or the Establishment Clause? Quite simply, both clauses *should* be interpreted broadly, leaving the "tension" in place. Each case must be resolved on its own merits and decided with the goal of preserving the core values of the clause *most* in view. Courts would be called upon to decide whether a case most reflects free exercise concerns or establishment concerns, and adjudicate the case accordingly.

For example, in the case of the Hasidic Jews, while the free exercise rights of the Satmar Jews were at issue, the more dominant issue was the nonestablishment one. The extraordinary lengths to which the state of New York went to accommodate the views of the Satmar community can be perceived only as state support for the tenets of the Satmar faith. By using tax dollars to form a school district with boundaries coterminous with a political entity that is, in fact, a homogeneous, sectarian religious community, the state had essentially created a governmental unit with an official religion. Such territorial divisions along religious lines have a long history of evil. They produced only religious wars in Europe for about 300 years (1500-1800), and are at the heart of what the Establishment Clause is designed to prevent.

Nothing is revolutionary in this approach. In fact, this is how the Supreme Court has traditionally handled church-state controversies. It has not always produced tidy, predictable results, but that is the inevitable consequence of attempting to be faithful to two clauses whose conflicting values are both enshrined in the First Amendment.

The Supreme Court has centered its efforts to balance free exercise and nonestablishment around the theme of "neutrality," or more specifically, of a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[17] Yet in the past decade a full-scale assault against the Supreme Court's church-state jurisprudence and "neutrality" has emerged. While this assault is sometimes justified in the name of harmonizing the tension between the religion clauses, it is actually born of a more basic philosophical disagreement with the way the relationship between government and religion has evolved in this country. Many, including several of the Supreme Court's membership, simply want to move away from a policy of separation between religion and government to one of government accommodation of religion. On the Supreme Court, this new arrangement would be achieved by narrow constructions of the religion clauses. Chief Justice Rehnquist and justices Scalia, Thomas, and to a lesser degree, Kennedy, interpret the Establishment Clause to proscribe only a national church and nondiscriminatory aid to religion.

If such a narrow interpretation of the Estab-

lishment Clause were to become the High Court's standard, governments at all levels would be free to dispense financial aid to churches, religious organizations, and church-related schools, and to "accommodate" generic religious practices in public schools and other public forums. However popular with some, such a program would represent a major step toward making religion dependent upon government, a sacrilege to those who look to the Divine rather than to government for direction and sustenance. Requiring religion to be independent of government has not only protected religion from the intrusions of government, it has allowed the practice of religion to remain genuine and authentic.

Likewise, a narrow construction of the Free Exercise Clause is an important dimension of accommodationism. The *Smith* decision was premised on decidedly accommodationist principles. That case granted state governments broad new powers over religious practices, entitling them to offer religiously based exemptions from generally applicable laws if they choose, without being constitutionally required to do so. Under *Smith*, legislatures would be free to proscribe unpopular religious practices, and even mandate religious uniformity if they were so inclined. The *Smith* case is frightening in its implications for religious liberty, especially in a day when so many, threatened by an expanding religious pluralism, are calling upon government to help restore a "Christian America." Fortunately, Congress recognized the potential for harm embodied in *Smith* and responded with RFRA.

Freeing religion from dependence upon government was one of the novel contributions of the American Founders to civilization. The Founding Fathers sought to achieve this end through two separate mandates embodied in the First Amendment. The Founders were not content to let religious liberty rest on the strength of either clause alone. In 11 separate drafts of the religion clauses considered at the First Congress in 1789, not one of them contained language in which either a clause protecting free exercise or a clause prohibiting establishment did not appear, or in which the two mandates were fused in one clause. It was understood by the Framers that their provisions on religion were broad in scope, leaving to future generations the task of implementing the clauses according to specific problems that might arise.

The Framers recognized, too, that there was some degree of tension between the religion clauses. James Madison understood the difficulty of harmonizing the clauses in all situations: "It may not be easy, in every possible case, to trace the line of separation between the rights of religions and the civil authority with such distinctness as to avoid collisions."[18] In short, any narrow reading of the religion clauses does not do justice to their purposefully broad language.

The controversies surrounding church-state jurisprudence today are highly complex. The complexities are not to be resolved, however, by attempting to perfectly reconcile the inherent (and intended) conflict between the Establishment and Free Exercise Clauses. To reconcile the conflict would be to defeat the basic purpose of the clauses, which, according to the Supreme Court, is to ensure that no religion be "sponsored or favored, none commanded, and none inhibited."[19]

In short, religious liberty rests on two religion clauses whose resolved tension would only frustrate the religious liberty they were carefully crafted to protect.

FOOTNOTES

[1]114 S. Ct _____(1994).
[2]374 U.S. 203 (1963).
[3]397 U.S. 644 (1970).
[4]403 U.S. 602 (1971).
[5]374 U.S. 398 (1963).
[6]For an excellent discussion on this point, see Suzanna Sherry, "*Lee v. Weisman*: Paradox Redux," in *Supreme Court Review*, 1992 (Chicago: University of Chicago Press, 1993): p. 123.
[7]450 U.S. 707 (1981).
[8]*Ibid.*, p. 720.
[9]*Ibid.*
[10]*Ibid.*, p. 722.
[11]*Ibid.*, p. 723.
[12]See, for example, Philip B. Kurland, "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," *Villanova Law Review* 24; No. 3 (1978-1979).
[13]Consider, for example, *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), p. 27, where Justice Harry Blackmun criticized Justice William Brennan's majority opinion because it "would resolve the tension between the free exercise and establishment clause values simply by subordinating the free exercise value."
[14]492 U.S. 573 (1989).
[15]Douglas Laycock, "'Nonpreferential' Aid to Religion: A False Claim About Original Intent," 27 *William & Mary Law Review* 875 (1986): 922.
[16]For an excellent discussion on this point, see Suzanna Sherry, "*Lee v. Weisman*: Paradox Redux," in *Supreme Court Review*, 1992 (Chicago: University of Chicago Press, 1993): 123.
[17]*Walz*, p. 669.
[18]Madison to Rev. Adams (1832), in Gaillard Hunt, ed., *The Writings of James Madison* (New York: n.p., 1904), vol. 9, p. 487.
[19]*Walz*, p. 669.

RELIGION-FREE SCHOOL?

BY WILLIAM JEFFERSON CLINTON

A Draft of the July 12, 1995, Memorandum From the President of the United States to the Secretary of Education and the Attorney General on Religious Expression in Public School

Religious freedom is perhaps the most precious of all American liberties—called by many our "first freedom." Many of the first European settlers in North America sought refuge from religious persecution in their native countries. Since that time people of faith and religious institutions have played a central role in the history of this nation. In the First Amendment, our Bill of Rights recognizes the twin pillars of religious liberty: the constitutional protection for the free exercise of religion, and the constitutional prohibition on the establishment of religion by the state. Our nation's Founders knew that religion helps to give our people the character without which a democracy cannot survive. Our Founders also recognized the need for a space of freedom between government and the people—that the government must not be permitted to coerce the conscience of any individual or group.

In the more than 200 years since the First Amendment was included in our Constitution, religion and religious institutions have thrived throughout the United States. In 1993 I was proud to reaffirm the historic place of religion when I signed the Religious Freedom Restoration Act, which restores a high legal standard to protect the exercise of religion from being inappropriately burdened by government action. In the greatest traditions of American citizenship, a broad coalition of individuals and organizations came together to support the fullest protection for religious practice and expression.

Religious Expression in Public Schools

I share the concern and frustration that many Americans feel about situations in which the protections accorded by the First Amendment are not recognized or understood. This problem has manifested itself in our nation's public schools. It appears that some school officials, teachers, and parents have assumed that religious expression of any type is either inappropriate, or forbidden altogether, in public schools.

As our courts have reaffirmed, however, nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the consciences of our students, or to convey official endorsement of religion, the government's schools also may not discriminate against private religious expression during the school day.

I have been advised by the Department of Justice and the Department of Education that the First Amendment permits—and protects—a greater degree of religious expression in public schools than many Americans may now understand. The Departments of Justice and Education have advised me that, while application may

William Jefferson Clinton is president of the United States.

depend upon particular cases, the following principles are among those that apply to religious expression in our schools.

Student Prayer and Religious Discussion

The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before- or after-school events with religious content, such as "see you at the flagpole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation Prayer and Baccalaureates

Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may not in some instances be obliged to disclaim official endorsement of such ceremonies.

Official Neutrality Regarding Religious Activity

Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching About Religion

Public schools may not provide religious instruction, but they may teach *about* religion, including the Bible or other scriptures: the history of religion, comparative religion, the Bible (or other scriptures) as literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influence on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student Assignments

Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submission. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious Literature

Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitution restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

As our courts have reaffirmed, however, nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door.

Religious Excusals

Subject to applicable state laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the student's parents on religious or other conscientious grounds. School officials may neither encourage nor discourage students from availing themselves of an excusal option. Under the Religious Freedom Restoration Act, if it is proved that particular lessons substantially burden a student's free exercise of religion and if the school cannot prove a compelling interest in requiring attendance, the school would be legally required to excuse the student.

Released Time

Subject to applicable state laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching Values

Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student Garb

Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages. When wearing particular attire, such as yarmulkes and head scarfs, during the school day is part of a student's religious practice, under the Religious Freedom Restoration Act schools generally may not prohibit the wearing of such items.

I hereby direct the secretary of education, in consultation with the attorney general, to use appropriate means to ensure that public school districts and school officials in the United States are informed, by the start of the coming school year, of the principles set forth above.

The Equal Access Act

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the federal courts, as well as its interpretations of the act, the Department of Justice has advised me of its position that the act should be interpreted as providing, among other things, the following:

General Provisions

Student religious groups at public secondary schools have the same right of access to school facilities as that enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer Services and Worship Exercises Covered

A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal Access to Means of Publicizing Meetings

A school receiving federal funds must allow student groups meeting under the act to use the school media—including the public address system, the school newspaper, and the school bulletin board—to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school-sponsored.

Lunchtime and Recess Covered

A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

I hereby direct the secretary of education, in consultation with the attorney general, to use appropriate means to ensure that public school districts and school officials in the United States are informed, by the start of the coming school year, of these interpretations of the Equal Access Act.

Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

hate GOVERNMENT?

Building a City on Bigotry?

BY CRAIG L. PARSHALL

At Gettysburg, Abraham Lincoln reminded America that a democratic form of government is one "of the people, by the people, and for the people."

But what happens when a segment "of the people" forms a "government" for the express purpose of bludgeoning a disfavored religious community?

That is what happened in the village of Airmont, New York, which—according to a federal lawsuit brought by Orthodox rabbi Yitschok Leblanc-Sternberg—was birthed out of anti-Orthodox bigotry and hate toward the 2,500-year-old traditions of his religion.

Charging Airmont with violating the Free Exercise of Religion Clause of the First Amendment and the federal Fair Housing Act, Rabbi Sternberg's lawyers presented the case before a federal jury in an eight-week trial that generated nearly 6,000 pages of transcript testimony, and produced a result that appears, at least for now, to be a serious victory for religious freedom.

The story goes back to 1991, when Airmont was founded, carved out of a section of the larger town of Ramapo, an area with a high population of Orthodox and Hasidic Jews.

Because the Orthodox are forbidden by their religion from driving cars on the Sabbath, they had to live within walking distance of a worship site, and because (by both tradition and financial necessity) their rabbi's home would often also double as a small synagogue—Ramapo zoning officials allowed Orthodox believers to have collective worship in groups of up to 40 persons in residential homes. Under Orthodox religious rules, collective prayer groups ("minyans") require the presence of at least 10 adult males to form the nucleus of worship, in addition to the wives and children of their families who might also attend. The 40-person limit was easy to reach in most minyans.

Although an attempt to balance local religious needs with the zoning characteristics of residential areas, the accommodation ignited a firestorm among non-Jews. Simmering anger had been building over the increasingly visible presence of the Orthodox and Hasidim. Orthodox worshipers—the men in their formal black Sabbath garb and full beards—could be easily identified as they walked to prayer services, and they quickly became targets for a growing anti-Orthodox sentiment.

Dissident community members activated the Airmont Civic Association (ACA) in an effort to oppose what they saw as the town's dangerous undercutting of the zoning prohibition against "houses of worship" in residential homes. At meetings of the ACA word spread of a grim "Hasidic belt" developing throughout the Ramapo area. The ACA began publishing its own newspaper and, in the maiden issue

Craig L. Parshall is an attorney in Fredericksburg, Virginia.

Home synagogue: Some were so determined to close it down that they started a new town.

Orthodox adherents supporting home worship were referred to as "fanatics."

According to trial testimony, at a Ramapo meeting where Rabbi Chaim Friedman sought zoning permission to build a synagogue, attendees interrupted with hissing, booing, and statements like, "How did Hitler let these people out? He should have gassed them out." Orthodox followers were described as "foreigners," "ignorant," and "uneducated." One ACA leader described their presence as an "insult" to the community.

The hostility increased. Rabbi Sternberg, in his testimony, recounted episodes of hatred on the streets when he and other worshipers would gather for Sabbath services.

"A car would slow down," he said, "the window would open, and somebody would spit at us, call out, 'dirty Jew,' and some other profanity that I'm not familiar with. Sometimes soda cans were thrown at us."

Anti-Orthodox and anti-Semitic graffiti

Rabbi Sternberg at study: He was determined to fight for their rights.

PHOTOS BY DENNIS CREWS

appeared on public recreational buildings, declaring "Hitler lives," "——— Jews, you'll pay," and "I hope your houses burn."

Liba Zucker, an Orthodox resident, had a swastika painted on her mailbox. She replaced it with a new mailbox, and then told the court what happened next:

"Around 9:00 p.m., a matter of two or three days later, I heard an explosion. I thought somebody had an accident. I looked out the window. Then I thought a tire had exploded. The next morning, when I took out the children, the entire mailbox was blown to shreds. Somebody had put in it one of those little fire bombs—you know, just blew it up into little pieces all over the yard."

Mrs. Zucker sold her house and moved out.

The ACA began calling for a petition drive to begin the formal process of forming a separate village. Under New York law a village, once formed, possesses the right to self-determination in matters of local zoning. The ACA urged the formation of the village of Airmont, within a section of what had been the town of Ramapo, in order to pass "strict zoning" against group worship in residential homes. The likely result was that the Orthodox Jews, or "Black Hats," as one ACA founder described them, could be screened out of the area.

The petition drive was successful, and in April 1991 Airmont, about 8,000 strong, became an official municipality. Elections placed an entire ACA slate of candidates into the offices of mayor and the board of trustees. Once formed, the village passed a zoning code that conspicuously targeted the home worship practices of the Orthodox, according to the Sternberg lawsuit.

The code was virtually identical to that of the town of Ramapo, except for one section: the "Home Professional Office" provision that Ramapo had used as the vehicle for accommodating the home worshipers. In that section, Airmont officials prohibited any activity that would interfere with the "residential character" of a neighborhood (a euphemism that Rabbi

Orthodox Jews worshiping in Airmont: Hoping that the promise of religious freedom would extend to them too.

Worshipers walking to the synagogue: Did this ruin the neighborhood?

Sternberg's attorneys argued was a code phrase for "no home-worship" of Orthodox Jews). Further, the Airmont code gave village residents the automatic legal standing to trigger official zoning inquiries into activities of residential homes suspected of violating the code.

According to Judge Gerald L. Goettel, who presided over the trial, the changes in the Airmont zoning code "Suggest the likelihood that, if the issue comes before them, the Airmont Planning Board and Zoning Board would not adopt the Ramapo solution with regard to Home Synagogues. . . ."

After the two-month trial, and a week of deliberations, the jury ruled in favor of Rabbi Sternberg and his followers, finding that the village of Airmont had violated both the plaintiffs' constitutional rights and their rights under the nondiscrimination provisions of federal housing laws. However, the jury declined to award any monetary damages against the village. Undaunted, Sternberg's attorneys sought a permanent injunction from Judge Goettel, preventing the village from enforcing its zoning code, in light of the jury's clear ruling that the civil rights of religious worshipers had been violated.

Then, in a surprise decision, Judge Goettel overturned the jury's verdict, finding that the village—whatever the motives of its founders—had never really taken any "significant action" against Rabbi Sternberg's home synagogue. And in fact, the village had refrained from commencing any legal proceedings to close down the Sternberg home worship meetings. Sternberg's lawyers argued that it was only the spotlight of a pending lawsuit against the village that stayed its hand in enforcing its new, drastic zoning code.

Evidence at trial did show that the village board considered bringing a lawsuit against the Sternberg prayer meetings under its new code, but refrained. According to some board members, they wanted to "recast" themselves into the role of moderates, rather than religious bigots.

One board member was more blunt, indicating that bringing a lawsuit to enforce the Airmont zoning law was not necessary, because "there are other ways we can harass them."

Rabbi Sternberg has appealed Judge Goettel's ruling to the federal Court of Appeals for the Second Circuit, in New York City. Oral arguments were presented to a three-judge panel on January 12, 1995.

The emotional charges of hate-motivated government and claims of zoning laws as the weapon of choice for antireligious bigotry have somewhat eclipsed the complicated legal issue: exactly where does the general zoning power of

a municipality stop and the rights of religious worshipers begin? And when the two irreconcilably conflict, which one wins?

Attorneys for the village of Airmont, in their written arguments, describe the case as a "historic clash between the right of a municipality to zone and the individual right to free exercise of religion" that nevertheless "need not be decided" because the village took no actual steps against Rabbi Sternberg's group that infringed their right to worship in the first place. Besides, they argue, the jury's finding of an intent by the village, as an official arm of the government, to commit antireligious discrimination is simply not supported by the evidence, regardless of how hostile the intent of some of the village founders, or even the community at large, may have been.

Attorneys for the rabbi argue that Airmont's zoning regulation smacks of the same kind of illegal discrimination against a specific disfavored religious group that was condemned by the Supreme Court in 1993. In the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the city council passed a regulation forbidding animal sacrifice, supposedly out of concerns for cruelty to animals and public health. Yet the evidence clearly showed that city officials were motivated by their disgust for the increasingly prevalent activities of the Santeria religion in their area. The High Court ruled that government officials cannot target an unpopular religion for discrimination and then successfully hide their bigotry under the guise of concern for public welfare.

There are, however, some differences between the actions of the village of Airmont and those of the city of Hialeah. The regulations condemned by the Supreme Court clearly targeted animal sacrifice by name. In contrast, Airmont's zoning code—while it was preceded by the bigoted intent of the village founders and reveals a discriminatory effect on Orthodox worshipers—does not target the act of Orthodox home worship, by name, for discriminatory treatment. Sternberg's lawyers, however, argued that such overt antireligious wording isn't necessary to prove a case in which the discrimination is so clearly evident, as in this one.

The Supreme Court has yet to define the limits of local zoning power when it clashes with religious worship, at least where the code does not expressly target the disfavored religious practice by name. Lower courts have used a myriad of sometimes conflicting rules to resolve the conflicting interests in such cases.

One of the village's attorneys described the village founders as "a group of average citizens" who simply "wanted to make their community better," according to the *New York Times*.

Not all of the issues in the Airmont case are unique. Other local officials around the country are grappling with the more typical kinds of difficulties that arise when they try to balance the needs of worshipers who meet in homes with the complaints of neighborhood residents. In Maryland, a few months before the beginning of the trial in the Airmont case, Prince Georges County passed a new zoning rule to respond to public criticism of home churches. Under the new regulation, future home-based churches will have to undergo a time-consuming review by county planners and the county council, a process that could cost up to $10,000 per application. That resulted in a cry of religious persecution from some of the local clergy.

Village of Airmont officials deny any discriminatory motives, and cast their actions as being in the American mainstream. One of the village's attorneys described the village founders as "a group of average citizens" who simply "wanted to make their community better," according to the *New York Times*.

Rabbi Sternberg and the Orthodox Jews of Airmont remain unconvinced. They view the village of Airmont and its zoning law as a kind of sword of Damocles. If they lose their case, they fear that the sword of increased persecution will inevitably fall.

Fortunately, the sword fell, but not on them. In September, the Court of Appeals in the Second Circuit of New York reversed the District Court, finding that religious descrimination did occur against the Jews in the Airmont dispute, and thus remanded the case back to the jury verdict, which first found in favor of the plaintiffs. The original verdict is now the one that stands. What remains to be resolved is what remedy will be applied. Lawyers for Rabbi Sternberg have asked for a dissolution of the village itself. If they can't get that, they at least want federal court supervision that will require approval before prosecuting under any zoning code. They are also asking for attorney's fees. The Village has threatened to fight all the way to the U.S. Supreme Court.

So, for now, the Jews quietly walk the sidewalks of Airmont on their way to the local minyan to join in the collective voices of Sabbath prayer. And, no doubt, among their petitions is a word of thanks to the Almighty that Lincoln's promise of a government "of the people, by the people, and for the people" still includes them as well.

THE ROSENBERGER RESULT

BY MITCHELL A. TYNER

Liberty recently asked, "Does the United States Constitution contradict itself? When free speech rights collide with the Establishment Clause, which takes precedence?" (see May/June 1995).

On June 29 the United States Supreme Court in *Rosenberger v. University of Virginia* answered—sort of but not really. In fact, it left more questions unanswered than answered.

The controversy began in 1990, when Ronald Rosenberger and other Christian students at the University of Virginia formed Wide Awake Publications (WAP) in order to publish *Wide Awake: A Christian Perspective at the University of Virginia.* But when WAP applied for funding of *Wide Awake* from the Student Association Fund (which distributes money from student fees to various student groups and activities) on the same basis as funding for other student group publications, the application was denied. The Establishment Clause prevented UVA from funding a religious publication, WAP was told, even though Muslim and Jewish student groups were allocated money from the fund. WAP filed suit, alleging violations of freedom of speech, free exercise of religion, and equal protection of the law.

Lawyers for WAP argued that the Free Speech Clause requires that once government decides to open a public forum, it may not deny access to that forum on the basis of the speaker's viewpoint. WAP charged that UVA wanted to allow speech (meaning printed speech as well as literal speech), but discriminated against it on the basis of the religious viewpoint of its speech. The federal trial court disagreed, ruling that no discrimination had occurred, and that even if it had, UVA's concern that it not violate the Establishment Clause by benefiting religion was a sufficient justification for the restriction.

In March 1994 the U.S. Court of Appeals for the Fourth Circuit reversed as to the Free Speech violation. It agreed with WAP that although the government has no affirmative duty to subsidize the exercise of constitutional rights, once it began to it may not penalize such rights by withholding an otherwise discretionary benefit. The denial of funding was just such a penalty, creating an uneven playing field tilted toward wholly secular speech. But the appellate panel affirmed the lower court's ruling that UVA's discrimination against WAP was justified by the Establishment Clause.

These lower court decisions seemed to require a ranking of constitutionally guaranteed rights not found in the text itself. According to the lower courts, UVA violated the Free Speech Clause, but the violation was required by the Establishment Clause. Therefore the Establishment Clause trumps the Free Speech Clause. No explanation was given for this result.

When the case reached the Supreme Court, the questions presented were, in essence: (1) did UVA violate the free speech guarantee? and (2) if so, was that violation necessitated by the Establishment Clause?

The decision of the Court was written by Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. Separate concurring opinions were filed by both O'Connor and Thomas, and a dissent by Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens.

Justice Kennedy's majority opinion makes two main points. First, UVA violated the protection of speech in a public forum. The university's action was unconstitutional viewpoint discrimination: it selected for disfavored status those publications with a religious editorial viewpoint. In previous cases the Court has ruled that when public school facilities are made available, after school hours, for public use, they must be available to religious groups on the same basis as others. The dissent argued that those cases are different because the access requested by WAP was to funds, not just space, a distinction that Kennedy believed was irrelevant.

Second, the free speech violation was not excused by the necessity of complying with the Establishment Clause. Kennedy, by finding that no establishment problem existed, neatly avoided a discussion of what happens when two constitutional protections conflict. Because there is no Establishment Clause problem with funding the WAP magazine, there can be no excuse for not honoring the requirements of the Free Speech Clause.

The controlling issue for Kennedy was the fact that the program at issue is neutral toward religion. That is to say, it was not created to benefit religion. The program respects the difference between government speech endorsing reli-

Mitchell A. Tyner, Esq., is associate general counsel for the General Conference of the Seventh-day Adventist Church.

gion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. The bottom line: the constitutional guarantee of governmental neutrality toward religion is not offended where government follows neutral criteria to extend benefits to a diverse group of beneficiaries.

Curiously, Kennedy stated that WAP is not a religious organization. Given the strident, evangelistic content of the publication, it is hard to describe WAP as anything other than an organization whose purpose is to advance Christianity. Was Kennedy trying to narrow the definition of a religious organization to include only churches and their counterparts?

In trying to allay concern over state funds going to pay for the printing of a religious publication, Kennedy used an interesting example. Suppose, he said, that UVA had given student groups access to university-owned computers for the preparation of their publications. Giving WAP equal access with other groups would not be challenged. But here UVA has determined it cheaper to pay for an outside printer rather than provide the equipment. What difference, therefore, was there between the provision of equipment and the provision of funds to pay for the work the equipment would have performed?

For Kennedy, the denial of funding for WAP would have caused an Establishment Clause violation, not prevented one. To avoid subsidizing religious material, UVA would have been required to engage in such intrusive inspection of student publications, in a search for disallowed religious material, as to in itself constitute an excessive entanglement between church and state.

Understandably, Justice Souter and those who joined him in dissent saw it differently. In the most quotable line from any of the opinions, he wrote: "The Court today, for the first time, approves direct funding of core religious activities by an arm of the state." Souter considers the grant of funds to WAP an Establishment Clause violation. But he too fails to address the core question of how to balance two conflicting constitutional provisions. If the Establishment Clause and the Free Speech Clause lead to conflicting results, he assumes that the Establishment Clause will control, though he didn't say why.

For Souter, the nonfunding of religious activities is at the heart of the Establishment Clause. And therein lies the heart of the Court's disagreement on this issue. For Souter, it means that government and religion must be separated, even if that means placing religion in a second-class, disadvantaged position. For Kennedy, the heart of the matter is evenhandedness: religion may not be singled out for special treatment, but it must not be singled out for negative treatment, either.

But try as he might, Kennedy's basic idea does apply: when government funds all the actors in a given sphere of activity, the fact that some money may thereby flow to a religious institution does not in and of itself offend the Establishment Clause.

Both Souter and Kennedy, of course, knew that much attention would be paid to how this opinion would apply to the ongoing discussion of the propriety of governmental funding of nonpublic, including religious, schools. In an effort to hold resolution of that matter for another day, Kennedy wrote, "Our decision cannot be read as addressing an expenditure from a general tax fund." In other words, proponents of such funding should get little encouragement from this decision. But try as he might, Kennedy's basic idea *does* apply: when government funds all the actors in a given sphere of activity, the fact that some money may thereby flow to a religious institution does not in and of itself offend the Establishment Clause.

That very application no doubt occasioned Souter's closing paragraph, which will resonate with all those who have historically opposed any governmental funding of religious activities: "Since I cannot see the future, I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon* [*Lemon v. Kurtzman,* a 1972 decision that set out an understanding of the Establishment Clause now under attack]: 'In constitutional adjudication some steps, which when taken were thought to approach the verge, have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a downhill thrust easily set in motion but difficult to retard or stop.'"

Did the Court deal a telling blow to the prohibition of tax expenditures to benefit religion?

No, but the kernel of this decision will be used in further discussion of that topic. Do we now know how to balance two conflicting constitutional principles? No again. Did the Court give us its long-awaited comprehensive statement as to the meaning of nonestablishment? Afraid not. What the Court did was to agree to disagree on those broad principles. We will have to wait a bit longer for those. In the words of Justice O'Connor: "We thus resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of the case."

CONTRARY ATTRIBUTES

"For it is false to say of that which is that it is not or of that which is not that it is."—Aristotle

"Enlightened statesmen will not always be at the helm."
—James Madison

"In the heavenly *polis,*" wrote Dietrich Bonhoeffer, "state and church will be one." Fine, but some enlightened American statesmen decided that, until then, the earthly *polis* would be better served by separating them, a view disparaged by those attempting to make the so-called Religious Equality Amendment the latest change to the federal Constitution.

Actually, it's not the Constitution proper, but the Establishment Clause itself, that the proposal would amend, potentially doing to it what the Twenty-first Amendment did to the Eighteenth. "The eighteenth article of amendment to the Constitution of the United States," the Twenty-first reads, "is hereby repealed."

Guiding the bill through the House, Congressman Ernest J. Istook (R-Okla.) admitted that "not everyone supports *reaffirming* the First Amendment as I propose."

Reaffirming?

Aristotle once wrote: "It is impossible that contrary attributes should belong at the same time to the same thing." Considering that the First Amendment forbade government support of religion, the Religious Equality Amendment—which would allow that support—far from a reaffirmation, is a "contrary attribute" instead.

"Because Congress possessed no power under the Constitution to legislate on matters concerning religion," wrote church-state scholar Leonard Levy, "Congress has no such power even in the absence of the First Amendment. It is therefore unreasonable, even fatuous, to believe that an express prohibition of power—'Congress shall make no law respecting an establishment of religion'—vests or creates the power, previously nonexistent, of supporting religion."

Of course it's fatuous, which is why those seeking government support of religion want the First Amendment changed, and the Religious Equality Amendment, if passed, will do just that.

Though a final draft hasn't yet been presented, supposedly the amendment would, among other things, prohibit the denial of "benefits" to religious groups. Yet that's the whole purpose of the Establishment Clause. Certain benefits, such as tax dollars, should be denied to religious groups. If Patrick Henry's tax assessment had been proposed in order to pay for an army or to build roads, Madison's *Memorial and Remonstrance* would have never been written. By denying certain "benefits" to religious groups, the Establishment Clause

"CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION OR PROHIBITING THE

FREE EXERCISE

THEREOF..."

has, for the past 200 years, protected the integrity of both church and state by keeping them separate.

This proposed amendment shows that those quick to claim the Court's Free Exercise protections hate its Establishment restraints. They want one interpreted broadly, the other narrowly. Yet broad readings have made them both effective.

"'Religion' appears only once in the [First] Amendment," wrote Justice Wiley Rutledge in his *Everson* dissent. "But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.'"

But that's how proponents want the religion clauses to be read: Free Exercise like a four-lane highway, Establishment like a dirt path. How ironic that some who chafed under the Court's narrow reading of Free Exercise in the *Smith* debacle seek a narrow reading of the Establishment Clause as well. However, because the judiciary won't give it to them, they hope the legislature will.

No one denies that religion clause jurisprudence can, at times, appear to be a mixture of King Solomon, Jean-Paul Sartre, and Hootie and the Blowfish. But the dilemma is with the courts, not with the Bill of Rights itself. And the occasional problem of some high school science teacher who, buffaloed by a false reading of the Establishment Clause, forbids a kid to pray silently over lunch or read the Bible at his desk can be solved by educating educators, not by letting "unenlightened statesmen" crush life out of the First Amendment.

Madison once warned that the Constitution had two enemies: "one that would stretch it to death and one that would squeeze it to death." Though no clairvoyant, Madison must have had a premonition of the Religious Equality Amendment when he wrote that last clause.

The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near 2,000 years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

—from *The Spirit of Liberty,* an address by Learned Hand, May 21, 1944.