A MAGAZINE OF RELIGIOUS FREEDOM

LIBERTY

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JANUARY / FEBRUARY 1999

Acts, Declarations, And Decrees

BY: BERT B. BEACH

In 1948 the United Nations adopted the Universal Declaration of Human Rights. Included was Article 18, which reads: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."

Today, more than 50 years after the signing of that document, a crucial point must always be remembered: no declaration, no constitutional enactment, and no legislative decree ever created freedom of religion. All that these declarations and decrees do is recognize religious freedom as an already existing right.

Thus, however helpful in expressing the reality of religious freedom, these acts, declarations, and decrees don't create religious freedom any more than Newton's Principia established planetary motion. Instead (like Newton's calculations) they merely recognize what already existed.

If, however, these rights have already existed, and are not, indeed, created by decree--on what foundation are they based? What justification can used for rights considered so sacred, so fundamental, that no government may legitimately take away or deny them? What enduring principles for religious freedom can be established? And, perhaps even more important, what dangers do these principles face?

Foundations of Freedom

1. The first principle on which religious freedom rests is, simply, human individuality. There is infinite value in individuality, a uniqueness that can never be reproduced and, if restricted and damaged, can never be replaced. From a Christian perspective the individual person is worth more than society for several reasons: (a) society cannot exist without individual persons, but individuals can exist without society; (b) the individual faces eternity--everlasting life--but society does not; © the individual faces divine judgment, while society (as such) does not.

2. Next is the principle of moral liberty, what the French call libre arbitre: the right of the individual, in conscience, to act as a personal referee, to freely choose, judge, and decide for himself or herself. It is this moral liberty, this right, that makes individuals responsible for their actions in the area of belief. If this liberty does not exist, there can be no individual responsibility and accountability to the Creator.

3. Both human individuality and moral liberty and responsibility, give human beings dignity, another pillar on which religious freedom should rest. This dignity must be respected by individuals and their socio-religio-political instruments. In contrast, restriction of individual ideological liberty is an attack on human dignity. This dignity can be protected only when each person respects the libre arbitre of every other person's conscience.

4. Next there is equality. Both human individuality and dignity imply equality of each individual person before both God and other human beings and in society at large. Any unequal treatment is an offense against the human person and the very basis of religious liberty.

5. This equality, of course, is why non-discrimination is another important principle for religious freedom. Like equality, non-discrimination is an inevitable corollary of human dignity, and it involves placing the belief rights of minorities on the same level as those of the majority. Fortunately, the concept of non-discrimination regarding religion is anchored in the very charter of the United Nations and is deeply ingrained in various international instruments.

6. Another pillar is found in the notion of pluralism. Where one church or religious body has an exclusive status, or at least a preferred established recognition, minority religious groups are usually discriminated against, both de jure and de facto. Equality before the law, and non-discrimination almost by definition, presuppose some form of religious pluralism.

Though any one of these principles is important in and of itself, together they cement in place a strong foundation on which religious freedom rests. To respect any--and especially all--these principles ultimately must lead to respect for religious freedom. No nation or polity can violate any of these principles without violating essential human rights.

Threat to Freedom

Unfortunately, no matter how basic, these rights are threatened by various geo political forces.

1. Religio-political fundamentalism is one. The use of the world "fundamentalism" does not refer to a certain hermeneutical approach to Scripture, but rather to an extremist and totalitarian religious stance that sees those of differing religious persuasion as either a danger to be wiped out or at least as a target of legitimate repression. This noxious force has been growing in most religious sectors, especially Islam, but Christianity, Judaism, Hinduism, and even Buddhism are not immune.

2. Economic inequality poses another large threat to religious freedom. Often in areas where people are locked into politico-economic misery, they succumb more readily to the siren song and promises of future bliss bandied about by fundamentalist demagogues. The neglect of these systemic human miseries lets religious extremism fill the hope vacuum with a corresponding assault on religious liberty.

3. Though sectarianism and anti-sect movements would appear by definition to be at the opposite ends of the ideological scale, they actually feed on each other, and both are inimical to religious liberty. The sectarian person wears religious blinkers, thinks that every other view is wrong and probably dangerous, and wants to live in splendid religious isolation. Respect for the rights of the other is a low priority.

Meanwhile, the organized anti-sect movement, itself so obsessed with "sects," is willing to trample upon basic human rights through, for example, deprogramming. While there are, no doubt, some "dangerous sects," their number is grossly exaggerated and legitimate peaceful and law-abiding groups are indiscriminately tarred with the sectarian brush.

4. Alliance between government and dominant religion can be another threat, as history has aptly shown. With both European and American colonial experiences in mind, the framers of the U.S. Constitution placed a divide between government and established religion, which has served as a buffer to keep that potentially dangerous alliance at a minimum.

In this century, when Communism became the established anti-religious ideology in Eastern Europe, it proclaimed separation of the church from the state. With the fall in those countries of totalitarian Communism, some leaders of the former state churches now claim that separation of church and state is a Communist ploy and the majority church should be returned to its former status and power in society. They miss the point: the Communists never practiced separation of church and state, but only separation of the church from the state, not the state from the church! The state controlled the churches with a heavy, at times persecuting, hand.

5. Today, some old majority churches are cuddling up to the state, asking for legislation and regulations bolstering the position of the historical church and restricting free exercise of minority churches, especially new religious movements. While democracy provides that the majority rules, the concept of basic human rights, not least the right to religious liberty, places these rights beyond the reach of either political or religious majorities.

Some politicians, unfortunately, are always eager to do the bidding of the religious majority, be it of the right or left, in order to gain its support in the election process. This can be a danger to religious liberty.

Conclusion

While the basis of religious liberty has, in the forum of public opinion, become clearer in recent decades, the battle for freedom of religion continues unabatedly. Now, more than 50 years after the Universal Declaration of Human Rights, the struggle, especially in the post-Communist world, is more acute than ever. Yet religious freedom continues to be one of the most basic and precious of all human rights--one that all the acts, decrees, and declarations can only enumerate, but never establish or, for that matter, abolish.

Bert B. Beach is general secretary of the Seventh-day Adventist Council on Inter Church Relations, and vice president of the International Religious Liberty Association.

Side Bar

THE INTOLERANCE OF TOLERATION

One thing the principles upon which religious freedom rests should teach lovers of liberty is this: "tolerance," no matter how nice sounding, is not religious freedom.

This word "tolerance" is frequently postulated as the basis for religious freedom, a position that is patently and dangerously false. Tolerance, by the very definition of the word itself, implies that freedom of religion or belief is not an intrinsic, fundamental right, but a favor granted in a spirit of either generosity or condescension. Tolerance suggests that those tolerating may be suffering somewhat (like a sick person "tolerating" pain), but stoically put up with other religions and denominations. It is dangerous to base religious liberty on either human generosity or endurance. Tolerance, it has been said, is a counterfeit to freedom; it certainly isn't what religious freedom is or should ever be about.--B.B.B.

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Obiter

"Many traditional ethical beliefs are hard to justify, except on the assumption that there is a God or a World Spirit or at least an immanent cosmic purpose."
--Bertrand Russell, Human Society in Ethics and Politics

"I have been assured by a very knowing American of my acquaintance in London, that a young healthy child well nursed is at a year old a most delicious, nourishing and
wholesome food, whether stewed, roasted, baked, or boiled, and I make no doubt that it will equally serve in a fricassee, or a ragout."
--Jonathan Swift, A Modest Proposal

While traversing a parallel universe (Cyberspace), I encoun tered the following syllogism: because opposition to abortion is based on Christian ethics, and because the Establishment Clause mandates that Christian ethics be kept apart from law, then separation demands a pro-choice position . . . an argument akin to logician Raymond Smullyan's doctors in a mental hospital who were ready to release a schizophrenic but only after he passed a lie detector test. When asked, "Are you Napoleon?" the patient answered, "No"--and failed the test. Though the logic's flawless, the result's absurd.

The same problem now exists in the church-state separation debate. Just as Voltaire turned Pierre Bayle's apology for Christianity into an anti-Christian polemic, many separationists have turned a principle designed to promote Christian morality into one that opposes it. The Establishment Clause was meant to prevent Christian (or any other religious) forms of worship, or doctrines, or dogma from being supported or promulgated by the state. Period. It had little to do with limiting religion-based morality.

On the contrary. The founders were creating a republic, a government in which the unwashed masses, played a pivotal role. Thus, in order for the nation to succeed, the people--so crucial to the process--needed to be moral. The founders all called for "public (or civic) virtue"; their noble experiment, they believed, could not survive without it. And most, if not all of them believed that religion was the key to ensure that this public virtue existed.

"Liberty regards religion," wrote De Tocqueville about early America, "as its companion in all its battles and triumphs,--as the cradle of its infancy and the divine source of its claims. It considers religion as the safeguard of morality, and morality as the best security of law, and sure pledge of the duration of freedom."

"Our constitution," wrote John Adams, "was made only for a moral and religious people. It is wholly inadequate for the government of any other."

Thus, the early battle regarding church-state separation was never over the need for religion, or for religious values and morals to permeate society, even (or especially) through law. The battle, instead, was over the best means of allowing religion to flourish. The accomodationists argued that because morality was crucial for the success of the nation, and because religion inculcated that morality, it was exigent upon the government to support, promote, and enforce religion. In contrast, the separationists--Madison, Franklin, Jefferson, and Washington, et. al.--holding similar premises regarding morality and religion, argued that the surest way of ensuring morality was to free religion from the state, where it could thrive on its own.

The separationists won, of course, not only the immediate political battle, but in the verdict of history as well: religion has flourished in America (if not necessarily the morality that was supposedly its corollary) in contrast to "post-Christian" Europe, where the church has been propped up by the state for more than a thousand years.

To seek, therefore, to strike down--on Establishment Clause grounds!--a sex education program that teaches abstinence solely because abstinence is linked to Christian morality is a gross perversion of the clause. To defend abortion rights or gay rights on separationist grounds could be like using the commerce clause to defend mail fraud. A person might have legal reasons to defend abortion or gay rights, but unless the challenged law is so overtly religion-based the Establishment Clause probably isn't one. Just because something has a religious rationale doesn't automatically make it violative of the Establishment clause--though, under certain circumstance, it could (the government, for instance, can't carte blanche use religious rationale to make law and policy).

The Establishment Clause, to be sure, demands fights against legislated prayer or worship during officially sanctioned school events; it demands keeping tax money from sectarian coffers; it demands keeping religious symbols from public property; it demands that judges not proselytize in the courtroom, or public school teachers in the classroom; it demands that Sunday laws be forbidden; it demands that creationism--no matter how true (as opposed to the defunct nonsense of evolution)--not be taught as religious dogma in public schools.

But it does not demand--and in fact mitigates against--the sophistry that any law with a religious moral base automatically violates the Establishment Clause. That law might be violative for other reasons, but not on a prima facie basis because it reflects religious values. On the contrary, protecting religious values was one reason why the clause had been written, and using it as a conduit for hormonal excesses is like using Sophocles' Antigone to deny natural law or Pascal's Pensees to promote agnosticism. The Establishment Clause, in most cases, has no more to do with abortion, homosexuality, or teen sex than it does with the speed limit--and to apply it in these areas could possibly distend and stretch a principle until it loses all the vigor and strength with which it has so aptly protected our most sacred freedom for more than two centuries.

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Iambs & Pentameters

Many of America's Founding Fathers, especially Jefferson, believed that education was the key to preserving our republican government. If so, one wonders how much longer the republic has when, for instance, the University of California (Santa Cruz) offers courses like "Feminist Cyborg Fiction," which includes stories about a "lesbian-of-color vampire." How secure are the foundations of freedom when Cornell students can get credit for "Radical Democratic Feminisms," which focuses on "socialist feminism, radical democratic pluralism, critical race theory and radical antiracist and anti-heterosexist multiculturalism"? Where's our republic heading when Amherst offers, "Taking Marx Seriously" (at least someone does) and students at the University of Pennsylvania can get "Vampire: The Undead"? Will the nation survive with courses like "Lesbian Personae," which explores the profound question facing every Republic: "What does it mean to read as a lesbian"?

Literary critic Harold Bloom wasn't too far off when, commenting upon the intellectual and cultural shift in the Western studies, he lamented, "After gods, heroes, and humans, there remain only cyborgs."

That's feminist cyborgs, mind you.

JEWS, TURKS, AND INFIDELS

Despite all the rhetoric about a bunch of unelected despots (i.e., the U.S. Supreme Court) running roughshod over the Constitution, last we heard the document is still dispositive, including Article Six, clause three, which reads: "No religious test shall ever be required as a qualification to any office or public trust under the United States." Don't tell that, however, to the God-fearing saints in Texas who, in the last election, wanted to ensure that only full-blooded bona fide kosher Christians would hold public office in Galveston County. According to Fort Worth Star-Telegram columnist Molly Ivins, Citizens for Better Government mailed to prospective candidates a questionnaire asking things like, "Do you believe that homosexuals should be afforded the minority status equal to that afforded to minority races?" or "Do you believe that the moral and ethical character of a candidate (including what he/she does in 'private') should be an issue?" No matter how crass, these could be considered legitimate political questions. But they also asked, "Do you believe that Jesus Christ was the son of God, died for the sin of man, rose the third day and presently sits at the right hand of God"?

Now, the Constitution stops the government, not private citizens, from imposing a religious test for public office, so--as private citizens--these folks were within their legal rights to ask whatever they want. What the question does show, however, is what's really in the minds of the Christian Right, which--at least at the national level--has developed enough political savvy to avoid such overt expressions of its theocratic aims.

Yet however immoral and crude, the attitude expressed by Citizens for Better Government merely reflects the concerns of many less enlightened 18th century Americans who wanted only Christians in the government. In one case, a Massachusetts deposition filed against the original proposal to include Article Six, clause three in the U.S. Constitution warned that if passed, the proposal would open "a door for Jews, Turks, and infidels" to run for public office.

Horrors! We need only Christians in those positions . . . like Southern Baptist Bill Clinton, for example.

THE ROMAN "HOLY" DAY OF MR. ROBERTSON

Last year on his 700 Club, Pat Robertson, after quoting Isaiah 58--which promised a blessing for those who keep the Sabbath--explained how during his failed presidential bid, he refused to campaign on Sunday. In fact, he said that he would at times be scheduled to land somewhere at one minute before midnight on Saturday night in order not to violate the day of rest, even during the heat of a presidential campaign. "I mean," he said, "I'm gonna have a day of rest, and that's just the way it is." The only problem is that by midnight Saturday, the day of rest that Isaiah (as well as both the Old and New Testament) recognize had already long passed.

First, calculating the day from midnight to midnight is a pagan Roman innovation; in Scripture, the new calendar day begins, not at midnight, but at sundown. Secondly, the Sabbath is the seventh-day, Saturday, not Sunday, the first. In fact, Sunday-keeping is another innovation that arose under the Romans. This means that the biblical day of rest commences on sundown Friday and ends sundown Saturday. So Pat, by beginning at midnight Saturday, is keeping "Sabbath" about six hours after the Sabbath ends and about 30 hour after it begins.

Sorry, Pat, but to justify your position, perhaps you'd be better off quoting the Pope's recent apostolic letter in favor of Sunday-keeping (see pg ?) Dies Domini, not the prophet Isaiah.

RUSSELL'S CHICKEN

In his book on parallel universes, Oxford University quantum physicist David Deutsch told a story about Bertrand Russell's chicken, which represents a human being trying to understand the regularities of the universe. The chicken noticed that the farmer always came to feed it, and thus predicted that the farmer would continue to bring food every day. "Inductivists," wrote Deutsch, "think that the chicken had 'extrapolated' its observations into a theory, and that each feeding time added justification to that theory." It happened over and over again, the farmer coming to feed the chicken, with the clockwork regularity. Then one day, as usual, the farmer came, only this time, instead of feeding the fowl--he wrung its neck! So much for deducing truths from past experience.

This story is somewhat like what happens with church-state jurisprudence. Over and again, the courts rule in a certain way, making one extrapolate that there's finally a coherent theory--only to have its neck wrung. Such as in Peck v. Upshur Country School Board of Education, where the Fourth Circuit Court of Appeals found that the school board did not violate the Establishment Clause by allowing private groups to "passively offer" Bibles and other religious material on school property. Despite all the court's dicta about an "open forum" and "view point discrimination" or that the Bibles were left on the table for anyone to pick up and that no one pressured students to get them, the U.S. Supreme Court has consistently ruled against attempts to promote religion or religious doctrine in public school, where students are by law forced to attend. Whether from Engle v. Vitale (1962) and Abington v. Schempp (1963) through Stone v. Graham (1980), Wallace v. Jaffree (1985) and Lee. v. Weisman (1992), the High Court has made it clear that public schools are not to be used, in any manner, no matter how supposedly passive, to promote religion. Even in Equal Access cases, the activities were after school without any kind of pressure upon students to participate.

Now comes this Fourth Circuit decision that allows religious groups to set up, in public schools, a table filled with Bibles and other religious literature that will be there during the whole school day--all under the rubric of "simply lifting one forum restriction on religious speech"? Under that rationale, why shouldn't the teacher, during class time, be able to teach Jehovah's Witness theology to the students? After all, if the teacher can talk about math, science, or history, why should his or her free speech be infringed upon by not allowing eloquent discourses on the coming kingdom of Jehovah? That there's less coercion from the books being left on the table is besides the point: it's still using the power of public schools to promote religion among students.

The Establishment Clause itself, but its very wording, demands that certain restriction apply to religion that don't apply to other forms of speech and action. Just as the Free Exercise Clause give religion special protections--at least until Smith (another of Russell's chickens dead)--that other actions and speech don't have, the Establishment Clause puts limits on what the government can do for religion. That's not persecution, that's not bigotry, that's not anti-Christianity--it's what's known as keeping the government from taking the responsibility that churches and parents are supposed to bear.

Another question, perhaps the most important, needs to be asked: Are the good religious folk in Upshur County so weak in faith, so unable to evangelize their neighbors and friends and young folk that they need the "godless, atheistic, heathen" public schools to help them preach the gospel? Do they need the state doing for them what they--tax free--can't seem to do for themselves?

And, finally, one wonders if, in the interest of free speech, how the good Christian folk in Uphsur County will react if some Latter-Day Saints roll into town and want to place on the table the book of Mormon alongside the King James Bible?

Let's hope they do. The reaction will then prove that this case isn't about free speech, but about people using the government to promote certain sectarian views, and (sadly), about the government willing to oblige.

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Op. Cit.

One Man's Faith is Another's Secular Organization

I have enjoyed your magazine for some time, finding your articles sometimes amusing (often unintentionally), sometimes stimulating, and sometimes moving. I have rarely found them inaccurate.
However, in your article "A Ride Down Sixteenth Street" (September/October 1998), you have included in your list of religious places of worship the Scottish Rite of Freemasonry Museum/Library and Temple. This in the context you presented it would lead the reader to assume that Freemasonry is a religion and its offices and meeting-places are places of worship. This implication is inaccurate. Freemasonry is not a religion. It is a fraternal organization with social and benevolent purposes. It has no creed, no theology, no doctrines of salvation, and no forms of worship. Each member is expected to find these in his own church or other place of worship. On the other hand, its ceremonies do reinforce the principles of morality to be found in all religions. Because Masons come from all kinds of religious backgrounds, religious tolerance is one of these Moral principles.
Free Masonry's position on religious liberty (together with willful misunderstanding) has caused it to be the target of persecution in many countries, the United States of America included. In this respect it has something in common with some of the other residents of Sixteenth street.
But a religion it is not.
MASON D. JARDINE, barrister and solicitor
Russell, Manitoba, Canada

Thank you for your article, "A Ride Down Sixteenth Street," which illustrated how the ideals of religious freedom in America are a reality. Your description of Churches brought back several happy memories dating back to the 1930's when my Mother drove her three daughters every Sunday morning from the "country" on Jones Mill Road through Rock Creek Park and down Sixteenth Street to the Christian Science Sunday School.
Between 1946 and 1948 when Washington society and schools were strictly segregated, my Bethesda-Chevy Chase High School speech teacher, Mrs. Black, invited a group of her students to meet once a month on Saturdays with a group of black students and their teacher from Cardoza High School at All Soul's Unitarian Church.
Later, in the 1950's before moving to California, I, with my future husband, attended a series of Bible Lectures at Hamline Methodist Church. We also attended weddings at two other Churches on the same beautiful avenue.
Do the priests, rabbis, ministers and clerics of all the churches on Sixteenth Street ever get together for prayer and dialogue--prayer and fellowship that could bless their collective congregations, promote moral values and good will among their neighbors in Washington and around the world?
Again, many thanks for your outreaching message!
(Mrs.) ANNE M. HOFFLUND
San Diego, California

I write to comment on your issue September/October 1998, and your policy in general.
I do not quarrel with your intentions and I wish to thank you for your willingness to have us on a complimentary mailing list.
Your article "A Ride Down Sixteenth Street" I think an unwarranted exercise in national self congratulation. Your statement (page 24) that "an intersection that houses Moonies, Masons, Unitarians, and Baptists could be made only in America" is simply false. There are many such intersections in Canada and the freedom which they enjoy owes nothing to the United States of America or its constitution.
Although I believe that Christ like behavior requires those who believe in him to respect and defend religious liberty, even of those whose creed does not support such liberty, is such a right "bestowed by the Creator himself?" The only effective public rights I experience are those granted by the effective public
power.
I ask that we be removed from your mailing list as the heavy preoccupation with the Constitution of the United States makes little of the magazine relevant to us in Canada and we prefer not to presume further on your generosity.
CHRISTOPHER WILLIAMS, Reverend Incumbent
Oshawa, Ontario

I was very disappointed at the hypocrisy expressed in the article "A Ride Down Sixteenth Street," by Clifford Goldstein in the most recent issue. The author used the derogatory term "Moonies" to describe members of the Unification Church. Then he proceeded to describe the church doctrine as "radically aberrant theology." Finally, he implied that the Church has somehow "bought" respect.
The tone of this section of Goldstein's article is bigoted and disrespectful. I assumed that a Seventh-day Adventist publication would be more sensitive to the issue of new religious movements since so many Christians consider Adventists to be another cult with an heretical doctrine. Now it appears the persecuted having achieved acceptance to some extent, can become the persecutor.
Unificationists object to the term "Moonies" and should be respected in their desire not to be labeled pejoratively. If theology of the church is to be discussed, then have a qualified author offer commentary in a balanced, fair and truthful manner. Goldstein seems to be not only ignorant of Unification Theology, but downright hateful.
Liberty is supposed to be a beacon of religious freedom, and instead is promoting, in this instance, the kind of prejudice that leads to the loss of freedom, first for new religious groups, and eventually for all. An apology is in order.
MARK ANDERSON, State Representative
Phoenix, Arizona
[Dear Mark:
Considering that Moonie (most Moonies I knew gladly used the term) theology teaches that Christ blew it by dying on the cross, and the Rev. Moon has come to finish what Jesus failed to do--"radically aberrant theology" isn't too strong a term.--Ed.]

Reconstructing the Free Exercise Clause

Nicholas Miller's recent article entitled "Reconstruction" was provocative, insightful, and disturbing. In short, it was a true clarion call to action. It was provocative because he set forth a persuasive case for appropriately and expeditiously responding to the Supreme Court's recent striking down of RFRA. It was disturbing because it reminds us how easy it is for us to lose our Constitutional freedoms.
While I understand the Supreme Court's Separation of Powers concerns as articulated in Boerne, it is vital that we secure the protections of the Free Exercise Clause by reintroducing RFRA with appropriate modifications. Mr. Miller's piece set forth one of the most comprehensive summaries of the present status of efforts to reinstate a RFRA of some sort.
I will be sure to share his article with my fellow legislative colleagues. As a state legislator, I believe that if we as a nation are unsuccessful in enacting a new RFRA at the federal level, we may have to individually pass state RFRAs to secure the freedoms which ought to have secured by our federal Constitution.
Thanks for an informative magazine. Mr. Miller's piece is truly representative of the thoughtful articles you have a reputation for publishing.
DAVID A. PENDLETON, Republican Whip, House of Representatives
Honolulu, Hawaii
sent through e-mail

The Grand Inquisitor

Your Obiter on "The Grand Inquisitor" in Liberty's September/October 1998 issue proves the folly of asking, "What would Jesus do?" Because Jesus refused to get involved in politics, does it follow logically that we should not--today, in America? A nation founded by Christians and set up as a democracy requiring participation by all?
Would Jesus have joined George Washington's army to fight for America's freedom? Would Jesus have chosen sides in the civil war? The Vietnam War? The local school board election?
When Jesus appeared to Joshua as he prepared to enter the promised land, Joshua asked him, "Are you for us or for our enemies?" The Lord wisely replied, "Neither." (Joshua 5:13-14).
God does not "pick sides." He loves all people and nations, as a loving father loves all his various children, though they may fight amongst themselves. We, however, are called to participate in society and government. All that is required for evil men to succeed is for good people to stand by and do nothing.
Rather than ask how people would react to Jesus if He were to walk the earth today; rather than ask "what would Jesus do?", we need to ask ourselves "what would Jesus have me do today?"
I hardly think that Jesus would wish no Christians to speak up for righteous values in our schools and government.
ARDITH A. MUSE
Portland, Oregon

P.S. I enjoy your magazine very much.

Suspect Class

I remained confused after reading "Suspect Class" in your July/August 1998 issue. I thought the purpose of your usually excellent magazine was to advocate a strong separation of church and state. Why then did Stephen Bainbridge's article lament the case of the Christian Legal Society at the University of Illinois for being forced to admit homosexuals?
No one at the university was dictating how the CLS members could practice religion privately, but at a public institution it makes sense not to allow clubs to discriminate. Should campuses allow white supremacists to express their first amendment rights in school sanctioned clubs without the input of minority voices? Sounds pretty lame.
And on a more Christian note, how dare Christians bar other sinners from sharing in the delights of the Lord! I am glad the university had the courage to lend the umbrage that such narrow mindedness deserves, otherwise we may have had Christian attorneys casting the first stone.
STEPHEN FORD
Chatsworth, California

A Christian Nation: The Presbyterian Approach

This is a post-script to the parody on talk about a Christian nation by Presbyterian minister Larry V. R. Bunnell in the July/August issue of Liberty. In addition to contributing leadership in the formation of a national government, Presbyterians in 1788 were putting together their own national organization. The form of government which they adopted has a preface that is addressed not to the members but to the general public. It describes the relationship of church and state in terms that are at once firm and gentle, and generous to those who differ in belief and organization.
In our present Book of Order the opening lines have been revised to introduce the "Historic Principles" that are basic to the Presbyterian concept and system of church government. Here are the original opening lines, and the first two of the eight sections.
The Synod of New York and Philadelphia, judging it expedient to ascertain and fix the system of union, and the form of Government and Discipline of the Presbyterian Church in these United States, under their care; have thought proper to lay down, by way of introduction, a few of the general principles by which they have been hitherto governed and which are the ground work of the following plan. This, it is hoped, will, in some measure, prevent those rash misconstructions, and uncandid reflections, which usually proceed from an imperfect view of any subject; as well as make the several parts of the system plain, and the whole plan perspicuous and fully understood.
The Synod are unanimously of the opinion:
I. That "God alone is Lord of the conscience" and hath left "it free from the doctrine and commandments of men, which are in any thing contrary to his word, or beside it in matters of faith or worship." Therefore, they consider the rights of private judgement, in all matters that respect religion, as universal, and unalienable: They do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time, equal and common to all others.
II. That, in perfect consistency with the above principle of common right, every Christian church, or union or association of particular churches, is entitled to declare the terms of admission into its communion and the qualification, of its ministers and members, as well as the whole system of its internal government which Christ hath appointed. That, in the exercise of this right, they may, notwithstanding, err, in making the terms of communion either too lax or too narrow: yet, even in this case, they do not infringe upon the liberty, or the rights of others, but only make an improper use of their own.
Reverend C. Fred Jenkins, Associate Stated Clerk, PC (U.S.A.)
Louisville, KY

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John Paul's Pseudo-Sabbath

BY: SAMUELE BACCHIOCCHI

On May 31, 1998, Pope John Paul II issued a lengthy Pastoral Letter Dies Domini, a passionate plea for a revival of Sunday observance. Though this document has enormous historical significance because it addresses the critical problem of Sunday profanation at the threshold of the Great Jubilee Year (2000), it is flawed, both theologically and politically.

The Creation Sabbath

To begin, the pope goes to great lengths to find the theological foundation of Sunday observance in the Seventh-day Sabbath as first revealed in the Creation account. "In order to grasp fully the meaning of Sunday, therefore," he writes, "we must reread the great story of creation and deepen our understanding of the theology of the 'Sabbath.'" John Paul II then rightly emphasizes the theological development of the Sabbath from the rest of creation (Genesis 2:1-3; Exodus 20:8-11) to the rest of redemption (Deuteronomy 5:12-15). He notes that in the Old Testament the Sabbath commandment is linked "not only with God's mysterious 'rest' after the days of creation (cf. Exodus 20:8-11), but also with the salvation which he offers to Israel in the liberation from the slavery of Egypt (cf. Deut 5:12-15). The God who rests on the seventh day, rejoicing in his creation, is the same God who reveals his glory in liberating his children from Pharaoh's oppression."

The problem, however, starts when he argues that Sunday, "the Lord's Day," now fulfills the creative and redemptive functions of the seventh-day Sabbath of Creation. The pope maintains that New Testament Christians "made the first day after the Sabbath a festive day" because they discovered that the creative and redemptive accomplishments celebrated by the Sabbath found their "fullest expression in Christ's Death and Resurrection, though its definitive fulfillment will not come until the Parousia, when Christ returns in glory."

No Evidence

The pope's attempt to make Sunday the legitimate fulfillment of the creative and redemptive meanings of the Sabbath is, however ingenious, void of biblical and historical support. There are, simply, no indications in the Bible that New Testament Christians ever interpreted the day of Christ's resurrection as the fulfillment and "full expression" of the Creation/redemption meanings of the Sabbath. The New Testament, in fact, attributes no liturgical significance whatsoever to the day of Christ's resurrection--simply because the Resurrection was seen as an existential reality experienced by living victoriously by the power of the risen Savior, and not a liturgical practice associated with Sunday worship.

Jesus Himself never said a word about making the day of His resurrection the new Christian day of rest and worship. Biblical institutions such as the Sabbath, baptism, and the Lord's Supper all trace their origin to a divine act that established them. But no such divine act exists in the Bible for a weekly Sunday memorial of the Resurrection.

The New Testament silence on this matter becomes even more cogent because most of it was written many years after Christ's death and resurrection. If by the latter half of the first century Sunday was viewed as the memorial of the Resurrection, which fulfilled the Creation/redemption functions of the Old Testament Sabbath, why is the New Testament void of any allusions regarding the celebration of the Resurrection on a weekly Sunday? This absence indicates that such developments occurred in the post-apostolic period.

Day of the Sun

From a historical perspective, Sunday is never called "the day of the resurrection" until the fourth century (see, for example, Eusebius of Caesarea, Commentary on Psalm 91, Patrologia Graeca 23. 1168; Apostolic Constitutions 2. 59. 3). Beginning from the second century, attempts were made to link Sunday with the Creation week, but not to make the day the fulfillment of the creative accomplishments memorialized by the seventh day. Rather, being the day of the sun, Sunday was connected to the first day of the Creation week because on that day the light was created. The creation of the light on the first day provided what appeared to many at that time a suitable justification for observing the day of the sun, the generator of light.

In his Apology to Emperor Antoninus Pius (about A.D. 150), Justin writes that Christians assemble on the day of the sun to commemorate the first day of Creation "on which God, transforming the darkness and prime matter, created the world" (67. 7).

Christians, as Cardinal J. Danilou points out, noticed early the coincidence between the creation of light on the first day and the veneration of the sun that took place on the selfsame day (Bible and Liturgy, pp. 253, 255).

The pope says that "Christian thought spontaneously linked the Resurrection, which took place on 'the first day of the week,' with the first day of that cosmic week (cf. Genesis 1:1-2:4) which shapes the creation story of the book of Genesis: the day of the creation of light (cf. 1:3-5)."

The linkage between the first day of the week and the creation of the light, however, may not have been as "spontaneous" as suggested by the pope. In fact, in my dissertation From Sabbath to Sunday I submit documents and arguments indicating that such linkage most likely occurred in the post-apostolic period, when the necessity arose to justify the abandonment of the Sabbath and the adoption of the day of the sun.

This development began during the reign of Emperor Hadrian (A.D. 117 138). In A.D. 135 Hadrian promulgated a legislation that prohibited categorically the practice of Judaism in general and of Sabbathkeeping in particular. His aim was to liquidate Judaism as a religion at a time when the Jews where experiencing resurgent Messianic expectations that exploded in violent uprising in various parts of the empire, especially Palestine (see From Sabbath to Sunday, pp. 178-182).

To avoid the repressive anti-Jewish and anti-Sabbath legislation, most Christians adopted the day of the sun, because it showed the Roman authorities their differentiations from the Jews and their identification and integration with the customs and cycles of the Roman empire. To develop a theological justification for Sunday worship, Christians appealed to God's creation of light on the first day and to the resurrection of the Sun of justice, both of which coincided with the day of the sun. Jerome, to cite only one example, explains: "If it is called the day of the sun by the pagans, we most willingly acknowledge it as such, since it is on this day that the light of the world appeared and on this day the Sun of justice has risen" (in Die Dominica Paschae homilia, Corpus Christianorum Series Latina 78. 550. 1. 52).

These considerations suggest that Christians did not spontaneously come to view the day of Christ's resurrection as the fulfillment of the creative and redemptive accomplishments celebrated by the seventh-day Sabbath. The linkage to the Creation week was primarily by virtue of the fact that the creation of the light on the first day provided what many Christians thought was suitable justification for observing the day of the sun.

Indeed, even if the Sabbath had been divinely established to commemorate God's creative and redemptive accomplishments, what right had the church to declare Sunday as its "fulfillment," "full expression," and "extension"? Was the typology of the Sabbath no longer adequate after the Cross to commemorate Creation and redemption? Was not the Paschal mystery fulfilled through the death, burial, and resurrection of Christ, which occurred respectively on Friday, Saturday, and Sunday? Why should Sunday be chosen to celebrate the atoning sacrifice of Christ when His redemptive mission was completed on a Friday afternoon, when the Savior exclaimed "it is finished" (John 19:30)* and then rested in the tomb according to the Sabbath commandment? Doesn't this suggest that both God's creation rest and Christ's redemption rest in the tomb occurred on the Sabbath? How can Sunday be invested with the eschatological meaning of the final restoration rest that awaits the people of God, when the New Testament attaches such a meaning to the Sabbath?

First Day of the Week

The pope also attempts to justify from Scripture Sunday observance based on few New Testament references (1 Corinthians 16:2; Acts 20:7-12; Revelation 1:10) to gatherings on first day of the week. For example, the first-day deposit plan mentioned by Paul in 1 Corinthians 16:1-3 hardly suggests, as the pope says, that "since apostolic times, the Sunday gathering has in fact been for Christians a moment of fraternal sharing with the very poor." The apostle clearly states the purpose of his advice, namely, "so that contributions need not be made when I come" (1 Corinthians 16:2). The plan then proposed has nothing to do with enhancing Sunday worship by the offering of gifts for the poor; instead it was simply to ensure a substantial and efficient collection upon his arrival.

Four characteristics can be identified in Paul's plan. The offering was to be laid aside periodically ("on the first day of every week"), personally ("each of you"), privately ("store it up") and proportionately ("as he may prosper"). Why would Paul advise to lay aside the money privately at home if the church met regularly for worship on Sunday?

Paul's mention of the first day could be motivated more by practical than theological reasons. To wait until the end of the week or of the month to set aside one's contributions or savings is contrary to sound budgetary practices, since by then one finds himself to be with empty pockets and empty hands. On the other hand, if on the first day of the week, before planning any expenditures, one sets aside what he plans to give, the remaining funds will be so distributed as to meet all the basic necessities. The text therefore proposes a valuable weekly plan to ensure a substantial and orderly contribution on behalf of the poor brethren of Jerusalem, but to extract more meaning from the text would distort it.

Another first-day reference used by the pope was the Troas meeting reported in Acts 20:7-11. Yet this clearly indicates a special

farewell gathering occasioned by the departure of Paul, and not a regular Sunday worship custom. In fact, the meeting began on the evening of the first day, which, according to Jewish reckoning (days begin with sunset), was our Saturday night, and continued until early Sunday morning when Paul departed. Being a night meeting occasioned by the departure of the apostle at dawn, it is hardly reflective of regular Sundaykeeping.

The claim that "the book of Revelation gives evidence of the practice of calling the first day of the week 'the Lord's Day'(1:10)" cannot be supported by the usage of the phrase in the New Testament or contemporary literature. The first clear designation of Sunday as the "Lord's day" occurs toward the end of the second century in the apocryphal Gospel of Peter. This usage cannot be legitimately read back into Revelation 1:10. A major reason is that if Sunday had already received the new appellation "Lord's day" by the end of the first century, when both the Gospel of John and the book of Revelation were written, we would expect this new name for Sunday to be used consistently in both works, especially since they were apparently produced by the same author at approximately the same time and in the same geographical area.

If the new designation "Lord's day" already existed by the end of the first century, and expressed the meaning and nature of Christian Sunday worship, John would hardly have had reasons to use the Jewish phrase "first day of the week" in his Gospel. Therefore, the fact that the expression "Lord's day" occurs in John's apocalyptic book but not in his Gospel--where the first day is explicitly mentioned in conjunction with the resurrection (John 20:1) and the appearances of Jesus (John 20:19, 26)--suggests that the "Lord's day" of Revelation 1:10 can hardly refer to Sunday. (For a discussion of this text, see From Sabbath to Sunday, pp. 111-131.)

Summing up, the attempt of the Pastoral Letter to find biblical support for Sunday worship in the New Testament references to the resurrection, the first day farewell night meeting at Troas (Acts 20:7-11), the first-day private deposit plan mentioned by Paul in 1 Corinthians 16:1-3, and the reference to the "Lord's Day" in Revelation 1:10, is not new. The same arguments have been repeatedly used in the past and found wanting. An important fact, often ignored, is that if Paul or any other apostle had attempted to promote the abandonment of the Sabbath, a millenarian institution deeply rooted in the religious consciousness of the people, and the adoption instead of Sunday observance, there would have been considerable opposition on the part of Jewish Christians, as was the case with reference to the circumcision. The absence of any echo of Sabbath/Sunday controversy in the New Testament is a most telling evidence that the introduction of Sunday observance is a post-apostolic phenomenon.

Civil Laws

Whatever the theological weaknesses of the letter, the most disturbing aspect deal in the area of religious freedom and civil legislation.

The Pastoral Letter rightly notes that prior to the Sunday law promulgated by Constantine in A.D. 321, Sunday observance was not protected by civil legislation. In many cases Christians would attend an early morning service, and then spend the rest of Sunday working at their various occupations. Thus the Constantinian Sunday law, as the pope points out, was not "a mere historical circumstance with no special significance for the church," but a providential protection that made it possible for Christians to observe Sunday "without hindrance."

The importance of civil legislation that guarantees Sunday rest is indicated by the fact that "even after the fall of the Empire, the Councils did not cease to insist upon arrangements [civil legislation] regarding Sunday rest." In the light of this historical fact the pope concludes that even "in our own historical context there remains the obligation [of the state] to ensure that everyone can enjoy the freedom, rest and relaxation which human dignity requires, together with the associated religious, family, cultural and interpersonal needs which are difficult to meet if there is no guarantee of at least one day of the week on which people can both rest and celebrate."

The need for civil legislation that guarantees Sunday rest, the Pope points out, was reaffirmed by Pope Leo XIII in his encyclical Rerum Novarum (1891), in which he speaks of "Sunday rest as a worker's right which the State must guarantee." The pope believes that Sunday legislation is especially needed today, in view of the physical, social, and ecological problems created by technological and industrial advancements.

"Therefore," the pope concludes, "also in the particular circumstances of our own time, Christians will naturally strive to ensure that civil legislation respects their duty to keep Sunday holy."

According to the Pastoral Letter, Sunday rest legislation is needed not only to facilitate the religious observance of Sunday, but also to foster social, cultural, and family values. "Through Sunday rest, daily concerns and tasks can find their proper perspective: the material things about which we worry give way to spiritual values; in a moment of encounter and less pressured exchange, we see the true face of the people with whom we live. Even the beauties of nature--too often marred by the desire to exploit, which turns against man himself--can be rediscovered and enjoyed to the full."

Yet to call upon Christians to "strive to ensure that civil legislation respects their duty to keep Sunday holy," means to ignore that in our pluralistic society there are Christians and Jews who keep the seventh-day Sabbath holy, and Muslims who observe Friday.

If Sundaykeepers expect the State to endorse Sunday as their legislated day of rest and worship, Sabbathkeepers, then, have an equal right to expect the State to endorse Saturday as their legislated day of rest and worship as well. To be fair to the various religious and non-religious groups, the State would then have to pass legislation guaranteeing special days of rest and worship to different people. Such legislation is inconceivable because it would disrupt our socioeconomic structure.

Sunday laws, known as "blue laws," are still on the books of some American states and represent an unpleasant legacy of intolerance. Such laws have proved to be a failure, especially because their hidden intent was religious, namely, to foster Sunday observance. People resent state attempts to force religious practices upon them. This is a fundamental principle of religious freedom in America, the idea that no governmental agency has the right to use its power to coerce religious belief or observance of any kind.

Sunday legislation is superfluous today because the short-working week, with a long weekend of two or even three days, already makes it possible for most people to observe their Sabbath or Sunday. Problems still do exist, especially when an employer is unwilling to accommodate the religious convictions of a worker. The solution to such problems is to be sought not in a Sunday or Saturday law, but rather in such legislation as the pending Religious Freedom in the Workplace Act, which is designed to encourage employers to accommodate the religious convictions of their workers when these do not cause undue hardship to their company.

The pope's call for Sunday rest legislation seems to ignore that Sunday laws have not contributed to resolve the crisis of diminishing church attendance. In most European countries Sunday laws have been in effect for decades. On Sunday, indeed, most of business establishments, gas stations included, are shut down. Have Sunday laws facilitated church attendance? Hardly. In fact, church attendance in Western Europe is considerably lower than in the United States, where enforced Sunday legislation is much rarer than in Europe. In Italy, for instance, it is estimated that 95 percent of the Catholics go to church three times in their lives: when they are hatched, matched, and dispatched.

Conclusion

Whatever the theological weakness of the letter, the pope is right to be concerned about the moral decline in society and, as the head of his flock, about the decline in church attendance. Yet this moral and religious decline comes not from a lack of legislation, but from a lack of moral convictions that compel people to act accordingly. The church should seek to solve the crisis of diminishing church attendance by the internal moral and spiritual renovation of its members, rather than using the strong arm of the law.

If the pope could do that for his church, more and more of his members would be there on Sunday--even if the theological justification for the day is sorely lacking in Scripture and sacred history

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Who Really "Changed" The Sabbath?

"The Catholic Church for over one thousand years before the existence of a Protestant, by virtue of her divine mission, changed the day from Saturday to Sunday. We say by virtue of her divine mission, because He who called Himself the 'Lord of the Sabbath,' endowed her with His own power to teach, 'he that heareth you, heareth Me'; commanded all who believe in Him to hear her, under penalty of being placed with the 'heathen and publican'; and promised to be with her to the end of the world. She holds her charter as teacher from Him--a charter as infallible as perpetual. The Protestant world at its birth found the Christian Sabbath too strongly entrenched to run counter to its existence; it was therefore placed under the necessity of acquiescing in the arrangement, thus implying the Church's right to change the day, for over three hundred years. The Christian Sabbath is therefore to this day, the acknowledged offspring of the Catholic Church as spouse of the Holy Ghost, without a word of remonstrance from the Protestant world."--From the Catholic Mirror, Sept. 23, 1893; reprinted in Rome's Challenge, p. 24.

Question. Which is the Sabbath day?
Answer. Saturday is the Sabbath day.

Question. Why do we observe Sunday instead of Saturday?
Answer. We observe Sunday instead of Saturday because . . . the Council of Laodicea (A.D. 336) transferred the solemnity from Saturday to Sunday."-Peter Geiermann, CSSR, "A Doctrinal Catechism," 1957 ed., p. 50. The Catechism of the Council of Trent, translated by John A. McHugh and Charles J. Callan, stated, "But the Church of God has thought it well to transfer the celebration and observance of the Sabbath to Sunday" (p. 402).

Question. Have you any other way of proving that the church has power to institute festivals or precepts?
Answer. Had she not such power, she could not have done that in which all modern religionists agree with her--she could not have substituted the observance of Sunday the first day of the week, for the observance of Saturday the seventh day, a change for which there is no Scriptural authority."--Rev. Stephen Keenan, A Doctrinal Catechism (New York: Edward Dunigan and Brothers, 1851), p. 174.

Question. By whom was it [the Sabbath] changed?
Answer. By the governors of the church, the apostles, who also kept it; for St. John was in the Spirit on the Lord's day (which was Sunday). Apoc. 1:10.

Question. How prove you that the church hath power to command feasts and holy days?"
Answer. By the very act of changing the Sabbath into Sunday, which Protestants allow of; and therefore they fondly contradict themselves, by keeping Sunday strictly, and breaking most other feasts commanded by the same church.

Question. How prove you that?
Answer. Because by keeping Sunday, they acknowledge the church's power to ordain feasts, and to command them under sin; and by not keeping the rest [of the feasts] by her commanded, they again deny, in fact, the same power." --Rev. Henry Tuberville, D.D.R.C., An Abridgment of the Christian Doctrine (New York: Edward Dunigan and Brothers, approved 1833), p.58.

And as one leading Protestant exponent of Sunday has written: "We must admit that we can point to no direct command that we cease observing the seventh day and begin using the first day."--Samuel A. Cartledge, "The Sabbath--The Lord's Day," in James P. Wesberry, comp., The Lord's Day, p. 100.

JANUARY / FEBRUARY 1999

Weeping And Gnashing Of Teeth

BY: ROLAND R. HEGSTAD

Paula Jones and Monica Lewinsky don't appear in the following case. Not a breath of illicit sex taints the record. Nobody's going to get kissed or propositioned against his or her will. If your kids sneak a look at this article, they won't ask about words you don't want in their vocabulary until they're senior citizens.

What you're going to get is a testy child-custody case (Kendall v. Kendall). And a Massachusetts judge's order that children be raised Jewish rather than Christian. Why did the judge make that decision? Was it because the court-appointed guardian ad litem was Jewish? Was it because his report convinced the court that the minor children were in danger of "substantial . . . current and imminent harm"? Or was it because the judge was prejudiced against the father, who, according to the record, believes that those who do not accept the Boston Church of Christ faith are "damned to go to hell," where there will be "weeping and gnashing of teeth"?

Are decisions in custody cases and subsequent restrictions ever influenced by religious prejudice? The answer, it seems, is yes. In fact, prejudice against the least "reasonable" religion within a court's jurisdiction (usually an aggressive minority faith) may result in custody being awarded to the parent representing the dominant faith group. Prejudice may even place restrictions on the minority-faith parent's right to share beliefs with the children.

Says attorney Mitchell A. Tyner, a Silver Spring, Maryland, based lawyer who has handled custody cases in which the religion of a parent played a decisive role: "There's no doubt: If you're a Catholic in Baptist country, a Mormon in Louisiana, or a Jehovah's Witness almost anywhere, and you wear your religion on your sleeve, judges may find reason to let your spouse determine the religious training of your child or children, all, of course, in their best interest."

There are, of course, other reasons a court may rule against a minority-faith parent. And some decisions may even be constitutional and just. But what about cases in which prejudice on the part of the judge motivates a decision?

Till What Do Us Part?

Before there was a case called Kendall v. Kendall, there was a Barbara Zeitler (Jewish) and a Jeffrey Kendall (Catholic). In 1988 they stood at an altar and pledged to love, honor, and cherish until death would part them. At that blissful moment they little realized that religious differences would do what death would not.

In 1991 Jeffrey joined the Boston Church of Christ, which the courts characterize as "fundamentalist." In 1994 Barbara adopted Orthodox Judaism. Thus began their personal "weeping and gnashing of teeth," with three minors caught in the cross fire of competing religious convictions that, eventually, led to the demise of their "till death do us part" pledge in August 1996.

More lasting has been their concern for the eternal destiny of their three minor children, Ariel, Moriah, and Rebekah (aged 7, 5, and 3 at the time of the divorce). Jeffrey testified before the court that he would "never stop trying to save his children." Their mother, meanwhile, sought to limit the children's exposure to Boston Temple's hellfire and brimstone theology. She received custody. The court later, in response to her plea, placed restrictions on Jeffrey's right to give religious instruction.

The troubling question arising from Kendall v. Kendall is How can a court limit someone's free exercise of religion in something so fundamental as a parent's right to give religious instruction to his or her children?

Danger: Religious Exposure

Courts encounter troubling questions regarding religious liberty when they (1) determine that religious differences are the basis for the divorce; (2) grant custody based on the religious preference of a parent, and (3) regulate a parent's right to give religious instruction. All three situations figured in Kendall v. Kendall. The court acts constitutionally in only such cases in which evidence conclusively demonstrates a threat to the mental and/or physical health of the minor child.

In Kendall the probate and family court found it "substantially damaging to the children to leave each parent free to expose the children as he or she wishes to his or her religion." The resulting judgment of divorce contained the following restrictions: "Neither [parent] may

indoctrinate the children in a manner which substantially promotes their . . . alienation from either parent or their rejection of either parent. The defendant (Jeffrey Kendall) shall not take the children to his church (whether to church services or Sunday School or church educational programs); nor engage them in prayer or Bible study if it promotes rejection rather than acceptance of their mother or their own Jewish self-identity. The [defendant] shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves."

The court (magnanimously?) conceded that J. Kendall could have pictures of Jesus Christ on his residence walls without losing his visitation rights. But he could not take his children to "religious services at which they receive the message that adults or children who do not accept Jesus Christ as their Lord and Savior are destined to burn in hell." He could, however, have the children with him "at events involving family traditions at Christmas and Easter." All this in harmony with court precedent (Felton v. Felton) that individual liberties may be restricted where there is a compelling interest.

Evidence of Substantial Harm

How did both the probate and family court and, on appeal from Jeffrey Kendall, the Supreme Judicial Court of Massachusetts determine that "substantial harm" to the children compelled them to limit the religious liberties of their father? Both courts cited the following findings:

In early 1995 the defendant threatened to cut off Ariel's "clothing fringes" [tzitzis]. The court noted that Jeffrey later apologized. He was alleged also to have threatened to cut off Ariel's "payes" [sideburns]. The court did not "find credible the . . . explanation that he did so at Ariel's request."

The Boston Church of Christ services to which Jeffrey took his children "included teachings that those who do not accept [its] faith are damned to go to hell, where there will be 'weeping and gnashing of teeth.'" Exposure to this teaching, said the court, caused Ari to conclude that his mother "may go to hell, and that this causes him substantial worry and upset."

The courts credited the conclusion of the court-appointed guardian ad litem, Michael Goldberg, Ph.D., that Jeffrey's behavior toward his children "fosters negative and distorted images of the Jewish culture." Jeffrey "opposes his children being taught the history of the Holocaust." Efforts to convince Ari that his religion was wrong damaged his "formal self-identification" as a Jew and was tantamount to "convincing him that his soul is damaged or inadequate." Kendall's actions had put the children "in a position in which they are perilously close to being forced to choose between their parents, and to reject one." Ari, said Goldberg, "is emotionally distressed by the conflict between his strong desire for affection and approval from [his father] and his desire to maintain his Jewish religious practice." As a direct result, "there has been a decline in his motivation and academic performance."

Goldberg's report to the court found Ari to be "understandably uncomfortable and unhappy when he 'has to do the stuff [he's] not supposed to do on Shabbas,'" and thus is put in the "no-win dilemma" of "pleasing and obeying" one parent while displeasing the other and his own "internalized beliefs about how the world is 'supposed' to function on the Sabbath."

The other children's well-being was not neglected. Moriah's distress was noted, as well as her understanding of her religion. "I'm not Christian. I'm Jewish. Mom is Jewish. My dad is Christian. My brother is Jewish and my sister is Jewish." Goldberg found her testimony "comfortable," "age-appropriate," "accurate," and "most important of all, it shows that she can tolerate the knowledge of her parents' religious differences."

Based on Goldberg's report, the judge found that anything "likely to promote Rebekah's identity as fundamentally different from that of her mother and siblings" would leave her with the detrimental "sense of not belonging in her own home." Of "substantial detriment" would be their father's beliefs that would likely cause them to view their mother negatively, as a person who would be punished for her sins. Said the judge: "For children of tender years (and it seems to me that this likely means at least up to age 12), I find directly contradictory messages from trusted adults to be solidly contrary to their best interests."

Judicial Discretion

Jeffrey Kendall's appeal to the Supreme Judicial Court of Massachusetts confronted the justices with, as they confessed, not only "questions of law and fact," but of "discretion" as well. The court admitted that whether the case involved the "substantial harm" required to justify interference with the defendant's religious interest was "a close question." For example, Goldberg had found "only a few instances of concrete present harm to the children." He did not find "current damage to the children so severe that it has caused them to suffer a psychotic break, or to have a 'formal psychiatric diagnosis.'" But, said the court, "case law does not require the court to wait for formal psychiatric breakdown, and the evidence paints a strong picture of the reasonably projected course if the children continue to be caught by the cross fire of their parents' religious difference."

Concluded the judicial court, quoting from the probate and family court record: "The question that comes to the courts is whether, in particular circumstances, such exposures are disturbing a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future." Applying that standard to this case, the court affirmed "substantial evidence of current and imminent harm, to these 7-, 5-, and 3-year-old children."

"Substantial harm" constitutes the "compelling interest" required to justify interference with the religious liberty guarantees under the Massachusetts constitution. As the probate and family court put it, and the Supreme Judicial Court of Massachusetts affirmed, parental rights "do not clothe parents with life-and-death authority over their children." Promoting the best interests of the children, said the court, is an interest sufficiently compelling to impose a burden on the defendant's religious rights. The justices determined that the divorce settlement did not establish Judaism as the religion to govern the children's upbringing; rather it merely recognized the preference that the parties allowed to develop and had encouraged. The court's focus in this regard was not on possible fostering of "excessive government entanglement" nor on the "merit . . . of the parties' respective religious teachings," but on the "emotional or physical harm to the children."

Justice: The Cutting Edge

With a different focus from that of the Massachusetts court, a wise judge once used the threat of physical harm to a child to achieve justice. Two women gave birth to sons within three days. One baby died. In the night, its mother replaced the live baby from the other mother's side with the dead one. In the morning the live baby's mother quickly determined what had happened, and they both stood before the wise judge, who listened to their stories. He then asked that a sword be brought, handed it to an aide, and directed that the baby be halved, a part given to each mother. The true mother pleaded that her child not be harmed, but given to the other woman. The pretender's calloused response--"Let it be neither mine nor yours; divide it!"--was all the evidence the judge needed to know who the true mother was.

Few cases of child custody are so easily resolved today, particularly when religious convictions are the roots of the divorce. Few parents will settle for half. They can't, when the destination of compromise is hell. And despite their best intentions, courts often fall short of justice.

The Spirit of Our Age

Says attorney Mitchell A. Tyner: "The greatest problem facing advocates of religious freedom in Western societies today is simply the spirit of the age. Government--and, by extension, society--often does not take seriously those who take religion seriously."

In Mendez v. Mendez, a case involving a Catholic father and a Jehovah's Witness mother, psychologist Eli Levy testified: "I believe that being raised a Jehovah's Witness would not be in the best interest of the child, given the fact that the principles, the way I understand them, do not fit in the Western way of life in this society." The problem with Jehovah's Witnesses, said Levy, is that they are "different."

Perhaps Dr. Levy had forgotten that God, through Moses, commanded the Israelites to wear a blue fringe on their garments to distinguish them from the homogenized heathen society of their age. "Ye shall not go after . . . the gods of the people . . . round about you. . . . Ye shall diligently keep the commandments of the Lord your God, and his testimonies, and his statutes, which he hath commanded thee" (Deuteronomy 6:14-17). His people were not to marry those not of their faith. "For thou art an holy people . . . a special people" (Deuteronomy 7:6). Such counsel is certainly not in harmony with the spirit of the age. Members of the Jehovah's Witnesses and Jeffrey Kendall's "fundamentalist" Boston Church of Christ may be "peculiar"--but that, after all, is what God called His people to be (Deuteronomy 14:2; 1 Peter 2:9). Of course, members of both faith communions may err in their interpretation of peculiarity, but the state shouldn't make that determination.

Prejudice also strides into the courtroom with a discernable chip on its shoulder. That idiomatic expression translates into bias against an unpopular religion.

How better to document this danger than through the minority dissent in Mendez v. Mendez. The setting: the Florida District Court of Appeal, Third District, had in April 1987 affirmed the judgment of the trial court in granting custody of their children to Mr. Mendez, a Catholic, rather than to his Jehovah's Witness wife. On November 10, 1987, the court of appeal denied motions for rehearing (based on religious prejudice), calling the case a "quite ordinary child-custody case." But three of the nine-judge court disagreed. Judge Baskin's dissent stated:

"What does emerge from the record is a demonstration of the experts' personal biases against the mother's religion. Their disdain for the mother's religion induced them to speculate as to the possibility of harm to the child in the future even though no evidence of harm existed. The trail court was obviously persuaded by their less than-objective considerations for removing the child from the custody of her natural mother and its judgment should not stand.

"To be forced to choose between one's religion and one's child is repugnant to a society based on constitutional principles. The soft voice of the minority should be audible to a responsible court sensitive to constitutional rights which include the right to practice an unpopular religion."

On March 7, 1988, the United States Supreme Court denied review. Case closed.

Alleged in Judge Baskin's dissent is prejudice on the part of the experts. What about the judges?

It's a tough call. For one reason, judges know how to tailor their "suit" without revealing whether they have cut it on the bias. And, as Dorinda N. Noble observes in Custody Contest: How to Divide and Reassemble a Child: "The reality is that the exercise of judicial discretion is far less a product of the judge's learning than of his or her temperament, background, interests, and biases" (p. 64).

But occasionally a court with 20-20 judicial vision will read the bottom line. In a Pennsylvania case, Stolarick v. Novak, the trial court determined that the father was an exemplary parent. But it awarded the mother custody because "the court disapproved of the father's fundamentalist Christian beliefs and his enrollment of the children in a religious school."

Injudiciously, the trial court stated: "It is the degree to which the father has pursued 'life in the Lord' that has deprived the children of social and educational opportunities and has presented them with a single-minded approach to life that is very restricted in view and allows for no spontaneity, artistic expression or individual development of rationale or logic or even just pursuit of ordinary curiosity. These children are being raised in a sterile world with very rigid precepts, with no allowance for difference of opinion, and no greater breadth than the doctrinaire limits of the religious beliefs."

On appeal, the superior court reversed, holding the statements of the trial judge to be unsupported by the record.

Said the court: "The record in the instant case reveals no basis for the trial court's belief that the children's horizons would be broadened by removing them from the 'sterile' environment of a religiously oriented school. Both parents adore the children and are genuinely interested in playing a role in their future. For five years since the separation of their parents, however, they have lived with their father in a single residential home, and their father has ably devoted himself to their care. Under these circumstances, the trial court abused its discretion when it suddenly took them from the only home and family they have known and awarded them to another whose facilities, if not inadequate, were less desirable and less familiar than those who which the children had been accustomed."

Maybe it's time for another wise judge, scales of justice in his hand, to step forward. One whose decisions will be so transparently wise and just that all will see that the wisdom of God is in him.

Any Solomons out there?

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JANUARY / FEBRUARY 1999

The Good Old Days

BY: ROB BOSTON

The summer of 1886 was a bad time for Charles B. Reynolds. The iconoclastic religious skeptic (and former Methodist minister) took his free-thought message to Boonton, New Jersey. If Reynolds expected Boontonians to abandon Christianity and embrace free thought, he must have been disappointed. Instead, an unruly mob pelted him with rotten eggs, tore down his podium, and tried to hurl him into a pond.

The following spring Reynolds appeared in Morristown, where he was jailed on charges of blasphemy based on his remarks in Boonton. Reynolds was found guilty by a local jury and fined $25.

Reynolds' ordeal came at an unusual time in American history; the late-nineteenth-century, post-Civil War period is probably the time the United States came the closest to being a "Christian nation," an ideal looked upon with great fondness by today's Religious Right. Indeed, if America ever was "Christian," the late nineteenth century--when courts boldly declared the country a "Christian nation" and the tenets of Protestantism received government favor--was the time.

But just what was this period like, especially in terms of religious freedom? And, even more important, does it represent a model that America today should emulate?

To begin, a type of "generic Protestantism" reigned supreme in the late nineteenth century, often receiving favors and special treatment in the law. Blasphemy was a criminal offense in most states, and the laws were occasionally enforced. Religious leaders, working with government officials, had great sway over the types of public amusements allowed. Religiously inspired censorship was common. Mandatory Sunday-closing laws were the norm in most states. Protestant prayer and Bible reading saturated many public schools. Other religions, especially Roman Catholicism and Mormonism, were viewed with official distrust and suspicion.

Blasphemy Trials

Though blasphemy trials as such were not common in the latter half of "the good old days" of the late nineteenth century, a determined effort to revive old blasphemy laws existed, and there were some cases in which judges refused to recognize the principles of religious freedom. At Reynolds' trial, for example, Chief Judge Francis Child instructed the jury to keep in mind that Morristown was "a Christian community" and reminded it that New Jersey's blasphemy statute, though rarely invoked, had been revised as recently as 1874 and thus was not obsolete. The judge said that no one in New Jersey had the right to speak about God or Christianity "in a manner calculated to wound the religious sentiments of the community."

After the trial, the New York Times complained that the fine was too low, but celebrated the fact that New Jersey "had gone on record against blasphemy" and asserted that blasphemous literature should be "suppressed" while those who circulate it prosecuted for "a violation of public decency."

Scandalous Amusements

Closely aligned with blasphemy were often-successful campaigns by religious leaders to shut down public amusements considered "scandalous" or "sacrilegious." All through his career showman P. T. Barnum battled religious leaders determined to stop his displays. Barnum's huge American Museum in New York featured stage shows, which many clergy condemned as sinful.

Religious leaders frequently enlisted government authorities and newspaper editors in high-profile crusades against various forms of entertainment that today are considered benign. The theater was one frequent target. In 1879 an eccentric Jewish entrepreneur named Salmi Morse attempted to stage in San Francisco a theatrical version of Christ's passion. Insisting it was sinful and sacrilegious to put the life of Christ on the stage, outraged ministers besieged the San Francisco Board of Supervisors, which banned the play. Morse went to court, but lost when a local judge ruled that his Passion play offended Christianity, which government had a right--indeed, a duty--to protect: "The Board of Supervisors," wrote Judge Morrison, "has seen fit to prohibit the exhibition in question because such an exhibition is, in their opinion, against good morals, because it is calculated to bring religion, which is the foundation of all morality, into ridicule and contempt, and because the sacred mysteries of the passion and death of the Redeemer upon the cross are too solemn and sacred to be made the subject of a theatrical exhibition."

Morse had equally dismal luck in the supposedly cosmopolitan New York City. Egged on by a crusading newspaper editor named Harrison Grey Fiske, the city's Board of Aldermen drafted legislation banning the play. Three years later, when Morse was finally able to stage the Passion play briefly in New York, a state senator quickly prepared legislation to prevent "any attempt to personate or represent Jesus Christ, the Savior of Mankind, in any exhibition, show, play, dramatic or theatrical performance." Morse was effectively put out of business.

Censorship and Sunday Laws

Religiously based censorship was common in the late nineteenth century. Novels that contained a hint of sexuality were banned, along with birth-control devices and information about them. Government-run censorship boards persisted in some states until well into the twentieth century--all done at the behest of religious leaders intent on defending "morality" or protecting religion from "ridicule."

But religious leaders and their willing partners in government did more than just ban racy books and arrest blasphemers. A common problem in the "good old days" of late-nineteenth-century America was the fixation on banning commerce and work on Sundays. Most states had Sunday laws that were rigorously enforced, and always at the insistence of religious leaders intent on defending majority religious practices.

Many of the Sunday episodes today seem simply an absurd waste of government time and resources, such as the case of W. B. Capps of Weakley County, Tennessee. In June of 1894 Capps was arrested for repeatedly performing "common labor" on his farm on Sundays. Capps, a Seventh-day Adventist, was found guilty and fined $10 and court costs totaling more than $50. The Supreme Court of Tennessee later upheld Capps's conviction, increasing his courts costs and fines to $110.45.

Capps, unable to pay, was sentenced to more than 400 days in the local jail, to work off the debt at the rate of 25 cents per day--leaving his wife and four children without support. He was released after serving 97 days, but only because readers of a Jewish newspaper in New York had raised enough money to pay his fines.

Adventists and Seventh Day Baptists who--guilty of violating Sunday laws--refused to pay fines on grounds of conscience were frequently sentenced to serve time on chain gangs, shackled alongside drunks, brawlers, and bank robbers.
In May of 1892 four Adventists in Springville, Tennessee, were found guilty of cutting wood, plowing fields, and chopping down weeds on Sundays. In court all four refused to make a formal defense and were quickly found guilty and fined $25. When they refused to pay, three of the men were placed on a chain gang and made to work on a local road project. Noted one Adventist publication, "The chain gang was composed of three honest, sober, industrious Christian farmers whose only crime was that of doing farm labor on the first day of the week, and three men who had been convicted of drunkenness, discharging of firearms on the streets, fighting, and shooting at the city marshal."

Adventists and others doing free or charitable labor on Sunday still faced arrest. In January of 1886 J. L. James of Star of the West, Arkansas, was hauled into court after a local Baptist minister saw him doing carpentry work on the home of a local widow. Though James explained that he repaired the house in order to protect it from a rainstorm, he was convicted and fined. James refused to pay and was saved from prison only because friends paid the fine for him.

After a Maryland court upheld the state's Sunday law in 1894, zealous citizens in Shady Side formed a "Watchman's Association" to ferret out those who worked on the "Lord's day." One man was arrested for picking up sticks in his yard. In Queen Anne's County one especially active Sunday protector reported his own brother for hauling window sashes from the local dock to a nearby Seventh-day Adventist church.

Even the U.S. Supreme Court jumped on the "protect Sunday" bandwagon. In the 1888 case Bucher v. Cheshire Railroad Company, the High Court ruled in favor of a railroad company that sought to dismiss a case brought against it by someone injured while riding one of its trains. The company held that the man, Theodore P. Bucher, was not entitled to damages because he had been traveling on Sunday, in violation of Massachusetts law. The High Court also reversed a murder verdict in 1897, declaring it invalid for having been entered on a Sunday (Stone v. U.S.).

Religious Exercises

Aside from zealous enforcement of Sunday laws, mandatory participation in Protestant religious exercises in public schools was a common feature of the "good old days" in nineteenth-century "Christian America."

Few issues are as widely misunderstood in contemporary society as prayer in schools, and ignorance about its ugly history is widespread. That's unfortunate, because even a casual glance at nineteenth-century practices shows why so many religious minorities today are wary of plans to "bring God back to the schools."

The reigning religious majority in "Christian America" brooked little dissent over this question. Roman Catholics, Jews, and other minorities frequently complained about the compulsory religion in public schools, but their protests were ignored. Laws in many Southern and Eastern states mandated that schools begin the day with recitation of the Lord's Prayer and readings from the King James Bible, with no provision for students who wanted to be excused.

In 1859 an 11-year-old Catholic boy in Boston named Tom Wall was ordered by his teacher to read the Ten Commandments from the King James Version of the Bible. Wall, instructed by his parents not to read the Protestant Bible, refused. The teacher beat the boy until he relented. Wall's parents took the teacher to court, but the court dismissed the charges.

In Cincinnati in 1896 Catholic parents went to court to get their children excused from mandatory Protestant religious exercises in public schools, an act that led to anti-Catholic demonstrations. In 1854 a priest in Ellsworth, Maine, was tarred and feathered after advising a parishioner to fight legally a mandatory Protestant practice in the local public school.

Belief-Action Standard

The latter half of the nineteenth century also reflected a time when there was a poor understanding of the meaning of religious freedom in the courts. In a famous 1879 Supreme Court case dealing with polygamy, the justices formulated a judicial doctrine known as the "belief-action standard," which held that the First Amendment makes freedom to believe absolute but does not necessarily protect actions based on those beliefs.

The fallout was severe. The polygamy case--Reynolds v. U.S.--was followed by a virtual war between the U.S. government and the Church of Jesus Christ of Latter-day Saints (the Mormons). Though the federal government may have had a legitimate interest in curbing plural marriage, subsequent governmental actions went way beyond that issue. What happened, in effect, was that U.S. officials tried to shut down an unpopular new faith.

In 1890 the Supreme Court in Church of Jesus Christ of Latter-day Saints v. U.S. upheld a law that voided the Mormons' charter in the Utah territory and allowed for the seizure of church-owned lands there. The court held that the Mormons were using the land to propagate their religious beliefs, including polygamy, which had already been declared illegal. In reality the law was designed to force the Mormons' hand on the plural marriage issue. It worked: church officials quickly issued a decree banning polygamy.

The federal government worked to tighten the screws on Mormonism in other ways, too. In 1879 the U.S. government sent a circular letter to American ambassadors in Europe instructing them to notify European governments that polygamy was unlawful in the United States and therefore they should ban Mormonism in their own countries and prohibit Mormons from emigrating to the United States.

Writes church-state scholar Leo Pfeffer, "The governments of the European countries to which the request was made replied to the country that gave the world the concept of religious freedom that they could not undertake to inquire into the religious beliefs of emigrants."

Christian Nation?

The latter half of the nineteenth century, with its blasphemy statutes, religion soaked public schools, and rigorous Sunday laws, would seem a poor model for contemporary U.S. society. Aside from Puritan Massachusetts, it is probably the closest to theocracy the United States ever came.

But, at least for now, the story ends happily. As the twentieth century progressed, and the Supreme Court began to "incorporate" religious freedom principles upon the states, the last of the blasphemy laws withered away, religiously based censorship lost its grip, and state courts began striking down mandatory religious practices in public schools. In 1962 and 1963 the U.S. Supreme Court issued its famous school prayer decisions. Even blue laws, though upheld by the Supreme Court in 1961, have largely faded, though pockets of resistance remain.

But so does the discontent. Religious Right activists continue to issue calls for "Bible-based" or "godly" law in America. Religious Right leaders such as Pat Robertson, Gary DeMar, and the Reverend D. James Kennedy insist that America was founded to be a "Christian nation."

To bolster these views many Religious Right leaders point enthusiastically to an 1892 U.S. Supreme Court decision in which a High Court justice declared the United States a "Christian nation." Justice David Brewer's comment in Church of Holy Trinity v. U.S. is, however, considered "dicta"--legal writing that does not have the force of law--and the decision is an obscurity that set no precedent. Nevertheless, Brewer's comment has been cited constantly by activists eager for a "Christian America."

Last February a Christian Coalition activist in Brevard County, Florida, posted an essay on the local group's website, calling for theocracy in America and the establishment of a "Christian nation." According to Jay Rogers, who serves on the board of the Brevard branch of the Christian Coalition, democracy is "mob rule" that leads to tyranny. The proper model, Rogers argues, is "a Christian republic: a representative government which protects the God-given inalienable rights of minorities while recognizing biblical law as the basis for all legislation and civil authority."

What Rogers and his allies either don't understand, won't admit, or simply don't care about is that we've been there and done it--and it doesn't work. Basing civil law on one group's understanding of the Bible--even if it's a majority view--eventually crushes freedom.

Perhaps the "nineteenth centuryization" of America is what the Religious Right really wants. If so, let the movement's leaders, activists, and others who praise the days when America was a "Christian nation" say so. But if they are determined to take the country back to the "good old days," let them also say exactly what awaits the nation: censorship, public school teachers who force Jewish kids to recite the Lord's Prayer, farmers sitting in jail alongside murderers and bank robbers because they dared to pick potatoes on Sunday, and men like Charles Reynolds facing a trial on charges of blasphemy.

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JANUARY / FEBRUARY 1999

Blank Check?

BY: KEN BYRD

The Wisconsin Supreme Court recently approved the participation of religious schools in Milwaukee's Parental Choice Program, which provides low-income parents with a $4,900 voucher for children to attend a private or parochial school.

The highly criticized decision raises a number of important questions regarding the flow of tax dollars to religious schools. Can religious schools that are not equipped to handle the disabled refuse to accept the disabled in the voucher program? Are same-sex private schools--discriminating on the basis of sex--eligible for government funds? Do religious schools have to change their punishment policies? Can they expel voucher students for disciplinary reasons without a fair hearing? Can private and parochial schools administer entrance exams to voucher students and refuse those who don't meet the academic standards?

These are question that need answers in a case that could reach the U.S. Supreme Court and, if so, possibly change the landscape of religious freedom in the entire nation.

To begin, a key issue when tax money goes to a religious institution deals with the government regulation that inevitably follows government money. Progressive religious and civil liberties groups argue that the way to prevent burdensome regulation of religious schools is for those schools to refuse government funds. Conservative religious groups, who have long endorsed vouchers, argue that religious schools should be able have government funds and no new regulations.

One such confrontation was thwarted in Milwaukee, at least temporarily, when--conceding to the demands of religious schools and state lawmakers--officials at the Wisconsin Department of Public Instruction (DPI) withdrew their ban on same-sex private schools entering the program. Otherwise six Milwaukee all-boy and all-girl private schools would have been barred. The DPI had previously contended that schools accepting public funds could not discriminate on the basis of sex.

Relying on previous court decisions, the agency demanded that participating schools sign an agreement outlining certain students' rights. The agreement also said that schools would be barred from discriminating on the basis of race, religion, gender, or disabilities. But a week after the Wisconsin state superintendent had informed private schools that they would have to follow the students' rights policy, DPI officials simply notified the schools that federal rules should apply to any school accepting public funds. They did not require them to sign a statement accepting those rules. Wisconsin officials predict that a court test will be necessary to determine whether the regulations must follow the vouchers.

"Once you decide to use public funds," said Milwaukee School Board member Sandra Small, "you have to play by those rules. Period."

Several choice school supporters argue that the participating schools should not have to be governed by rules that apply to public schools because vouchers are given to a parent, not to the school. Officials from some of the private schools have said that the regulations would, indeed, interfere with the mission and function of the schools.

"We adhere to the Catholic doctrine," said Carolyn Ettlie, principal of St. Barnabas/Holy Spirit School in Milwaukee. "We teach the Catholic religion. I will certainly sit down and be straightforward with a parent. I'm not going to turn anyone away."

Ettlie said, "They will have to understand. We cannot serve certain children." She added that the school is "not equipped to handle" students with severe mental or physical disabilities or learning disabled students.

Ettlie has a ready solution to the school choice policy that allows students to opt out of religious functions. "If they don't feel comfortable here, they shouldn't come here. If a child chooses not to pray, they do not have to pray. But they are not going to leave the room while we pray. We don't have special places for them to be."

John Norris, superintendent of schools for the Archdiocese of Milwaukee, said, "No one here is pro-discrimination. The debate is What kind of schools are we talking about? Are they private schools or public schools?"

Another impact of DPI's last-minute decision to remove certain nondiscrimination requirements is that private and religious schools will not have to fully accommodate disabled children. Although unable to bar the disabled from attending, they will not be required to make special accommodations.

"We think parents and taxpayers deserve to know whether or not the school will accept and serve all of the students or some of the students," said Chris Ahmuty, executive director of the American Civil Liberties Union of Wisconsin. "Is it a parental choice or do the schools choose?" asked Ahmuty, whose organization was one of several that filed the suit against the extended school choice program.

Ahmuty said abiding by nondiscrimination laws was not an issue until the choice program was extended to parochial schools. "Nonsectarian schools readily gave assurances that they would comply with the nondiscrimination laws and other students' rights protections."

He said it was unfortunate that the DPI agency withdrew the regulatory requirements in the face of "intense pressure from pro-(school)choice groups and some legislators."

Ahmuty said it would be wrong for religious school officials to require children to attend religious services and to remain in classrooms during prayers that they do not want to hear.

"That's contrary to the intention, spirit, and letter of the law," Ahmuty said. "They really have to have a reasonable non-stigmatizing alternative to make the opt-out mechanism meaningful," he said. If schools are going to advise prospective students that if they don't like it, they don't have to come, "the only people that would go there are likely to be of that denomination. So then you have to wonder who's benefitting from the program? Choice parents or the school?"

Critics also point out that in many cases the $4,900 voucher is greater than the tuition charged by the private or parochial school.

"In many instances the aid is greater than the amount of tuition charged to attend the private school," Ahmuty said. "You can't say the parents are the only ones benefitting from this. The schools are also benefitting. And we're doing that at the expense of religious liberty. This violates individual conscience. It compels people to support religions they may not agree with. It also tends to undermine religious education."

It is unsure what strings will be tied to religious schools, Ahmuty said, noting that he is concerned about the constitutional ramifications of government interfering in religious institutions as well. "However, it seems to me the rules of the game change significantly when these institutions are accepting tens of millions of tax dollars. If they don't want to abide by a bare minimum of regulation, they shouldn't participate in the program. . . . Some of those schools want a blank check to do whatever, without any accountability to the parents or taxpayers."

After voucher programs faced legal setbacks in recent years in Maine, Ohio, Puerto Rico, and Vermont, the June 10 Wisconsin ruling is the first major legal victory for voucher advocates. The 4-2 decision declared that the Milwaukee Parental Choice Program (MPCP)--extended to include religious schools--does not violate either the U.S. Constitution's First Amendment or the Wisconsin Constitution's provisions forbidding public benefits for religious schools.

Milwaukee started the program in 1990 after state lawmakers approved a limited program to address the city's troubled public schools. The original program permitted up to 1,500 (1.5 percent) public school students from poor families to attend private nonsectarian schools. Over the years the schools participating grew to roughly 23. However, in 1995 the legislature expanded the MPCP by allowing religious schools to participate and by increasing to 15,000 (15 percent) the number of Milwaukee public school students who could be eligible.
Under the voucher initiative city officials send a check to a private or parochial school chosen by a parent, who then must endorse the check over to the school.

The expansion was challenged by individuals and such groups as Americans United for Separation of Church and State, People for the American Way, the American Civil Liberties Union, and the National Association for the Advancement of Colored People.

Dane County Judge Paul Higginbotham and a state appeals court panel ruled that expanding the program to religious schools violated the state constitution. Higginbotham said that "it can hardly be said that this does not constitute direct aid to the sectarian schools. Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth."

The Wisconsin Supreme Court, however, ruled the voucher program constitutional, stating that the program "has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive entanglement between the state and participating sectarian private schools." It "places on equal footing options of public and private school choice and vests in the hands of parents to choose where to direct the funds allocated for their children's benefit."

Justice Donald Steinmetz, writing for the majority, said the state money would pay only for services of instructing students previously

enrolled in public schools and therefore it should not be considered a benefit. "Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed," Steinmetz wrote. "They are not enriched by the service they render. Mere reimbursement is not aid."

Not everyone agrees with the decision or the rationale behind it.

"The state is giving millions of dollars to private religious schools," said Barry Lynn, executive director of Americans United for Separation of Church and State. "Even worse, in over half the schools the $5,000 in voucher aid more than covers tuition, so additional hundreds or even thousands of public dollars can go to purchase Bibles, erect crucifixes and pay teacher salaries. Contrary to the Wisconsin court's interpretation, this is certainly a benefit to the religious schools," he said.

He has a point. At least one religious school is seeing record enrollment since the state court ruling. When doors opened August 31, Messmer High, a Catholic school, experienced a first in its 72-year history--a waiting list. Bob Smith, president of Messmer, had told the state from the beginning that "we're not going to change our religiosity and we're not going to change the way we do things." Smith said that, after the ruling, 165 of the 366 students enrolled in the school are using vouchers. The school is filled to capacity and more than 30 students are on a waiting list. While the school charges only $2,800 in tuition, the government will pay at least $4,850 per voucher student--the amount the school said is the actual cost of educating a child.

Messmer High requires students to take four years of religion and attend an annual class retreat (one class focuses on prayer and on getting close to God). The school also begins each day with intercom prayer and allocates two time periods a week for organized prayer. Messmer teaches about abortion from the Catholic perspective and does not teach about contraception.

Smith said, "It is not real heavy proselytizing, but it is an attempt to give children an introduction to God." Students of other faiths have attended the school in previous years and have not complained about the religious programs or refused to participate in them, he said.

"The myth is that there are people being manipulated, coerced, or forced. They're making an informed choice to choose an academic program and a religious program," Smith said. He added that if a voucher student refused to participate in the activities, he would counsel the student that the activities are not bad things and do not disrespect other religions.

Smith said he would tell a child in a wheelchair who needed special assistance eating food, as well as a curriculum teaching basic motor skills, that "it would not be in your best interest to be at Messmer."

At Messmer, students who attended public schools in the previous year are not the only ones benefitting from vouchers. Smith acknowledged that several voucher students actually attended Messmer last year even though the program was intended for students coming from the public system. He said the students are eligible because they had originally qualified and registered for the voucher program in 1995.

The main point in the debate over allowing children to use vouchers at religious schools is that "government money does not belong to the government. It belongs to the populace and they're the ones deciding," Smith said.

Maybe. The case has been appealed to the U.S. Supreme Court. Nine justices might determine, among other things, if there is a difference between the government writing a check to a private school and a parent endorsing a government check to one of 86 schools, most of which are religious. However the Court decides (as of this writing it has not yet granted cert.), it will have ramifications that go far beyond Milwaukee.

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