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Church-state separationists mixed over desert cross decision

WASHINGTON — A divided Supreme Court rendered a complex decision April 28 on the fate of a lonely cross in the California desert. The decision — the first major church-state case of Chief Justice John Roberts' tenure — upset religious freedom advocates but heartened some religious conservatives.

By a 5-4 vote, the court's majority agreed only that the case should be returned to a lower court to re-evaluate an injunction that required the cross be removed from public view, while splintering over their reasons why.

The case began in 1999 when the National Park Service, which oversees the land, denied an application from a group that wanted to build a Buddhist shrine near the cross. The agency then studied the history of the monument, said it did not qualify as a historic landmark and announced plans to remove it.

Congress intervened with a series of actions and land transfers that effectively preserved the cross.

In 2001, Frank Buono, a Catholic and a retired National Park Service employee, filed suit, claiming the cross violated the First Amendment's ban on government establishment of religion.

After a series of federal court decisions with different results, the 9th U.S. Circuit Court of Appeals invalidated the land transfer in 2007. The Bush administration appealed the ruling, and the Justice Department under the Obama administration continued to defend the monument.

Associate Justice Anthony Kennedy wrote the court's plurality opinion, but was only joined in his reasoning fully by Roberts and partially by Associate Justice Samuel Alito. Kennedy said a lower federal court had erred by denying an attempt by Congress to transfer a small parcel of land on which the cross is located to a private owner who would maintain the monument.

Religion News Service photo

The cross at issue in *Salazar v. Buono* is in California's Mojave National Preserve.

The lower court called the attempted land transfer an impermissible government attempt to avoid enforcement of a previous court decision — a decision not at issue in this case.

But Kennedy disagreed. "By dismissing Congress's motives as illicit, the [federal] district court took insufficient account of the context in which the statute was enacted and the reasons for its passage," he wrote. "Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message."

Alito wrote separately that he saw no need to send the case back, because Congress had come up with an acceptable remedy to a difficult constitutional situation.

"The singular circumstances surround-

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Editor's note: At press time, President Barack Obama nominated Solicitor General Elena Kagan to replace Associate Justice John Paul Stevens on the U.S. Supreme Court (see p. 6-7). The BJC will provide analysis on Kagan in a future publication.

Founders front & center at 2010 Shurden Lectures

From Montesquieu to Madison, Marty focused on wise words & church-state separation

BIRMINGHAM, Ala. — Martin E. Marty, a prominent interpreter of religion and culture, drew on historical episodes and figures such as Montesquieu, Benjamin Franklin and James Madison to clarify aspects of religious liberty and church-state separation for audiences at Samford University April 27-28.

His presentations were part of the annual Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State, a series sponsored by the Baptist Joint Committee for Religious Liberty and hosted by Samford.

Marty

Supporting the separation of church and state does not mean being against religion, Marty said.

"There are strong impulses in society to say that you serve religion by protecting and privileging it," Marty said, but there is a difference in protection and privilege, which is defined as a right or immunity granted as a benefit. "There are all kinds of ways to protect religion without privileging it," he said.

Marty told how 18th century French philosopher Montesquieu, who wrote that religion is more harmed than helped by favoritism, influenced the writers of the U.S. Constitution on matters of separation of church and state.

"Montesquieu never visited America, but they were reading him," he said of the 55 founders who gathered in Philadelphia, Pa., for the Constitutional Convention.

In his writings, George Washington used 28 different names for God, such as First Architect, but not one was biblical, Marty said. "They were looking for language that would enlarge the context."

The founders, he said, solved the religion problem by not solving the religion problem. Marty, an ordained Lutheran minister who taught for 35 years at the University of Chicago, told how the writings and beliefs of Franklin and Madison played roles in religious liberty during the three-part lecture series.

To some extent, the quality of indifference, such as that exhibited by Franklin, contributed to the lack of religious references in the Constitution, he said.

Franklin was religious, but didn't like the dogma associated with it. Nor did he like defining religions, and opposed zealotry and fanatics, Marty said, noting that zealousness and difference both play a large role in religion.

"Religion in the end almost always calls for profound, sustained passionate commitment," said Marty.

A degree of indifference helped move along the framing of the Constitution, which involved people who had convictions, but who had to make decisions and eventually go home.

Although Franklin once questioned why the Framers did not have morning prayers to help them in their task, the idea was scuttled, in part because there were no funds for a chaplain.

Also, Marty said, the Framers knew it would get them in a dilemma. "They were passionate people, but they knew that introducing religion into the setting would get them in trouble." The situation, he said, "was a close-up of how it would be in the republic."

Madison predicted that it would be difficult to trace a line of separation between the rights of religion and civil authority without collisions and doubts. And although little is known about his religious stand as an adult, Madison saw no need for a religious protection clause in the Constitution, but later became a key figure in writing the First Amendment.

Marty said it is not easy to trace the line of distinction, citing current court cases such as those involving military endorsement of chaplains and lobbying by Catholic bishops on healthcare reform.

"Madison anticipated that it would be impossible to trace a line of distinction in all cases," Marty said. "A wall may be slender and have holes, but it's a wall. Madison said that a line wasn't something you could storm. And, you could see people on the other side."

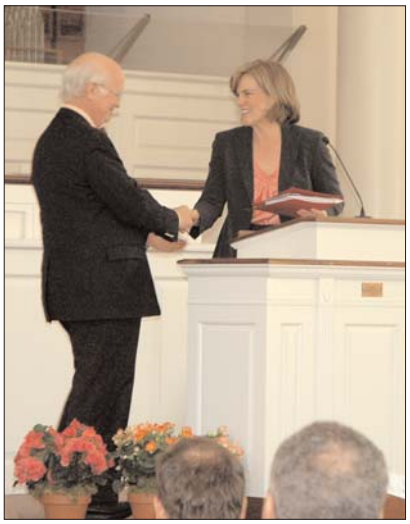
"Separation is important, and whenever we talk of convergence we must recognize potential problems," Marty said. He continued by saying that Madison advised defending rights of religion, but not privileging religion.

While at Samford, Marty and the BJC staff spoke to several different student groups and classes, including history, religion and media classes. BJC General Counsel Holly Hollman and Staff Counsel James Gibson also led a joint political forum with Samford's College Democrats and College Republicans.

The annual lectureship was established in 2004, when the Shurdens, of Macon, Ga., made a gift to enhance the programs of the Baptist Joint Committee. The lectures are held at Mercer University in Macon every three years and at another seminary, college or university in other years. The Shurdens both taught at Mercer for many years.

The 2011 Shurden Lectures will be on the campus of Georgetown College in Georgetown, Ky. The series will return to Mercer in 2012.

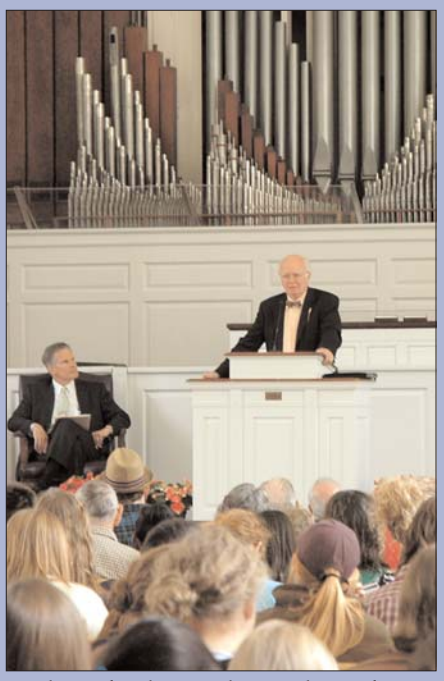
— Mary L. Wimberley, Samford Univ.



BJC General Counsel Holly Hollman introduces Martin Marty and welcomes him to the pulpit for his first lecture.

Each of the lectures is available to view online at www.BJConline.org/lectures.

2010 Shurden Lectures at Samford University



Students, faculty members and out-of-town guests pack Samford University's A.H. Reid Chapel to hear Martin Marty's first lecture. In the lecture series, Marty explained how supporting the separation of church and state supports religion.

Samford University Provost Brad Creed, Shurden Lecturer Martin Marty, Kay W. Shurden, Walter B. Shurden and BJC General Counsel Holly Hollman (l-r) stand on the steps outside the Beeson Divinity School at Samford University in Birmingham, Ala. The Shurden Lectures, endowed by a gift from the Shurdens in 2004, is designed to enhance the ministry and programs of the Baptist Joint Committee.

BJC Staff Counsel James Gibson and General Counsel Holly Hollman speak to a gathering of Samford's College Democrats and College Republicans about religious liberty. During the forum, they explained the First Amendment's protection of religious liberty and how both political parties can get it right *and* get it wrong.

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ing the monument on Sunrise Rock presented Congress with a delicate problem, and the solution that Congress devised is true to the spirit of practical accommodation that has made the United States a nation of unparalleled pluralism and religious tolerance," he wrote.

In a separate opinion, Associate Justice Antonin Scalia, joined by Associate Justice Clarence Thomas, wrote that he agreed with the judgment but would have settled the case by determining that Buono did not have legal standing to bring the lawsuit in the first place.

Many church-state separationists feared that conservatives like Scalia and Thomas could use the case to further curtail the ability of taxpayers to bring such challenges to government endorsements of religion. However, the plurality explicitly found that Buono's standing was not in question.

"To date, this court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules," Kennedy wrote.

Retiring Associate Justice John Paul Stevens wrote a fiery dissent, joined by Associate Justices Ruth Bader Ginsburg and Sonia Sotomayor, which said the lower court had every right to enforce its earlier decision preventing the government from permitting the display of the cross in the area of Sunrise Rock.

"A Latin cross necessarily symbolizes one of the most important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ," he wrote. "In my view, the district court was right to enforce its prior judgment by enjoining Congress' proposed remedy — a remedy that was engineered to leave the cross intact and that did not alter its basic meaning. I certainly agree that the nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message."

He also criticized a separate effort by Congress to preserve the cross by making it an official national memorial. And he expressed bafflement at Kennedy and Alito's notion that the cross is more than merely a symbol of Christianity, but also a universal symbol for the dead.

"Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian," Stevens wrote. "The Mojave Desert is a remote location, far from the seat of our government. But the government's interest in honoring all those who have rendered heroic public service regardless of creed, as well as its constitutional responsibility to avoid endorsement of a particular religious view, should control wherever national memorials speak on behalf of our entire country."

Church-state separationists expressed mixed feelings about the decision.

The Baptist Joint Committee for Religious Liberty filed a friend-of-the-court brief defending Buono's right to file the suit. BJC General Counsel Holly Hollman said she was "pleased that the court rejected the government's claim to deny the plaintiff the right to bring this case. Of course, the wrangling over the display will continue."

However, she added, "It does religion no good when religious individuals and communities seek to advance religion through official government religious displays."

— *Associated Baptist Press and Staff Reports*

K. Hollyn Hollman
General Counsel

Lowering the wall of separation

Beware. In battles over religious displays on government property, such as in the U.S. Supreme Court's most recent church-state decision, a win for a religious display is not a win for religion. In *Salazar v. Buono*, the Court reviewed a challenge to a statute that would transfer a cross and the government land on which it stands to a private party. The lower courts had stopped the transfer, holding that it was an attempt to keep the stand-alone cross atop Sunrise Rock that would continue the underlying constitutional violation.

By a vote of 5-4, the Supreme Court reversed. The Court was severely fractured—the five in the majority having four different opinions and the dissenters having two — and the case is not over (it was remanded for further consideration). The case provides little guidance for lower courts that must decide other cases about religious displays on government property. Instead, led by a plurality decision by Associate Justice Anthony Kennedy, the Court gives us another tangled Establishment Clause decision that lowers the wall of separation and devalues religious symbols.

"In their zeal to display Christianity's most sacred symbol on government property, [cross supporters] have received an opinion from the highest level of government that redefines the distinctly Christian message of the cross."

On a positive note, the Court (with the exception of Associate Justices Antonin Scalia and Clarence Thomas) rejected the argument that plaintiff Frank Buono, a Roman Catholic, lacked standing to challenge the display of a symbol of his own faith on public lands. The BJC and other *amici* joined Mr. Buono in arguing against the further erosion of standing in Establishment Clause cases. Unfortunately, there is little else to commend in the remainder of the plurality opinion.

It is widely agreed that the First Amendment's religion clauses protect the authentic expression of religion by individuals and faith communities. It is less commonly understood that one means of that protection is through the Establishment Clause's prohibition on government promotion or endorsement of religion.

In church-state battles, there are always strong voices from the Christian majority who fight mightily to have the government advance religion, or at least advance the most popular religious symbols. In public debates, they undermine the separation of religion and government, and by implication the protection for religion it provides, often by asserting misguided arguments to achieve their goals. Unfortunately, Justice Kennedy's opinion (See page 1) in *Salazar v. Buono* is now Exhibit A in this phenomenon.

First, Justice Kennedy makes a questionable analogy to the Ten Commandments monument that was allowed to remain on the Texas State Capitol grounds in the Court's 2005 *Van Orden v. Perry* decision. Both displays had a decades-long history, but unlike the monument in Texas, the cross in this case stood alone, absent any markings or inclusion in a larger display that may alter its apparent message. Without attention to the physical surroundings of the display, emphasis on the bare passage of time threatens to create a "squatters' rights" exception in Establishment Clause jurisprudence.

More disturbing, he writes that the cross "is not merely a reaffirmation of Christian beliefs" but a symbol "often used to honor and respect" heroism. He added: "Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." Such a statement ignores the value of government staying out of purely religious disputes, which reflects an important concern in Establishment Clause cases. As former Associate Justice Sandra Day O'Connor observed in her concurring opinion in *McCreary Co. v. ACLU*: "Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices."

Those who would like to preserve the full expression of Christianity to the non-governmental sphere can thank the most senior (and soon-to-be former) member of the Court, dissenting Associate Justice John Paul Stevens, who made plain what we all know: "The cross is not a universal symbol of sacrifice. It is the symbol of one particular sacrifice, and that sacrifice carries deeply significant meaning for those who adhere to the Christian faith." The World War II veteran, joined by Associate Justices Ruth Bader Ginsburg and Sonia Sotomayor, added, "I certainly agree that the nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message."

Those who would look to the government for religious expressions of the majority faith found a friend in Justice Kennedy and a resulting victory in the *Buono* case. But it is a pyrrhic victory. In their zeal to display Christianity's most sacred symbol on government property, they have received an opinion from the highest level of government that redefines the distinctly Christian message of the cross.

High Court hears arguments in 'Christian Legal Society v. Martinez'

The nation's highest court took up a case April 19 that pits the rights of a Christian student group against the efforts of a California public law school to enforce its nondiscrimination policy. The Baptist Joint Committee filed a friend-of-the-court brief in the case focused on religious freedom, but on behalf of neither party.

A campus chapter of the Christian Legal Society — which bars gays and non-Christians from leadership positions — argues that if it follows the policy of the Hastings College of the Law in San Francisco, a student who does not believe the Bible could lead its Christian Bible studies.

"A public forum for speech must be open and inclusive, but participants in the forum are entitled to their own voice," argued Michael McConnell, a Stanford law professor and former appeals court judge, on behalf of the student group.

The group believes the public school's anti-discrimination policies violate its First Amendment rights to free association and free speech as well as free exercise of religion.

The brief filed by the BJC and the Interfaith Alliance asked the U.S. Supreme Court to protect the religious autonomy of student groups that have expressive association rights to meet on campus as part of a public university's forum, but not in a manner that clears the way for government funding of religion.

During oral arguments, the justices delved into several different questions. One focused on whether they were dealing with an anti-discrimination policy or an "all-comers policy" that allows any student with any perspective to be part of any group that receives money from Hastings, which is part of the University of California system.

"This all-comers policy is how it's implemented in this context," said Gregory Garre, a former U.S. solicitor general and Washington lawyer representing the law school, answering a battery of questions from the justices about the school's nondiscrimination stance.

The school, which won in two lower courts, has argued the Christian Legal Society is the only group out of more than 60 campus organizations seeking an exemption from its rules. When a group agrees to abide by school policy, it gains access to meeting space, e-mail communication with the student body and limited funding.

McConnell compared the case to *Healy v. James*, a 1972 case in which the Supreme Court ruled the anti-war group Students for a Democratic Society could not be denied recognition by a public college.

"It is also a frontal assault on freedom of association," he said. "Freedom of association is the right to form around shared beliefs."

Garre, however, cited a Supreme Court decision a decade later, in which the court decided that Bob Jones University, a fundamentalist Christian school, could not keep its tax-exempt status if it wanted to continue a ban on interracial dating.

The justices peppered the lawyers with hypothetical situations about inclusion or exclusion of religious groups that might have exclusionary policies about gender or race.

Associate Justice Ruth Bader Ginsburg asked whether a group would be permitted if the group thought, based on its belief of the Bible, that "only white men can lead Bible studies."

McConnell replied Hastings would not be required to give official organizational status to such a group.

"People can believe in all kinds of things that are illegal," he said. "That doesn't mean that they can do them."

Many of the friend-of the-court briefs filed in the case centered on CLS's policy that "unrepentant participation in or advocacy of a sexually immoral lifestyle" prevented students from becoming official members or leaders of the organization.

"Hastings has an obligation under state law to prohibit discrimination on the basis of sexual orientation," Garre told the court.

BJC Executive Director Brent Walker, Staff Counsel James Gibson and General Counsel Holly Hollman (l-r) exit the Court after listening to oral arguments in *CLS v. Martinez*.

McConnell argued that CLS meetings are open to all, including gays. "What it objects to ... is being run by non-Christians," he said.

The justices grappled with the questions of both students' and educators' rights.

Associate Justice Sonia Sotomayor questioned CLS's argument that following the school policy would force it to accept leaders it did not want. "Your group is not being excluded or ostracized completely from the school," she said.

McConnell responded that the chapter has been denied the right to have on-campus meetings, and said there is no guarantee that a request to use a meeting room would be granted. "They have gotten a complete runaround," he said of the chapter.

While McConnell viewed the Hastings policy as calling for diversity among groups, Ginsburg said it is also seeking diversity within groups. Even if the policy may be "ill-advised," Ginsburg said CLS's hypothetical concerns about takeover and sabotage by opponents have — according to Hastings — so far been unfounded.

"They haven't happened," she said.

When Garre said the equal-access policy aims to reduce strife among students, Associate Justice Antonin Scalia wondered if the policy was actually creating more conflict.

"There are going to be even more lines to have to draw," he told Garre. "Why does it solve your problem?"

Garre also defended groups that might choose members based on knowledge of the subject around which they meet. Chief Justice John Roberts called such a standard "pretty tough" and questioned how it would be applied.

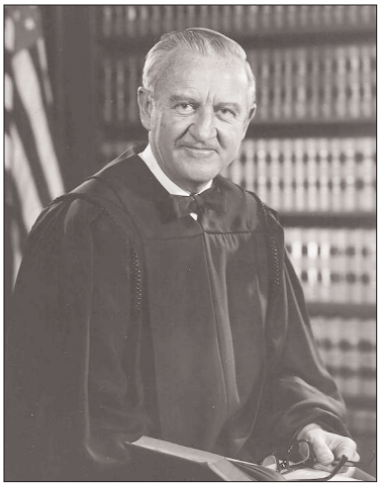
"How can you have a test that allows distinctions based on merit but not beliefs?"

The justices are expected to issue their decision by summer.

— Religion News Service and Staff Reports

John Paul Stevens

Reflections on the retiring U.S. Supreme Court Associate Justice



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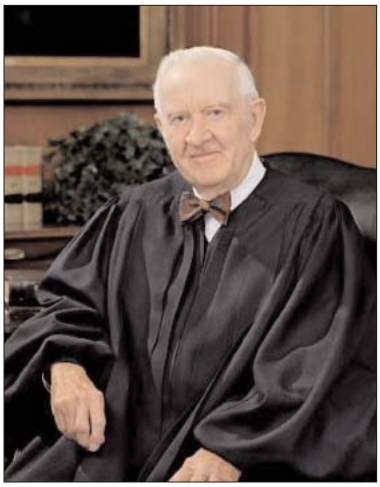


Supreme Court photo

By J. Brent Walker

The retirement of Associate Justice John Paul Stevens brings to a conclusion the second-longest tenure in the history of the U.S. Supreme Court. At the term's end, Justice Stevens will have served 34 ½ years, just two years shy of his immediate predecessor, Associate Justice William O. Douglas. Much has changed over the past three and a half decades.

Justice Stevens was nominated by President Gerald Ford and confirmed by the Senate in 1975 as a moderate conservative; he will leave the bench as a leader of the Court's liberal wing. As is the case with all justices, he undoubtedly changed his views somewhat over the years, but Stevens attributes the shift mainly to the Court's moving to the right rather than his drifting to the left. The Senate confirmed Stevens by a whopping 98-0 vote, a mere 17 days after he was nominated. His successor, no doubt, will take much longer to confirm, and no one expects such unanimity from today's Senate.

Stevens has often been characterized as eccentric, creative and quirky. These adjectives have been used to describe his appearance (the only justice always to sport a bow tie) as well as his jurisprudence in both reasoning and in result. Despite this uniqueness and his long service on the Court, Stevens has maintained a low profile and relative anonymity. For example, I can recall some 20 years ago walking in front of the Supreme Court building and seeing Stevens bounding down the front steps (presumably going to lunch) and making his way through a throng of tourists. No one, except for me, appeared to recognize him. The same thing would probably happen today.

Still, I think history will report that Stevens' influence on the Court was significant. Jeffrey Toobin, Supreme Court analyst and author of *The Nine*, observed that the justice who assigns an opinion is as important as the justice who writes the opinion. For the past 16 years, Stevens has been the senior Associate Justice. As such, when the Chief Justice is not in the majority, the senior associate in the majority assigns the opinion either to himself or to one of his colleagues. The ability to assign opinions is an important political tool in building intra-Court coalitions and assembling viable majorities. By all accounts, Stevens was astute in this role, often nabbing Associate Justice Sandra Day O'Connor or, more recently, Associate Justice Anthony Kennedy to round out a majority of five.

Stevens' contribution to religion clause jurisprudence and his church-state legacy will be judged less significant than in other areas. Although he participated in 65 church-state cases, he authored or assigned only five majority opinions, and one can point to scant quotable prose. Moreover, Stevens' idiosyncratic judging is revealed more clearly here than in any other area of constitutional decision-making.

Almost every justice over the past half century has exhibited either a strong or weak view of both the Establishment Clause and Free Exercise Clause. For example, Associate Justices William Brennan, Harry Blackmun and David Souter were exponents of a robust Establishment Clause and a strong Free Exercise Clause. Others, such as Chief Justice William Rehnquist, Associate Justice Antonin Scalia and Associate Justice Clarence Thomas, have exhibited an attenuated view of the two clauses. Stevens is the only Justice to have a strong commitment to the Establishment Clause and a weak Free Exercise jurisprudence. *

Establishment Clause cases can be divided into two categories: those dealing with government-sponsored religious speech or expression and those with government funding of religious enterprises and activities. Justice Stevens has opined that both violate the First Amendment's Establishment Clause.

With respect to religious expression, it is interesting to note that the first church-state case in which Justice Stevens authored the majority opinion was *Wallace v. Jaffree* (1985) some 10 years after he arrived on the Court. In that case, the Court struck down a mandatory moment of silence law in Alabama that mentioned prayer as a preferred activity in the public schools during the moment of silence. Similarly, Stevens authored the majority opinion in *Santa Fe Independent School District v. Doe* (2000) that struck down the practice of selecting by majority vote a student to lead prayer at a high school football game where the context clearly indicated government sponsorship.

Stevens has been dubious about cases involving equal access for religious clubs in public schools. In *Board of Education v. Mergens* (1990), a case upholding the constitution-

*Arguably Justice O'Connor and Associate Justice Stephen Breyer may be Stevens' mirror image here. They both tend to have a strong understanding of Free Exercise, but a slightly weaker view of the Establishment Clause, particularly with respect to government funding issues.

ality of student-led religious clubs under the Equal Access Act of 1984, he was the lone dissenter. And, in *Good News Club v. Milford Central School* (2001), Stevens dissented from the Court's approval of religious clubs in elementary schools after class.

Stevens was equally firm in his belief that government should not fund pervasively religious organizations and religious activities — neither directly nor indirectly. He readily embraced the Court's decisions in the 1980s condemning government support for a variety of religious schools and their programs. He dissented vigorously in recent cases that overturned those decisions and loosened the restraints on government funding of religious education (as in *Agostini,* 1997, and *Mitchell,* 2000). Stevens also dissented in the narrowly divided (5-4) Court decision upholding the use of vouchers under certain circumstances for religious education (*Zelman*, 2002).

Finally, although a staunch supporter of free speech rights, Justice Stevens dissented in a free speech case that approved governmental funding via student activity fees of a magazine expressing a religious viewpoint that was published by a student organization (*Rosenberger,* 1995).

On the First Amendment's Free Exercise side, Justice Stevens has never required accommodation and sometimes would not even permit it. Perhaps the best example of this is Justice Stevens' participation with the majority (along with four conservatives) in the Native American peyote case that gutted the Free Exercise Clause of vigorous protection for religious liberty (*Smith,* 1990).

Consistent with this narrow understanding of the Free Exercise Clause, Stevens joined the Court's slim majority in negating the right of a Jewish psychiatrist serving in the Air Force to wear a yarmulke while in uniform (*Goldman,* 1986) and joined the Court's minority condemning legislative prayer before legislative bodies and presumably legislative chaplains (*Marsh,* 1983).

Along the same lines, Stevens has been unsympathetic to most religion-specific legislative accommodations such as tax exemption for religious publications (*Texas Monthly,* 1989), mandatory accommodation of religious exercise by employees in the workplace (*Estate of Thornton*, 1985), and the Religious Freedom Restoration Act as applied to the states (*City of Boerne*, 1997).

However, consistent with Justice Stevens' reputation for independence, we must avoid hasty generalizations. In fact, he has been from time to time sympathetic to the accommodation of religion, particularly in the case of the rights of prisoners (*O'Lone*, 1987, and *Cutter*, 2005), the reasonable accommodation of religious practice in the workplace (*Amos*, 1987), the right of ministers to serve as public officials (*McDaniel*, 1978) and the right of minorities not to suffer unfavorable religious regulation (*Lukumi*, 1993, and *Gonzalez*, 2006).

Other aspects of Justice Stevens' church-state jurisprudence also bear mentioning. Generally speaking he has taken a narrow view of the church autonomy doctrine — the principle that forbids judicial interference in ecclesiastical and internal decision of church bodies based on theology, polity and administration. In *Serbian Eastern Orthodox Diocese* (1976), he dissented along with then-Justice Rehnquist from the Court's determination that it should not be involved in a dispute over the defrocking of a bishop in the Serbian Orthodox Church.

Stevens' Supreme Court Career

Dec. 1, 1975: Stevens is nominated by President Gerald Ford to replace retiring Associate Justice William O. Douglas.

Dec. 17, 1975: Stevens is confirmed by the U.S. Senate with a 98-0 vote.

Dec. 19, 1975: Stevens takes the oath of office.

August 3, 1994: Stevens becomes the senior Associate Justice upon the retirement of Associate Justice Harry Blackmun.

April 9, 2010: Stevens announces his retirement from the Court.

Justice Stevens also joined in a decision that, on a limited basis, allows the courts to adjudicate certain autonomy issues, such as "neutral principles of law" (*Wolf*, 1979).

Another issue pervading the discussion at Justice Stevens' retirement is the religious affiliation of the remaining justices. When Justice Stevens ascended to the High Court, he was one of eight Protestants (Justice Brennan was the sole Catholic); when he leaves, no Protestants will be left on the Court (six Catholics, two Jews). If Supreme Court nominee Elena Kagan is confirmed, she will be the third Jewish member of the current court.

At any time during most of the 20th Century, at least seven Protestants populated the Court with often (although not always) a "Catholic" seat and "Jewish" seat. The fact that this ratio has been essentially inverted signals, perhaps, that we have begun to take seriously the "no religious test" principle in Article VI of the Constitution. In today's post-denominational religious milieu, other issues seem to eclipse religion as important characteristics — gender, ethnicity, judicial experience, and constitutional philosophy.

While we should embrace the "no religious test" principle, I think we should strive for some diversity on the Court with respect to religion. Nevertheless, the proper question is not whether there are too many Catholics, but "what kind of Catholics?" When it comes to their church-state jurisprudence, I gladly will take another Bill Brennan (a Catholic) over another Bill Rehnquist (a Lutheran) anytime. By way of comparison, there have been no Baptist justices appointed since Hugo L. Black in 1937 and Earl Warren in 1953.

Justice Stevens has been a remarkable justice. He has stood up for church-state separation. With regard to his Establishment Clause jurisprudence, he has been consistently firm; as to Free Exercise and church autonomy he has been often too soft. I hope Stevens' replacement will incorporate his appreciation for the Establishment Clause but have a more robust vision for the protections afforded by the Free Exercise Clause and the First Amendment doctrine that ensures the autonomy of religious organizations. These considerations — what the new justice thinks about religious liberty — are far more important than the prospective justice's religion.

Panel faults Obama for lagging on religious freedom

WASHINGTON — The U.S. government is not doing enough to protect religious freedoms abroad, the independent U.S. Commission on International Religious Freedom said April 29 in its annual report to Congress and the White House.

"The problems are above and beyond what we saw last year, and the administration must do more," said Leonard Leo, chair of the commission, which was founded by Congress in 1998.

The commission named 13 "countries of particular concern" on religious freedom violations: Burma, North Korea, Nigeria, Eritrea, Iran, Iraq, Pakistan, China, Saudi Arabia, Sudan, Turkmenistan, Uzbekistan and Vietnam.

The panel also named 12 countries to a second-tier "watch list" which deserve close monitoring by Washington: Afghanistan, Belarus, Cuba, Egypt, India, Indonesia, Laos, Russia, Somalia, Tajikistan, Turkey and Venezuela. India was the only addition from last year.

Beyond the annual list of offenders, which has remained relatively stable in recent years, commissioners chided the Obama administration and U.S. diplomats for ignoring religion in foreign policy when so many conflicts find their roots — or justification — in religion.

"We're completely neglecting religious freedom in countries that tend to be Petri dishes for extremism," Leo said. "This invariably leads to trouble for us."

The commission brings attention to global "hot spots" where freedom of religion is threatened by state hostility, state-sponsored extremist ideology, or failure to protect human rights.

Commissioners said the issue of religious freedom has been, and continues to be, largely ignored. "Regrettably, this point seems to shrink year after year for the White House and State Department," Leo said.

Indeed, the lists' stability — the addition of India represented the only change from last year's report — has been interpreted by some observers as reflecting a lack of progress or priority.

More than 10 years after the International Religious Freedom Act that created the bipartisan panel, the commission says the State Department has not implemented or has underutilized key provisions of the law.

Of the eight nations designated as a "country of particular concern" (CPC) by the State Department, only one, Eritrea, faces sanctions specifically imposed under the IRFA for religious freedom violations. Iraq, Nigeria, Pakistan, Turkmenistan and Vietnam — which are all cited by the panel — are not included on the State Department's CPC list.

The State Department has declined to designate other countries suggested by the panel, and has not made any designations since 2006.

The panel also joined other critics who have chided the administration for not filling the State Department's ambassador-at-large position for international religious freedom.

— Religion News Service and Staff Reports

Workplace religious freedom bill revived

WASHINGTON — Almost two decades after it was first introduced, an on-again off-again bill to protect employees' religious expression in the workplace is attracting renewed attention that could lead to action on Capitol Hill in coming weeks.

The Workplace Religious Freedom Act would revise and strengthen the existing requirements imposed on employers to accommodate the religious practices of their employees.

"The bill will be introduced to Congress soon in a fashion that will eliminate the concerns some folks had since its inception," said Richard Foltin, the director of national and legislative affairs for the American Jewish Committee.

Foltin co-chairs an unusually broad coalition of almost 40 religious groups, including the Baptist Joint Committee.

If passed, the now narrowly tailored legislation would require employers to make reasonable accommodation in the three areas where the vast majority of religious accommodation claims fall: religious clothing, grooming and scheduling of religious holidays.

Previous versions of the bill had been criticized for being overly broad. The ACLU and the U.S. Chamber of Commerce were concerned other employees might be forced to carry additional workloads to accommodate co-workers, and that it would allow religious viewpoints to interfere with a secular workplace.

Whitney Smith, a spokeswoman for Sen. John Kerry, D-Mass., the bill's lead sponsor in the Senate, said organizers are confident that with "the broad coalition of religious and civil rights organizations they've organized, they can finally pass this legislation in this Congress."

Current standards require employers to accommodate an employee's request unless it imposes more than a "de minimus," or minimal, cost on the employer. This very low threshold makes it difficult for an employee to successfully obtain his or her requested accommodation, such as the right to wear a yarmulke in an office that otherwise does not allow headwear.

The debate centers on when employees' requests become an "undue hardship" for managers. The proposed bill would place a larger burden of proof on the employer by raising the standard to a "significant difficulty or expense" for the employer.

The bill, introduced each Congress with great fanfare but little success, has garnered bipartisan support. Sen. Orrin Hatch, R-Utah, has joined Kerry as a co-sponsor in the Senate; Rep. Carolyn McCarthy, D-N.Y., continues to lead the fight in the House.

"Federal law requires employers reasonably to accommodate employees' religious belief and practice, but courts have weakened that protection," Hatch said. "WRFA will restore the level of protection that religious freedom deserves."

Many corporations maintain the Civil Rights Act of 1964 adequately protects employee rights, and argue the bill would confound an already convoluted set of rules.

Even supporters concede the bill would increase employer responsibilities, but such change is warranted to restore balance for the rights of religious expression.

— Religion News Service and Staff Reports

The state of liberty

Oliver Thomas
Guest Columnist

***BJC Executive Director Brent Walker is on a summer sabbatical. His column will return in October's* Report from the Capital.**

What makes America America? Ever stop to think about it?

You could answer that question in lots of ways. A big army? Sure, but Russia and China have that. Great colleges and universities? Ditto England, France and Germany. A burgeoning economy? Check out China or the European Union. Lots of churches? You should visit Korea or Mexico.

So what is it that makes America America?

Ideas mostly. Freedom, first and foremost. But not just freedom to do what you want. You can find that in lots of places. I'm talking about the freedoms (and corresponding responsibilities!) set forth in our Constitution and Bill of Rights. None is more uniquely American than our shared commitment to religious freedom for all — believers and nonbelievers alike. With just 16 words, James Madison and his congressional colleagues gave us the twin pillars of religious freedom American style: (1) Freedom to practice one's religion without interference, and (2) No government establishment of religion.

So how are we doing two-plus centuries later? What is the state of our union when it comes to religious freedom?

On the surface, I would say it's good. Folks are generally free to worship whenever, wherever and however they choose. Generally. There is a lot of litigation around the edges. For example, can a church operate a homeless shelter without installing a costly sprinkler system and additional fire exits? Can an historic downtown synagogue alter its building to accommodate a growing congregation? Can a mosque operate a soup kitchen in a residential neighborhood?

We win a lot of these cases because a small network of guardians and advocates are keeping watch over our freedoms. The Baptist Joint Committee is the premier. It is the only denominational organization that works exclusively on this critical — yet unsung and underrated — task. Without the BJC, I hate to think about the shape our country would be in. For example, it was the BJC that pulled together the coalitions that created sensible consensus guidelines for the country on such things as the Equal Access Act and religious holidays that made public schools willing to crack the door to more religious expression and activity. And in 1990, when the Supreme Court took a chain saw to the Free Exercise Clause, it was the BJC that pulled together the coalition that restored those protections through the Religious Freedom Restoration Act and other state and federal laws. The BJC's former general counsel — Melissa Rogers — chaired the White House Advisory Council on Faith-based and Neighborhood Partnerships that recommended to the president how the administration can work more effectively (and constitutionally) with private groups providing social services. Like the little engine that could, no agency gives America more bang for its buck than the BJC.

So that's where we are on Free Speech and Free Exercise — pretty fair shape due to the work of the BJC and its allies.

On the No Establishment side, I am not so sanguine. First, it was government vouchers for parochial schools. Then, it was the permanent display of the Ten Commandments on the grounds of the Texas State Capitol. Two years ago, the Supreme Court ruled that taxpayers did not have legal standing to challenge executive branch spending that promotes religion. Now the Court is considering whether ordinary citizens have standing to challenge congressional shenanigans to maintain a large Latin cross in the Mojave Desert (see coverage on page 1). God help us if the High Court decides we cannot enforce the most fundamental freedoms of our Bill of Rights.

Of course I have no idea if the well-intentioned (and not so well-intentioned) zealots will be successful in reducing Mr. Jefferson's wall between church and state to a picket fence. But here's what I do know. I want the BJC representing my interests in constitutional matters great and small. The BJC is smart, committed and respected by the courts, the media, academia and politicians on both sides of the aisle. And they are nuanced. They never reach for a meat cleaver when a scalpel will do. In one of the year's key Supreme Court cases (*CLS v. Martinez*), the BJC staked out a principled middle ground, saying in effect that religious organizations on college campuses must be free to adopt their own criteria for the selection of members and officers despite a school's general policy of non-discrimination (see coverage on page 5). That's the same principle that allows Catholics to refuse to ordain women or some Protestants to ordain gays and lesbians. The First Amendment protects our right to be wrong. But the BJC drew the line at providing pervasively sectarian groups with taxpayer funds. Bravo!

So what makes America America? Religious freedom as much as anything. And what is the state of that freedom? Uncertain. That should not surprise us in light of Thomas Jefferson's famous assertion that "eternal vigilance" is the price we pay for our freedom.

So pay it we must. But as for me, I shall employ the services of a more talented, more connected, better qualified surrogate to assist me in that task. Which reminds me. Where's my checkbook?

Oliver Thomas is a columnist for USA Today *and former BJC General Counsel. He is President of the Knoxville Public Education Foundation.*

2010 Religious Liberty Council Luncheon:
June 25 in Charlotte, North Carolina

Join us in Charlotte, N.C., on Friday, June 25 at 11:30 a.m. for the 20th annual Religious Liberty Council Luncheon.

Tickets are $40 each until June 11, and you can host a table of ten for $400.

After June 11, the ticket price increases to $45.

Learn more about the luncheon and purchase tickets at www.BJConline.org/luncheon .

Call our office at (202) 544-4226 or e-mail Kristin Clifton at kclifton@BJConline.org for information on purchasing tickets over the phone or by mail.

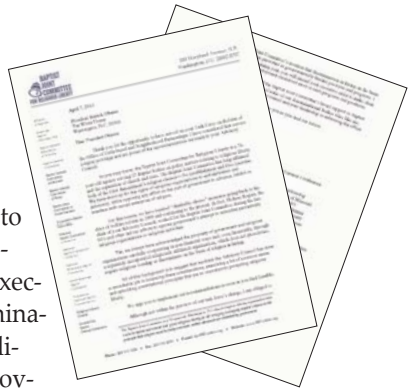
Don't miss this celebration of religious liberty!

Meet the 2010 recipients of the Baptist Joint Committee's J.M. Dawson Religious Liberty Award, to be presented at this year's luncheon

William D. Underwood is the president of Mercer University in Macon, Ga., a former BJC intern, and this year's luncheon speaker. He is a strong voice for religious liberty on campus and in the community.

The Rev. Dr. Gardner Taylor, known as the "dean of American preaching," has been a staunch supporter of religious liberty, both as an orator and as a religious leader during the Civil Rights Movement.

Baptist leaders applaud work of President Obama's Advisory Council



Religious leaders representing the Baptist denominations and groups that comprise the Baptist Joint Committee have joined to applaud the work of the 25-member advisory council created by the president to help the administration partner more effectively with private groups — including religious ones — that provide social services.

In an April 7 letter to President Barack Obama (available online at **www.BJConline.org**), BJC Executive Director J. Brent Walker explained that the BJC has long affirmed both of the First Amendment's religion clauses — no establishment and free exercise. He then acknowledged the propriety "of government and religious organizations carefully cooperating in non-financial ways and, even financially, through a separately incorporated religiously affiliated organization, which does not proselytize, require religious worship or discriminate on the basis or religion in hiring."

"All of this background is to suggest we think the Advisory Council has done a remarkable job in balancing these considerations, exercising a lot of common sense, and upholding constitutional principles that are so important to protecting religious liberty," Walker wrote.

The Advisory Council approved 12 specific recommendations made by a task force charged with reforming the faith-based office to strengthen the constitutional and legal footing of public-private partnerships. Specifically, it urged clarifying the prohibited uses of direct financial assistance, providing guidance on the protection of religious identity while providing social services and assuring the religious liberty rights of clients and beneficiaries of federal social service funds.

Walker, who served on the task force, urged the president to implement the Council's recommendations and to amend an executive order to state that discrimination in hiring on the basis of religion is not to be permitted in government-funded positions and programs.

Baptist leaders endorsing the letter were: **Pam Durso**, chair of the Baptist Joint Committee; **Robert Appel**, executive director of the Seventh Day Baptist General Conference; **Glen Howie** of the North American Baptist Conference; **Lewis Petrie** of the Baptist General Conference; **Daniel Vestal**, executive coordinator of the Cooperative Baptist Fellowship; **James L. Hill**, executive director of the Baptist General Convention of Missouri; **Sumner M. Grant** of the MMBB of the American Baptist Churches, USA; **John Upton**, executive director of the Baptist General Association of Virginia; **Aidsand F. Wright-Riggins III** of the American Baptist Home Mission Society; **Randel Everett**, executive director of the Baptist General Convention of Texas; **Julius R. Scruggs** of the National Baptist Convention, U.S.A., Inc.; **Stephen J. Thurston** of the National Baptist Convention of America; **T. DeWitt Smith Jr.** of the Progressive National Baptist Convention, Inc.; **Paula Clayton Dempsey**, minister for partnership relations of the Alliance of Baptists; and **Larry Hovis**, executive coordinator of the Cooperative Baptist Fellowship of North Carolina.

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REPORT from the Capital

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Take the next step

Many of the people who receive *Report from the Capital* and keep up with the work of the Baptist Joint Committee have never made a financial contribution to the organization. If you have never donated to the BJC, we invite you to take that **next step** and show your support for religious liberty!

Your first donation is the next step in your journey down a path of defending and extending religious liberty for all. Protecting religious freedom is the first step in protecting other rights and liberties we enjoy every day.

A donation to the BJC will help us teach individuals across the country about the importance of religious liberty. Our annual essay scholarship contest engages high school students from coast to coast, giving them the opportunity to research and write about religious liberty. Plus, the BJC is constantly encouraging churches to reach out to members in their congregation and talk about religious freedom in a Religious Liberty Day. The BJC provides free resources — including hymns, litanies and Bible study lessons — to make sure every church has what it needs to teach its congregation about the importance of our God-given liberty. Go online to our Web site at **www.BJConline.org/ReligiousLibertyDay** to learn more about these resources that are available at no cost.

Be a part of our team and **take that next step** in partnership with the Baptist Joint Committee! **As we defend the First Amendment in our nation's capital**, we want to equip you to have a conversation with your neighbor, relative or co-worker about the importance of religious liberty. We want to make sure you have the knowledge and the confidence you need to stand up in your community for religious liberty.

If you have never given to the Baptist Joint Committee, we have set up a special Web site just for you. Visit us online at **www.BJConline.org/NextStep** to make a secure donation and to become a full partner in the work of the BJC. You can also call our offices at (202) 544-4226 to make a donation by credit card, or you can mail your donation to our offices at 200 Maryland Ave., N.E., Washington, D.C. 20002. Your donation of $100, $50 or any other amount can go a long way.

Take that next step, knowing the BJC is uniquely situated to make a difference in our nation's capital and across the country, as we are the only religious organization whose sole focus is religious liberty and church-state separation.

Your first donation also identifies you as part of our Religious Liberty Council, an association of individuals working to provide education about and advocacy for religious freedom.