RELIGION, THE PUBLIC SQUARE, AND THE PRESIDENCY

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I. INTRODUCTION

In addressing what advice on issues of religious liberty a practitioner in the religious liberty field might give to the new President, it almost seems rude to dwell on another branch of government. It would seem more appropriate that advice to the Chief Executive on furthering religious liberty focus on the executive branch, entailing questions such as those which faced the Clinton Administration: whether military chaplains are free to preach about partial-birth abortion,[1] whether to retain a display about Native American worship in a national park visitor's center despite an Establishment Clause challenge,[2] or

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1. *See infra* notes 234-35 and accompanying text.
2. *See infra* notes 85-86 and accompanying text.

how to deal with the suppression of student religious speech in public schools.[3] Another proper area of focus would be the President's legislative opportunities, such as whether to support school vouchers and charitable choice as measures that enhance the freedom and equality of religious people and institutions, or to adhere to the view that they are threats to religious freedom.

Try as I might to focus on these issues, one clause of Article II, Section 2 refuses to be ignored: "[A]nd he shall nominate, and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law." Two powers within this clause—the power to appoint Justices of the Supreme Court and the power to appoint other federal judges (hidden in the catch-all "other Officers" language)—have arguably become the primary engine of the federal government's policy on religious liberty issues.

Things were not supposed to be so. The Framers certainly intended the Constitution to be the supreme law of the land and the legislative will subservient to it. As Hamilton wrote, "[T]he constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[4] But the Framers nevertheless conceived of the judiciary as "the least dangerous" branch.[5] Madison observed in *Federalist No. 68* that because of the specificity with which the judiciary's role is defined in the Constitution "projects of usurpation . . . would immediately betray and defeat themselves."[6] Hamilton was even more optimistic. He remarked in *Federalist No. 81* that

> the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any

3. *See infra* notes 172-82 and accompanying text.
4. THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) (Max Beloff ed., 1987).
5. *Id.* at 396.
6. THE FEDERALIST NO. 68, at 254 (James Madison) (Max Beloff ed., 1987).

sensible degree to affect the order of the political system.[7]

Experience has not been kind to Madison and Hamilton's prognostications. As Abraham Lincoln observed in response to the *Dred Scott* decision: "[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."[8] Nor have the Federalists' predictions held true in the twentieth century, particularly on the issue of religion in public life. Since the incorporation of the Establishment Clause in *Everson v. Board of Education*,[9] it has been the federal courts that have largely determined national, state, and local policy on the proper role of religion in public life. The issues of whether prayers[10] or moments of silence[11] are appropriate in school, what types of holiday decorations will be seen in towns each December,[12] and whether disadvantaged children attending parochial schools will receive the same special educational services public school children receive[13] are but a sampling of areas in which the Supreme Court has co-opted the field.

The Supreme Court's influence is not limited to directly

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7. THE FEDERALIST NO. 81, at 414 (Alexander Hamilton) (Max Beloff ed., 1987); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton); R. Alexander Acosta, *Judicial Activism and Self-Government*, *in* LAW AND THE FREE SOCIETY 49-50 (T. William Boxx & Gary M. Quinlivan eds., 1998).

8. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 1 DOCUMENTS OF AMERICAN HISTORY 387 (Henry Steele Commager ed., 9th ed. 1973).

9. 330 U.S. 1 (1947).

10. *See* Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting the practice of official morning prayer in public school recited aloud by each class).

11. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that law authorizing a one-minute period of silence violated the First Amendment's Establishment Clause where secular legislative purpose was lacking).

12. *See* Allegheny Co. v. ACLU, 492 U.S. 573 (1989) (upholding display of menorah, Christmas tree, and sign saluting liberty outside courthouse and striking down solitary Nativity scene on grand staircase inside courthouse); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding municipal display of Nativity scene as part of broader holiday display).

13. *Compare* Agostini v. Felton, 521 U.S. 203 (1997) (upholding practice of public school teachers delivering secular special-education services on premises of parochial schools), *and* Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (upholding government funding of sign-language interpreter for disabled child attending religiously affiliated school), *with* Aguilar v. Felton, 473 U.S. 402 (1985) (striking down same practice).

determining what practices are permitted and which are forbidden under the Constitution. As Judge John Noonan has observed: "Through its pronouncements current conventions about the Constitution take compact shape, decide cases, provide guidance to public officials, and stimulate debate, reaction, and the development of further pronouncements."[14] The law is a great moral teacher; Hadley Arkes has remarked, "As the ancients knew, and the moderns confirmed, the laws may reshape the attitudes of the public, and they may instruct people in new understandings of the duties they owe one another."[15] And the decisions through which the Court is instructing the public—not to mention delivering edicts that have the force of law—rest on the narrowest of margins.[16]

Despite the compelling reason to start with—and remain on—the subject of judicial appointments, there are good reasons to refrain from doing so and to first discuss the President as Executive and as participant in the legislative process. The first such reason is the importance of tone. The President through myriad subtle means controls the debate on, and shapes public perception of, the complicated and often divisive issue of religion's proper role in public life. Second, the President oversees a vast network of governmental interactions with religion through such diverse agencies as the Department of Housing and Urban Development, the Department of the Interior, and the Department of Defense, not to mention

14. JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 5 (1998).

15. HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE 27 n.20 (1986). Arkes noted that attitudes toward racial segregation in the South changed dramatically between 1963-66, which he attributes to the Civil Rights Act of 1964:

> The change would seem to bear a relation to the fact that some rather different understandings were being held forth in public by the men at the top of the state. Public men were teaching new lessons through the things they were saying in public and, even more important, through the things they were willing to make binding on the country with the force of public law.

Id.

16. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997) (overruling, 5-4, Aguilar v. Felton, 473 U.S. 402 (1985), which had held (also 5-4), that practice of public school teachers delivering secular special-education services on premises of parochial schools violated Establishment Clause); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding, 5-4, that the Establishment Clause does not justify a University's discriminating against a Christian student publication in access to student activity funds for publishing costs).

independent agencies over which the President exercises some degree of control, such as the Equal Employment Opportunity Commission (EEOC) and the Federal Communications Commission (FCC). Through implementation of Administration policy by these agencies, the President has the power to create positive examples of the proper accommodation of faith in public life and to shape perceptions of the public and the courts. Third, as overseer of the Department of Justice, the President has significant control over which cases will be brought to court, what theories will be advanced when the United States is a party or an *amicus curiae* to an action, for which cases the Solicitor General will seek *certiorari*, and what legal guidance will be given to various agencies.

The President also has the power under the Constitution to propose (and thereby to champion in the public arena) legislative measures to protect religious freedom. This is particularly important in the realm of Free Exercise Clause protections, in which the Supreme Court has cut back on the scope of the Free Exercise Clause and simultaneously invited the federal and state legislatures to take on the role of accommodating religious practices.[17]

As both Chief Executive and Persuader-in-Chief, the President can thus do much to influence positively the federal government's policy toward religion. This Article explores are five areas in which the next President can and should do so, followed by a discussion of how the appointment power ultimately frames the debate in each of these areas.

II. FRAMING THE CONTOURS OF THE PROBLEM

Both major-party candidates for the Presidency in the 2000 election publicly articulated a compelling portrait of how faith's place in the public square has been devalued, and have made thoughtful statements suggesting a better approach. Vice President Al Gore derided the "hollow secularism" of the left while also criticizing "[s]ome on the right [who] have said for too long that a specific set of religious values should be imposed."[18] He recognized that our Founders, who "believed

17. *See infra* note 214 and accompanying text.

18. Al Gore, The Role of Faith-Based Organizations (May 24, 1999) (formerly

deeply in faith . . . created the Bill of Rights in large measure to protect its free expression."[19] And, noting that the greatest need at the time of the Founding "was to protect believers of one faith from religious coercion by others [, t]oday, we also need to ensure that believers of all faiths are free to engage in national dialogue and community action—without feeling that they must hide their religious beliefs."[20]

The former Vice President called for faith-based organizations "to have a seat at the national table when decisions get made,"[21] and has proposed "carefully-tailored partnerships"[22] with them for the delivery of social services.

Our new President George W. Bush has similarly criticized the exclusion of religion from public life and has called for change. In his Republican Party nomination acceptance speech, he highlighted the important role that faith-based social service providers play, and explained why government should support them: "[Government] can feed the body, but it cannot reach the soul. Yet government can take the side of these groups, helping the helper, encouraging the inspired."[23] Bush has supported greater freedom for student religious expression in public schools.[24] In 1996, then-Governor Bush signed an executive order prohibiting state agencies from discriminating against religious charities or imposing regulations that secularize. He also took actions as governor to reduce excessive regulatory interference with religious organizations.[25]

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published on the Gore 2000 website).

19. *Id.*

20. *Id.*

21. *Id.* Al Gore's Vice Presidential candidate, Senator Joe Lieberman, has made similar remarks. *See, e.g., Sen. Joseph Lieberman Deserves a Closer Look*, DET. NEWS, Aug. 9, 2000, at 17, *available at* 2000 WL 3487324 ("We in government should look to religion as a partner, as I think the founders of our country did."); *see also* Richard Perez-Pena, *Lieberman Seeks Greater Role for Religion in Public Life*, N.Y. TIMES, Aug. 28, 2000, at A14. Senator Lieberman has received considerable criticism for doing so. *See* David S. Broder, *Lieberman Pulls Back on Religion*, WASH. POST, Sept. 10, 2000, at A12, *available at* 2000 WL 25415187; Editorial, *God and Politics*, WASH. POST, Aug. 30, 2000, at A24, *available at* 2000 WL 25412964; Kenneth L. Woodward, *Does God Belong on the Stump?*, NEWSWEEK, Sept. 11, 2000, at 54, *available at* 2000 WL 21083784.

22. *Id.*

23. George W. Bush, Republican National Convention Acceptance Speech (Aug. 3, 2000), http://www.georgebush.com/News.asp?FormMode=SP.

24. *See* Terry M. Neal, *Citing 'Moral Chaos,' Bush Urges Religion in Schools*, WASH. POST, Nov. 3, 1999, at A9.

25. *See* Joe Loconte, *Leap of Faith: How W. Injected Religion into Public Life*, NAT'L REV., July 12, 1999, at 40.

Gore and Bush were not, of course, the first to recognize a hostility in many quarters to religion in public life. In his influential 1984 book, *The Naked Public Square*,[26] Richard John Neuhaus expressed alarm at the degree to which religion had been banished from the public square in the United States. By public square he meant not only government activities but also work, entertainment, education, and everyday interactions among individuals and communities. He argued that "in the public arena . . . in order to gain admittance, we are told to check our deepest beliefs at the door."[27] Neuhaus emphasized that "[t]he public square is not limited to Government Square. At the same time—and for reasons that may be nearly unavoidable—government impinges upon all public squares."[28]

In another influential book, *The Culture of Disbelief*, Yale Law School Professor Stephen Carter describes "a common rhetoric that refuses to accept the notion that rational, public-spirited people can take religion seriously."[29] Carter, while a strong supporter of protecting faith from political corruption and protecting government from religious control, believes that we have taken the principle of government and religion occupying completely separate spheres too far. "In our sensible zeal to keep religion from dominating our politics, we have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them."[30] Like Neuhaus, Carter expressed amazement that the religious aspect of Martin Luther King's life is downplayed,[31] despite King's unrepentant emphasis that God's authority is

26. RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1984).

27. *Id.* at 28.

28. *Id.* One of the poignant examples Neuhaus uses to illustrates his point is the remark by a television reporter after a memorial service for the Rev. Dr. Martin Luther King Jr.: "It was a religious service, and it is fitting that it should be, for, after all, Dr. King was the son of a minister." *Id.* at 97-98. Faith did not merely motivate the young reverend from Atlanta, but religious arguments, scripture, and imagery were at the very heart of his impassioned pleas for justice. For this reporter to feel the need to explain that Rev. King was the son of a minister to justify a religious service for him was simply astounding.

29. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 6 (1993).

30. *Id.* at 3.

31. *See id.* at 59-60.

precedent to the authority of civil society and thus "just law is a man-made code that squares with the moral law or the law of God."[32]

The cultural problem identified by Neuhaus and Carter, as both authors recognized, tracked what was going on in the courts. Professor Michael McConnell has described the Religion Clause jurisprudence of the Warren and Burger Courts as "press[ing] relentlessly in the direction of a more secular society. The Court's opinions seemed to view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere."[33] The degree to which the Court led the culture on this score, or was led by the culture generally or by trends among elites, is impossible to determine with precision.

Former President Clinton also addressed this problem in speeches and radio addresses. Citing Professor Carter in a speech unveiling his Administration's guidelines on religious expression in the public schools,[34] President Clinton noted that tension has resulted from the idea that "religion is simply not welcome at all in . . . the public square. Americans feel that instead of celebrating their love for God in public, they're being forced to hide their faith behind closed doors."[35] The guidelines themselves state in their introduction that "nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door."[36]

This problem of many people viewing personal religiosity as out of step with modernity, and public displays of it as the equivalent of "second-hand smoke, something which you can indulge in private but which the government must protect you from in public,"[37] is an troubling phenomenon touching a wide

32. *Id.* at 38 (quoting Martin Luther King, Jr., Letter from Birmingham City Jail (April 16, 1963)).

33. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992).

34. Memorandum from President William J. Clinton to the U.S. Secretary of Education and U.S. Attorney General on Religious Expression in Public Schools, 31 WEEKLY COMP. PRES. DOC. 1227 (July 12, 1995), *available at* 1995 WL 15155312 [hereinafter Memorandum].

35. President William J. Clinton, Remarks by the President on Religious Liberty in America (July 12, 1995), *available at* http://www.clinton.nara.gov/.

36. Memorandum, *supra* note 34.

37. Editorial, *Let Us Pray*, WALL ST. J., June 21, 2000, at A26 (quoting Kevin

range of society. Public schools provide some of the most colorful examples, such as the boy who inadvertently started a holy war of sorts that ultimately deadlocked the *en banc* Third Circuit. First-grader Zachary Hood was barred from reading a story called "A Big Family," based on the Old Testament story of Jacob and Esau, that he had brought to school in response to an opportunity to bring a favorite story to share with the class.[38] Such school incidents range from the comic—a move to rename Saint Valentine's Day "Special Person Day"[39] to avoid tying the day to a Catholic Saint—to the tragic, such as that of the high school student in Cameron County, Pennsylvania whose funeral announcement over the school public-address system was censored of its "religious" content, namely the vaguely redemptive phrase "we will come full circle" and a reference to "our creator."[40]

Children do not get a break from this over the summer, with similar incidents occurring at day camps, including an eight-year-old girl barred from singing Kum Ba Yah in a talent show.[41] Job applicants with certain religious indicia on their

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Hasson of The Becket Fund).

38. *See* C.H. v. Oliva, 990 F. Supp. 341 (D.N.J. 1997), *aff'd in part by an equally divided en banc court, vacated in part,* 226 F.3d 198 (3d Cir. 2000), *petition for cert. filed sub nom.* Hood v. Medford Twp. Bd. of Educ., 69 U.S.L.W. 3383 (Nov 22, 2000) (No. 00-845). In an earlier incident, Zachary was asked as a Thanksgiving Day assignment to make a poster of something for which he was thankful. He chose Jesus. Zachary's teacher hung his poster on the wall, and school employees first removed the poster and later allowed it to be restored to a less prominent position. After his mother brought suit challenging both incidents, the District Court dismissed it on the pleadings, and the Third Circuit affirmed without opinion. The Court later granted rehearing *en banc,* deadlocked six-to-six, and remanded the case for further proceedings. The Becket Fund took on representation of the plaintiffs after the first Third Circuit decision. We are currently petitioning for certiorari. *See also* Nat Henthoff, *Bible Lessons,* WASH. POST, Nov. 14, 1998, at A23; George Will, *The Censoring of Zachary,* NEWSWEEK, Mar. 20, 2000, at 82.

39. *See* Evelyn Nieves, *Explaining Holiday Policy Is No Picnic,* N.Y. TIMES, Nov. 2, 1997, at 37. The insipid "special" moniker appears to be a favorite: it also was used in the East Lansing, Michigan public schools, which hosted visits from the "Special Bunny." *See* Zay N. Smith, *Quick Takes,* CHI. SUN-TIMES, Apr. 4, 2000, at 26.

40. *Law Group Joins Case of Student Who Wanted to Say 'Our Creator',* ASSOCIATED PRESS, Nov. 24, 1998, *available at* http://www.freedomforum.org/religion/1998/11/24pastudent.asp.

41. The Kum Ba Yah incident occurred at a boys' and girls' club camp. While not raising constitutional concerns, it is nonetheless a troubling illustration of the attitude that religion is something to be left at home. The director of the camp explained, "We just can't allow any religious songs . . . You have to check your religion at the door." *Girl Barred from Singing 'Kum Ba Yah,'* WASH. POST, Aug. 14, 2000, at A2.

resumes are suspect[42]—indeed personality tests such as the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and California Psychological Inventory (CPI) have flagged the deeply religious as psychologically unqualified.[43] Similarly, applicants for elite educational opportunities often need to tone down or hide their religious feelings to improve their chances for admittance.[44] Religious symbols and garb are often unwelcome in the public square, as in the case of the Jewish attorney ordered to remove his yarmulke in court in Texas,[45] or the elderly Sikh priest arrested on weapons charges for carrying a ceremonial "dagger" that was as dull as a butter knife.[46] The public workplace sometimes is aggressively secularized, something a supervisor for Polk County, Iowa discovered when he was ordered to take down the ubiquitous serenity prayer from his wall.[47] Holidays celebrated by towns frequently have their religious origins watered down to the point of absurdity.[48]

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42. *See* CARTER, *supra* note 29, at 7.

43. *See* Bennett v. County of Suffolk, 30 F. Supp. 2d 353 (E.D.N.Y. 1998) (holding that genuine issues of material fact existed as to whether certain questions employed by the MMPI and CPI, including "I believe in a life hereafter" and "I feel sure that there is only one true religion," were proper); *see also* Sarah E. Hinlicky, *Seminary Sanity*, FIRST THINGS, Aug./Sept. 2000, at 14, 15 (recounting incident of seminary candidate who was alarmed at high score on MMPI for "Bizarre Mentation," and was assured by the psychologist that "[a]ll religious people score high on that one" based on positive responses to statements like "I believe there is an afterlife" or "I think angels exist.").

44. *See* Albert E. Gunn & George O. Zenner, Jr., *Religious Discrimination in the Selection of Medical Students: A Case Study*, 11 ISSUES L. & MED. 363 (1996); *see also* Gunn, *The Healing Profession Needs Healers: The Crisis in Medical Education*, 15 ISSUES L. & MED. 125 (1999).

45. *See* Brenda Sapino Jeffreys, *Banned Yarmulke Leads to Judicial Conduct Commission Complaint*, TEXAS LAWYER, Sept. 30, 1996, at 5. Stephen Carter similarly reports an incident of a prosecutor ordered to remove the ashes from his forehead on Ash Wednesday. CARTER, *supra* note 26, at 12.

46. *See* David Briggs, *Sikh Priest Arrested for Ceremonial Knife*, THE PLAIN DEALER, Sept. 17, 1999, at 1B. The Becket Fund represented the priest. The charges were later dropped.

47. *See* Brown v. Polk County, 61 F.3d 650, 659 (8th Cir. 1995).

48. My favorite is Pittsburgh, in which even "Holiday Season" apparently was too religious sounding, so that they renamed their downtown festival of decorations and activities "Sparkle Season," with a star-shaped mascot named Sparkle. Four years later, "Season" was dropped, resulting in the name "Downtown Pittsburgh Sparkles." *See* Jan Ackerman, *Light Up Nov. 20; Season Gets New Name*, PITT. POST-GAZETTE, Nov. 12, 1998. This was, of course, unnecessary: it was Pittsburgh, after all, where the diverse display of a Menorah, Christmas Tree, and sign saluting liberty was upheld in Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989). In a similar linguistic flight to the bottom, the public library's annual Easter Egg Roll in my town is now called the Spring Egg Roll,

The new President has taken office at a time in which we may be in the midst of a reversal of these trends. There appears to be a growing recognition of the salience of religious faith in public life, as evidenced by the attention given to it by the 2000 presidential election candidates, the mass media, academics, and judges.

The new President has a unique opportunity to reclaim the Founders' understanding of religion's positive role in public life—an understanding that fueled the abolitionist movement, the progressive movement, the civil rights movement, and even the American Revolution itself.[49] The notion that religion must be completely excised from the public square and relegated to a personal lifestyle choice best engaged in behind closed doors would have been incomprehensible to the Founders. Commentators as diverse as Russell Kirk[50] and President Clinton have noted that "[t]his country . . . was founded by people of profound faith who mentioned Divine Providence and the guidance of God twice in the Declaration of Independence."[51] As former federal judges Arlin M. Adams and Charles J. Emmerich wrote in their excellent analysis of the foundations of the Religion Clauses, though it may be that "[a]ny attempt . . . to read the beliefs of certain Founders, no matter how prominent, into the First Amendment is apt to produce indefensible and culturally unacceptable results[,]" it is certain that the Founders "were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they did not envision a secular society, but rather one receptive to voluntary religious expression."[52] Washington said in his Farewell Address:

> [L]et us with caution indulge the supposition that morality can be maintained without religion. Whatever may be

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which sounds more like a menu item than a holiday event.

49. *See* NEUHAUS, *supra* note 26, at 10.

50. RUSSELL KIRK, RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION 62 (Mitchell S. Muncy ed., 1997) ("With only three or four exceptions, [the Framers] were Christians of one profession or another: that is, they took their primary assumptions about the human condition, consciously or unconsciously, from the Bible."); *see also* CARTER, *supra* note 29, at 4. ("Even though some popular histories wrongly assert the contrary, the best evidence is that this deep religiosity has always been a facet of the American character.").

51. President William J. Clinton, *supra* note 35.

52. ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 31 (1990).

> conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. It is substantially true that virtue or morality is a necessary spring of popular government.[53]

Similarly, the *Federalist Papers* are infused with references to the religious underpinnings of the Constitution.[54] The same week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states for ratification, it appropriated funds for the hiring of House and Senate chaplains.[55] Washington, Adams, and Madison proclaimed days of Thanksgiving that invoked God,[56] though Madison later believed that it was a mistake to do so at the federal level.[57]

Indeed, even Madison and Jefferson, who opposed special tax assessments for the support of religious seminaries in Virginia,[58] and are clearly the favorite Founders for those advocating a strict separation of church and state, believed that religious liberty came from God. As Jefferson set forth in the preamble to his Statute of Religious Liberty, coercion in religious matters is against God's will:

> Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do[.][59]

Similarly, Madison's Memorial and Remonstrance Against Religious Assessments declares that it is a

> fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and

53. President George Washington, Washington's Farewell Address (Sept. 17, 1796), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 8, at 173.

54. *See* Stephen B. Presser, *Some Realism About Atheism: Responses to* The Godless Constitution, 1 TEX. REV. L. & POL. 87, 99-105 (1997).

55. *See* Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

56. *See* ADAMS & EMMERICH, *supra* note 52, at 51.

57. *See infra* note 92.

58. *See* ADAMS & EMMERICH, *supra* note 52, at 11-12.

59. Virginia Statute of Religious Liberty, January 16, 1786, *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 8, at 125.

> conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . *It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.*[60]

It was the elimination of *coercion* in matters religious, as being inconsistent with God's will, that was of greatest concern to the Founders. Madison, in particular, saw the Free Exercise Clause as a bulwark against governmental interference with conscience and citizens' actions based thereon.[61] The same is true for the Establishment Clause. As Professor McConnell has noted, "The generation that adopted the First Amendment viewed some form of governmental compulsion as the essence of an establishment of religion."[62]

Although our Establishment Clause jurisprudence may be "in hopeless disarray," as Justice Thomas remarked,[63] it is nonetheless clear that our founding principles and traditions support the idea that religion should have a place in the public square. The Founders saw coercion in religious matters as an anathema to natural liberty and were deeply distrustful of "an alliance of civil and ecclesiastical power that would threaten religious liberty . . . ."[64] But they nonetheless "affirmed the importance of religion to the new republic and would have rejected the use of the establishment clause to eradicate the religious leaven from public life. . . . [W]hile recognizing the dangers posed by establishments, they would agree that government may acknowledge the importance of religion to many citizens."[65]

This is equally true today. As Professor Douglas Laycock observed, because two-thirds of those active in social movements report that their motivation is principally religious

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60. James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* ADAMS AND EMMERICH, *supra* note 52, at 104 (emphasis added).

61. *See* NOONAN, *supra* note 14, at 82-83.

62. McConnell, *supra* note 33, at 154-55.

63. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861 (1994) (Thomas, J., concurring).

64. ADAMS AND EMMERICH, *supra* note 52, at 51.

65. *Id.* at 51-52.

and 95% of Americans say they believe in God, "[w]e simply do not have democratic self-government if we take seriously the notion that there is something suspect about arguments that motivate two-thirds of the people and that might appeal to ninety-five percent of them."[66] Professor Laycock referred to the specific problem of the exclusion of religious ideas from political discourse, that is, the process by which policy is formulated. The same might well be said in terms of the substance of the policies created—we do not have true pluralism if religious people are systematically shut out of full participation in public programs, cultural activities, and public employment, or otherwise shunted to the margins of public life. In each of these realms, presidential leadership can have an enormous impact.

III. RELIGION AND THE CHIEF EXECUTIVE

A. Religion in Federal Cultural Activities

There is good reason why strict separationists like the ACLU dedicate so much of their resources to fighting municipal crèches and menorah displays[67] or the inclusion of religious music in high school choir repertoires[68] and why such challenges are defended so vigorously: symbols and culture matter. As noted by Jersey City Mayor Bret Schundler, who was sued by the ACLU concerning a crèche and menorah display that were part of a cultural celebration policy that encompassed a Hindu parade, Ramadan Remembrance Day, Republic of India Day, Dominican Republic Day, and scores of other events sponsored by the city: "What we're doing in Jersey City is honoring the diverse cultural heritages of our very

66. Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 799 (1996).

67. *See, e.g.*, ACLU v. Schundler, 168 F.3d 92 (3d Cir. 1999). The Becket Fund represented the defendants in *Schundler*.

68. *See, e.g.*, Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998) (holding that public high school's singing of Christian devotional music as part of repertoire and performance of some concerts at various local churches did not violate Establishment Clause). The Becket Fund represented the Defendant-Intervenors in *Bauchman*. Among the groups filing amicus briefs on behalf of the Plaintiff in support of *certiorari* included Americans for Democratic Action, The National Organization for Women Foundation, Americans United for Separation of Church and State, and many others. (Amicus briefs on file with author).

diverse people. . . . Religion is a part of those cultures and we don't wipe it out as if it were not . . . ."[69] The federal government, like many towns and cities across the nation, is involved in various cultural activities and can send either a message of inclusion or exclusion based on how it treats various religions and religion generally. The President can do much to ensure that religion is not treated as the poor stepchild of culture, but rather has an equal place at the table.

The Supreme Court has stated that "the Government's acknowledgment of our religious heritage and governmental sponsorship of graphics manifestation of that heritage" are a natural part of the fabric of public life.[70] The executive branch of the federal government has the ability to include religion in, or exclude it from, a wide variety of cultural activities. There is devotional art throughout the National Gallery of Art, which no one would seriously contemplate challenging. Step outside of the safety of museum walls, however, and the inclusion of religion in culture can meet opposition. For example, the United States Postal Service had a twenty eight-year tradition of including a Madonna and Child stamp, usually a detail of a Renaissance painting, among its offerings of holiday stamps. In 1994, the Postal Service announced that it would end the tradition.[71] Its top stamp official declared that "[w]e're moving away from being denominational to being nondenominational," and the Madonna and Child stamp would be replaced by an angel stamp.[72] What the Postal Service official did not realize is that the principle that government should not be denominational, that is, that it not take sides in religious matters, does not mean that every cultural expression with which the government is associated must be a whitewashed, least-common-denominator bit of blandness. There is an incredible diversity of stamps printed each year; including a Madonna and Child painting among them sends a message that religion is important to many people and a part of

69. Ray Kerrison, *Faith Prevails Today Despite ACLU Scrooges*, N.Y. POST, Dec. 25, 1997, at 7.

70. Lynch v. Donnelly, 465 U.S. 668, 677 (1984) (upholding a municipal display of a crèche in the context of a larger holiday display).

71. *See* Bill McAllister, *Postal Service Ends Christ Child Stamp Series*, WASH. POST, Nov. 18, 1994, at F1.

72. *Id.*

the culture. It does not favor religion[73] any more than a Santa Claus stamp favors secular celebration of Christmas over religious observance of the day. After a public outcry, the Postal Service relented and resumed the tradition.[74]

The President acts as steward of one agency that has admirably managed to array the diverse facets of America's religious heritage in cultural activities: the National Park Service. The Park Service provides an excellent example of how, in ways large and small, the federal government can recognize religion in an authentic and respectful way, without its message devolving into unconstitutional promotion.

The National Park Service oversees thousands of square miles of land that encompass many religious sites, including historic mission churches in the southwest, small churches in the Shenandoah Valley, hundreds of sites that are sacred to Native Americans, Arlington National Cemetery, and even historic churches in cities. It thus does not have the luxury of being indifferent to religion; if it decided to excise all traces of religion from property under its control to create an absolute separation of church and state, it would find itself tearing crosses out of historic churches, bulldozing Native American sites like the Medicine Wheel,[75] and barring religious

73. It is not the case that religious elements of culture are only to be permitted when they stand alongside secular items, as in museums, or when they are in the holiday display as in *Lynch*. The Court made clear in last Term that in applying the "reasonable observer test" to determine if a cultural display or activity endorses religion, "we 'must be deemed aware of the history and context of the community and forum.'" Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 320 (2000) (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (O'Connor, J., concurring)). This case settled a lingering debate between Justice O'Connor's view that religious items are to be viewed in their total context over time, and Justice Stevens' prior insistence on a review of the items in a snapshot of their physical context. *Compare* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring, joined by Souter and Breyer, JJ.) ("[P]roper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by [Justice Stevens' dissent]. . . . [T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears."), *with id.* at 807 (Stevens, J., dissenting) ("For a religious display to violate the Establishment Clause . . . it is enough that *some* reasonable observers would attribute a religious message to the State."). Thus, the Library of Congress could feature an exhibit about the Great Awakening, since the Library of Congress features a wide variety of offerings, even though someone walking in off the street might see an endorsement of religion in it.

74. *See Reprieve for Madonna-and-Child Stamp*, N.Y. TIMES, Nov. 25, 1994, at A22.

75. The Medicine Wheel is a stone structure on U.S. Forest Service land with

ceremonies at Arlington National Cemetery. Unless we accept overt hostility towards religion as a necessary requirement of the Establishment Clause, some degree of interaction with religion will occur. The Park Service has found the right balance of including religion in a meaningful and genuine way that does not constitute an establishment of religion.[76]

When Martin Luther King, Jr.'s home church, Ebenezer Baptist in Atlanta, became too small for its congregation, the congregation moved to a new building across the street, leaving the old church building in the care of the National Park Service. The Park Service, which had operated the visitor's center near the church, undertook efforts to—as the superintendent of the Atlanta office put it—"keep the historic church alive" and ensure that it did not take on a "stale museum feel."[77] The Park Service plays tapes of King's speeches—which are filled with reference to God and faith—in the halls, and encourages the congregation to continue to hold ceremonies at the church.[78] This is no anomaly. Mission Churches in the Southwest under Park Service control continue to operate as churches, and tours do not shy away from explaining the religious significance of the architecture.[79] At Arlington National Cemetery there are signs stating the cemetery is "Our Nation's Most Sacred Shrine . . . Please Conduct Yourself With Dignity and Respect at All Times."[80] On Memorial Day, 2000, the Park Service sponsored a National

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religious significance to many Native Americans. *See* Michael Milstein, *Sawmill Sues: Medicine Wheel Debate Goes to Court*, BILLINGS GAZETTE, Mar. 19, 1999, *available at* http://www.billingsgazette.com/wyoming/990319_wyo001.html.

76. While the Park Service has recently had a solid record in protecting religion, it is worth noting that its sister service in the Department of the Interior, the U.S. Forest Service, was the agency that made plans to build a logging road through sacred Native American lands, resulting in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Although the Court in *Lyng* gave the Forest Service permission to build their road, Congress subsequently barred them from doing so. *See* H.R. REP. No. 100-713, at 72 (1988) (Prohibiting "the use of funds for construction of the Gasquet-Orleans (G-O) road in California, pending further Congressional review of the issue of Indian religious rights that would be significantly affected by the road construction."). The Forest Service has been more accommodating in recent years. *See, e.g.*, Milstein, *supra* note 75.

77. Hanna Rosin, *King's Historic Ebenezer Baptist Church to Move into New Building*, WASH. POST, Mar. 6, 1999, at A8.

78. *See id.*

79. *See* Supplemental Appendix of Intervenor Appellees Cheyenne River Sioux Tribe et al. at 24-70, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999) (on file with the author).

80. *Id.* at 17.

Moment of Remembrance by posting signs and having tourmobile drivers pull over and explain to their passengers that a "one-minute moment of silence is about to be observed to pay homage to those who died serving in the military."[81] Plugging the word "church" into the National Park Service website search engine yields 2370 hits.[82]

The Park Service has been vigorous in defending its cultural efforts. It successfully defended its annual "Christmas Pageant of Peace," located on the Ellipse behind the White House, which includes the National Christmas Tree, a Nativity Scene, and live reindeer in a pen, against a group who sued after its sculpture bearing a political message was excluded from the event.[83] The Park Service similarly fended off a challenge by Madalyn Murray O'Hair over its granting of a permit to Pope John Paul II to hold a Papal Mass on the National Mall.[84] And most recently, the Park Service defeated efforts by a group that claimed that the Park Service's efforts to accommodate Native American worship activities at Devils Tower National Park in Wyoming violated the Establishment Clause.[85] The challenged measures included efforts designed to encourage visitors to respect the Native American religious traditions through strategically placed signs saying this site "is sacred to American Indians. Please Stay on the Trail"; an interpretive education program offered to inform visitors about various Native American religious practices that occur at the site; and a rangers' policy requesting that those seeking rock climbing permits in June, when most of the religious activities occur, voluntarily choose another month.[86]

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81. National Park Service, News Release: Taking a Moment to Remember, May 25, 2000, *available at* http://www.nps.gov/ncro/PublicAffairs/PressReleases/ur_Memorial_Day_Take_a_Moment_To_Remember_25May00.htm.

82. This was true as of December 3, 2000. *See* http://www.cr.nps.gov:8765.

83. Community for Creative Non-Violence v. Lujan, 908 F.2d 992 (D.C. Cir. 1990). The Park Service had told them that their sculpture was not "a symbol relating to how Americans have traditionally celebrated the Christmas season." *Id.* at 995 (quoting Letter from National Park Service to Community for Creative Non-Violence (Nov. 10, 1988)).

84. O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

85. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999).

86. *Id.* at 820; *see also* Brief of Amicus Curiae, The Baptist Joint Committee on Public Affairs et al. in Support of Defendants-Appellees and Defendant-Intervenors-Appellees, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999), *available at* http://www.becketfund.org. The suit alleged that the Plaintiffs were being forced to violate the First Commandment—Thou Shalt Have

Another area of activity involving the role of religion in culture is the wide variety of declarations made by Presidents, governors, and mayors, from President Clinton's National Character Counts Week in 1997[87] to Minnesota Governor Jesse Ventura's Rolling Stones Day.[88] Some of these recognize religious aspects of our heritage. Twenty-seven states and more than 400 cities and towns made Bible Week declarations in 1998[89] as has every President since Franklin Roosevelt.[90] National days of Thanksgiving and days of "humiliation, fasting, and prayer," date back to the Second Continental Congress.[91] Washington and Adams continued the tradition[92] as did Lincoln.[93] President Truman established a National Day

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No Other Gods Before Me—by being asked by the government to be respectful of Native American practices. I submitted an amicus brief to the Tenth Circuit on behalf a coalition of Christian and Jewish groups and churches arguing that efforts by the government to accommodate private religious practices are not only constitutional, but in the best of our traditions of protecting private religious practice.

87. *See* Debra J. Saunders, *Character Counts Week Has Arrived*, S.F. CHRON., Oct. 21, 1997, at A23, *available at* 1997 WL 6708760.

88. *See Newsmakers*, HOUS. CHRON., May 7, 1999, at A2, *available at* 1999 WL 3988674. Ventura refused, however to issue a proclamation on the National Day of Prayer. *See id.*

89. *See* Valerie Richardson, *Withdrawal of Bible Week Denounced: Arizona Caved In to ACLU, Critics Say*, WASH. TIMES, Mar. 2, 1999, at A3, *available at* 1999 WL 3079293.

90. *See* Jeremy Leaming, *Federal Judge Issues Negative Order Against Arizona's 'Bible Week' Proclamation*, FREEDOM F. ONLINE, Nov. 23, 1998, *at* http://www.freedomforum.org/religion/1998/11/23azbible.asp.

91. *Religion and the Founding of the American Republic, Section IV*, Library of Congress Exhibition, *at* http://lcweb.loc.gov/exhibits/religion/rel04.html.

92. *See id.* at Section VI, part I. While Madison engaged in the practice of declaring national days of prayer, he later regretted doings so, feeling it was too close to the setting down of a national creed. *See* NOONAN, *supra* note 14, at 85. However, in his day the proclamations were accompanied by elaborate prayers full of creed-based specifics. *See, e.g.*, the Continental Congress's proclamation of a "day of Humiliation, Fasting and Prayer" on May 17, 1776, in which it urged citizens to "confess and bewail our manifold sins and transgressions, and by a sincere repentance and amendment of life, appease his [God's] righteous displeasure, and through the merits and mediation of Jesus Christ, obtain his pardon and forgiveness." *Id.* at Section IV. It is quite possible that he would not have found inappropriate the more general declarations of Bible Week or a National Day of Prayer or Thanksgiving today, which merely acknowledge the importance of faith in the lives of many or most citizens.

93. *See Voice of the People*, HERALD (Rock Hill, S.C.), May 7, 1998, at 11A, *available at* 1998 WL 7640572. In his 1863 proclamation of a national day of fasting, humiliation, and prayer, Lincoln declared:

> Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us! It behooves us, then, to humble ourselves before the offended power, to confess our national sins, and to pray for clemency and forgiveness.

of Prayer in 1952, which was formally codified in 1988 and set as the first Thursday in May.[94]

The ACLU has targeted Bible Week in various states and cities.[95] Gilbert, Arizona's Bible Week declaration was enjoined by a federal judge in 1998.[96] More often, however, such suits succeed merely by scaring mayors and governors into refraining from such declarations to avoid legal costs or the threat of paying plaintiffs' attorneys' fees should they lose. This happened in Arizona, which dropped its Bible Week declarations in the face of an ACLU suit, despite having issued 400 proclamations in the previous year honoring events ranging from Ramadan, International Day of Prayer, Habitat for Humanity Day, Armenian Martyr's Day, to even Clown Week.[97] The President, unlike small towns with little resources, has a Justice Department full of attorneys with experience in constitutional law and has less to fear from attorneys' fees awards,[98] need not capitulate on these matters. The United States has successfully fought challenges to the placement of "In God We Trust" on currency[99] and the designation of Christmas as a federal holiday.[100] The new President should continue the practice, as typified by the National Park Service efforts, of recognizing the role of religion in our culture and heritage and should resist efforts to present a distorted picture

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Id.

94. *See* Esther Talbot Fenning, *Community Prepares for National Day of Prayer*, ST. LOUIS POST-DISPATCH, Apr. 30, 1999, at 4.

95. *See* Valerie Richardson, *Backers of Bible Week on Defensive: ACLU Goes All-Out in Arizona Lawsuit*, WASH. TIMES, Dec. 26, 1998, at A1.

96. The case was later dismissed on standing grounds. Arizona Civil Liberties Union v. Dunham, 88 F. Supp. 2d 1066 (D. Ariz. 1999) (dismissing claim on standing grounds), *vacated in part on reconsideration*, 112 F. Supp. 2d 927 (D. Ariz. 2000) (holding on reconsideration that residents made to feel unwelcome had standing to challenge constitutionality).

97. *See* Richardson, *supra* note 95; Jeremy Leaming, *Arizona Governor Ends Support of 'Bible Week' Proclamations*, FREEDOM F. ONLINE, Mar. 2, 1999, *at* http://www.freedomforum.org/religion/1999/3/2arizbible.asp; *see also* Mayor's Proclamation Brings Media Attention, DAYTON DAILY NEWS, Jan. 14, 1999, at Z87, *available at* 1999 WL 3950962.

98. The federal government pays lower attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (2000), than the reasonable and customary fees the federal government makes states and municipalities pay under 42 U.S.C. § 1988(b) (2000). Attorneys' fee awards of tens or hundreds of thousands of dollars can be daunting to municipalities but less fearsome at the federal level.

99. *See, e.g.*, Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996).

100. Ganulin v. United States, 71 F. Supp. 2d 824 (S.D. Ohio 1999), *aff'd* 238 F.3d 420 (6th Cir. 2000), *petition for cert. filed*, (Feb 26, 2001) (No. 00-1355). The Becket Fund represents the Defendants-Intervenors in *Ganulin*.

of America lacking its religious components.

B. Pluralism and the Non-Discrimination Principle

There has been a growing recognition in recent years that the Establishment Clause does not mandate discrimination against religious individuals and institutions in all facets of public life. The President can do much to further this trend by ensuring that this principle is carried out in practice in a wide variety of government activities under his control.

1. The Growth of the Principle

In 1992, Professor Michael McConnell predicted that the Supreme Court would continue the trend of *McDaniel v. Paty*,[101] *Widmar v. Vincent*,[102] and *Witters v. Washington Dep't of Services for the Blind*[103] toward a "pluralistic" model of the Establishment Clause that recognizes that "[a] governmental policy that gives free rein to individual decisions (secular *and* religious) does not offend the Establishment Clause, even if the effect is to increase the number of religious choices."[104] Subsequent decisions have proven Professor McConnell correct. The Court in the 1990s held that the Establishment Clause permits a group to show a religious film at a community education program held at a public school,[105] permitted a deaf student attending a religious school to use government funds for an interpreter,[106] allowed a private group to display a cross on a statehouse plaza,[107] permitted a student religious publication to use a public university's student activity funds for publishing costs,[108] and,

101. 435 U.S. 618 (1978) (holding that Tennessee constitutional provision barring clergy from serving as delegates to constitutional convention violates Free Exercise Clause).

102. 454 U.S. 263 (1981) (holding that a university's discriminatory policy against student religious groups' use of campus facilities violated the Free Speech Clause and not justified by the Establishment Clause).

103. 474 U.S. 481 (1986) (holding that allocation of state vocational training funds provided to a blind man studying for the ministry at a Christian college did not violate the Establishment Clause).

104. McConnell, *supra* note 33, at 175-80 (emphasis original).

105. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that where school opened it premises after-hours as a public forum, it could not discriminate against group wanting to show film about child rearing from a Christian perspective).

106. Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993).

107. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

108. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

this past Term, upheld a federal program loaning computers and other resources to all schools, including public, secular private, and religiously affiliated private schools.[109] These cases recognize that there is a fundamental difference between government promoting religion and government making resources and fora available with which private citizens may decide to promote religion.[110] President Bush should make all efforts to ensure that religious organizations and individuals are not discriminated against simply because they are religious.

This problem has arisen in various federal agencies. For example, in 1986, after Congress passed legislation to provide for the conversion of buildings for use as emergency homeless shelters, the Department of Housing and Urban Development (HUD) proposed regulations that excluded churches and other "primarily religious organizations" from obtaining any of the funds.[111] After Congress sharply criticized HUD's total ban, HUD issued final regulations that lifted the ban but put numerous requirements on the shelters, including removing all religious symbols.[112]

In a similar vein, the Department of Commerce has denied funding to Fordham University for a religiously-oriented radio broadcast,[113] and the Small Business Administration has denied loans to a Christian day care center[114] and to a Christian bookstore in furtherance of a policy banning aid to any religion-oriented businesses. [115] In a case that sparked a public

109. Mitchell v. Helms, 120 S. Ct. 2530 (2000) (holding that loaning educational materials to a private school did not violate Establishment Clause).

110. *See* Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 290 (1999) ("Since *Widmar* . . . the general trajectory of the Supreme Court's Establishment Clause cases has moved away from no-aid separationism and toward the neutrality principle."); *see also* Ira Lupu, *The Increasingly Anachronistic Case against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375 (1999); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341(1999).

111. CARL H. ESBECK, THE REGULATION OF RELIGIOUS ORGANIZATIONS AS RECIPIENTS OF GOVERNMENT ASSISTANCE 13 (1996).

112. *See id.* at 13-14.

113. *See* Fordham Univ. v. Brown, 856 F. Supp. 684 (D.D.C. 1994).

114. *See* Blocker v. Small Bus. Admin., 91 F. Supp. 37 (D.D.C. 1996); *see also* Frank J. Murray, *Christian Day Care Center Chief Pursues Suit on SBA Loan Policy*, WASH. TIMES, Dec. 2, 1995, at A2, *available at* 1995 WL 12646581.

115. The SBA quietly changed its rule against religion-oriented businesses in 1996. *See* Vicki Torres, *SBA New Lends to Religion-Oriented Firms: Little-Publicized*

backlash, the Federal Communications Commission (FCC)[116] issued a ruling in December 1999 that religious broadcasting was not "educational" for purposes of satisfying the (ordinarily) loose requirements for non-commercial educational radio station licenses. Less than one month later, the FCC reversed itself.[117] The President, through his appointments, through agency regulations and "guidances,"[118] through executive orders,[119] and through the general tone he sets toward non-discrimination, can prevent such incidents from occurring in the federal government.

2. Charitable Choice

One issue relating to the non-discrimination principle that received considerable attention during the 2000 presidential campaign was that of governmental support for faith-based social service providers.[120] This is not a new idea: municipalities contract out over half their human-services funding to independent organizations, many of which are religion-based groups.[121] Catholic Charities receives 65 percent

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Rule Change Marks the End of a Years-Long Legal Fight, L.A. TIMES, June 18, 1996, at D5, available at 1996 WL 10651564.

116. The FCC is an independent regulatory agency whose five commissioners are appointed by the President for staggered five-year terms, subject to a requirement that only three be of the same political party. This permits the President to appoint four of the five members of the commission over a single term of office. *See* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 298 (1993). The President can thus have a powerful effect on the commission's attitude toward religion.

117. The original decision, its subsequent vacatur, and surrounding events are summarized in *Testimony of Commissioner Harold W. Furchtgott-Roth Before the Subcommittee on Telecommunication, Trade, and Consumer Protection, Hearing on H.R. 3525, the Religious Broadcasting Freedom Act and H.R. 4201, the Noncommercial Broadcasting Freedom of Expression Act of 2000*, 106th Cong. (2000), *available at* http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/2000/sthfr017.htm; *see also* FCC, Order on Reconsideration, *In re* Applications of WQED Pittsburgh et al. (January 28, 2000), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Orders/2000/fcc00025.txt; *see also* Helgi Walker, *Communications Media & The First Amendment: A Viewpoint-Neutral FCC Is Not Too Much To Ask For*, 53 FED. COMM. L.J. 5, 16-20 (2000).

118. *See, e.g.*, HHS OFFICE OF POPULATION AFFAIRS, GUIDANCE TO AFL GRANTEES (1993) (questions and answers regarding the administration of Adolescent and Family Life Act funds by religiously affiliated providers).

119. *See, e.g*, Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, Exec. Order 13160, 65 Fed. Reg. 39773 (2000).

120. *See supra* text accompanying notes 18-25.

121. *See* ESBECK, *supra* note 111, at 7.

of their more than $2.2 billion a year budget from government sources.[122] The Salvation Army receives approximately 15 percent of its budget from the federal government, and in some metropolitan areas, as much as 40-50 percent.[123]

There is a growing understanding that in granting contracts to such providers, there is a danger that the government can destroy what is unique, and most effective, about such programs. In the 1990s, such prominent Catholics as the late John Cardinal O'Connor and Senator Rick Santorum began to question the secularizing influence of the government on the mission of Catholic Charities.[124] The Salvation Army similarly noted a problem with government agencies, in particular HUD, which tried to pressure it to remove a cross from a building lobby and change its letterhead in order to obtain funding.[125] The presidential candidates in the 2000 election expressed concern that faith-based charities, which have been especially effective at delivering services and transforming lives, not be required to abandon their uniqueness to participate.

In reaction to such concerns, in 1996 Congress enacted, as part of comprehensive welfare reform legislation,[126] provisions aimed at allowing faith-based organizations to participate as providers of welfare reform programs without being forced to alter their religious nature. These provisions, comprising section 104 of the Act,[127] are known as the "Charitable Choice" provisions.[128] Charitable Choice was proposed by then-Senator John Ashcroft "to encourage faith-based organizations to expand their involvement in the welfare reform effort by

122. JOE LOCONTE, THE ANXIOUS SAMARITAN, CHARITABLE CHOICE AND THE MISSION OF CATHOLIC CHARITIES 10-11 (Center for Public Justice monograph, May 2000).

123. DIANE WINSTON, SOUP, SOAP, AND SALVATION: THE IMPACT OF CHARITABLE CHOICE ON THE SALVATION ARMY 11 & n.17 (Center for Public Justice monograph, May 2000).

124. *See* LOCONTE, *supra* note 122, at 1. For a discussion of concerns that Charitable Choice programs may harm religious freedom, see Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choices*, 5 TEX. REV. L. & POL. 149 (2000).

125. *See* WINSTON, *supra* note 123, at 12-13.

126. The Personal Responsibility and Work Opportunity Reconciliation Act, Public Law 104-193 (1996).

127. *Id.* at § 104, codified at 42 U.S.C. § 604a (2000).

128. *See* Stanley Carlson-Thies, *Faith Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision, in* WELFARE REFORM & FAITH BASED ORGANIZATIONS 31-35 (Derek Davis and Barry Hankins eds., 1999).

providing assurances that their religious integrity would be protected."[129]

Charitable Choice requires that assistance programs under the Welfare Reform Act (providing funds for private organizations) may not discriminate against religious organizations.[130] Charitable Choice also has specific safeguards to prevent states from requiring changes to the internal structure of participating organizations, such as making them create social service affiliates,[131] requiring removal of religious symbols in order to receive funds,[132] or changing their hiring practices.[133] It also orders providers to avoid discrimination against beneficiaries. If a beneficiary objects to the religious character of a provider, the government must find him an alternative within a reasonable period of time.[134]

To ensure that the government does not directly fund religious activity, when the state contracts directly with religious organizations to provide services, its funds may not be used for "sectarian worship, instruction, or proselytization."[135] Hence, one can serve dinner with government funds and announce a Bible study afterwards, but making attendance at the Bible study a prerequisite for the dinner is prohibited. There is no usage restriction in programs where the government merely provides vouchers to beneficiaries, since the choice of provider is left to the beneficiary.[136] Justice O'Connor has analogized voucher programs like this to a public servant taking a portion of his or

129. Letter from Senator Ashcroft (Dec. 1996), *reprinted in* A GUIDE TO CHARITABLE CHOICE (1996), *available at* http://cpjustice.org/charitablechoice/guide/ashcroft.

130. 42 U.S.C. § 604a(c) (2000). This provision covers both programs where beneficiaries are given vouchers for use at any provider, as well as those under which states contract with providers for delivery of services. In programs involving direct contracts by states, however, Charitable Choice has a non-preemption clause which allows a state to decline a contract with religious providers as required by the state constitution or statute. *Id.* § 604a(k).

131. *Id.* § 604a(d).

132. *Id.*

133. Charitable Choice specifically states that the exemption under Title VII which allows religious organizations to discriminate in hiring based on religion shall not be stripped simply because of their participation in welfare reform programs. *Id.* § 604a(f).

134. *Id.* § 604a(e)(1).

135. *Id.* § 604a(j).

136. *Id.* § 604a(e)(1).

her paycheck and donating it to the church.[137]

Charitable Choice has proven to be quite popular and successful. Comparable measures have been added to subsequent legislation.[138] Both presidential candidates tried to tap into public support for it.[139] As governor, President Bush implemented Charitable Choice provisions in Texas. A member of the state's Department of Human Services recently stated, "We have altered the whole environment of an enormous agency because of Charitable Choice."[140] A recent study found that the legislation has resulted in new government-provider partnerships and more creative services without loss of the religious autonomy enjoyed by groups included in the program.[141] While the legislation has not affected the number of government supported Salvation Army programs, the safeguards have encouraged its leaders about the sanctity of its own religious mission and identity.[142]

Charitable Choice has nonetheless received its share of criticism. Strict church-state separationists claim that providing government funds to religious organizations is inherently unconstitutional, whether via direct funding of social services or voucher-based allocation where funds are indirectly transferred to religious organizations without conditions.[143] Americans United for Separation of Church and State, the ACLU, People for the American Way, and other strict-separationist groups have formed a "Working Group for Religious Freedom in Social Services" to vigorously oppose

137. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 848 (O'Connor, J., concurring) ("[The] vocational assistance provided under the Washington program [in *Witters*] is paid directly to the student, who transmits it to the educational institution of his or her choice. The benefit to religion under the program, therefore, is akin to a public servant contributing her government paycheck to the church.") (quotation, citations omitted); *see also infra* note 156 and accompanying text.

138. *See* Esbeck, *supra* note 110, at 285.

139. *See supra* notes 18-25 and accompanying text.

140. LOCONTE, *supra* note 122, at 5.

141. *See* AMY L. SHERMAN, THE GROWING IMPACT OF CHARITABLE CHOICE 8-11 (Center for Public Justice monograph 2000).

142. *See* WINSTON, *supra* note 123, at 1.

143. *See, e.g.*, Julie A. Segal, *A "Holy Mistaken Zeal": The Legislative History and Future of Charitable Choice, in* WELFARE REFORM & FAITH BASED ORGANIZATIONS, *supra* note 128, at 12 (religion so "pervades the environment" of institutions contemplated by Charitable Choice that funding would violate the Constitution).

Charitable Choice.[144] The new President should be prepared to defend Charitable Choice's constitutionality.

The outlook for Charitable Choice in the courts is favorable. As Professor Carl Esbeck has noted, "The Supreme Court has never struck down aid to a church-affiliated college or social-welfare agency."[145] From *Widmar* through *Mitchell*, the Court has indicated support for the principles underlying Charitable Choice. Professor Douglas Laycock notes that Charitable Choice presents a simpler case than the issue presented in *Rosenberger*: "Charitable choice is easier both doctrinally and politically, because when government contracts with religious providers to deliver social services, it gets full secular value for its money."[146] The *Mitchell v. Helms*[147] decision also appears to have made it easier for such programs to withstand scrutiny. *Mitchell* suggests that both the voucher provisions of Charitable Choice, and direct aid to religious organizations earmarked for social service (and not for religious activities) are constitutional. The old paradigm relied on by Charitable Choice's critics, in which pervasively sectarian organizations may not be entrusted with any secular aid for third parties, has seemingly been overruled.

Certain opponents of Charitable Choice have focused less on the constitutional problem of funds going to religious organizations and more on the possibility of burdening religion with regulation and undermining the core functions of ministries.[148] However, as Professor Laycock has observed, "If government says it will pay for your soup kitchen if and only if you secularize it, that is a powerful incentive to secularize. . . . if government will pay both religious and secular providers, it creates no incentive for either to change."[149] A faith-based organization *without* Charitable Choice-type protections has two options: compromise its religious mission to qualify for secular aid, or decline to participate in the government-funded

144. *See* Letter to House Members on H.R. 1031, the American Community Renewal Act (Apr. 25, 1997), http://www.aclu.org/congress/l042597a.html.

145. ESBECK, *supra* note 111, at 12.

146. Laycock, *supra* note 110, at 67.

147. 120 S. Ct. 2530 (2000). *Mitchell* is discussed *infra* notes 153-56 and accompanying text.

148. *See, e.g.*, Melissa Rogers, *The Wrong Way to Do Right*, *in* WELFARE REFORM & FAITH BASED ORGANIZATIONS, *supra* note 128.

149. Laycock, *supra* note 110, at 71.

program. A faith-based organization *with* Charitable Choice assistance also has two options: take part in the program with its protections against governmental interference with its religious mission, or decline to participate altogether. The latter scenario still potentially runs the risk of an organization compromising its religious mission, but here a potentiality is preferable to a near certainty. In either scenario, a religious organization can always choose to decline government aid. One of the principal ideas behind Charitable Choice is that religious liberty is enhanced when the determination of whether accepting government aid will interfere with a religious organization's mission is made by the organizations, and not by the government at the outset through a sweeping bar.

The President can work to further the principles embodied in Charitable Choice. He can instruct agencies which oversee such programs to provide detailed explanations of the statutory provisions' meaning so as to give grantees and local administrators of programs a better understanding of the protections Charitable Choice offers.[150]

3. School Choice

Charitable Choice is closely related to the school choice issue. While the Supreme Court has never struck down an aid program for social services or college expenses on Establishment Clause grounds, church-state jurisprudence in the latter half of the Twentieth Century is littered with the shattered hulls of well-meaning aid programs for lower education which have been struck down by the Supreme Court.[151] With the recent ascendancy of the pluralism principle in the Court's Establishment Clause jurisprudence, however, the Court has moved quite definitively toward approving

150. For example, the Department of Health and Human Services provided a formal "guidance" for grantees of the Adolescent Family Life Act. *See* GUIDANCE TO AFL GRANTEES, *supra* note 118.

151. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (striking down portion of statute granting aid for field trip services and instructional materials to nonpublic schools); Meek v. Pittenger, 421 U.S. 349 (1975) (striking down portion of aid program providing instructional materials such as maps, periodicals, and laboratory equipment to nonpublic schools); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (striking down, *inter alia*, program of private school tuition reimbursement for low-income parents).

government aid flowing to these schools through private choice.[152]

This past term, in *Mitchell*,[153] the Court upheld a program lending computer equipment and other instructional equipment to public and private schools. The decision seemingly demolished the remnants of the legal arguments available to the teachers' unions and the ACLU against school vouchers. Four Justices held that the program, by lending equipment like computers to schools regardless of whether the recipient was religious or secular, and based rather on the number of children attending the school, was neutral and therefore permissible under the Establishment Clause. Two others, Justices O'Connor and Breyer, agreed that the program was constitutional, but believed that a critical aspect of the aid was that the program had adequate safeguards to ensure that the equipment not be diverted to religious purposes.[154]

Both the plurality opinion and the concurrence in *Mitchell* gave the green light to the school choice principle. Justice Thomas, joined by the Chief Justice and Justices Scalia and Kennedy, wrote, "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[155]

Justices O'Connor and Breyer, while refusing to extend this per se rule to direct aid for private school, nonetheless were equally forthright in their support for the principle of school vouchers:

> [W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a

152. *See* Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (upholding government funding of sign-language interpreter for disabled child attending religiously affiliated school); Mueller v. Allen, 463 U.S. 388 (1983) (upholding tax deduction for nonpublic education expenses).

153. Mitchell v. Helms, 120 S. Ct. 2530 (2000).

154. *Id.* at 2560-62 (O'Connor, J., concurring).

155. *Id.* at 2544-45 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)).

> religious practice or belief. Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.[156]

School choice remains highly controversial, opposed by teachers' unions[157] and church-state separationist groups.[158] With the Court's movement toward a pluralistic model of religious liberty, six Justices on record for the principle behind school choice, and a growing body of scholarship recognizing the consistency of school choice with the fundamental principles established in the religion clauses,[159] the new President should address the issue as a public policy matter that should stand or fall on its merits, not on an outdated argument that the Supreme Court would find voucher programs to be per se unconstitutional.

There still remain difficult religious liberty issues surrounding vouchers. These programs run the risk of placing limitations on the use of vouchers which over regulate religious institutions and entangle church and state. After U.S. House Majority Leader Dick Armey introduced a school voucher program for the District of Columbia in 1995, amendments were added requiring written consent before students could attend any religious classes or activities and preventing any funds traceable to vouchers for use in any religious instruction. These additions would have "require[d] Catholic schools to compartmentalize their curricula into secular and religious parts . . . utterly contrary to Catholic tradition."[160] James Cardinal Hickey, Archbishop of Washington, D.C., informed Congress that he would not permit the schools in his Archdiocese to participate in the voucher program, and the bill

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156. *Id.* at 2559 (O'Connor, J., concurring) (quotation omitted).

157. *See, e.g.*, George Weeks, *School Vouchers Remain Hot Issue: Lieberman Assures Delegates Gore's Views Will Prevail*, DET. NEWS, Aug. 18, 2000, at 6.

158. After the Wisconsin Supreme Court upheld that state's pilot voucher plan for Milwaukee, "Carole Shields, president of People for the American Way, called the ruling a 'renegade decision' that would set 'Thomas Jefferson and James Madison spinning in their graves. . . . Separation of church and state is as American as apple pie and the Wisconsin Supreme Court has just baked a worm into that pie.'" Frank J. Murray, *Court OK's Vouchers for Parochial Schools*, WASH. TIMES, June 11, 1998, at A1.

159. *See, e.g.*, JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999); sources at *supra* note 110.

160. Douglas Dewey, Are Vouchers Good For Catholic Schools?, at 7 (Faith and Reason Institute, publication of remarks at debate held at U.S. Capitol, May 19, 2000) (on file with author).

ultimately was defeated.[161]

Public officials charged with oversight over public schools may similarly seek to impose layers of regulations on eligible schools. As Professor Ira Lupu has warned, "Once the public begins to finance religious education, the regulatory concerns about design of curriculum, admissions, policy, and employment decisions will surface with a vengeance."[162] Not all regulations are entanglements. Religious schools are currently subject to fire codes, health regulations for their cafeterias, and accreditation requirements. However, there is a danger that, as with the D.C. proposal, so many strings will be attached that the schools' religious autonomy will be compromised. The President, in any voucher plans proposed, and in regulations the Department of Education may promulgate to administer voucher programs, should be mindful of this potential pitfall.

C. Religious Rights of Public School Students

On the issue of religion in the public sqaure, , no government function has been given as much scrutiny as the public school system. The Supreme Court initiated this trend with its decisions in *Engel v. Vitale*[163] and *Abington School District v. Schempp*,[164] striking down teacher-led prayer and mandatory devotional readings at the start of the school day. These determinations properly recognized the problems inherent in government sponsored religious activities: they often constitute religious coercion and place the state in the position of choosing which prayers, devotional readings, or other worship activities merit inclusion.

Despite the Supreme Court's cautionary tone in suggesting that striking down government sponsorship of religious practices in the schools did not mean that religion was to be shut out of the public schools entirely,[165] the registered message

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161. *See id.*

162. Lupu, *supra* note 110, at 395.

163. 370 U.S. 421 (1962).

164. 374 U.S. 203 (1963).

165. The Court observed in *Abington*:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities.

was nevertheless that religion did not belong in public schools. As Professor McConnell has stated, "When we cast off the practice of imposing the values of the Protestant majority through the public schools, we should have undertaken a more pluralistic approach," but instead "we preserved the structure by which the Protestant Christians had dominated the public culture, and only changed the content. Secular ideologies came into a position of cultural dominance."[166]

This notion that schools should be actively secularized is a complex phenomenon with multiple causes, but the courts have played a critical role. In *Wallace v. Jaffree*,[167] for example, the Supreme Court struck down an Alabama moment of silence law on the narrow ground that the purpose of the provision, as evidenced by its legislative history and wording, was to promote prayer. But the decision is widely viewed by the public, in my experience, as barring any moment of silence.

In similar fashion, *Stone v. Graham*[168] struck down a law requiring the posting of the Ten Commandments in schools because of the particular circumstances in which they were displayed—hung on the classroom walls, rather than "integrated into the school curriculum."[169] Many teachers and officials have incorrectly believed that the Court intended to convey the message that religion—even student initiated religious expression—has no place in a public school education, and this notion has been affirmed by some lower court decisions.[170] As one California teacher remarked, "Most

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> Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Abington, 374 U.S. at 225.

166. *Group Preferences and the Law: Hearing Before the Subcommittee on the Constitution of the House Judiciary Committee*, 104th Cong. (1995) (statement of Professor Michael W. McConnell), *available at* http://www.house.gov/judiciary/2108.htm.

167. 472 U.S. 38 (1985).

168. 449 U.S. 39 (1980).

169. *Id.* at 42.

170. *See, e.g.*, DeNooyer v. Livonia Pub. Schools, 799 F. Supp. 744 (E.D. Mich. 1992) (second-grade student could be barred from playing video of herself singing a solo in church for show-and-tell because it was a "proselytizing religious song"), *aff'd*, 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); Guidry v. Calcasieu Parish Sch. Bd., 9 Relig. Freedom Reporter 118 (W.D. La. 1989) (valedictorian could be barred from talking about the influence of Jesus on her life during her graduation address), *aff'd on jurisdictional grounds sub nom.*, Guidry v. Broussard, 897 F.2d 181, *reh'g denied*, 902 F.2d 955 (5th Cir. 1990); Perumal v. Saddleback Valley Unified Sch. Dist., 243 Cal. Rptr. 545 (Ct. App. 4th Dist.), *cert.*

teachers are extremely wary of allowing any religious expression in their classroom because they are afraid they may be breaking the law."[171]

Responding to the concern that religious clubs were being denied equal access to school facilities, Congress in 1984 passed the Equal Access Act.[172] This provision requires secondary schools receiving federal assistance to give student religious clubs the same right to use school facilities as other non-curricular student clubs. If a student chess club or the pre-law society may meet on public school premises, then the student Bible study group may as well. The Supreme Court upheld the Equal Access Act against Establishment Clause challenge in *Board of Education of Westside Community Schools v. Mergens*,[173] holding that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[174] When speakers, the Court held, are treated equally, "the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[175] Indeed, "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech."[176]

The scope of the Equal Access Act is limited to student clubs, and to secondary schools. To address wider concerns about continued discrimination against religious speech in public schools, President Clinton in 1995 issued a Memorandum for the U.S. Secretary of Education and Attorney General on Religious Expression in Public Schools.[177] It noted that

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denied, 488 U.S. 933 (1988) (high school students could be barred from distributing invitations to Bible study).

171. *See* Joe Loconte, *Making Public Schools Safe for Religion*, POL'Y REV., July/Aug. 1996, at 19, 20.

172. 20 U.S.C. § 4071 (2000).

173. 496 U.S. 226 (1990).

174. *Id.* at 250.

175. *Id.* at 248.

176. *Id.* at 253.

177. 31 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1227 (July 12, 1995). At the time these guidelines were issued, there was a push in Congress for a constitutional amendment protecting religious expression in the public schools. *See* Statement of McConnell, *supra* note 166, at 2.

> nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the consciences of our students, or to convey official endorsement of religion, the government's schools also may not discriminate against private religious expression during the school day.[178]

Among the key provisions, students "have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity;" they may "express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions;" and public schools "may not provide religious instruction, but they may teach *about* religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture) as literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects."[179]

Guidelines based on this Memorandum were sent by Education Secretary Richard W. Riley to every school superintendent in the country in August 1995.[180] They delineate the current free exercise, free speech, and statutory rights of students as protected by the Equal Access Act.

Despite these federal guidelines, discrimination against student religious expression continues to occur, and is sometimes upheld by lower courts. *C.H. v. Oliva*,[181] for example, was affirmed by an equally divided *en banc* court of the Third Circuit.[182] Should the Supreme Court deny certiorari and hence

178. 31 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, 1227, 1228 (July 12, 1995).

179. *Id.* at 1228-29 (emphasis original).

180. *See* Press Release, U.S. Department of Education, Riley Sends Guidance on Religion and Schools, Aug. 17, 1995, http://www.ed.gov/PressReleases/08-1995/pray.html; *see also* Secretary's Statement on Religious Expression, May 1998, *available at* http://www.ed.gov/Speeches/08-1995/religion.html; Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169 nn.253-54 (1996). The guidelines were sent by Secretary Riley to school principals, with additional materials, on December 17, 1999. *See* Secretary's Letter to Principals on Religion and Public Schools, http://www.ed.gov/inits/religionandschools/secletter.html.

181. 990 F. Supp. 341 (D.N.J. 1997). *C.H.* is discussed *supra* note 38.

182. 226 F.3d 198 (3d Cir. 2000), *petition for cert. filed sub nom.*, Hood v. Medford Twp. Bd. of Educ., 69 U.S.L.W. 3383 (Nov 22, 2000) (No. 00-845). *But see* Hedges v.

miss an opportunity to clarify students' rights to equal treatment, President Bush should work to give the guidelines real authority. Filing amicus briefs to clarify the issues, intervening in suits to protect students' rights, or proposing legislation that would protect student religious expression in contexts beyond that of the secondary school student club (currently protected by the Equal Access Act), would help achieve true neutrality toward religion in the schools by ensuring that schools neither promote religion nor are hostile towards it.

D. Enforcement of Civil Rights

The President's greatest opportunity to impact religious liberty through civil rights policy arguably is not in cases of religious discrimination, which are relatively few in number,[183] and typically involve a straightforward application of the law.[184] Where the Executive may have the greatest opportunity to shape civil rights policy to advance religious liberty is in cases where the *defendant* is a religious organization or an individual with religious interests at stake.

Although the EEOC is an independent agency with staggered-term appointed Commissioners, "the Department of Justice—with White House backing—has successfully exerted extraordinary control over [it]."[185] The Department of Justice Civil Rights Division also has the authority to enforce and interpret employment discrimination laws,[186] as well as those against discrimination in education, housing, public accommodations, and other areas that impact religious

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Wauconda Community United Sch. Dist., 9 F.3d 1295 (7th Cir. 1993) (holding free speech rights of eighth-grader violated by barring her distribution of church leaflet at school because of its religious content).

183. In 1999, for example, only 2.3% of all charges filed by individuals with the EEOC involved religion claims. *See* EEOC Charge Statistics, *at* http://www.eeoc.gov/stats/charges.html.

184. *See, e.g.*, Complaint, U.S. v. City of Winter Springs, *available at* http://www.usdoj.gov/crt/emp/documents/wintrspg.htm (case brought by U.S. Department of Justice Civil Rights Division alleging that fundamentalist Christian, whose religious observances and practices included not participating in the display of decorations commonly associated with Christmas, was fired by fire department because he failed to obey order to display Christmas decorations, in violation of his beliefs).

185. Devins, *supra* note 116, at 274.

186. *See id.* at 286; *see also* Civil Rights Division Activities and Programs, Employment Litigation Section, *at* http://www.usdoj.gov/crt/activity.html.

freedom.[187]

A significant problem arises when religious individuals and organizations act according to beliefs that conflict with civil rights laws. Title VII expressly permits religious organizations to discriminate on religious grounds in hiring.[188] The Supreme Court upheld this provision against Establishment Clause challenge in *Corporation of Presiding Bishop v. Amos*,[189] noting that "there is ample room for accommodation of religion under the Establishment Clause."[190]

Religious employers nonetheless remain subject to Title VII's various other provisions, although there is a judicially created exemption for ministerial positions under the Free Exercise Clause.[191] This exception has varied under court scrutiny, giving ample flexibility to the EEOC and Department of Justice to negotiate the contours of the ministerial definition. In *EEOC v. Roman Catholic Diocese of Raleigh*[192] the EEOC brought suit against the Diocese of Raleigh on behalf of a woman fired from her position as director of music ministry. The Diocese claimed that it fired her on a performance-related basis, but also argued that the suit should be dismissed because the position fell within the ministerial exception; the Fourth Circuit agreed. Similarly, the EEOC brought suit against Catholic University on behalf a female professor who did not receive tenure as a canon law specialist. The D.C. Circuit similarly found the employment action to be constitutionally protected.[193]

Courts have disagreed about what types of positions require

187. *See* Civil Rights Division Activities and Programs, Introduction, *at* http://www.usdoj.gov/crt/activity.html#intro (explaining civil rights division jurisdiction).

188. 42 U.S.C. § 2000e-1(a) (2000).

189. 483 U.S. 327 (1987).

190. *Id.* at 338. The necessity for this exemption is illustrated in Ward v. Hengle, 76 Fair Empl. Prac. Cases 36 (Ohio Ct. App. 1997), *review denied*, 692 N.E.2d 617 (Ohio), *cert. denied sub nom.*, Hengle v. Ward, 525 U.S. 878 (1998), a case that arose in Ohio, where churches are not exempt on religious grounds from anti-discrimination laws. A Catholic church's secretary who believed himself to be a monk, but who was not considered one by the Catholic Church, insisted on wearing a habit and holding himself out as "Brother" at work, over the objections of the parish priest, and was eventually fired. The court upheld a damage award to the *soi-disant* monk and rejected the church's Free Exercise Clause defense.

191. *See, e.g.*, Combs v. Central Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) (holding that Free Exercise Clause bars clergy member's Title VII sex-discrimination suit against church).

192. 213 F.3d 795 (4th Cir. 2000).

193. EEOC v. Catholic University, 83 F.3d 455 (D.C. Cir. 1996).

deference to a religious institution's autonomy. Courts have held that a teacher fired from an evangelical school for becoming pregnant may sue for sex discrimination,[194] and that a temple administrator who served as the contact person for prospective synagogue members was not in a ministerial position and therefore could sue for age discrimination.[195] Line drawing is necessary, however, and the EEOC and Department of Justice, by adopting a narrow understanding of positions entitled to free exercise deference, can interfere with the ability of religious organizations to pursue their religious missions in the way they believe is best. Latitude also exists when an organization is sufficiently "religious" in nature to fall within Title VII's exemption permitting religious discrimination by religious employers. In *EEOC v. Kamehameha Schools/Bishop Estate*,[196] the Ninth Circuit denied the exemption to a school whose charter required all teachers to be Protestant and whose curriculum included religious education and activities. The Court found that the school had become more secular since its founding and therefore could not enforce its charter provision. There is also some uncertainty regarding the degree to which religious schools may impose restrictions on the behavior of their teachers.[197]

Civil rights enforcement actions that can compromise the religious liberty of defendants also arise outside the employment context. For example, the Department of Justice brought a sex- and religion-based discrimination claim against a community of summer homes founded by the Knights of Columbus.[198] The Justice Department convinced the court that the community was not entitled to the Fair Housing Act exemption for religious organizations,[199] despite the fact that the community: a) limited membership to male Roman

194. Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998).

195. Weissman v. Congregation Shaare Emeth, 38 F.3d 1038 (8th Cir. 1994).

196. 990 F.2d 458 (9th Cir. 1993).

197. *Compare* Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (female Protestant teacher at Catholic school has no Title VII cause of action for religious discrimination when not rehired because of remarriage, in conflict with Catholic moral teachings), *with* Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998) (noting general ability of religious schools to impose morals requirements on teachers, but allowing case to proceed challenging policy of terminating unmarried teachers who become pregnant).

198. United States v. Columbus Country Club, 915 F.2d 877 (3d Cir. 1990).

199. 42 U.S.C. § 3607(a) (2000).

Catholics recommended by their parish priests; b) received special dispensation from the Archbishop to celebrate mass on the premises; and c) provided a chapel and religious symbols and activities on the grounds.[200] It was a two-to-one decision, and five judges of the Third Circuit voted to grant rehearing *en banc*.[201] The issue was thus one that arguably could have gone either way. The Department of Justice, by bringing and winning the case, succeeded in raising the bar as to what constitutes a religious organization in this context. The result underscores the importance of a President being cognizant of the potential impact of civil rights actions—even those involving religious discrimination claims—on the religious freedom of others.

This point was demonstrated further when the Department of Justice advocated two diametrically opposed positions in the space of four months. In 1999, the Third Circuit upheld the free exercise rights of two Muslim police officers in Newark, New Jersey to wear beards in *Fraternal Order of Police v. City of Newark*.[202] The officers claimed that since officers with a skin condition making it painful to shave were exempted from the Newark Police Department's no-beard policy, but not those with religious reasons , the law discriminated against the latter in violation of the Free Exercise Clause in light of dicta in *Employment Division, Department of Human Resources of Oregon v. Smith*[203] and the holding of *Church of the Lukumi Babalu Aye, Inc.*

200. 915 F.2d 877, 879 (3d Cir. 1990).

201. *Id.* at 885-88.

202. 170 F.3d 359 (3d Cir.), *cert. denied*, 120 S. Ct. 56 (1999). I was counsel for *amici* in the Third Circuit and represented the two police officers in their opposition to *certiorari* in the Supreme Court.

203. 494 U.S. 872 (1990). *Smith* rejected two Native American men's argument that the Free Exercise Clause gave them an exemption from the laws against ingestion of the drug peyote during religious ceremonies, holding "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (Stevens, J., concurring)). *Smith* suggested that laws affecting free exercise which were *not* generally applicable, however, could continue to be reviewed. The state would have the burden of demonstrating the law advanced a compelling government interest in a narrowly tailored fashion. *See id.* at 884. An excellent description of how *Smith* drastically altered Free Exercise jurisprudence is found in Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

v. City of Hialeah.[204] The Third Circuit agreed that, because of the medical exemption, the rule was not generally applicable, and because the city had not shown a sufficiently compelling justification for the distinction between religious and medical reasons for wearing beards, the officers were entitled to a religious exemption under *Lukumi.*[205] In May 2000, the Department of Justice filed suit against the City of Newark seeking to extend this rule to all of Newark's Muslim police officers.[206]

Just three months later, however, the Justice Department filed a brief[207] supporting a gay rights ordinance in Louisville, Kentucky, urging a District Court to adopt a Free Exercise rule that would have effectively barred actions like that of the Newark police officers. A physician brought suit challenging the ordinance, alleging that he had a sincerely held religious belief against hiring homosexuals, and that requiring him to do so violated his Free Exercise rights. As the Becket Fund argued in the *Newark* case, the doctor argued that the law was not generally applicable, since it provided an exemption for churches and similar religious organizations but not for religious *individuals*; thus, the doctor argued that the city needed to demonstrate a compelling interest in denying him an exemption. In its brief, the Justice Department argued for an extremely narrow reading of *Lukumi,* construing it to say that the test for general applicability is whether a law was either motivated by legislators' disapproval of a particular religion, or if it, as applied, affects only members of a particular religion.[208] While obviously undermining the Department's position in the *Newark* case, this position, if maintained, would also weaken

204. 508 U.S. 520 (1993) (holding that ordinance barring ritual killing of animals but giving exemptions for various secular reasons violated Free Exercise Clause since unsupported by compelling government interests).

205. *Fraternal Order of Police,* 170 F.3d at 365-66.

206. *See Justice Department: N.J. City Discriminates Against Muslim Police Officers,* ASSOCIATED PRESS, May 17, 2000, *available at* http://www.freedomforum.org/news/2000/05/2000-05-17-01.asp.

207. Memorandum of the United States as *Amicus Curiae,* Hyman v. City of Louisville, No. 3:99CV-597-S (W.D. Ky.), *available at* http://www.aclu.org/court/DoJHyman.html); *see also* Press Release, ACLU, ACLU and U.S. Dept. of Justice Ask Court to Dismiss Challenge to Anti-Gay Bias Law, Noting Broad Impact (Aug. 15, 2000), *available at* http://www.aclu.org/news/2000/n081500b.html.

208. Memorandum of United States, *supra* note 207.

the Free Exercise rights of other citizens.[209]

E. Accommodation of Religion

The President also can make the public square more hospitable to people of faith by taking actions that affirmatively accommodate religion. As the Supreme Court remarked in *Zorach v. Clauson*,[210] when the government accommodates people's private religious practices, it "follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs."[211]

Accommodating private faith often requires crafting exemptions to laws that interfere with individuals' religious exercise. Such accommodations date back to the First Continental Congress,[212] and the need for them has grown with the size and scope of government power. As Professor McConnell has noted: "Government protects religious freedom best by leaving religiously sensitive matters to the private sphere. . . . [But] with the growth of the modern welfare-regulatory state, the occasions for overlap increase exponentially, as governments regulate and subsidize activities

209. *See, e.g.*, Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996) (finding free exercise rights are violated where university refused to grant exemption from mandatory on-campus residency requirement to freshman desiring to live in religious group house, but gave exemptions for numerous nonreligious reasons); Horen v. Commonwealth, 479 S.E.2d 553, 557 (Va. App. 1997) (criminal law against possessing wild bird feathers, with exemptions for "taxidermists, academics, researchers, museums, and educational institutions," must provide similar exemptions for Native Americans); *see also* Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 772 (1998) ("Where a law has secular exceptions or an individualized exemption process, any burden on religion requires compelling justification under a reasonable reading of *Smith* and *Lukumi*.").

210. 343 U.S. 306 (1952) (upholding school board's policy under which students were released from class during school hours so they could attend religious classes and activities off school grounds).

211. *Id.* at 313-14.

212. Religious exemptions to military conscription were provided by the Continental Congress during the American Revolution, and this practice was continued by Congress after the framing of the Constitution. *See* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring). As early as the seventeenth century, various colonies exempted Quakers from being required to swear oaths, and by 1789 "virtually all of the states had enacted oath exemptions." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1467-68 (1990). Among many other accommodations were religious exemptions to the requirement that persons remove their hats while in court. *See id.* at 1467-72.

previously private and often religious."[213] At the federal level, the importance of the legislative and executive branches as protectors of religious freedom has increased dramatically in the past decade in the wake of the *Smith* decision, when the Court cut back on judicial religious-liberty protections and explicitly passed this responsibility to the other two branches.[214]

The executive branch can craft exemptions from laws through regulations such as the Drug Enforcement Administration's exceptions to criminal drug laws for sacramental use of controlled substances,[215] exemptions to endangered species laws for the possession of eagles and eagle parts for ceremonial use,[216] military regulations providing procedures for religious exemptions,[217] or executive orders related to these matters.[218]

The President also can propose legislation creating religious exemptions. For example, Congress has protected conscientious objectors from conscription,[219] exempted

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213. Michael W. McConnell, *Five Reasons To Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 640.

214. The Court instructed that although the courts are limited in protecting religious exercise,

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990).

215. *See* Lee v. Weisman, 505 U.S. 577, 628-29 (1992) (Souter, J., concurring) ("in freeing the Native American Church from federal laws forbidding peyote use, see Drug Enforcement Administration Miscellaneous Exemptions, 21 C.F.R. §1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans."); *see also* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (holding that exemptions from peyote laws for Native Americans did not violate the Establishment Clause); United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984) (same); Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342 (N.D. Tex. 1988) (same).

216. *See* 50 C.F.R. §§ 22.22, 450 *et seq.* (2000).

217. *See, e.g.*, Air Force Instruction 36-2706, Dec. 1, 1996, Section 4F, *available at* http://afpubs.hq.af.mil.

218. *See, e.g.*, Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

219. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971) (upholding Congress's grant of religious exemption from military conscription); Selective

sacramental use of wine during prohibition,[220] and more recently accommodated the wearing of yarmulkes in the military in response to the Supreme Court's decision in *Goldman v. Weinberger*.[221] It has also passed a law protecting church tithes from fraudulent conveyance treatment in bankruptcy proceedings.[222]

Most notably, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. RFRA attempted to restore the Free Exercise Clause standard of the Court prior to *Smith*,[223] giving citizens exemptions from generally applicable laws and other forms of state action that substantially burden their religious practice unless the state has undertaken a narrowly tailored pursuit of a compelling interest.[224] The Supreme Court, however, in *City of Boerne v. Flores*,[225] struck down RFRA as applied to the states, holding in a six-to-three decision that Congress had exceeded its power under Section 5 of the Fourteenth Amendment.[226]

While the *Boerne* decision may have struck down RFRA as applied to the states, many courts have assumed that it is still applicable to the federal government.[227] The Department of Justice also continues to defend its constitutionality as applied to the federal government.[228] The new President can sustain this policy, and ensure that all agencies are aware of its

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Draft Law Cases, 245 U.S. 366, 389-90 (1918) (same).

220. *See* McConnell, *supra* note 212, at 1419 n.41 (noting that Volstead Act, 41 Stat. 305, 308-39 (1919), *repealed by* U.S. CONST. Amend. XXI (1933), exempted sacramental wine).

221. 475 U.S. 503 (1986) (holding that Air Force psychologist had no right under the Free Exercise Clause to wear a yarmulke while on duty). In response, Congress created such a right statutorily. 10 U.S.C. § 774 (2000).

222. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (codified as amended in scattered sections of Title XI).

223. *See supra* note 203.

224. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2000).

225. 521 U.S. 507 (1997).

226. Only one Justice believed that RFRA's preference for religious reasons for seeking exemptions over secular ones violated the Establishment Clause. *Id.* at 536-37 (Stevens, J., concurring).

227. *See, e.g.*, Alamo v. Clay, 137 F.3d 1366, 1368 (D.C. Cir. 1998) (assuming that RFRA applies to federal agencies); Adams v. Commissioner of Internal Revenue, 170 F.3d 173, 175 (3d Cir. 1999) (same).

228. *See* Official Department of Justice Website, The Structure of The Civil Division, Federal Programs Branch, Government Agencies and Corporations Section, *at* http://www.usdoj.gov/civil/brochure/brochure.html; *see also* Brief for Plaintiff-Appellee United States, at 20 n. 9, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., No. 97-1246 (Fed. Cir.), filed Sept. 24, 1997.

strictures when they implement policy. Similarly, a bill recently enacted by Congress and signed by the President, the Religious Land Use and Institutionalized Persons Act of 2000,[229] applies heightened scrutiny to certain land use and prison regulations that discriminate against religion or burden religious practice without compelling justification. It also has a provision that authorizes the United States to bring an action to enforce compliance with the Act.[230]

Not all accommodations take the form of exemptions. Since the federal government occupies large amounts of public space, owns vast tracts of land, and employs so many people, the Executive can have a profound affect on the ability of people to practice their faiths. For example, because access to sacred land, so much of which is under federal control, is critically important to Native American religion, accommodation of their access is critical to their practice of their faiths. To this end, President Clinton issued an executive order requiring the accommodation of access to Native American sites and preservation of sacred lands when feasible.[231]

Another area where accommodations are critical is in the military. The military controls where members of the armed forces will live, when they will be on duty, and how they will act and dress. This can greatly affect when and how they will be able to practice their faiths. As Commander-in-Chief the President can do much to ensure that the service members and their families' religious liberty interests are protected.

The Supreme Court has observed that having chaplains in the military is not merely constitutionally permissible but may be constitutionally required, noting that in the military "the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths."[232] The Second Circuit

229. Pub. L. 106-274 (2000).

230. *Id.* at § IV(f).

231. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

232. School District of Abington Township v. Schempp, 374 U.S. 203, 226 n.10 (1963); see also *id.* at 297 (Brennan, J., concurring) (providing chaplains and churches may be "necessary to secure to the members of the Armed Forces . . . those rights of worship guaranteed under the Free Exercise Clause."); *id.* at 309 (Stewart, J., dissenting) ("a lonely soldier stationed at some faraway outpost could

similarly held that "[u]nless the Army provided a chaplaincy it would deprive the soldier of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion."[233]

Chaplains, base chapels, and similar accommodations thus are necessary to protect soldiers' religious liberty. Implementation of this principle has varied widely, however. In *Rigdon v. Perry*,[234] the Becket Fund brought suit against the armed services on behalf of a diverse group of Christian, Jewish, and Muslim chaplains, service members, and families challenging a Pentagon order banning chaplains from encouraging parishioners to contact Congress in support of the Partial Birth Abortion Ban Act (which former President Clinton had recently vetoed and was at the time subject to a veto override effort). Finding the Pentagon's actions to be "heavy-handed censorship" that unjustifiably interfered with priests being priests and rabbis being rabbis, the District Court struck down the policy.[235]

In another action struck down by a court for unduly restricting the religious rights of military personnel, the Army had issued regulations that allowed home day care centers in base housing but forbade such day care centers where grace before meals and similar religious activity occurred. The Sixth Circuit overruled the restriction as a Free Exercise Clause violation.[236] The military has stood up for giving service members' children the ability to join the Boy Scouts of America, successfully defending its sponsorship of Scout troops on military bases against ACLU Establishment Clause claims[237] based upon the Boy Scouts' religious aspects and requisite statement of belief in God.[238] These cases highlight the

surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.").

233. Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985).

234. 962 F. Supp. 150 (D.D.C. 1997).

235. *Id.* at 165.

236. Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995).

237. *See* Winkler v. Chicago Sch. Reform Bd. of Trustees, 2000 U.S. Dist. LEXIS 240 (N.D. Ill. Jan. 11, 2000) (dismissing on standing grounds ACLU suit against U.S. Transportation Command on Scott Air Force Base for sponsorship of Boy Scout troop); *see also* Frank J. Murray, *ACLU Sues To Cut Federal Support for Boy Scout Troops, Cites Policies on 'Obligation to God'*, WASH. TIMES, Apr. 16, 1999, at A5.

238. The Boy Scouts, while perhaps not thought of first as a religious organization, has a strong religious component that includes a requirement that

importance of the new President affirming a strong commitment to accommodate the religious needs of both service members and their families. Similarly, the federal workplace should be friendly to people of all faiths. In 1997, the President issued guidelines for all federal employees regarding religious expression in the workplace.[239] They generally advanced the principle that religious speech should not be subject to discrimination. They stated that when federal employees are permitted to express themselves on non-workmatterss, such as chatting with other employees or decorating their own work space, religious expression is to be permitted to the same extent as any other private expression. In other words, if one can say "Tiger Woods is God" at the water cooler, one can say "Jesus is Lord." Unfortunately, the guidelines are inadequate. They unnecessarily insist that religious speech among coworkers must not violate the Supreme Court's endorsement test.[240] In addition, they require that an employee must cease his religious speech when told to do so by another employee, although no explicit directive exists for other speech that might be unwelcome.[241] Thus, while the general tenor of the guidelines seems to permit religious speech into the public square without discrimination, the details work in a different direction. Nonetheless, if these and similar efforts

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Scouts "affirm their 'Duty to God,'" a Scout-sponsored on-line prayer forum, and an imposition on Scouts to be reverent "in their everyday lives." *See* John C. O'Quinn, Comment, *How Solemn is the Duty of the Mighty Chief: Mediating the Conflict of Rights in* Boy Scouts of America v. Dale, 24 HARV. J.L. & PUB. POL'Y 319, 360 (2000).

239. Guidelines on Religious Expression in the Workplace (Aug. 14, 1997), *available at* 1997 WL 475412.

240. *See id.* at § (1)(A)(3). It would seem tautological that an employee would know that another non-supervisory employee's religious speech was not government speech, just as he would know that the employee's expression of opinions about the Boston Red Sox was not government speech. Provisions such as this could send a signal to readers of the guidelines that perhaps equal treatment of private religious expression does not really mean equal.

241. The guidelines open by equating religion and ideology. *See* § (1)(A) (introduction). Then, in describing inter-employee expression in section (1)(A)(3), the guidelines state that employees must refrain from religious expression "when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome." *Id.* Unwanted religious expression can be offensive, surely. But so too is unwanted ideological expression. A park ranger badgered by her coworkers for her pro-gun control views could be just as offended as someone subjected to a coworker repeatedly asking her to come to his church in order to be saved. The guidelines, by opening with an equality approach and quickly shifting to treating religion as potentially noxious reinforces the problems that are the focus of this Article.

were properly designed, they could have an ameliorative effect on the misguided notion that religious people must leave a large part of themselves at home when they go out into the world, and hence should be among the measures to enhance religious freedom considered by the new President.

IV. THE APPOINTMENT POWER

As the previous survey demonstrates, there are many avenues through which the President can counter the excessive secularization of the public square and reduce government encroachments on religious freedom. But it is ultimately the courts that will frame the debate. The executive branch may strive to include religion in cultural activities (as the National Park Service has done quite thoroughly), but the courts can block any or all such efforts. Many of the gains in equal treatment of religion in a variety of federal programs, from SBA loans to HUD programs to faith-based social programs, ultimately hinge on the Supreme Court's willingness to sustain them. The Supreme Court's decisions in this area of the law rest on the slimmest of margins. The trend toward greater recognition of the pluralism principle in the 1990's outlined in Part III.B of this Article is fragile, for the Court did not really speak in unison—as it had, for example, in the desegregation decisions of the 1950s. Rather, it has been a trend established by consistently narrow margins. *Zobrest*,[242] which permitted a deaf child to use a government-supplied sign interpreter at a parochial school, was a five-to-four decision, with Justice O'Connor, the faithful swing vote in Establishment Clause cases, dissenting (now-retired Justice Byron White was the fifth vote to uphold the program). *Rosenberger*,[243] upholding the equal treatment of student religious expression in the university student activity funding process, and *Agostini*,[244] allowing disabled parochial school children to receive secular instruction from public school teachers in their schools rather than in vans parked outside, also had one-vote margins. *Mitchell*[245] permitted the loans of computers and other

242. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).
243. Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995).
244. Agostini v. Felton, 521 U.S. 203 (1997).
245. Mitchell v. Helms, 120 S. Ct. 2530 (2000).

equipment to public and private schools, but did so only by a four-judge plurality with Justices O'Connor and Breyer casting the decisive concurring votes to uphold the program. Thus, the President's next Supreme Court appointment could determine the survival of the principle that religious people should be able to participate fully in public life and public programs without changing their identity. That decision could ultimately impact concrete programs in the future, such as the government funding of faith-based social service providers, something both presidential candidates embraced.

In the cultural arena, *Allegheny County*,[246] with its shifting majorities striking down the indoor display of a crèche with poinsettias and upholding the outdoor menorah, Christmas tree, and sign celebrating diversity, illustrates how uncertain the future of this area of the law could be. Lower court decisions on the inclusion of religion in cultural activities have also been close. In *Bauchman v. West High School*[247] the Tenth Circuit upheld by two-to-one the dismissal of a lawsuit brought by a student to bar her high school choir from singing sacred music as part of its repertoire and holding field-trip concerts at area churches; the court deadlocked six-to-six on whether to grant rehearing *en banc*.[248] Similarly in *ACLU v. Schundler*,[249] the Third Circuit upheld Jersey City's display of a crèche, menorah, some secular symbols, and a sign tying the holiday display into the cities broader celebration of diversity, and then denied rehearing *en banc* by a six-to-six vote.[250] Most recently, the *en banc* Sixth Circuit sustained the Ohio State motto "With God, All Things Are Possible," holding it did not constitute an Establishment Clause violation.[251] Thus, single appointments in the circuit courts could conceivably lead to major changes in the law.

Public school free speech faces an uncertain future as well. In addition to the six-to-six deadlock in the Third Circuit on

246. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

247. 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998).

248. Order, Jan. 28,1998 (on file with author).

249. 168 F.3d. 92 (3d Cir. 1999).

250. Sur Petition for Reh'g En Banc, March 18 1999, (on file with author).

251. ACLU v. Capitol Square Rev. & Advisory Board, No. 98-4106, — F.3d —, 2001 WL 273584 (6th Cir. Mar. 16, 2001) (en banc).

rehearing in *C.H. v. Oliva*,[252] the Ninth Circuit in *Doe v. Madison School District*[253] at first upheld a school policy choosing graduation speakers based on academic rank and allowing them to include prayer and religious speech in their remarks, and then granted rehearing *en banc*, finally dismissing the case for lack of standing.[254]

The potential for conflict between civil rights laws and the autonomy of private organizations was dramatically illustrated last Term in *Boy Scouts of America v. Dale*,[255] which held that New Jersey's law banning sexual-orientation discrimination in "public accommodations" could not force the Scouts to accept an openly gay scoutmaster without violating the group's First Amendment right of free association. The Boy Scouts are a private organization dedicated to instilling a particular set of values in boys, including reverence and faith. It is not surprising that the Court would find that forcing such an organization to accept for a leadership position someone who publicly affirmed values that conflicted directly with its own is violative of its rights. What was unexpected to many court observers was that the decision was five-to-four, leaving the autonomy of private organizations hanging on a rather tenuous thread.

A President should not make appointments based on how a prospective judge or Justice would vote on a catalog of issues such as Charitable Choice, moment of silence laws, school vouchers, or whether a school choir can sing Christmas carols. Nor is it desirable for the President to have a litmus test simply asking whether a potential judge or justice supports a greater role for religion in the public square, for this is a complex issue with many subtleties. It is justifiable, however, to ask what general principles about the Religion Clauses judicial candidates hold, and in particular, their view on the nature of the Constitution's role in maintaining a proper relationship between religion and government.

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252. C.H. v. Oliva, 990 F. Supp. 341 (D.N.J. 1997), *aff'd in part by an equally divided en banc court, vacated in part*, 226 F.3d 198 (3d Cir. 2000), *petition for cert. filed sub nom.*, Hood v. Medford Twp. Bd. of Educ., 69 U.S.L.W. 3383 (Nov 22, 2000) (No. 00-845).

253. 177 F.3d 789 (9th Cir. 1999).

254. *Id.* at 799.

255. 120 S. Ct. 2446 (2000).

Therefore, it would be reasonable to ascertain whether or not a judicial candidate believes the Founders "would have rejected the use of the establishment clause to eradicate the religious leaven from public life,"[256] or, rather, if the Establishment Clause was intended to accomplish the "establishment of [a] secular public order,"[257] (a principle advanced by Professor Kathleen Sullivan and cited approvingly by Justice Ginsburg in *Pinette*[258]). It is also legitimate to seek out whether he or she believes that religion is a vital source of morality which is a "spring of popular government" as George Washington believed,[259] or if religion is an "ancient," "atavistic" wellspring that bigotry's "roots have been nourished by," as Justice Stevens wrote, dissenting in *Boy Scouts*.[260] The answers to these fundamental questions could determine to a great extent the future place of religion in the public square.

256. ADAMS & EMMERICH, *supra* note 52, at 52.

257. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 205 (1992).

258. Capitol Square Rev. and Advisory Bd. v. Pinette, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting, citing Sullivan, *supra* note 259).

259. President George Washington, Washington's Farewell Address (Sept. 17, 1796), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 8, at 173.

260. 120 S.Ct. 2446, 2477-78 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals have ancient roots. Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. . . . Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions.") (citations omitted).