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THE LEGAL FRONTIER OF RELIGIOUS FREEDOM: RELIGION AND STATE IN THE TWENTY-FIRST CENTURY

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Usually, when I get up to speak, the subject has something to do with anti-Semitism. It might be about the Holocaust; it might be about Israel; it might be about a serious hate crime against a Jewish institution; or it might be about Arab terrorism. But sooner or later my thoughts and words turn to questions of anti-Semitism. That is, after all, the issue most closely associated in the public's mind with the Anti-Defamation League ("ADL"), and that has been the case throughout our eighty-seven-year history. We fight anti-Semitism, and we take pride in our work.

However, fighting anti-Semitism is not all we do. Our concerns have always been much, much broader. Our real mandate is to safeguard the interests and security of the Jewish people, and to secure justice and fair treatment for all. Our founders, more than eight decades ago, recognized that the best way to guarantee justice and fair treatment for Jews was to guarantee it for all Americans. Ever since, that has been our goal and our dream.

In pursuit of this mandate, ADL speaks out broadly against bigotry and against hate, against prejudice and against discrimination. In pursuit of this mandate, ADL also monitors, exposes, and seeks to counteract the threat posed by extremists of the left and the right. As an organization rooted in the Jewish community, we are concerned about domestic and international terrorists, about Klansmen, about neo-Nazi skinheads, and about other violence-prone extremists. The threat they pose to our society is obvious. All I have to do is mention Oklahoma City, and everyone understands that the threat is real.

These extremists and domestic terrorists have a vision of a white America, free from blacks, from Jews, from gays, and from other minorities. Fortunately, I can say with confidence that their vision is not going to become a reality. They are not part of the

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mainstream of our society; they are on the fringes, and that is where they will remain.

However, there is another threat to the security of American Jews out there, a threat not just to Jews, but to all religious minorities, and to all Americans. Compared to neo-Nazis, this threat is much more subtle. It is not a threat of physical harm or of violence. However, it is a real threat to our freedom, and one which should not be underestimated.

I am talking about a threat to our religious liberty. I am talking about those who would turn a blind eye to the wisdom of our founding fathers. I am talking about those who either intentionally or out of ignorance, would curtail or even abolish a fundamental principle of the American democracy: the separation of church and state mandated by the First Amendment to the United States Constitution.¹

Like the extremists and white supremacists, the opponents of church-state separation also have a vision. It is not a vision of a purely white America, but they would love to see a more Christian America reflecting their particular religious values. They would love to see an America where children say Christian prayers in public schools, join Bible clubs, and sing religious songs. They would love to see an America where taxpayers pay for religious education and fund sectarian organizations to provide drug counseling and other basic social services. They are not especially concerned when a Jewish child is asked to perform a concert of exclusively Christian music, or the part of Jesus in a school play.

Here is why this threat should concern us. Unlike Klansmen, neo-Nazis and other extremists, these opponents of church-state separation have a significant following in this country. They are not relegated to the fringes; they have serious, mainstream support. Unlike white supremacists, their vision could someday become a reality in the United States, and that profoundly troubles me.

I recognize, of course, that not every advocate of vouchers, charitable choice, or school prayer is seeking to impose his or her views on everyone else. I recognize that many of those advocates are well-intentioned, and are casting about for ways to address the serious problems which plague our society. I respect that. However, I believe those who reject church-state separation are misguided.

Let me pause here for a moment, because I want to be very clear. The Anti-Defamation League is pro-religion. Some Ameri-

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cans believe that if you support the separation of church and state, you are hostile to religion. That is absolutely, positively not so.

We at ADL support the separation of church and state because we believe in religious freedom. We believe that so many religions have flourished in the United States precisely because we have kept church and state separate, and we intend to be vigilant in our defense of the First Amendment.

I've been asked today to speak about my perspective on religion and state in the year 2000. I am delighted to be here, in a place near and dear to my heart, and I am pleased and honored to share some thoughts on this subject. I must say, however, that I recognize that the expertise in this room on this subject is extraordinary. I tip my hat to those of you on the panels to come and those of you in the audience who have thought long and hard about this subject and who have made these issues your life's work. I know even as I share some of my thoughts with you this morning that there is much more I could learn from all of you.

It strikes me that this program is especially timely because I believe that on several church-state issues, particularly on the Establishment Clause side where I intend to focus these remarks, we are at a crossroads. The decisions to be made this year and next on vouchers, on charitable choice, and on school prayer are destined to have lasting ramifications for the future of religious freedom in the United States.

Just think about all of the Establishment Clause issues which have been in the news recently. The 106th Congress debated voucher and charitable choice proposals which would channel more and more taxpayer dollars to religious institutions,² and the 107th Congress will continue that debate.³ Voucher initiatives are on the ballot next month in California and in Michigan,⁴ and pro-

2. See, e.g., 146 CONG. REC. H7464-70 (daily ed. Sept. 12, 2000) (statements of Reps. Scott, McKeon and others) (discussing charitable choice), available at http://www.access.gpo.gov/su_docs/aces/aces150.html; 146 CONG. REC. H8249-64 (daily ed. Sept. 27, 2000) (statements of Reps. Jackson-Lee, Edwards and others) (discussing charitable choice); 146 CONG. REC. H10228-29 (daily ed. Oct. 18, 2000) (statements of Reps. Owens and Green) (discussing vouchers).

3. President George W. Bush has indicated his intent to provide federal money to religious groups providing social services. See Marc Lasey & Laurie Goodstein, *Bush Fleshes out Details of Proposal to Expand Aid to Religious Organizations*, N.Y. TIMES, Jan. 31, 2001, at A15.

4. A Proposal to Amend the Constitution to Permit State to Provide Indirect Support to Students Attending Nonpublic Pre-elementary, Elementary and Secondary Schools; Allow the Use of Tuition Vouchers in Certain School Districts; and Require Enactment of Teacher Testing Laws (Mich. 2000), at <http://>

posals are under consideration in several state legislatures.⁵ State and local legislatures are also considering other church-state issues, including proposals to encourage or mandate the display of the Ten Commandments in public places and to teach creationism in public schools.⁶

Also this year, the Supreme Court ruled in two major church-state cases, upholding the provision of computers and other equipment to parochial schools while rejecting organized prayers at public high school football games.⁷ Earlier this month, the Court agreed to hear another church-state case involving the right of a religious club, the Good News Club, to hold religious meetings at a public elementary school here in New York State.⁸

As 2000 draws to a close, the major pending Establishment Clause controversies can be divided into two broad categories: defining the proper role of religion in public life, especially in public schools; and providing taxpayer funds for religious institutions. In both categories, we are at a distinct crossroads.

In *Santa Fe v. Doe*, the Supreme Court made it clear that organized, school-sponsored prayers in public schools are unconstitutional.⁹ In many parts of this country, especially Santa Fe school district's home state of Texas, this decision was met with widespread disappointment and hostility.¹⁰ Unfortunately, proponents of such prayers remain largely insensitive to the notion that their organized

www.mfstrp.org/ballot.html; National Average School Funding Guarantee and Parental Right to Choose Quality Education Amendment (Cal. 2000), at http://vote2000.ss.ca.gov/VoterGuide/text/text_proposed_law_38.htm. Both initiatives failed. Rene Sanchez & William Booth, *Voucher Plans Go Down to Defeat*, WASH. POST, Nov. 8, 2000, at A39.

5. See, e.g., H.B. 2252, 45th Leg., 1st Reg. Sess. (Ariz. 2001), available at <http://www.azleg.state.az.us/legtext/bills.htm>; H.B. 1071, 83rd Gen. Assemb., Reg. Sess. (Ark. 2001), available at <http://www.arkleg.state.ar.us/ftp/root/bills/2001/html/HB1071.pdf>; S920, 209th Leg., Reg. Sess. (N.J. 2001), available at <http://www.njleg.state.nj.us/html/bill2000.htm>.

6. See, e.g., *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000) (finding unconstitutional Elkhart's placement of the Ten Commandments in front of a municipal building); Pam Belluck, *Science Expands, Religion Contracts*, N.Y. TIMES, Aug. 13, 2000, § 4 (Week in Review), at 1.

7. *Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

8. *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), cert. granted, 121 S. Ct. 296 (2000).

9. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. at 2275, 2281, 2283.

10. *Despite Ban, Some Plan to Pray at High School Football Games*, AUSTIN AMERICAN-STATESMAN, Sept. 1, 2000, available at 2000 WL 7340581.

“in your face” public praying is offensive to those in the religious minority in their communities.

From ADL’s perspective, a legal skirmish was won, but our more serious concern is that attitudes remain unchanged. What will come next? One possibility is continued resistance to the Court’s decision, and efforts to find ways around it—especially in certain parts of the country. Another possibility is acceptance of the decision, and an understanding that it does not prohibit individual voluntary prayer, but rather protects everyone’s religious freedom. Which path will we as a nation follow? You are the experts, but I am cautiously optimistic. Sometimes, as evidenced by our civil rights history, changes in attitude take longer to achieve than changes in the law, but we get there eventually. I hope that will happen here.

On the funding side, some Court observers believe the Court’s decision in *Mitchell v. Helms*, allowing the government to provide computers to parochial schools, opens the door for voucher plans.¹¹ Others disagree.¹² Sooner or later, perhaps even in 2001, a voucher case will reach the Supreme Court. When it comes to charitable choice proposals, proponents of church-state separation face an uphill fight: both Vice President Gore and Governor Bush have expressed support for such initiatives.

Here again, we are at a crossroads. I believe vouchers jeopardize public education in this country by taking necessary resources away from public schools. I also believe charitable choice jeopardizes the government’s ability to provide necessary social services to every needy American in a non-sectarian way. Unfortunately, I see our political leaders encouraging more and more programs channeling taxpayer dollars to religious institutions. As we reach this crossroads, I fear that if we choose to rely too heavily on religious institutions to provide services which are the government’s responsibility, we will come to regret it.

So we are at a crossroads. It is abundantly clear that both the legislatures and the courts will continue wrestling with church-state issues into 2001, and I expect that the debates to follow here at NYU today will mirror the broader debates in our society. Wherever we come out, I hope that we can move forward in a spirit of

11. See, e.g., Patrick B. McGuigan, *For ‘Some Level of Achievement,’* DAILY OKLAHOMAN, July 8, 2000, available at 2000 WL 26241563; Editorial, *Court Blurs Church-State Line*, HARTFORD COURANT, July 21, 2000, available at 2000 WL 23011598.

12. See, e.g., Jodi Wilgoren, *A Ruling Voids Use of Vouchers in Ohio Schools*, N.Y. TIMES, Dec. 12, 2000, at A1.

religious tolerance that acknowledges our nation's rich religious diversity.

There is one more important element to this discussion. It is not taking place in a vacuum. I cannot stand here before you today and talk about religion and state in the year 2000 without talking about this year's election campaign. The issue was highlighted this year much more dramatically than in past campaigns.¹³ We do not yet know what lessons the candidates might have taken away from the controversy which swirled earlier in the campaign, but it certainly gave them and us food for further thought. Where we head may be directly affected by who leads us as we move forward toward those forks in the road.

The appropriate role of religion in politics is not an easy issue. Clearly, there is a role. ADL has not and would not ever take a position that a candidate for office must repress or hide his religious background or views from the voters. At the same time, keeping in mind the religiously diverse and pluralistic nature of our society, we believe a distinction must be drawn between candidates who appropriately explain their religious convictions to voters and those who inappropriately pander to voters on the basis of their religiosity. Elections should not become contests to determine which candidate is "closer to God." Rather, they should reflect determinations by voters as to which candidate is the best qualified and most closely shares their political views.

Early in this campaign year, we were unsettled by Governor Bush's reference to Jesus as the political philosopher he admires the most, and by Vice President Gore's assertion that he often asks himself, "What would Jesus do?" We wrote to all of the presidential candidates urging them to refrain from excessive public professions of religious beliefs intended to appeal to voters along religious lines.¹⁴ More recently, as I am sure you all know, ADL questioned some specific statements by Senator Joseph Lieberman, in the first week or two after he was nominated as the Democrat's candidate for Vice President, because his emphasis on religion seemed excessive. We believe our comments on this issue stimulated an important national discussion, and we draw some satisfaction from the

13. Teresa Mask, *Religion Takes Center Stage*, CHICAGO DAILY HERALD, Oct. 19, 2000, available at 2000 WL 28846789; Jonathan Riskind, Editorial, *Poll Shows Increasing Role Religion Is Playing in Politics*, COLUMBUS DISPATCH, Feb. 4, 2001, available at 2001 WL 3783600.

14. Michael J. Jordan, *The Lieberman Factor*, JERUSALEM POST, Nov. 2, 2000, available at 2000 WL 8266337.

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fact that more recently the candidates have focused more on the issues and less on their personal religiosity.

Apart from the question of the appropriate role of religion in political campaigns—and ultimately perhaps more important—is what kind of leadership a President shows on church-state issues. Where does he stand on school prayer, on religious accommodation, on vouchers, on charitable choice? Some of you here share ADL's perspective on these issues; others I know disagree. What is worth noting today is that whoever is elected President stands to have considerable influence on the future of church-state separation in this country. These are not issues which only concern Congress or the courts. To my mind, with all of the attention given to religion in politics, it is unfortunate that substantive church-state issues have not received more attention in the 2000 campaign.

In fairness, I have not looked at this issue as my highest priority—certainly not in the past few weeks when developments in the Middle East have consumed my attention. However, I do see one parallel between the search for peace in the Middle East and efforts to safeguard religious liberty in this country. Both are, by their very nature, quests we must sustain over the long-term. Every incident, every skirmish, every dispute, every local controversy is part of a bigger picture—a larger vision. First we have to agree on how we would like the world to look—and that, by itself, is not so easy. If we can reach some consensus on a shared vision, the next challenge will be how to achieve it and how to sustain it—and that may be even tougher. But the causes—peace and religious liberty—are worth the effort.

So I commend the editors of the *Annual Survey of American Law* for convening this symposium today. I thank you for the opportunity to provide some context for your deliberations, and I congratulate you on the important work you have already done and the important work you will continue to do, today and in the future.

Thank you very much.

