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## P R O C E E D I N G S

MR. DIONNE: I want to welcome everyone here today, including lots of good friends, friends of religious liberty. My name is E. J. Dionne. I'm a Senior Fellow here at Brookings, and I have to say I'm very, very excited about the event we are hosting here today.

In this room we here at Brookings have had the opportunity to host an extraordinary range of people, including political leaders, Cabinet officials in both parties, heads of other nations, distinguished policy specialists, and recently the President and Vice President of the United States. But only rarely have we seen such a diversity of view represented at a single event; rarely have we seen so many people work so hard across the lines of principled disagreement to produce a document like the one that we are presenting to you today. The range of views represented here politically and the range of religious traditions represented is exceptional. I counted Catholic, Protestant, Jewish, including a lot of range within those traditions, Muslim and Sikh as well, and there are others in other communities who are vitally interested in this document.

And what's even more impressive is that what we are talking about today are not issues that are anodyne or easy to solve. We're talking about one of the most contested questions in our politics: the matter of religious expression in American public life. In all our arguments about religious freedom, we sometimes forget that our passions reflect not only our disagreement but also our shared commitments. We argue about religious liberty because we all believe in it so much. We debate what the First

Amendment guarantees that religious liberty means because we care about them so much.

My friend, John Dilulio, once said -- and I'm paraphrasing here from memory -- and in America we don't really care about something unless we're willing to go to court about it. By that definition, we care about the First Amendment and religious freedom very, very, very much.

In a free society, there will always be conflicts of principle and of interest, and we should welcome that fact. But there are useful conflicts and useless conflicts. Useful conflicts involve honest arguments over honest differences of principle or differences over how principles should be applied in practice. Useless arguments -- and I'm afraid we've gotten accustomed to them here in Washington -- useless arguments take many forms. They occur when one side parodies the views of the opposing side rather than answering their best arguments.

Useless argument occurs when one party to a debate tries to deny well-established facts. Useless arguments occur when the parties don't discuss what they really disagree about but instead introduce red herrings, distortions, and irrelevant side issues. I could take the whole morning if I discussed simply recent examples of that in our political argument.

Today's document sets its face against useless arguments of a related kind. In church/state discussions, there are always temptations to assert that the law clearly says one thing when it in fact says another thing. People will say that the courts

have long permitted or not permitted this practice or that approach when, in fact, the courts have said no such thing. The parties to this consensus document want to clear the ground for real debate and honest disagreement by setting out what the law actually does say on church/state questions and, more generally, on the role of religion in our public square. In the process that they went through to product this document, they proved that civility is not a sign of weakness, as John Kennedy once observed, nor is civility an evasive way of suppressing conflicts that need to be thought out. Civility is simply an effort to have those conflicts within the bounds of respect and of fact, and, to use a loaded word, of truth.

Now, I said at the outset -- and, by the way, I want to welcome our C-Span audience here today as well -- I said at the outset that I am excited by today's event and the document being released, and I could discuss it at great length, but that is not my job. Fortunately, the people who actually wrote the document are here to do that. And so I want to introduce our very distinguished panel. I'll introduce the other members later on.

I want go start by introducing my friend and colleague and a person for whom I have boundless respect and admiration, Melissa Rogers. I am very proud to say that Melissa is a nonresident Senior Fellow with the Governance Studies Department here at Brookings. She also serves as Director of Wake Forest University's Divinity School's Center for Religion and Public Affairs. Melissa teaches classes on Christianity and Public Policy and on Church/State Relations in the United States.

In 2008, Baylor University Press published a case book she coauthored, *Religious Freedom and the Supreme Court*. She previously served as the Executive Director of the Pew Forum on Religion and Public Life and as General Counsel of the Baptist Joint Committee on Public Affairs.

President Obama appointed Melissa to his Council on Faith-Based and Neighborhood Partnerships in 2009. Melissa has won many, many awards, but not nearly as many as she deserves. I present you with Melissa Rogers.

(Applause)

MS. ROGERS: Good morning, and thanks to my friend E.J. for that kind introduction. As you can tell, E.J. has such a way with words and he always is able to put his finger right at the heart of an issue, and I thank him for that very eloquent introduction.

I also want to thank, just as we get started, Darrell Last, Emily Luken, Christine Jacobs, and John Tao at The Brookings Institution for helping to assist in this event and encourage the work. Additionally, I want to thank the Wake Forest University Divinity School and all the people named on the final inside page of this booklet that you have today, particularly Bill Leonard, James Stern, Adam Woods, Susan Tagg, and Julie Robbins. (Phonetics 01:56:28) Without their support and assistance, this project wouldn't have come together.

Let me begin by highlighting taking you to the first inside page of this document where you will see the list of the members of the drafting committee for this document. In this project in particular, the drafters are as important as the draft. I want

to recognize all these distinguished leaders for their effort, painstaking at times, and their commitment to religious freedom.

I'm going to call the names of the drafters who were able to join us today, and if you wouldn't mind just raising your hand when I call your name. (01:55:44) Nathan Diamet of the Union of Orthodox Jewish Congregations of America. Richard Foltin of the American Jewish Committee. Charles Haynes of the Freedom Forum First Amendment Center. Holly Holman and Brent Walker of the Baptist Joint Committee. Shibir Monsuri of The Institute of Religion and Civic Values. Colby May of the American Center for Law and Justice. Rabbi David Saperstein of the Religious Action Center for Reformed Judaism. Dr. Roslyn Stein of the Sheikh Council on Religion and Education, Marc Stern of the American Jewish Congress. Mitchell Tyner formerly of the General Conference of Seven Day Adventists. And I hope I haven't missed any drafters here in the audience with us today.

Oh, Isabelle (01:54:52) -- my goodness, thank you, Isabelle. You changed your name recently, but I am so glad that you raised your hand here. Isabelle Richman of the First Freedom Center, a very valued drafter and came from Richmond to join us this morning. Thank you so much, Isabelle, for your participation in this project.

Well, again, what makes this statement particularly valuable is that it has been jointly drafted, not only by a group that is quite diverse in religious terms but also diverse in terms of the church/state with respect to the represented. Indeed, some on the drafting committee are actually on opposite sides of church-state litigation with some

regularity. The drafting committee for the statement includes, for example, a former staff member of the ACLU, Jeremy Dunn (phonetic 01:54:10), and a current staff member of the American Center for Law and Justice, Colby May. And if experts like this can agree on what the law is, I think it commands our attention.

Now, as the document makes clear, saying that these experts agree in many cases about what the law is, is not to say that these drafters always agree about what the law should be. Indeed, some of the members of the drafting committee are challenging and trying to push the law in different directions, some of the law that's described in this booklet. But while this diverse group often disagrees about how the law should address legal issues, the drafters agree in many cases on what the law is today. And, more fundamentally, the drafters agree that religious liberty or freedom of conscience is a fundamental inalienable right of all people, religious and nonreligious, and that there is a need to correct misunderstandings about this right.

And indeed, we drafted this statement because -- I don't have to tell you - - that there's tremendous confusion about this area of the law. We hear broad, inaccurate statements all the time: On the one hand the statement that somehow religion's been kicked out of the public square; on the other hand the statement that there are no limits when government deals with religion or just one or two.

So this statement is an effort to try to blow away those mischaracterizations, to state what the current law is where we can together, and to educate people about that law.

Let me just say you may be wondering how did this motley crew come together to draft this statement, and so let me just give you a bit of background on the genesis of this project, if you will. It began several years ago when the Freedom Forum First Amendment Center which Charles Haynes is associated with, the First Amendment Center of the Freedom Forum with the McCormick Freedom Museum hosted a conference and brought many of us together to talk about the future of religious liberty. And at that conference we discussed some ways in which some previous joint statements of current law had helped us educate Americans about church/state law. These statements, some of you may remember, were about religious expression in public school, and Charles played an instrumental role in the development of these statements as did Marc Stern, who will speak in just a moment.

So we talked about those statements, their usefulness, and decided that it would be a good idea to draft another joint statement, this one addressing some issues of religious expression in the wider public square, including religion and politics, religious gatherings on government property, chaplains and legislative bodies, prisons in the military, and religion in the workplace. I offered to convene and facilitate the project under the auspices of the Center for Religion and Public Affairs at Wake Forest University Divinity School, and while I think it's safe to say that there were times that all of us doubted our sanity for agreeing to participate in this project, we can say today that it had a happy ending.



Let me also just note quickly that we have been very fortunate to have a number of statements of endorsement for this project by a distinguished and diverse group of leaders. We asked a handful of leaders to endorse the statement, and I'm very pleased that Stanley Carlson-Thies is the president of the Institutional Religious Freedom Alliances, one of those endorsees to be with us today, too.

Let me just turn quickly to the document itself. We've divided the questions among ourselves so we can give you just the briefest of overview of some of the subjects that the statement addresses. This statement, by the way, does not address every issue, it does not address all specific fact patterns; instead, a certain general principles of law and constitutional law.

So let me say that the first -- roughly, the first 11 questions deal with, generally, with religion's role in public life and religion in politics. The statement makes clear that the First Amendment protects the right of religious groups to participate in political activity. Religious individuals and groups like nonreligious individuals and groups have a right to participate in the debate of all issues that are important in political and civic life.

Now, as the statement notes, if organizations, including religious ones, wish to qualify and maintain a status as tax-exempt 501-C3 organization, they have to abide by certain restrictions on their political activity, and you can see in the document questions 9 through 11 briefly discuss those rules. I'm not going to take the time to discuss them right now, but we can later if you wish.

Carrying forward with this theme of religion in politics, government officials' religious beliefs may inform their policy decisions so long as advancing religion is not the predominant purpose or primary effect of governmental action. But the mere fact that a law coincides with religious tenets doesn't mean that it violates the religious clauses of the Constitution. For example, just because some religions teach that theft is wrong doesn't mean the government cannot act laws against larceny.

Also, the federal government may require a person to swear or affirm that he or she will support the Constitution in order to serve as a government official, but it may not require a person to promise allegiance to or against the God, any particular faith, or any purely religious precept in order to serve in government. And those who make an affirmation or take an oath promising to fulfill certain duties toward government may choose to do so while placing a hand on a text that is sacred to him or her, whether the text is the Bible, or something else. But this is not in any way required by the Constitution.

We also note in the statement that elected officials have to protect and defend the Constitution, including the establishment clause of the Constitution. At the same time, elected officials are given substantial leeway to refer to religious ideas and communities, and to talk about their personal beliefs, including their personal religious beliefs in their official capacity. The Constitutional lines in this area aren't always clear, but we tried to provide a few examples of where this might run afoul of the establishment clause in question and answer 7.

Let me conclude with an overarching note, but before I do, I want to note that Barrett Guise (phonetic 01:47:29) has also joined us from the Ethics and Religious Liberty Commission of the Southern Baptist Convention, and he is here and we're so happy he's here, and Richard Land of the Southern Baptist Convention was also a drafter, and we're very grateful for his participation in the project.

So let me just conclude with one overarching note that dovetails from some comment E.J. made. I said one of our purposes for drafting this document was to attempt to educate people about current law. We also have another purpose and that is we know that we can and should have a better conversation about religion's role in public life. And we hope this statement will help us do so. The statement should help settle the debate about whether our current law provides any protection for the right of religious expression and practice in public life. It clearly does, and it should focus our attention on the merits of specific laws and court decision in this area.

And as we say in this document, we hope as we Americans debate these very important areas of church/state law and religion's role in public life, we will describe the law accurately. Doing this job of describing the law accurately certainly will not end our debate over religious liberty, but it should help to make them more productive.

With that, let me thank you again for being here, and let me turn over the mike to E.J. again for the introduction of other valued colleagues.

(Applause)

MR. DIONNE: Thank you, Melissa, and we are very honored with colleagues on the stage here today, as well as so many of the folks in the audience.

Charles Haynes. Many of you are familiar with his work, he is Senior Scholar at the Freedom Forum First Amendment Center, and he directs the religious liberty initiatives at the Newseum in Washington, D.C. He is best known for his work on First Amendment conflicts in public schools. Over the past two decades, he has been the principal organizer and drafter of Consensus Guidelines on Religious Liberty in American Schools. Personally, I think that is one of the most important documents anyone has produced in a long time on this subject because it cleared a lot away, a lot of ground to secure actual religious liberty in the schools, and to put aside some useless arguments, was endorsed by a broad range of religious civil liberties and educational groups.

He is the author and coauthor of six books, including First Freedoms: A Documentary History of First Amendment Rights in America; a series of other books. His column Inside the First Amendment appears in more than 250 newspapers nationwide. And as somebody who writes a column, that's a lot of newspapers.

He holds a Masters degree from Harvard Divinity School, a doctorate from Emory University.

Marc Stern. Welcome to Marc. He is Acting Co-Executive Director and General Counsel of the American Jewish Congress and Director of its Commission on Law, Social Justice, and Intergroup Relations. He is one of the most respected lawyers in the U.S. on church/state and religious liberty issues. He is consulted widely by many

Jewish and non-Jewish organizations interested in maintaining the separation of church and state, and he is widely interviewed in the print and broadcast media.

He has been named one of the Forward 50 most influential leaders in the American Jewish community. When I saw the Forward 50, I thought it was a basketball group, but it is a very --

SPEAKER: That's 50 years (phonetic 01:43:45).

MR. DIONNE: What? Prior to joining the American Jewish Congress, he was a law clerk up to the U.S. Court of Appeals for the 4th Circuit. He was an undergraduate at Yeshiva where he graduated summa cum laude. He received his legal education at Columbia University School of Law where he was a managing editor of The Columbia Journal on Law and Social Problems.

And Colby May, Director and Senior Counsel of the Washington Office of the American Center for Law and Justice, he's been with the ACLJ since 1994. He specializes in federal litigation, regulatory proceedings, communications and technology, nonprofit tax issues, and First Amendment law.

He is a graduate of George Mason University School of Law, and he's represented parties in various amicus curiae briefs and, in other ways, in so many landmark Supreme Court cases that -- I have five and a half pages of them here -- that you will forgive me if I don't read them all. But they stand as a history of First Amendment litigation in our country over the last many years. He has testified before Congress on a variety of matters, including the Religious Liberty and Protection Act that

dots his (phonetic 01:42:22) Domain Name Act, the Houses of Worship Political Speech Protection Act.

He's an Adjunct Professor of Law at Regent University in Virginia Beach.

He is on the board of directors of many civic and charitable organizations, including Enough is Enough!, a pro-family organization working to make the Internet safe for children. That is a very interesting topic we should discuss some here today.

I first call on Charles Haynes for his response.

DR. HAYNES: Thank you very much, E.J., for that very generous introduction, and I am delighted to be here to cross the finish line with the rest of my drafters. And I just want to begin by expressing my deep gratitude to Melissa Rogers. You know, she mentioned that this started in 2005, actually, Conference on the Future of Religious Freedom. The future is now, and it took us that long to get here today, but not because Melissa didn't do her job: It was because the rest of us, I think, kept her from getting it finished.

But she -- not only did it start there, but it was her idea, and then she volunteered to do it. I think she might do that over again differently today, but her leadership has been extraordinary, her (inaudible 01:41:03) and negotiating skills. And thanks to her, the American people now have, I think it's fair to say, the first ever consensus statement on the Constitutional role of religious expression in American public life under current law. And those of you who are not with the press can certainly now applaud Melissa for her leadership on that.

(Applause)

Well, the document we released today builds on the civility and the trust that has characterized similar common ground negotiations over the past two decades. Now, the people at the table have varied, but the process, I would say, has consistently reflected a shared dedication to First Amendment principles even when we disagree on how to apply those principles and an abiding commitment to treat one another with fairness and respect.

Now, prior common ground agreements, nine in all by now, have focused on religion in public schools, as E.J. mentioned, beginning with Guidelines for Teaching About Religion in 1988. I think I have the last abiding copy, although Marc says he has one, so there may be two last copies. Do you have one? There are three copies left in the world, it's so old --

SPEAKER: It's un-in-print now on the Internet (inaudible 01:38:41).

DR. HAYNES: Yeah, we actually printed them. But that goes way back, beginning with that statement through the joint statement on religion in schools that Marc led the way on in 1995, the Guidelines on The Bible in Schools in 2000 -- that was an interesting negotiation -- and a more recent agreement on A Process for Addressing Sexual Orientation in Public Schools, another difficult negotiation.

But because of the comprehensive nature of many of these earlier agreements, we didn't find it necessary to include in this statement more than a brief summary of the common ground already reached on the place of religion in public

schools, and we simply then refer people to those more comprehensive statements.

Otherwise this would have been a book.

In answer to questions 33 and 34, you'll find this summary, and we reaffirm there that public school officials may not promote or endorse religious expression, but we underscore that students are free to express their faith so long as they're not disruptive, they don't infringe on the rights of others, and they comply with the same time, place, and manner of restrictions applicable to other nonschool-related students' expression. And we reaffirm that public schools may teach about religion, and we finally get over the myth that religion can't be discussed in public schools. They can teach about religion as opposed to engaging in religious indoctrination, of course, where appropriate as an important part of the complete education.

The consensus on what the law requires on key issues involving religious expression in public schools is spelled out more fully in these earlier joint statements, I would say, has helped transform how many public school districts apply to First Amendment. In 2000, three of these consensus statements were sent by the U.S. Department of Education to every public school in the United States, and that provided school leaders with a legal safe harbor for addressing conflicts over religion in schools.

Now having worked with hundreds of school districts on these issues for two decades, I can say with confidence that common ground reached on a national level frequently enables local communities to adopt policies and practices that enjoy broad public support. That's why this matters. The success in the school arena is a powerful



illustration of why the work of finding common ground is essential for the civic health of our country. Based on the track record of these past agreements, I'm convinced that this new joint statement covering a wide range of issues can play and will play a significant role in preventing litigation, encouraging civil discourse, and promoting public understanding of the religious liberty principles of the First Amendment.

At a time of rapidly expanding religious diversity, ongoing culture wars over religion, disagreement is a welcome reminder that America still works. Seeking common ground is not an attempt to ignore or minimize differences that are deep and abiding but rather a reaffirmation of what we share as Americans across our differences. As Father John Courtney Murray famously reminded us years ago, the First Amendment principles that sustain the American experiment in religious liberty are not articles of faith. We have those in our different ways. But they are, he said, are Articles of peace. And now more than any time in our history it is imperative that we live and model these Articles of Peace and our life together as citizens of one nation with many faiths, with many cultures, with many people.

Thank you very much.

(Applause)

MR. STERN: My colleagues, all of whom I've worked for many years, have a knack for saying the right thing; I have a knack for saying the wrong thing.

MR. DIONNE: That's why he's invited to be on panels. It's very essential --

MR. STERN: It's a radical tendency in some of my family, and I guess that much has come down.

Like much else in American life, our church/state separation and religious liberty are today highly polarized topics, or at least so it appears, presently intending for influence for those who see religion as an indispensable pillar of the state and those who would confine religion to the purely private sphere. Debates over highly charged issues, such as same sex marriage and abortion, touch on, in both popular discourse and both freedom from established religion, and freedom of religious practice, these debates seem to take on more intention and not less as time goes on.

The abortion wars are 35 years old and show no signs of abating. The abortion war and the battle over same sex marriage are today complicated by competition between those who prize equality over liberty or those who prize liberty over equality. The emergence in the last five to ten years of visible and active secular movements with litigious organization elan -- it's good for lawyers -- have added a new dimension to American debate over religious presence in the public sphere and square leading to challenges to a variety of practices, including manifestations of civil religion that others' concerns for religions liberty have long ignored. Accommodation of religion, once routinely accepted, is now challenged.

Life in short was simpler 30 or 40 years ago, or so it appears in hindsight, when all we thought about was prayer and Bible reading in the public school, aid to parochial schools, and the provision of unemployment benefits, to Saturday

Sabbath observance. As E.J. mentioned, the issues I have mentioned in which we are divided are important and, understandably, divisive. I don't think we ought to shy away from vigorous debate, nor do I think that the country cannot survive some unbridgeable gap between those of differing views on the place of religion in public life. One argument I cannot stand and hear repeatedly is: If you raise that argument, you'll be divisive. There are arguments in a democracy.

What would be damaging, however, I would paraphrase and pick up on an argument that others have made -- is -- and to paraphrase titles of report from the days of the civil rights trouble -- would be the widespread impression that we are too unbridgeable a society, separate and unequal, over religion and the law. The joint statement we are releasing today should, at a minimum, dispel the suggestion that such a gap exists, or at least that it's unbridgeable entirely.

As you can see, there is broad agreement on important points, if not always on what the law should have been but what it is. If people knew what the law was, they would be less likely to be attentive to mischievous demagogues of right and left who either damn mills (phonetic 01:32:07) in secularism or religious fanatics for capturing the law of religion in state. The actuality of our law is quite different and more moderate than the demagogues on either side portray it. That's plain from our statement.

Charles has said it's not the first joint statement of the '80s; there were two important ones under the Unequal Access Act (phonetic 01:31:49) and holiday observances in the public schools, as well as religion in the public schools, the ones he

mentioned in 1990 and 1995. It was the joint statement on religion in the public schools, and one on teaching Bible and religion in the school. The impact of these statements is not found in their impact in litigation. They don't show up there. Rather, they show up, as it were, in the absence of litigation, as Charles has said. They also helped changed the political atmosphere. The joint statement on religion in the public schools was credited by some legislators as derailing the push for a school prayer amendments in '90s by diffusing the politically potent but completely inaccurate statement that God has been driven from the public school.

Finally, on a personal note, the effort to produce the joint statements have, over time, led to personal or organizational relationships that would not have existed and, frankly, to depths that would not have existed as well but for the drafting process. It is a matter of great regret in the polarization of the last decade there has not been efforts to create joint statement. I think that's led to a centrifugal force -- centrifugal -- the other way, I never took physics. That's it, centrifugal force in the organizations which have drawn apart, I think, over time.

I've been asked and tasked with the impossible job of explaining to you the rules on access to public land for private religious speech, question 17 and 21. If I don't understand this particle, I'm not quite sure I'm going to explain it. It gets more and more confusing every time the Supreme Court clarifies it.

There are four categories of cases that you have to keep in mind. The first is access by government to its own property for the purposes of displaying its own

symbols, including religious symbols. The important constraint here is the establishment clause as construed in cases involving crosses in the Ten Commandments. We now know, however, that the government is under no obligation to allow balance, or competing symbols, on its own property if it excludes everybody except itself.

The traditional public forum is the second category. This is land set aside by tradition, whatever that might be, for public expression such as parks or sidewalks. Here mere access by religious groups poses no establishment clause problem: The Pope can say mass on the Great Lawn or in New York, or on the Mall here, and there's no establishment, there's no unconstitutional aid to religion.

On the contrary, the exclusion of religion only from these places would be a violation of the establishment clause, the free access clause, and the free speech clause. However, reasonable time, place, and manner restrictions, limit on the number of people attending, with a decibel level of sound amplification equipment, are permissible in this context.

The third category is the designated public forum. Here whose land, or the property of the state, need not make available by tradition to public debate but deliberately chooses to open to public debate. If it does so intentionally, not by accident, it's created a designated public forum subject to the same rules as applicable to traditional public forum. In particular, in a designated public forum, content-based with no discussion of politics or religion, or a viewpoint-based restriction -- Catholics are allowed,

Protestants aren't -- are impermissible. But again, time, place, or manner restrictions are okay.

In a nonpublic forum -- say a jail -- it's public property which is kept close to the public, and here the government's free to exclude everybody from speaking; however, if it chooses to allow some people in, it cannot engage in viewpoint discrimination, will allow people who favor government policies to speak in this nonpublic forum but not others.

Now here comes the hard case -- and don't worry if you don't understand it 'cause I think it's completely unintelligible. The hard case is what's sometimes called -- you'll love this -- the limited designated public forum. That is, the government limits and sets up an otherwise nonpublic forum for limited speech purposes, say, a forum for discussion of community interests or community issues, or if it's a community group, may it then say it will exclude worship services because these do not fall within the parameters of the intention of the open forum. The forum is for discussion of community issues and you are praying? Well, that's not within the bounds of the forum we set up.

Well, first in the access side is, is that content-based exclusion? We're excluding a particular kind of content worship services? Or is that viewpoint-discrimination; we're excluding the viewpoint that God can help us through our problem? I don't understand this. Don't expect help. Some courts say yes that sort of -- when you set up a designated forum, you can limit what sort of speech you'll allow; other courts say no you can't. Some courts say you can do it on the basis of contents but not viewpoint.

Of course, they can't agree on whether -- and the Supreme Court's cases are in complete disarray -- as to whether an exclusion of religion is an exclusion of viewpoint or an exclusion of content. And you can plausibly understand it either way.

We didn't even attempt consensus on this issue; it was hard enough to understand it. There is a case presently pending before the Supreme Court which is supposed to clarify but will undoubtedly muddy the waters still more in which a Christian group, Christian Legal Society, was denied access to a law school forum -- that is, a student club rule that allowed people to meet in classrooms and use the e-mail to announce a meeting -- because, strangely enough, the Christian club thought that people who belonged in those offices should be Christians. And they said, no, our designated limited forum is only open to clubs that are open to everybody. And, of course, there's a sexual orientation issue as well.

And the way the case gets litigated is whether this is a designated public forum in which case these are content and viewpoint-based discrimination, or whether it's a designated limited forum in which case these are the rules that marked off the forum, and therefore you fall outside the forum and you can be excluded. Look for greater confusion by the end of the term on this area of the law.

I think it's a singular accomplishment of Melissa and her drafting skills that she manages to state in the document all these rules in deceptively simple and coherent fashion. I cannot resist before Colby gets up to speak that the real miracle here is that he got out at all because, unlike the rest of us, Colby a) knows the rules of English

grammar and cares about them, and b) knows the rules for citing legal cases and cares about them. Most of the rest of us put both of those out of mind as soon as we graduated elementary school and law school, in reverse order. We, nevertheless, overcame his objections to get a statement out.

(Applause)

MR. DIONNE: Colby, if you prefer to talk to us about the rules of grammar, that's okay. You can do that. I used to laugh at the rules.

MR. MAY: Thanks a lot. I tend to agree that sometimes the rules of grammar can be maybe more ascertainable than some of the rules that we've put forward in this joint statement. But I do, like all the others, I want to thank Melissa particularly first for her leadership on this. It wouldn't have happened otherwise.

And to be on the panel with Charles Haynes I think is also a distinct privilege because Charles in many ways, as we discussed earlier before the panel began, I regard him as kind of the godfather of all of these events where, you know, we need to try and work things out and see what the common grounds are. And every time I've participated and been given the privilege to do so, I can tell you that, lo and behold, there's really pretty good common ground that exists between the two.

But lots of times in the fever of the moment, if you will, and it seems that those of us who are engaged in a litigation in these areas are sort of avoiding this constant fever. It's difficult to sort of calm down a little bit and say, well, okay, we could agree with those sorts of things.



But, clearly, as has been noted, when it comes to the intersection of religion in government, there's really no doubt that the signers of this document disagree over what the law should be but in many ways the law in this area is clear, and we wanted to be able to give you some insights and some direction on how that happened.

Now, just as surely as we are all in the throes of trying to figure out what the law should be, we're all also actively trying to get the courts to shape the law in the ways that we actually want it to be. And so Marc made allusion to a case that my organization, the American Center for Law and Justice, litigated where we recently obtained a unanimous decision from the United States Supreme Court just this last February which noted that governments may in fact accept permanent monuments from private parties, including the Ten Commandments monuments, and they may in fact display those monuments without otherwise opening up, shall we say, this public forum which obligates government to allow divergence or contrary points of view to be done.

Now, not surprisingly as we say, many in the academy, if you will, opposed us on that, and yet we very much are about trying to carve the law and push it in the direction we think it's appropriate in order to fulfill the aspirations of the Founders and to recognize the importance of religious liberty.

So when we come together of what the law currently answers these basic questions regarding, what really brought us together is our shared conviction that religious liberty and the freedom of conscience are in fact fundamental. They are inalienable rights for all people. And it's our hope that the efforts to find consensus that

will stir others to engage in another and similar efforts to find that common ground, as Charles Haynes has said many times over the years.

Now, in keeping with the format of this morning's kind of panel, I just -- let me briefly poke at some of the specific issues. And it's when we get down to the nitty-gritty of the various issues that we seem to litigate or have controversy over, that's when all heaven breaks loose, you might say. In my home when I was growing up, my grandmother didn't like the other word, so she always made sure that she said "now when all heaven breaks loose." She was an optimist, and she wanted the good things rather than the other things you might say.

So let me briefly discuss a few of these. I want to touch base on the national model of prayer at certain public events, including inaugurations of elected officials and the like; prayer at the beginning of legislative sessions, and then why government does not violate the establishment clause when it hires military and prison chaplains whose obvious function, of course, is to perform religious services and meet the religious needs of those who are in the government's charge. These are questions, generally 23 through 25, in the joint statement that you have.

Let me state, categorically, the national motto In God We Trust does not establish a state religion or impermissibly endorse religion over nonreligion. This is so because, as the courts have noted for many, many decades, the motto which originated during the War of 1812 has become so deeply interwoven into the fabric of our civil policy

that its primary effect is one of ceremonial patriotism, and it bears no real resemblance to government sponsorship of a religious exercise.

Now even in the fact of this general consensus, however, the Freedom From Religion Foundation recently challenging engraving of the national motto at the new Capitol Visitors Center here in Washington, so stay tuned, we'll see what happens as that case may develop itself out.

Turning to the customary practice of prayers at inaugural events, here, too, the courts have a general consensus that the practice can be traced back to the founding of the country, and that this distinctive history and ubiquity allows such prayers to be treated as ceremonial exercises and not as government sponsorship of religious exercise.

In addition in this context, because of inaugural events involve the individual choices of the elected official as to what's going to be in or not in the particular ceremony or event, the oath of office notwithstanding, the courts have usually given deference in those decisions.

And then the last reason we can say with some confidence that inaugural prayers are permissible is that the courts just simply have not been convinced that inaugural prayers are used to affiliate the government with religion or to otherwise proselytize.

Now, regarding legislative prayers, it's also clear that they are permissible and legislative bodies may employ chaplains to provide prayers during

legislative sessions. And this is so for the reasons stated in *Marsh v. Chambers* back in 1983 which is, in light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society to invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, an establishment of religion or a step towards establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.

Now, this acknowledgement, however, is not open-ended, and there continues to be litigation in the area in the lower courts, particularly over when official prayers, particularly at the local, county, and city levels, may become impermissible government attempts to proselytize or advance any one religion or disparage any other religions or belief. Therein lies the rub, so you have to be careful. While in the general it may be permissible, in the particular all heaven may break loose, in the words of my grandmother.

Now, lastly, in the context of military and prison chaplains where there's controversy over when and what if any limitations may properly be placed upon the religious exercise and prayers of those officials and what they may offer, there is a general consensus that the government may and indeed perhaps should hire such chaplains and make them available as an accommodation to the individuals that are in the charge of the government.

Going as far back as the Supreme Court's decision in 1963 in *Abington v. Schempp*, a decision which struck the mandatory Bible-readings in public schools, the courts acknowledged that when the government requires someone to be somewhere -- in this case the context of armed forces and prisoners -- when they have to be in specific places for specific times, and they're otherwise denied the opportunity to practice their faith at the place and time of their choosing, then, in order to avoid infringing their free exercise guarantees, the government should provide substitutes where it requires that person to be.

Each of these categories -- the motto, prayer at public events and inaugurals, legislative prayers, military and public chaplains, prison chaplains, they're -- of course, they have nuances. We've tried to address those nuances to the extent appropriate in the joint statement, and we think that that will be helpful, as you may actually get the friction points of these things playing out in the day-to-day life. That's why I commend the joint statement to you.

I look forward to today's discussion on this. And again, I want to thank every member of the panel on the opportunity to be able to participate in the drafting of this document.

Thank you very much.

(Applause)

MR. DIONNE: Thank you so much. I must say, by the way, as a Catholic of a certain age I particularly appreciate the question and answer format. This is sort of the

Catechism of Law and Religious Liberty. And I very much appreciate a point Marc made that American law is more moderate, fundamentally, than demagogues would have it, and religion has not been driven from the public square, and we are not moving down the road toward a theocracy. And I think that the First Amendment itself invites balance since it says that Congress shall make no law establishing religion or interfere with its free exercise. And I always think, instructed by my lawyer Melissa that a lot of our arguments are really arguments about the two halves of the First Amendment and how we can live by both of them.

I want Melissa to join me in moderating this, and we're going to bring in the audience fairly quickly. But for people who sort of are not all that familiar with this area that you all are very familiar with, they might come to this and say, okay, all you smart lawyers have actually managed to agree on what the law says, what good is that, actually? What difference does a document of this sort make? Will it ward off unnecessary litigation? Might it comfort both the more secular and more religious Americans that the law makes more sense than either of them might imagine? Could you talk about why this matters?

I sort of suggest why I think it matters, but I'd be very curious who would like to take that first. Maybe Melissa since you were responsible for everything except the grammar, which Colby was --

MS. ROGERS: No, no. And I want to emphasize again before getting to that question that this document was drafted jointly by all these people. We did it together, it was a joint draft. So --

SPEAKER: Stop blaming the rest of us, Melissa.

MS. ROGERS: Oh, we're all in this together. And I want to say that all these topics any one of the drafters could stand up and talk for two -- and probably all day about. So I want to bring the folks that are with us at the front of the room, they're part of the drafting committee, into the conversation quickly.

But to really reiterate quickly, and then I'll turn to my colleagues, I do think that this statement that there has been just an incredibly brain-dead discussion about religious expression in American public life in so many contexts, and part of that brain-dead nature of that conversation is that there are so many false claims about religion in public life -- just the idea that religious groups can't meet on government property, just to cite one.

Now, they can't always do so in every context, but, of course, they can in many contexts, and this document, even though the law is very complicated, as Marc described, makes that point clear. And so I do hope that this document will help us to have that more productive discussion about religion's role in public life, which is so important to all of us whether we're religious or not religious. It's important to all of us, and we ought to have an accurate and productive discussion. But I want to --

MR. MAY: It's (inaudible 01:12:21).

MS. ROGERS: Yes.

MR. MAY: I give concrete examples, in answer to E.J.'s question. Just so you know that this is not a waste of time, and this actually gets out there and is used -- it remains to be seen how this document will be used -- but earlier documents, if you look at school district policies around the country, just go and look, what do you have on religion in schools and school districts that have worked on good policy -- and there are quite a few now -- you'll see quoted verbatim a lot of these earlier consensus statements, including the one Marc drafted on religion in schools, including the one Buzz Thomas and I negotiated earlier in the history of this. You'll see, actually, they use these agreed words and this language because this is their safe harbor. Because groups on one side and the other have signed onto these agreements, they have now a basis for developing policies and the courage to do it. That plays out in preventing a lot of fights in those school districts.

And you hear about the fights and you hear about the lawsuits, but you don't hear about the ones that didn't happen. And I can tell you a lot more would happen if it hadn't been for this consensus. So it's a preventive kind of measure.

The Bible guide that we put out in 2000, and again Marc was instrumental in that as well, and I can tell you that state boards of education have used these guidelines, the consensus guidelines, to filter requests for Bible courses that come in. Are they constitutional? Are they not? They look at the guidelines we drafted. The



Christian Legal Society is on there, the National Association of Evangelicals, People for the American Way, groups that often litigate each other over this Bible issue are signed onto the guidelines so the state board, the local board, has some way of just telling is this "legit," is it not under current law? So that Bible guide has been very significant.

And the more recent one that just a small number of organizations worked on, but still important on how two deal with sexual orientation in public schools, it's more of a process guide; it's not a prescriptive legal guide, but it's how do you get down to a conversation about this and maybe find some common ground. And I can tell you there are a number of school districts around the country that have used that process and that guide to find some common ground on that very difficult and volatile issue in their public school.

So those are some concrete ways in which this kind of agreement can actually change live in local communities in ways that bring people together rather than send them into court or into bitterly divided argument.

Let me try another couple of examples from the broader community. There is a rumor around that there's a petition at the FCC to delicense all religious broadcasters, and that it's constitutionally required. I think it's probably generated more letters to the FCC than anything else. The latest efforts to raise cable rates may change that.

This statement dispels that. The recent cite over health care has led the bishops to take a position on two things which ought to have been controversial. One is the abortion issue, of course, and the other is the whole idea of there being some

communal responsibility to care for the poor. But one of those was said to be a violation of church and state; the other gets passed over in utter silence, and you get a false debate about whether the church has any right to be heard on a public issue.

These things then generate controversy that has no basis in law leave aside public policy, have no basis in law, and yet you routinely see claims that the IRS ought to be investigating this, or the FCC shouldn't be doing that when it's all nonsense. And that's a waste of public energy. It creates disagreement and sometimes bordering on hatred. It's unnecessary. It doesn't serve a useful function. There's a legitimate debate about the role of abortion in the health care program; there's a legitimate debate - not when I have much sympathy with -- about whether the government has any responsibility for health care, legitimate debate about how much religious broadcasts, the radio spectrum -- all those things are legitimate to debate.

Which are not legitimate to debate are the issues that I've said are the ones that are being debated. And we hope that this statement will clear the air and we can have real debate that's important enough to do.

MR. MAY: Yeah, I would just add that, you know, when we think about the joint statement on religious expression in the public schools, I can't tell you how many times we do demand letters to various schools and school districts, and usually that's the first place we direct them to saying perhaps you should take a look at the joint statement and educate your general counsel as to what the law really is in this area, and then we

can avoid this whole dispute and not get involved down in the weeds in issues that have long since been resolved.

So, you know, they do have a very practical day-to-day impact and usefulness, and that's obviously what you hope. Now, that's not to say that when Marc is involved in a piece of litigation soon over some issue that's discussed in this joint statement that I'm going to be able to cite this saying, well, Marc, you said in the joint statement such and such because that's not what this otherwise is --

MR. STERN: There is a wonderful story I heard in law school. There was a fellow, Lou Loss, who wrote a book on securities law. And he gets up to argue a securities case representing a plaintiff for a corporation, and one of the judges leans down, and he says, "But, Professor Loss, in this book Loss on Securities Law, the opposite conclusion is reached.

And Professor Loss looks up and says, "Ah, that's because you're looking at the 1st edition. Wait till the 2nd edition comes out."

MR. DIONNE: But before we turn first to some of the other signers who may want to intervene, and then any other questions, I want to ask one other question. I was struck by questions 8 through 11 where in answer to the question, "Does the First Amendment place restrictions on the political activities of religious organizations," the answer is a flat no. And that's important. But then, obviously, we immediately get into the IRS restrictions on political activities of tax-exempt organizations. That boy that said, "I soon expect to see a church called St. 501-C3 out there somewhere."

Could you talk about that distinction, because I think the, to the lay reader, the first no might answer all the questions. In fact, it doesn't, but that the 501-C- - - how much does the 501-C3 issue have to do with the First Amendment, and simply, how much does it have to do with tax law? Who wants to --

MR. STERN: I'll do that. Here we get into another complicated Supreme Court set of doctrines. The answer that the churches are unrestrained in their political activity rests on at least two Supreme Court cases where the court has said that explicitly, and it has been said by both conservative's Chief Justice Berger and by liberal's Justice Brennan. So there's no question about that constitutional question. The question is when they become too successful and actually persuade the legislature, then there are some restrictions. But at least the churches are free to say whatever they want.

There are two competing doctrines. One is the doctrine of unconstitutional condition. I can't give a government benefit and then say you can only get it if you give up on some other constitutional right. So, for instance, in 1957, the Supreme Court said if you give a tax credit or deduction to veterans, you can't take it away from veterans who happen to be on the left of the political spectrum because that's an unconstitutional condition to a right. You can't make the excise of one right a condition on waiving a constitutional right. That's one doctrine the Supreme Court's enunciated.

The Supreme Court's also enunciated another doctrine. It's like -- what's the Newton second law? -- For every doctrine there's a counter doctrine. The counter

doctrine is that the government doesn't have to subsidize speech it doesn't like. Its most famous case, of course, is *Russell v. Sullivan*. The Supreme Court said you don't have - the government is entitled to fund, you know, contraception and not abortion, and it's not an unconstitutional condition to ask Planned Parenthood to say you can't perform abortions with our money. And that's the same doctrine that says we're not going to subsidize libraries and allow access to child pornography, or it's the same doctrine that would allow a municipality which gave out art grants to turn down a racist play.

These two doctrines cannot be coherently expressed together, and that is why your question is a very good one. On the one hand the government doesn't have to subsidize -- which is how the court takes it, although it's debatable as well -- the government doesn't have to subsidize with a tax exemption or a tax deduction speech that's directly political, partisan political activity.

On the other hand, that sounds like a classic unconstitutional condition. The only thing I can say to you is when the issue was presented directly to the Supreme Court, not in the context of 501-C3 in churches but 501-C3 also has a general ban on not-for-profits which state the e exemption from engaging in partisan political activity and a substantial amount of lobbying, there's an exemption from the substantial lobbying activity for veterans' groups. And nonveterans' groups challenged that as, amongst other things, as an unconstitutional condition. And the Supreme Court said, no, the government, when it gives out its tax exemptions, is free to decide what speech it will subsidize and what speech it won't.

So we think that -- although some people are challenging it -- I think it's pretty clear that the court has said this falls on the subsidy side. But why it's not an unconstitutional condition remains an open question that there's no good answer for.

MR. MAY: I would just add that the statutory side of this is that the government can award certain benefits to various groups for perhaps fundamental First Amendment rights like freedom of religion. And it has done so in the context of tax exemption. But it's created this sort of dual track under which in the context of lobbying activity described, perhaps broadly, as kind of political issue advocacy but not an actual endorsement of the candidate, you can do that, and even churches can do it, all 501-C3s can do it. You're just not supposed to do a lot of it, you know. So where do we draw that line? So we get this confusion there.

And then the second side is but there's an absolute black-letter ban against actual endorsement. Vote for, vote again so and so. But there, you know, having established those two sort of goals on either end of the playing field, you get down to, well, is something sort of a suggestion of an endorsement and therefore it is an endorsement, and it violates the 501-C3 restriction? And, you know, the IRS -- I've kidded Melissa, who has considerable expertise and experience in this area as well -- I've kidded her that they have this sort of this policy that says, you know, without actually endorsing or using any express advocacy on behalf of the candidate, you can still utter coded words which we will then intuit to mean an actual endorsement.

So, for example, if you say support, you know, life at all levels, or don't forget a woman's right to choose, the government might intuit that actually what you're doing, then, is you're endorsing the candidate who's pro-life or the candidate who's pro-choice, and therein now you've violated the prescription. And so it becomes a very opaque kind of maze that you've got to work through against the two clear goals you can endorse, and you can advocate but you can't do a lot of it.

MR. DIONNE: Does somebody have a mike? I just want somebody to come in the front so we can transition to the audience. Go ahead.

MR. STERN: Can I just say one other thing?

MS. ROGERS: Just real quick Marc, it won't surprise you to know that there are people in the drafting committee that have problems with some of the IRS rules, others who feel that the rules are reasonable and well stated. So again we're stating what the IRS says about its rules and not necessarily agreement about whether that's the best way for it to articulate its rules. And also, E.J., just to give the quick answer would be that these restrictions that are present in the IRS code flow from the request and the attempt to maintain tax-exempt status and not from the First Amendment, and those things are often confused. People think the First Amendment sets down these rules and lobbying and political activities, instead it is the attempt to seek and maintain tax-exempt status that triggers these obligations and a substantial amount of lobbying and no electioneering.

MR. MAY: I just want to make one comment. The nasty secret is that these rules are largely either self-enforcing or not self-enforced. The IRS the last time I looked which was a couple of years ago I think took on 100 cases a year of 501(c)(3)

violations for political activity. I can't remember the last lobbying campaign they understood, probably Planned Parenthood in the 1930s. So most of the enforcement is self-enforcement. There has been an effort first by Americans United and more lately by others to turn 501(c)(3) into a political weapon as people catch the other side in a violation and then report it to the IRS which both because of secrecy and because everybody forgets after the election is over, nobody bothers to notice that the IRS has probably done nothing about it. So you need to keep this all in proportion as well about its real impact in the world.

MR. DIONNE: I was thinking by the way of coded words. Many preachers give sermons about hope and change. I wonder of those would have been coded words in 2008?

MR. MAY: Only if somebody was listening to the sermon.

MS. ROGERS: Speaking of that, E.J., can I just recognize that Joshua Dubois and Michael Weir from the White House Office of Faith-Based and Community Initiatives have joined us? We welcome you to join in the conversation and we're so glad you're here.

MR. DUBOIS: Thank you to the entire drafting committee. This is just a wonderful document. One might think that current law speaks for itself, but unfortunately in too many cases it doesn't. So the fact that you've been able to dig into these very complex issues and find some real common ground and a coherent statement across various ideological lines is really tremendous so that we will certainly be reading this quite closely. I'll share it with my colleagues in the government. Ben O'Dell from our office is going to stick around for the entirety of the conversation. Thank you. I really appreciate the great work that's been done here.



MS. ROGERS: Thank you so much, Joshua, and thank you, Ben and Michael for being here. We appreciate it very much.

MR. DIONNE: That really wasn't intended as a transition to Joshua. I was inspired by Colby. Go ahead, Melissa.

MS. ROGERS: We want to bring you into the conversation and the drafters into the conversation. I wonder if we can get a few questions. If you have a question, raise your hand and we will encourage the drafters to answer the questions with us. I see a few hands going up.

MR. DIONNE: Could we go to our friend from the Baptist Press over there? A journalistic preference; I think that's permitted me.

MR. MAY: It's content-based discrimination.

MR. MARUS: I'm Rob Marus from the Associated Baptist Press. Two questions. Number one, and probably Melissa and Charles can best answer this. What was the most difficult of these affirmations to get consensus on or the most difficult area of the law? Number two, one of the benefits of the public schools statement is that the Clinton administration sent out that guidance to all public schools. Is there a proactive part of your plan to get this information to local governments or all the various entities that are affected by this consensus statement?

MR. DIONNE: And for a follow-up, can you even agree on which was the most difficult to put together?

MS. ROGERS: Probably not. In fact, I could go down the line and take nominations for what people thought was the most difficult.

SPEAKER: Wouldn't you say work place?

SPEAKER: Yes, work place.

MS. ROGERS: Work place we did struggle with and here I have to point to my colleague Nathan Diamont was stalwart in keeping us going on the work place issues, and we did as you can tell arrive at a statement of those principles and I thank Nathan for his encouragement and also Rich Fulton is here and is going to talk about these issues a little bit more in a moment.

SPEAKER: Melissa, it's fair to say that at one point can I say outside the committee we almost didn't put it in there.

MS. ROGERS: Yes, because we were having trouble.

SPEAKER: Because we couldn't find shared language on what actually the law says. Nathan said you can't produce this without -- I think it was really the pushback that you can't produce a document on these issues, people will say where is the work place?

MR. DIONNE: Could somebody explain that, because I think a lot of people are unfamiliar with why work place religious liberty issues are so palpable.

MS. ROGERS: I might be a good time to turn to Rich because he's going to talk about that part of the statement. And I haven't forgotten your other question, Rob. We'll get to that.

MR. FULTON: Thanks. This was actually planned for me to come up here at some point, so we've done it sort of spontaneously.

MS. ROGERS: Yes.

MR. FULTON: Since I've got this post I want to make an introductory remark which is to say as always I think Melissa has been unduly modest in her role in getting this about and I think the day may come when Melissa together with Maimonides and Chaim is seen as a great codifier of law. That's assuming the law stays as it is long enough for that to come about.

I also want to note that as we found in earlier similar exercises on religion in the public schools, the application of the Equal Access Act, there has been common ground in all these areas including with respect to the role of religion in the work place than we might have expected, and it's important not only to understand the commonalities for compliance reasons, but also for the sake of comity in a pluralistic, multifaith nation. But nevertheless, coming to the direct question that was asked of me, I think one of the reasons why the religion in the work place issue proved to be so contentious and difficult but not withstanding that there is I think a set plate of set law is that there are differing values as to how we're supposed to deal with religion in the public square and that in the work place a lot of this really came to the fore.

I think two of those area where there is some conflict is that there is agreement that you don't get to impose religion on others so you don't get to use the government as a way of imposing your religious perspective, and similarly in the work place there are protections in place to avoid having a particular religious expression imposed on you. And yet on the other hand, none of us is entitled to walk around in a bubble in which we are never exposed to religious perspectives that are contrary to our own religious perspective. And I think those are broad values that I think we share and yet as one struggles with how that is realized in terms of the application in the work place, I think that's where a lot of these differences came out as we were struggling with what is the right language to capture these contending streams in terms of value and law.

Having said that, let me go to the part which I was charged with which was to talk briefly about what the group concluded are the commonalities. I put this in two broad categories. One is the discrimination versus accommodation category, that is, what are the distinctions between not discriminating against people on religion and yet at the same time how do we deal with the obligation to accommodate religious practice.

And the second of the distinctions that exist between the government work place and the nongovernment work place. I think those were the two broad themes that this statement dealt with.

Firstly, secular nongovernmental employees may not discriminate against employee or potential employee because of his or her faith or lack thereof. Employers are responsible, and this falls within that broader category, to assure that employees are not subject to harassment in the work place based on their religious affiliation and beliefs or lack thereof. Having said that, employees who hold supervisory positions have special responsibilities in the work place because they have at least some power to hire, fire and promote and otherwise control the employees they supervise and they must understand that there religious or antireligious expression can be coercive even if it's not intended to be, and that's a broad principle that applies to both of course government and nongovernment employers. I would call that the equal treatment prong of how we deal with these issues.

Then you do with the accommodation principle which by definition means that in some cases employers are going to be obligated to do things for religiously observant employees that they wouldn't otherwise have to do so that the nondiscrimination principle sets a floor, but on the other hand I like to talk about the existential reality of employees who have religious observances that if they are not accommodated will in practice mean that they being treated differently than other employees because they're not able to function under the equal treatment rules that would otherwise be applicable to employees. That is covered by Title VII which provides that you have to provide a reasonable accommodation of a religious practice of belief unless there's an undue hardship for the employer which has come to be understood as including the undue hardship on a religious worker's fellow employees.

What those terms mean is of course a subject of debate and concern. Some of us in this room have worked on an effort to strengthen the existing law so that it is more protective of religious practice and belief than the current law as it's been interpreted by the Supreme Court, but even the existing law it must be clear is not a nullity and even with some unfavorable Supreme Court opinions there is an obligation for employers to provide that accommodation and there are cases that employees win when the employer fails to provide that accommodation. So it does provide if not enough protection in the view of some of us a certain degree of protection that needs to be recognized. The kinds of cases where this comes up are cases having to do typically with somebody who needs an accommodation in terms of not working on certain days because of holy day observances, typically the Sabbath or because they're required to be groomed in a certain way, wear a beard or wear certain clothing, and in some cases, a relatively small class of cases but nevertheless out there as well, cases in which somebody has a religious objection to certain duties -- but other duties that they could perform that would be within the parameters of the job. Again that's the equal treatment pillar and then as modified by the obligation to accommodate.

Then very briefly turning to the impact of these principles on the government, the same rules typically apply, but of course the government operates as well under a set of statutes and constitutional rules that create another layer of law to consider. The government may restrict personal speech including religious or antireligious speech which is understood to be part of an employee's work responsibilities, so in that respect the government is in fact parallel to a private employer in their ability to regulate what goes on within the work place. But there are also free speech First Amendment implications as well which may to some extent limit the ability of the government to regulate speech and certainly where there is speech taking place

outside of the place of employment where the free speech protections would apply to an employee that might not otherwise be the case would not be the case for a private employee.

The final area that I'm going to touch upon is in terms of these constitutional protections and how they apply to an employee is the expression of religious perspective in the work place. Here we go back to this equal treatment notion which is of course modified by the constitutional protections of free exercise of religion as well as statutory protection so that sometimes the Establishment Clause may require the government to restrict an employee's religious or antireligious speech so that it does not appear that the government is endorsing particular speech. For instance, the example given in the document is a worker at a city toll booth can't be handing out religious tracts or antireligious tracts for that matter to people as they come through and pay their toll. On the other hand, in speech that takes between employees, you can have speech that touches on religious topics between employees at least up to the point where one employee says to the other please stop talking to me about these matters in which case issues of harassment in the work place could also come into play.

There has also been some discussion in looking at these issues whether or not the Religious Freedom Restoration Act plays out in providing an additional layer of protection to employees in the government work place besides Title VII, but there is some controversy as to whether or not the Religious Freedom Restoration Act which was intended to provide a statutory application of the Free Exercise Clause after the Supreme Court diminished those protections and whether that applies to government employees. That I think the courts are going to clarify or not clarify for us in the future. Thank you.

MR. DIONNE: Richard, thank you so much. I think that answers the question as to why it was very complicated, not complicated in the sense that you didn't explain it well, complicated because the issues are really hard.

SPEAKER: The second question.

MS. ROGERS: The second question, that phase one is completion of the document. We have completed phase one. Phase two is already underway but certainly will be a substantial effort to disseminate this especially to states and localities, to mayors, city council members and all kinds of governmental officials who have to deal with these questions daily. So we hope this document will be a real service to them and there will be an aggressive attempt to get it out to those folks.

MR. DIONNE: And thanks to Joshua Dubois we know it got to the White House somehow. This lady had an urgent question and Holly was supposed to come in also. Correct?

MS. ROGERS: Absolutely. Yes.

SPEAKER: A couple of weeks ago when we had the incident with the man who had the explosives on the airplane, the "New York Times" had done an article on this university I think in London where they were saying that this particular university's Islamic group is a hotbed of whatever. I was wondering in the United States if we have any cases where a public university if there's a religious group where there are attempts to close a group down because of speech that's going on in the group, and then what are the legal issues involved? Let's say they are not espousing terrorist activities or anything like that, but let's say that the government is monitoring these people and finding a common connection.

SPEAKER: Going back to our youth of those of us on the panel, this is not an entirely new question. In *Haley v. James*, when the SDS was at its height in the

1960s and 1970s, colleges tried to shut down SDS chapters because somebody in the Students for a Democratic Society might some place have urged bombing something at the university having to do with the war in Vietnam or just the establishment and that's a different establishment than we're talking about today. Some small public university in Connecticut banned an SDS chapter and the Supreme Court said they couldn't do that absent a showing of direct disruption in the university. We have a separate set of rules that deal with incitement to violence and the current rule which underenforced by the courts is that unless the incitement is direct and likely to result immediately or relatively immediately in violence it's protected. In the case involving Brandenburg v. Ohio, somebody gets on TV with a gun and says here where the ADL offices are and there are too many Jews and they're too powerful and we ought to go get some, and the Supreme Court said that's not direct and immediate enough to constitute an incitement to violence. I have nothing against shutting against the ADL I want everybody to understand as that's the competition.

SPEAKER: He's just joking.

SPEAKER: I'm just joking.

MS. ROGERS: The ADL are valued drafters of this document.

SPEAKER: Then subsequently there are cases involving threats to the president where the same rule is applied. However, that's at the Supreme Court level. If you look in the lower courts, there has been either an erosion or a return to sanity depending on your point of view. The most notable case in the last two decades was the Nuremberg site, it was an antiabortion group that had a list of abortion documents and their addresses with the caption "Wanted Dead or Alive" and whenever somebody was shot there would be a line drawn through them, and the question was was that an incitement to violence. Under Brandenburg, I thought that was a fairly easy case that it



was not because it didn't actually call on somebody to be shot. The Ninth Circuit held that it was and ordered the site shut down, and you can find lots of cases like that with regard to threats to the president. That's sort of the answer. Our tradition generally is that we are extraordinarily tolerant of hate-laden speech, nowhere else in the world do they have that degree of tolerance.

SPEAKER: The only thing I would add to the remarks is that there is a whole cluster of issues about free speech on campuses today, public and private universities, which is a topic we don't need to get into. But I think one of the questions include are some of the speech codes being adopted on college campuses both public and private, are they indeed in the case of public universities constitutional or do they go too far in restricting speech. So I think it's fair to say that within various universities and colleges there's a debate going on about how to limit speech that others might find offensive that people don't want to hear. At some colleges you actually have free speech zones being set up. Some of these have been struck down already in the courts.

SPEAKER: All of them that have been challenged.

SPEAKER: Those that have been challenged.

SPEAKER: Do some states, say Texas, have more limits on speech?

SPEAKER: No. It's entirely idiosyncratic and most of it comes from the other direction. The genesis of the hate-speech codes were an effort to ensure diversity. When minorities were first coming on to campuses there was coded speech that was taken to exclude those minorities and the universities responded with these speech codes, and also some sexual harassment was intended to be covered by this. Wherever they've been challenged they've been struck as overly broad. If one wanted to deal with a situation like that in a serious way then one would be I think best off dealing with a particular situation as it arose rather than try general rules which almost inevitably will

strike too broadly. If you're not targeting somebody, you're writing very broadly and you're going to encompass a lot of speech which we ought to tolerate. So if somebody could show that somebody is actually engaged in lawless activity, lawless incitement, you could deal with that, and I don't think the speech codes are a productive way of doing it.

MR. DIONNE: Melissa suggested before we turn to Holly we go to one more audience question. Did somebody want to add something?

SPEAKER: I was just going to give you a fun case that the court had about 2 years ago. I can't remember the exact name, but the moniker goes Bong Hits 4 Jesus. There was during the time of the Vietnam war a decision known as Tinker and it stood for the proposition that students don't check their First Amendment rights at the school house gate. As Marc indicated and explained pretty well, the preference is to have a pretty wide tolerance in this area. However, in Bong Hits 4 Jesus at least at the high school level the idea that you might be perceived as advocating an illegal activity, that's something that interferes with the pedagogical purposes of the school and therefore they have every right to go ahead and discipline shall we say for that kind of activity. To the extent that you might have a group that's advocating some form of criminal activity or violence and the like, you may find that same kind of trend at least at the high school level may come into play there.

MR. DIONNE: By the way, for the uninitiated, do you want to translate Bong Hits 4 Jesus?

SPEAKER: No, I think I'll leave it alone.

SPEAKER: That was another thing the Supreme Court couldn't get clear.

MS. ROGERS: Morse v. Frederick. We had a question over here?

MR. RITTER: Bob Ritter with the Appignani Humanist Legal Center. As co-counsel in *Newdow v. Roberts* challenging the infusion of religion into the presidential inaugural ceremony, I'd like to express some concern about this report in the sense that I don't see the nonbelief community represented on not just the panel but in the drafters themselves. I think we would express great concern that the answers to some of the questions favor the belief community over the nonbelief community. I'd also like to ask Colby a question in terms of his interpretation of the *Summum* decision. I was there and certainly heard your boss. My understanding is that the case was about *Summum* trying to put its monument into Pioneer Park in Pleasant Grove City and the court held, the first part I would agree with you, that the government can choose which monuments it wants, but it did not settle the issue with respect to the Fraternal Order of Eagles Ten Commandments Monument in Pioneer Park as to whether that was permissible. It left that for a latter day. In fact, Chief Justice Roberts said to Jay, pick your poison. Essentially you have either a free speech problem here or you have an Establishment Clause problem. So perhaps you could address that issue.

MR. STERN: The answer is true, they haven't yet addressed, and whether or not it properly comes before the court because certainly in that case there was no bringing of the Establishment Clause issue that you made reference to. My reference to the unanimous *Summum* decision is to make clear that governments are allowed to accept private permanent monuments for placement in public display. In this particular context, that was the Ten Commandments Monument. It stands to this day in Pioneer Park in the city of Pleasant Grove in Utah, and I think that's actually the right decision because it goes to limit down at least in the public fora area what it is government can do. Can government speak on its own as it does when you walk by courthouses and government buildings all over, or go to Jefferson's Memorial, in so many

places it's time out of mind in this city particularly you have religious expressions and when the government does that, the government has the right to speak. Whether or not that then crosses the line and it becomes an Establishment -- you're right, that would be my mother would say where heaven will break loose and we'll have all sorts of different issues about that. But it's a pretty big plate to try to take on and say government can never be in the position of having a monument, a permanent display which includes a religious message and that's the point we're trying to make.

SPEAKER: The reason why the court didn't reach the issue was a litigation decision by Summum. They had a legitimate Establishment Clause claim. The Tenth Circuit had virtually invited it to be litigated in an earlier round of litigation and for reasons that escape everybody, they chose not to raise it. I wrote the only amicus brief in that case supporting Summum. I thought that the boundary between public speech and nonpublic speech in this context was much murkier than the court had it and that it's not clear that this is not really the government speaking and it's a hybrid category and I think the case should have been decided in different ways.

As to your larger point about the drafting committee, we did have several groups participate all throughout and some of us come from groups that have distinguished separation its history, the Baptists, my own organization, Americans United, ADL, it's not as if those points of view were not -- and my recollection is that Americans United for Separation of Church and State participated through large parts of the drafting process.

MS. ROGERS: Yes, and if you'll look at the list of the signers you can see that there is Jeremy Gunn who was formerly with the ACLU, Judith Shafer .

MR. RITTER: -- member of those organizations and I'm very familiar, but I said nonbelief. My point is that I think you might get a different result of you accepted

nonbelief groups like the American Humanist Association, like the Freedom from Religion Foundation, like American Atheists, like the Center for Inquiry. Thank you.

SPEAKER: If what you're doing is accurately stating the law, you're accurately stating the law and the gaps between the groups were sufficient here to ensure that that wouldn't happen. If you're talking about what the law ought to be, you obviously could not make a statement about what the law ought to be without including that growing segment of American life. But if you're describing what the law is, it seems to me a lot less urgent to have every single group represented; Alliance Defense Fund isn't here either.

MS. ROGERS: Having said that, this is an ongoing project and we want to include everybody in the conversation so I welcome those voices as well. We tried to reach out as broadly as we thought we could in this project, but the conversation continues and we value those voices as well. Let me call on Holly Hollman, a great friend and a wonderful lawyer who works for the Baptist Joint Committee for Religious Liberty. She's general counsel there and has filed amicus briefs in many of the cases that we've discussed and is going to talk a little bit about the statement's Q and A's on government expressions or displays that include some kind of religious element. Holly, thank you for being with us.

MS. HOLLMAN: Thank you. Again the questions led straight to the nice transition we wanted to highlight here. Let me join others in thanking Melissa for her strong leadership, but also just for being such a good model for civil discourse. All of us really appreciate that and it's an honor to have participated in this with my colleagues, coworkers and friends.

I have to say one thing. I think everybody has talked about the value of this project, but I think we just demonstrated the value of this project. I had my little notes

here because I'm going to cover questions 18 through 21 to clarify the difference in Sumnum and these cases addressed in the document. When we go off record, when we go off document, there's a lot of disagreement about what these cases mean, but when we discuss them as we have in the Q and A here, we came to some clarity about the Sumnum case being decided in the free speech realm where you have to decide who's talking and the different analysis that would be applied in the Establishment Clause arena where government cannot promote or advance religion.

Looking quickly at questions 18 through 21, these questions address religious expression on government property in the context such as grave markers on government-owned cemeteries, in religious references and scripture on monuments on government property. We started talking about a little bit temporary holiday displays and art galleries. As you all know, controversies in these areas are very common and I would say many find the court's rulings very difficult to understand. I think they are much more subject to ridicule and some pretty good jokes, they are very difficult to explain but it is possible, and I just urge you all to look at this section. The first question about individual grave markers on a government-owned cemetery is a great example of how the court looks at the overall context. What is the religious message? When you're talking about references to religion on individual grave markers, the context shows that this is a reference to the individual person's faith, as opposed to the government making a statement about Christianity, Judaism or whatever symbol you might find there, and the government has to go to great lengths to make sure that all religions are represented so that there's a wide variety of those symbols. So that's a good example of religious expression where the context shows that it is more related to the individual than the government.

The next is the question about whether or not the government can erect temporary holiday displays. Everyone would know that, yes, in some circumstances as we see so many articles and controversies about that, and in our answer there we talked about how the court looks at the context and tries to avoid any kinds of displays where the government is actually endorsing religion as opposed to the kinds of displays the court has upheld where there are a number of different messages being promoted that represent a particular season on the calendar. These cases of course aren't easy, but there are some useful guidelines in these cases.

Question 20 goes beyond the holiday context and the temporary disputes we have to the permanent monuments, and while this is a difficult area for line drawing, there have to be lines to be drawn. Our best evidence of what the court says what the law is, is found in two decisions that were decided on the same day in 2005, the McCreary County v. ACLU case and the Van Orden v. Perry case. Those are the two Ten Commandments cases in which the court decided that one display did violate the Establishment Clause, the McCreary County display in Kentucky, but they upheld the monument in Texas in the Van Orden case. What I can say about our agreement is that there was a lot of back and forth on what the law says here and we do fight about what the law should be, what would be the best guideline for the court to put forward, and I would say that the Baptist Joint Committee submitted a brief and we did not get our analysis approved by the court which would have had some different result. But the court in these two cases issued two distinct cases, 137 pages, 10 different opinions, and yet our drafting committee got this down to a page and a half. So I think for all of you who haven't gotten around to reading the 137 pages and would really like to understand what does the court look at, what is the law, then I urge you to look at that because I think what you will see is context is important, you have to look at the purpose, and you have to look

at the overall effect. And while the law may not be satisfying, it is a little more clear than is often exaggerated in our debates. Thank you.

MS. ROGERS: Thank you, Holly. I just have to say that I was there when the court handed down those decisions on the same day, Justice Rehnquist was sitting, and he read off all the names of all the opinions, and as Holly said there were multiple opinions. After he read the long list of names of all the plurality and the concurring and dissenting he turned to his colleagues and said, I didn't know there were that many people on this court.

MR. DIONNE: Marc just pointed out that there were more opinions than actual justices on the court. By the way, I'm tempted to ask Holly to tell us one of those religious liberty Supreme Court jokes.

MS. HOLLMAN: The best one is a fine Baptist lawyer who's a friend of the BJC said, Holly, he just cut to the chase. If the material is hanging on the wall and easily removed, take it down. If it's made of concrete in the ground it's too much trouble. But that is not at all the line that the court drew and there is much more helpful guidance if you read those couple of pages.

SPEAKER: I just wanted to use what Holly said as an opportunity to remind us that the law is one thing. What's right is often another. In this country, one of the great struggles about religious freedom in my opinion is to live up to these principles and ideals in a way that it is fair to everyone, that really allows everyone into the conversation to go back to your point. For example, the Wiccan community in this country, a growing community, tried for years to get approval for their symbol to be on headstones in Arlington and others. They were stonewalled. We can say all we want about that the law requires that they should have been treated like all the others, there's a whole list of groups that had approved symbols, but it just didn't happen for years and



years and years. So a lot of what goes on in the country in terms of treating people unfairly in violation of religions freedom the law doesn't address, we address, and how we respond to people who are in minority groups or people who haven't had a voice and that's one of the challenges. This statement is kind of the floor, but I think the real challenge for religious liberty is to live up to these principles in ways that listen to people. And I would say also that Native American folks if they were sitting up here would say when is this going to apply to us? You say here's what this law says in this area, in this area and this area, but there's a long string of defeats for Native Americans in the courts when they raise their religious freedom issues in spite of the fact that the law seems to protect almost everybody else on a lot of the same similar kinds of issues. In these examples I think we're talking about here an important agreement on what the law says, but then we need to think about what's the right thing to do as Americans to live up to the First Amendment and that's another challenge.

MR. DIONNE: I was thinking of gradual improvements on the religious liberty front, being stonewalled is better than being stoned.

SPEAKER: That's true given our history.

SPEAKER: E.J., being stoned was the highest thing.

MR. DIONNE: Who wants to save us, please, the lady back there.

MS. BANKS: Adelle Banks, Religion News Service. I know that some of you on the panel are deeply involved in litigation and you're saying you hope this will reduce litigation, so of all the questions here, which area do you hope you'll really see fewer cases in the courts?

MR. DIONNE: Excellent question. Are you all working against your own self-interests is what the lady is asking?

SPEAKER: I'd like to see religious symbol litigation go away. There are now reasonably clear rules that lawyers can apply, and taking into account Charles's correct notion that what is legal is not necessarily what's right, these are very bitter debates about very little and I can think of cases where plaques stood on the corners of courthouses for 75 years and then somebody challenged it. Yes, you understand why some people might be offended, but nobody was for 75 years. On the other hand, you have states now enacting legislation putting up rather trivial Ten Commandments monuments disguised with other documents of American government most of which are eminently forgettable for the simple purpose of sticking it in other people's eyes. These generate intense litigation, lots of controversy and nothing of any substance at all with regard to the place of religion in American life in any serious way. So if that whole area of the law disappeared because we simply were more measured in where we put up symbols and then more measured in our response to whatever passed through that filter I think we would all be well ahead of the game.

MR. DIONNE: Does anyone else have a favorite area that they want less litigation in?

SPEAKER: I would say generally we hope we're out of business. We didn't necessarily sign up to be lawyers. You heard it here.

SPEAKER: Some of us are not old enough to retire yet.

SPEAKER: We didn't up to necessarily engage in conflict over minutia and sometimes the law seems to the outside observer to sort of end up there. I've heard Judge Janice Rogers Brown who sits here in the D.C. Circuit say that the distinction between the Kentucky Ten Commandments and the Texas Ten Commandments is that in Texas it faces the weather and is rained on, but in Kentucky it was inside a building and that this was the analysis that she was willing to provide to it, so it sort of reduces at

level to be what? Can that really be something that the law makes these distinctions on? And sometimes it seems that way. So ultimately, the reason that you spend a considerable amount of time, and as noted, it took about 4-1/2 to 5 years to finally get to the place where we have what you have before you, so the hope is that we can begin to develop further and further consensus and be out of business so I can just do trusts and estates and life will be beautiful.

SPEAKER: Most of the lawsuits in my opinion about religion and public schools, the area I'm most interested in here, are frivolous and ridiculous, and I think if they would read the sections here as brief as they are and then look more deeply at the early agreements, I think many people might not file those lawsuits. So I'm hoping this is another run at reducing some of the silly fights. There are some legitimate fights over religion and public schools, areas we still disagree on about student speech before captive audiences, about the constitutionality of some of these bible electives and so forth, so I'm not saying that it isn't important for people to go to court when they need to. But many of the other kinds of cases involving issues including religious music and holiday programs and so forth I think could go away if school districts not only knew the law but would actually write and adopt policies in their own districts that reflect current law and then went on to let their teachers and administrators know what the law says. Then teachers, administrators and parents for that matter might stop fighting over what is already settled. So I am hopeful that this statement will be another opportunity for public education to get this right.

MR. DIONNE: Could I ask a question inspired by the gentleman from representing if I could say the broad community of nonbelievers which is does the fact that there are many more open atheists or nonbelievers in the country, people who say it more outright and more organized, does this have an effect on either litigation or the

nature of the law? And a follow-up question to that, and this goes to some work my friend the political scientist John Green has done, that in some ways you've had more polarization in this area because you've had simultaneously the rise of a very active including intellectually and in the law an evangelical community and the rise of a larger community of nonbelievers, what effect does that have on what we're looking at here and the future of this?

SPEAKER: A huge impact. I think in my lifetime we are now before the second major revolution in the relation between religion and society. The first was sort of epitomized by Will Herberg's Catholic, Protestant, Jew, where without saying so the mores were Protestant and everybody else sort of fit in somehow in that larger rubric. That disappeared beginning in the 1930s and that continued through the 1960s. I think now, and of course some would say the resurgence of Evangelicals coming into the public sphere in the 1960s was the second, but clearly now we face I think a major realignment and it's an important discussion. It's going to lead to very bitter litigation. It already has. Like every group that comes in, there's a learning curve so some of the early litigation by the secular groups has not necessarily raised the most serious of issues.

But at heart, the claim of secularists is the whole society and the government are so permeated with religious influence that we start at a disadvantage, it's not a level playing field is I think sort of the phase you used before, and we come to different results. Some in that community have expressed themselves of the view which is very popular in Europe, sort of taken for granted in Europe, that religion is a purely private matter, it's confined to home, and once you enter the public sphere we all enter on a secular, even basis. I think that's going to be the great fight over the next 20 years. How much of it will end up in litigation is hard to say because this court, first of all, has

guttled the Free Exercise Clause as a legal principle and because it at least as currently figured is not terribly active in looking to referee these larger social disputes with doctrines like standing and pleading and so on, but I think in legislation and in public debates that is going to be the great subject for the next 20 years.

You can see it in my view most clearly in the debate over same sex marriage where on the one hand you have people saying this is the traditional way we understand religion and you're banishing us as it were from the public sphere if we can't say that our understanding of the marriage -- on the other side you have claims that are dominating the discussion on the internet that the ban on same sex marriage is a form of establishment of religion and that's not a technical argument. There's a profound argument about what the nature of society is and how much role religion can play in the ordering in the most fundamental ways of society. I think that is for the next 20 years going to be a huge and very hard to manage debate.

MR. DIONNE: Thank you very much. I want to call on Shabbir Mansuri who is the founding director of the Institute on Religion and Civic Values because I might have added to my list that if Will Herberg wrote his book now, it would be Catholic, Protestant, Jew, Muslim, Sikh, Hindu --

SPEAKER: The title would be longer than the book.

MR. DIONNE: The title would be longer than the book. Shabbir, if you could grab a mike there and join us.

MR. MANSURI: This indeed is on a personal level an honor because this journey has been a very long journey especially a journey on my personal level that began, and I don't want to embarrass my daughter who's sitting in the audience here who read her social studies textbook when she was in the sixth grade in 1989, is when I began to address the issue of teaching about religions in our public school textbooks and

established an organization called the Council on Islamic Education which now has changed its name to the Institute on Religion and Civil Values. But I wanted to make a brief comment as to those of us who are in the trenches how the First Amendment Center's documents had actually helped us. For 15 years, Charles I want you to know, what you had given us allowed us to interact with the publishers when we reviewed the textbooks based on teaching about a principle that you had published, working with teachers to develop the teacher's workshop again was the basis for that, and creating documents, the publications that have become now the model in Europe for example as to how do we teach about what is religion in our public schools.

So it's really been an incredible experience on a personal level and a journey indeed that I am privileged to be part of, and I just wanted to thank you for giving us this incredibly important framework within which we can function. And I do know as a practicing Muslim that the Shura that Muslims talk about consensus based on consultation, we have institutionalized that process. So showing us the world out there especially Muslims in major countries as to how do we as a nation using this process of consultation and then creating a consensus based agreed upon principles that we live by. Thank you for that.

MR. DIONNE: Thank you very much. We have just a couple minutes left. I want to first ask if any of the other signers want to say anything before we close. I also realize that I'm not sure we formally introduced Holly who is general counsel to the Baptist Joint Committee. So I would just like to give everyone on the panel a chance to make one last comment before we close on any of the 30-odd questions here. Richard, do you want to say something?

MR. FULTON: I just want to pick up on the last point that we were discussing which is about where we're going from here. I think the history of this country

is of groups that have been discriminated against and victims of intolerance coming forward and demanding that they be treated on an equal basis with other parts of the society which is right and fitting. The danger is, looking forward and just picking up on some of the themes we heard, that those who have been the victims of discrimination and of intolerance, maybe there's a phenomenon that could explain this, but that they themselves then demand not to be put on parity, but that they want to seek to go to the public square to impose values in a way that was imposed upon them in the past. I think the challenge to all of us, and I'm not singling anybody out in this hall in saying that, but I think there's that phenomenon, and I think the challenge for all of us is to find a roadmap that builds on the principles of the First Amendment which tries to balance so that in fact we have a public square in which we can all be present and all participate and which those who have particular religious beliefs can be full actors as well as those who do not and that's I think the great challenge for us on a going forward basis is to create that welcoming public square.

MR. DIONNE: Thank you. That's a wonderful comment. Anyone else?

SPEAKER: I just want to follow on what Richard said, and I don't know if we introduced Richard properly either, Richard Fulton of the American Jewish Committee, who spoke earlier.

MR. DIONNE: And has worked with us on a lot of great projects.

SPEAKER: A lot of these projects. I just wanted to underscore that it seems to me that the great challenge in the 21st century in the United States, one of the great challenges, I rank it very high, is how we're going to live with our deepest differences, particularly our religious differences. As we grow more and more diverse religiously, how are we going to do that? It can't be of course by somehow imposing someone's religious or philosophical perspective on everyone else. The ground rules for

living with deep differences have got to be embedded and drawn from the Constitution of the United States, particularly the First Amendment. That's our civic framework for living with one another and the current law is part of that framework. I think the challenge for us going forward from this agreement is to help Americans understand the ground rules, the civic ground rules for bringing people into the conversation, for working for common ground, for debating our differences, but with civility and with respect. And I think we need to work much, much harder on the civility front and that's why I think this project is so important not just because of the substance, because it models that the civil ground rules work if we use them, if we try.

And one last point. Forrest Montgomery who was general counsel for the National Association of Evangelicals for many years and was a key voice in those early agreements, Forrest Montgomery, when we got to an agreement years ago on religious liberty in public schools and so forth, we got to the end of the agreement and he insisted that we add some language like this, and this is what he said we should add, even when our differences are deep, all parties engaged in public disputes should treat one another with civility and respect. But he said we have to add in here that being a part of this conversation, finding common ground, does not mean that you compromise your deepest convictions. Our civic commitments are important agreements, but our deepest convictions and our many ways are our religious convictions or our nonreligious philosophical positions in the First Amendment and these ground rules protect us to bring those into the conversation and engage one another and where possible to find common ground.

SPEAKER: Crucibles are interesting things and what they require is a considerable amount of heat and energy in order to figure out what it is we're cooking here and such it seems to me is the nature of the diverse pluralistic society that is the gift



of what our Founding Fathers gave us. They talked in terms of the world being unordered liberty, that there are certain things that are required in order for a civil and a constructive society to go forward. Among those are a way in which you can vent your views and your desires for the aspirations of the country and do it in a manner that ultimately ends in some kind of a consensus, you cook it down and eventually you get to some consensus. In that process lots of times you won't ultimately be fully satisfied, but it's a lot better than the alternative if you will and the alternative many times has driven man to do other things that I think most of us or all of us in this room would agree are not particularly constructive. So our hope is that we are part of the crucible process which is continuing to define and otherwise give contour to what it means to be an American, what it means to have a civil society that allows us to have ordered liberty, and a civil society that allows us to be able to bequeath to our children the same kinds of opportunities and gifts we were given, and if we're really fortunate, more than what we were given. So even time we are given opportunities to participate in this kind of a thing, it doesn't always end with a kind of consensus or joint statement that this one does, but nevertheless, the process in and of itself I submit to all of you is very, very important. I would encourage all of you to do the same. It's a joy to see you all here today and I want to say running the risk of not offending anybody, but God bless you because that means something to me.

MR. DIONNE: Thank you very much.

MS. ROGERS: Thank you, and I wanted to say again to thank Rich for his eloquent words, and we could have asked him to talk about any subject in this book, but I am grateful for his leadership especially on the work place issues and explaining those and am grateful for all of the leadership that he has provided on church/state issues, and he himself has led a common-ground process on social services on the American Jewish Committee and has been a real leader in another area where we

sought consensus and where it was difficult and hard, but the AJ Committee and Rich Fulton led us to a happy ending result.

I also wanted to just point out, and E.J. maybe you can get back to me, this web version of the statement is posted on the front page on the Center for Religion and Public Affairs and you can see that web address on the back of your booklet.

MR. DIONNE: Do you want to say it for the C-SPAN audience?

MS. ROGERS: It's [divinity.wfu.edu/rpa/](http://divinity.wfu.edu/rpa/). I guess we need to work on that little bit.

SPEAKER: Google it.

MS. ROGERS: I hope that you will visit that and share it with your friends and neighbors and help us be a part of this dissemination work and this ongoing conversation which I sincerely mean is an ongoing project that is welcoming to those who would like to be a part of it. I also want to just conclude by especially thanking E.J. for participating in this and leading it so thoughtfully, and to thank each member who has contributed to this whether as a drafter or an endorser. It's not easy to do this work. It's hard. It's difficult. It's time consuming. It draws you away from many other things. And frankly, sometimes I'm surprised that we show up again for the next time. It's like hit me again. Here I am. I am deeply, deeply inspired by the fact that all of us will come to the table and that all of you return again and again to this table for conversation, for sharing views, and for the hope that we can find consensus together and that we can respect each other where consensus is not present. So let me thank you for inspiring me and for returning for that very important task as fellow Americans.

MR. DIONNE: Thank you, Melissa, and Marc, he said he was the specialist on inappropriate comments, but I think he has an appropriate or inappropriate close for us before we close down.

MR. STERN: One of the landmark First Amendment cases in the freedom of speech area arose out of World War I and Justice Holmes flipped his position on the protection of free speech. If you read his opinion and his writings, he flipped essentially because he didn't believe very deeply in anything and therefore who am I to decide what's right? I can't be sure. There are no certainties, so of course we should have open debate. One of the issues that every one of these processes raises for all of us or it should raise for all of us who do the drafting is how you balance between believing in nothing, can we just reach some agreement that everybody can live with and really holding true to one's principles? If one looks at the secular political world, the nonreligious world, there are two models floating around now, the people who don't seem to believe anything except what it takes to get me reelected and the people who believe so firmly in a principle that they cannot compromise and they would throw the entire government into chaos and paralysis rather than compromise an iota on principle. There has to be something better than those two models. I hope we've come some degree toward reaching that better model, but it seems to me going forward given the sharp differences that we face now in the area, that's going to be one of the very difficult ongoing projects to balance between deeply believing something and believing nothing and simply wanting to get along, and how we do that it seems to me is the great challenge of the next generation of people who do these sorts of statements. Hopefully it will be somebody else and not us, but that's what I think awaits us.

MR. DIONNE: Thank you. I will read one sentence in conclusion. Also [brookings.edu](http://brookings.edu) will link to the long Wake Forest site so you can look at this statement somehow. Just one sentence at the beginning of the report, the starting point for our dialogue and agreement is our shared conviction that religious liberty or freedom of

conscience is a fundamental inalienable right for all people religious and nonreligious.

It's the right starting point, it's the right ending point. Thank you all very, very much.

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## CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

Notary Public in and for the Commonwealth of Virginia

Commission No. 351998

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