REPORT from the Capital

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INSIDE:

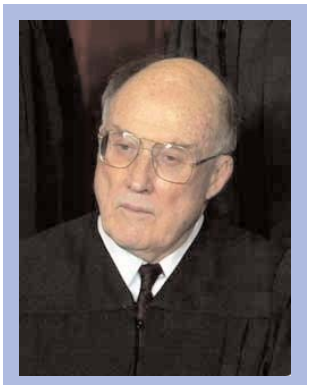
Rehnquist leaves important legacy on church-state decisions

Chief Justice William H. Rehnquist died Sept. 3 of thyroid cancer, prompting President George W. Bush to quickly shift his nomination of Judge John G. Roberts to replace Rehnquist as chief justice, instead of his original plan of having him replace Associate Justice Sandra Day O'Connor.

As part of his long legacy, Rehnquist was remembered for his influence on how the court redefined the line separating church and state. When he joined the court in the 1970s, he was at first a lone voice, but Rehnquist eventually mustered a coalition and moved the court toward allowing closer relationships between government and religious organizations, including vouchers to pay for schools that might include religious instruction. However, it did not move so far as to allow government-sponsored religious exercises like prayer in public schools.

"Unfortunately, Chief Justice Rehnquist was often hostile to church-state separation and the guarantee of religious freedom it provides," said Ayesha Khan, legal director for Americans United for Separation of Church and State.

"In an infamous 1984 dissent, he called Thomas Jefferson's wall of separation between church and state a 'metaphor which has proved useless as a guide to judging.' Rehnquist said it should be 'frankly and explicitly abandoned.'"



Chief Justice William H. Rehnquist (1924-2005)

According to Rehnquist, the court's contemporary readings on religion were wrong because of a misinterpretation of the original intent of the Constitution's Establishment Clause as envisioned by the Founding Fathers. Instead, he felt the Founders wanted to prevent the establishment of a predominant national religion, rather than make government neutral or prevent government from aiding religious organizations.

Khan said Rehnquist's death, and the departure of O'Connor—who was well known for her swing vote on church-state issues—places the court at a critical juncture.

"In the years to come, long-settled church-state law governing issues such as religion in public education, government endorsement of religion and taxpayer aid to sectarian endeavors could be reconsidered," she said.

In 2002, Rehnquist wrote the majority opinion in the historic *Zelman v. Simmons-Harris* case that ruled that a publicly funded school voucher program in Cleveland, Ohio, was constitutional even though vouchers were being used to pay for tuition at parochial schools where religious instruction was taught. In its ruling, the high court said that system provided a legal buffer from direct public funding of religion because the beneficiaries using the vouchers, not the government, had "true, genuine, and independent" private choice about where to use them.

"The Ohio program is neutral in all respects toward religion," Rehnquist wrote in the majority opinion. "It confers educational assistance directly to a broad class of individuals defined without reference to religion."

Rehnquist said the Ohio vouchers program allowed parents to make genuine and independent choices about schools to which they send their children, thereby avoiding a challenge under the Establishment Clause, which forbids the use of public resources for the advancement of religion. Justice O'Connor joined Chief Justice Rehnquist and voted with the majority in the case.

Some claim that the decision opened the way for public funding of other faith-based programs, including those with religious content, with the voucher mechanism being seen as a significant vehicle for supporting programs under President George W. Bush's Faith-Based and Community Initiative.

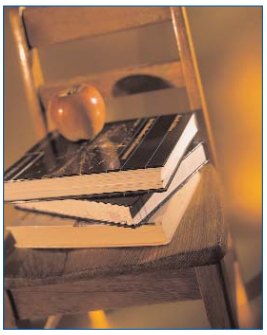
Justices Rehnquist and O'Connor did not always agree on religion cases before the Court. In 1992, Rehnquist voted with the minority in *Lee v. Weisman*, disagreeing with a majority opinion of the Court which held that including clergy-led prayers in a public high school graduation ceremony is unconsti-

(continued on page 8)

For teachers, faith in classroom requires delicate balance

Many Christian public school teachers see their vocation as more than a job. They view it as a divine calling. But some wrestle with how to follow Christ without stepping out of bounds.

Teachers should start by keeping in mind, and in balance, the two key clauses about religion in the First Amendment—"no establishment" and "free exercise," said Brent Walker, executive director of the Baptist Joint Committee for Religious Liberty in Washington, D.C.



The Establishment Clause forbids government-sponsored speech endorsing religion, but the Free Exercise Clause protects private speech endorsing religion, he explained.

As they talk with students in tax-supported schools who are required to be in their classrooms, schoolteachers cannot use their position to promote their faith. But outside the classroom, they do not give up their individual free-exercise rights, he noted.

Walker pointed to a guide recently produced by his agency that states: "As representatives of the government, teachers and administrators must remain neutral toward religion while carrying out their duties. For example, teachers do not have the right to pray with or in front of their students during the school day. They do, however, maintain their free-exercise rights outside the school setting and in situations where it is obvious they are acting in their individual capacities, such as praying and participating in Bible study in the teachers' lounge or at the lunch table." The issue guide is available at www.BJConline.org.

The Baptist Joint Committee—along with organizations including the National Education Association, the American Jewish Congress, the Christian Legal Society and the National Association of Evangelicals—endorsed two booklets produced by the Freedom Forum's First Amendment Center at Vanderbilt University—*The Bible & Public Schools* and *A Teacher's Guide to Religion in the Public Schools*.

Among other answers, the booklets offer a consensus approach to dealing with religion in public schools. That approach is expressed more fully in *Finding Common Ground*, a comprehensive guidebook about religion and public education, produced by the First Amendment Center.

In summary, a school may:

— Approach religion in an academic, but not a devotional, manner.

— Strive for student awareness of religions, but it should not press for student acceptance of any particular religion.

— Sponsor study about religion, but it may not sponsor the practice of religion.

— Expose students to a diversity of religious views, but it may not impose, discourage or encourage any particular view.

— Educate about all religions, but it may not promote or denigrate any religion.

— Inform students about various beliefs, but it should not seek to conform students to any particular religious belief.

—ABP

Bible curriculum for public schools draws criticism

A Bible curriculum that has been placed in hundreds of school districts across the country has been sharply criticized in a new report commissioned by a Texas religious right watchdog group.

The 32-page report, released Aug. 1 by the Texas Freedom Network, says the curriculum published by the National Council on Bible Curriculum in Public Schools "on the whole is a sectarian document" that is inappropriate for the public school setting.

Author Mark A. Chancey, an assistant professor of religious studies at Southern Methodist University in Dallas, concluded that the curriculum seeks to persuade students to embrace conservative Protestant views about the Bible and the "distinctively Christian" nature of America.

"The issue at stake here is not whether individuals or groups should hold such beliefs, but whether such positions should be presented as fact in a public school setting," Chancey wrote in the introduction. "The obvious answer—both constitutionally and ethically—is 'No.'"

Chancey argued the curriculum is not merely a study of the Holy Book as literature, but a course that "adopts a tone of assumed historicity when it discusses miracles and divine intervention." He also questioned its lack of inclusion of scientific literature.

"The curriculum's discussion of scientific issues also appears designed to support the theological claim that the Bible is completely accurate," Chancey writes.

The president of the Greensboro, N.C.-based council discounted the criticisms of the curriculum, which she said is used by about 1,100 high schools in 37 states.

"The Texas Freedom Network is a well-known, fringe leftist organization," Elizabeth Ridenour said in an interview Wednesday. "We've had over 300 school board attorneys approve it for their districts. We really don't put any credibility in their report."

In a statement released with the report, the Austin-based Texas Freedom Network President Kathy Miller defended the need for the critique.

"This curriculum is simply an attempt to use public schools to interfere with the freedom of families to practice their own faiths and pass on their own religious values to their children," Miller said. "The curriculum's supporters are demonstrating a fundamental misunderstanding of what religious freedom really means."

—RNS

REFLECTIONS

J. Brent Walker
Executive Director

Experiencing Baptists' roots and fruit in England

Attending the Baptist World Centenary Congress in Birmingham, England, this summer made me proud to be Baptist.

Here in the States we tend to think that all Baptists look and think like us. Spending several days with 13,000 Baptists from around the globe reminds us that Baptists come in all shapes, sizes and colors. For me, Jimmy Carter's powerful call for unity among our amazing diversity was the highlight of the meeting.

My two weeks in Birmingham and traveling through the Cotswolds helped me get in touch with my Baptist *roots*. Baptists originated as an outgrowth from English Separatists in the early 17th century. One group, under the leadership of John Smyth and Thomas Helwys, went to Holland in 1609 where they formed a Baptist church. Some of them became involved with and absorbed by Dutch Anabaptists, while others, led by Helwys, came back to Spittalfield, near London, and formed the first Baptist church on English soil.

Helwys authored a cutting edge treatise on religious liberty titled *A Short Declaration of the Mystery of Iniquity* (1611-12). In his inscription to the copy he sent to King James I were the audacious words that the King is a mortal man, not God, and has no power over the immortal souls of his subjects. For his trouble, Helwys and his wife Jane were thrown into Newgate prison in London where they later died.

On a side trip to Regents Park College at Oxford University, our tour group (ably led by premiere Baptist Historian, Buddy Shurden, and Georgia Baptist leader, Drayton Sanders) had the opportunity to view one of the four known extant first edition copies of *The Mystery of Iniquity*. What a powerful link with the past and a tangible connection to the first Baptist martyr for freedom.

We also traveled to Kettering to visit the Fuller Baptist Church. The church is named for one of its early pastors, Andrew Fuller (1754-1815). A strong strain of hyper-Calvinism resulted in an anti-missionary mentality among 18th and early 19th century Baptists. Fuller was the theologian who broke the back of hyper-Calvinism and cast the theological vision for the modern missionary movement. It was thrilling to step into Fuller's pulpit and to visit his grave behind the church.

We then traveled a short distance to Moulton to see the Carey Baptist Church, named for William Carey (1761-1834). A cobbler and school teacher by trade, Carey served as pastor in Moulton and was instrumental in forming Baptist Missionary Society in 1792. If Fuller was the theologian of the modern missionary movement, Carey was the leading missionary. He traveled to India in 1793 and spent more than 40 years—the rest of his life—in mission work there. The connection with this ordinary man who accomplished extraordinary things was overwhelming as we toured Carey's small, one-room schoolhouse and stood in his humble pulpit.

While in England I also experienced the *fruit* of our Baptist beginnings. Helwys' fight for religious liberty and the missionary enterprise spawned by Fuller and Carey have resulted in a world-wide Baptist diaspora. Baptists—from more than 100 countries and more than 200 unions—worshiped, studied and had fellowship together.

I participated in an insightful focus group session led by British Baptist Frederick George on persecution and religious liberty. Baptists from Germany, Lebanon, Sri Lanka, Georgia, Indonesia and Latvia all told stories of religious persecution in their countries and regions. I was struck by how, in 400 years, we could come from persecuting early Baptists to electing one president of the United States while Baptists continue to be persecuted in other parts of the world.

I found particularly striking the common thread among nearly every story from all these countries: the boot heel of persecution came not so much from the forces of hostile atheism as from the oppressive policies of established or semi-established state churches. The rights of conscience and the free exercise of religion have been denied throughout history and are denied today as much by people of faith seeking to impose their brand of religion as by people of no faith seeking to deprive us of ours.

These stories from around the world reminded me of the crucial importance of the two protections for religious liberty in the Bill of Rights—one prohibiting the interference of the free exercise of religion but the other keeping government from trying to establish religion. Without either one of these, religious liberty is endangered.

In a word, my trip to England encouraged me to bless my roots and to redouble my efforts to preserve the fruit of religious liberty for everyone in the world.

The rights of conscience and the free exercise of religion have been denied throughout history and are denied today as much by people of faith seeking to impose their brand of religion as by people of no faith seeking to deprive us of ours.

God vs. the Gavel:

Religion and the Rule of Law

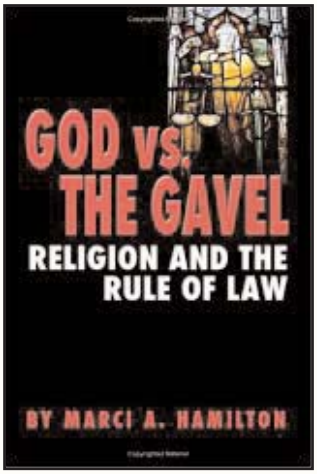
Reviewed by K. Hollyn Hollman

Marci A. Hamilton, professor of law at Yeshiva University's Benjamin N. Cardozo School of Law in New York City, wants to shake up the national discussion about religion's role in American society. In *God vs. the Gavel: Religion and the Rule of Law*, she does just that. Her aims in the book are two-fold: recounting harm done by religious actors or in the name of religion and promoting her approach to the law of religious accommodation.

Fortunately, the design of the book clearly delineates its two distinct parts. Less fortunate is the fact that the two parts share a common cover, improperly suggesting a greater connection between the two than is warranted.

In the first half of the book, Hamilton asserts that the United States—in its culture and its laws—embraces a naïve and ultimately harmful belief that religion is simply good. Hamilton, who sometimes refers to herself as "the leading expert on religious entities that break the law," sets out to strip off the reader's rose-colored glasses. To do so, she details numerous crimes of physical and sexual abuse by clergy.

Showing that religion can be contaminated and can contaminate proves easy in any one of several chapters. The general principle that laws intended to protect welfare and safety must govern religious entities is not controversial. The First Amendment, even in its broadest interpretation, creates exemptions from criminal statutes only in rare circumstances. Hamilton is right to correct those who would generalize about the duty to protect unpopular religious views, leaving an impression that such duty means tolerating harm to others. The law certainly does not require and should not countenance such a view. In fact, many of Hamilton's horrific examples include an appropriate (if not totally satisfying) legal response, making just that point.



By Marci A. Hamilton
Cambridge University Press
2005, 408 pp.

In addition to the chapter on children, part one's review of religion behaving badly includes chapters dedicated to marriage (religious voices in the debate), land use disputes (churches as thoughtless neighbors) and prisons (frivolous or excessive claims for accommodation). Throughout these chapters, the primary theme that religious institutions must be accountable to the law is supplemented by a secondary theme debunking the myth that religious influence is lacking in the public square. In some of these contexts, Hamilton argues convincingly that it is more accurate to say that religious voices dominate the debate.

Hamilton is well-known among church-state experts for her opposition to judicial and legislative exceptions that provide broad protection for religion. While her views on the Establishment Clause are similar to those of the BJC, her defense of the Supreme Court's 1990 decision in *Employment Division v. Smith* and strong criticism of recent legislative accommodations put her at odds with the BJC in the area of free exercise.

Part two of *God vs. the Gavel* focuses on that aspect of church-state law dealing with religious accommodation. Hamilton reviews "the history and doctrine behind the rule that subjects religious entities to duly enacted laws" and argues for a narrow approach to religious exemptions. In short, Hamilton believes the *Smith* rule—holding that the Free Exercise Clause is not offended by neutral and generally applicable laws that incidentally burden religion—appropriately avoids harm by religious groups. For her, *Smith* "brings religious entities under the horizon of the rule of law and in harmony with the public good." Like Supreme Court Justice Antonin Scalia in his majority opinion in *Smith*, to the extent that religious accommodations are allowed by law, Hamilton believes that protection is the job of the legislative branches.

Hamilton uses both history and modern jurisprudence to argue against judicially created exemptions to the law. Her views regarding the founding era are in stark contrast to the work of other well-known scholars, including the classic 1990 Harvard Law Review article by Professor Michael McConnell, who recently joined the 10th U.S. Circuit Court of Appeals. She clearly articulates one side in an important and ongoing debate in church-state law.

One of the difficulties with Hamilton's argument, however, is the precarious position in which it leaves free exercise rights. Having rejected judicially created exemptions to general laws, she often is highly critical of legislative accommodations as well. She proposes a simple three-part test for legitimate accommodation—religious accommodation must be achieved through legislation, not the judiciary; it must be consistent with the public good; and it must be debated under the harsh glare of public scrutiny. Yet, she takes great issue with legislation that many would see as passing such a test. She has been the leading critic of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which the BJC has ardently supported.

Despite Hamilton's prediction to the contrary, earlier this year the Supreme Court upheld the prisoner provisions of RLUIPA against a constitutional challenge. Next term, in a case about a government attempt to restrict religious practice, Hamilton hopes the Court will revisit the constitutionality of RFRA, this time as applied to the federal government. No doubt the discussion about the proper role of Congress and the courts in the protection of religious liberty will continue. As Hamilton notes at the outset of her book, "If religion was always good, religious liberty could be absolute." Since it is not, we will continue to debate where lines should be drawn.

Hamilton's success and persistence as an advocate have earned her views serious consideration. *God vs. the Gavel*, with its combination of cultural criticism and challenges to church-state law, ensures that she will continue to enliven the conversation about religion and society.

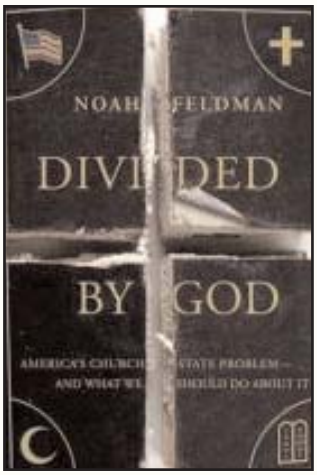
Divided by God:

America's Church-State Problem—and What We Should Do About It

Reviewed by J. Brent Walker

This year's must-read book is Noah Feldman's *Divided by God: America's Church-State Problem—and What We Should Do About It*. It commends itself not because Feldman is always correct—particularly in his prescription for a church-state settlement. Rather, it demands our attention because the book is provocative, historically accurate for the most part and well researched. Plus, Feldman's the interesting kind of guy you would enjoy getting to know: a 35-year-old, orthodox Jew ("Joe Lieberman orthodox," to use Feldman's words) who clerked for Justice David Souter; teaches law at NYU; and speaks four languages, including Arabic, fluently. Finally, Feldman's proposed settlement is at least a good-faith attempt to advance the important conversation about church and state and how Americans can bridge our deep differences concerning the relationship between religion and politics.

Feldman sees the current church-state landscape divided into two camps: what he calls "values evangelicals" and "legal secularists." Values evangelicals are not just born-again Christians but represent a variety of advocates of traditional moral values. According to Feldman, "What all values evangelicals have in common is the goal of evangelizing *for* values: promoting a strong set of ideas about the best way to live one's life and urging the government to adopt those values and encourage them whenever possible." (p. 7) They are heirs to the tradition of "Civic Republicanism" at the time of our nation's founding (Washington, Adams) and Puritans earlier who argued that religious values are indispensable to a good society, and that government must promote a common set of values and beliefs, many of them religious.



By Noah Feldman
Farrar, Straus and Giroux
2005, 320 pp.

Legal secularists, according to Feldman, are not "strong secularists"—who are atheistic or hostile to religion. Many have deep religious convictions but simply believe that government should be neutral towards religion, neither advancing it nor prohibiting it. Legal secularists find their heritage among Enlightenment thinkers (Jefferson, Madison) and many religious dissenters (Leland, Backus) who acknowledged the importance of religion and public morality but refused to assign government the task of fostering it.

These, of course, are ideal types, and most people fall somewhere in the middle or even on the far sides of Feldman's lines of definition. Some on the far right clearly want government not to promote broadly grounded moral values but to establish a theocracy of their choosing. Some on the far left are strong secularists in the sense of debunking religion and wishing to diminish its influence in the public square.

Nevertheless, it does little harm to think about these two groups—values evangelicals and legal secularists—as long as we realize they are inadequate to describe the totality of reality.

Feldman's survey of history is very helpful, particularly his recognition that the church-state battles of the founding era were fought over money issues—compelled taxes to support established churches or teaching of religion. And Feldman correctly points out that the overriding purpose behind efforts to eliminate public funding of religion was to protect "liberty of conscience." However, Feldman's tenacious focus on the rights of conscience of religious dissenters causes him to ignore other important principles that scholars, like John Witte, have observed also informed the religion clauses: disestablishment of religion, free exercise of religion, separation of church and state, religious pluralism and religious equality.

Finally, resulting from the author's emphasis on liberty of conscience and his understanding of the strong opposition to taxpayer-funded religion, Feldman propounds his church-state compromise: "[O]ffer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities." (p. 237) Reduced to a slogan, "[N]o coercion and no money."

Feldman argues that legal secularists ought to tolerate, if not welcome, an increased role of religion in public life, especially one that would reflect our pluralism and offer minority participation. At the same time, he hopes values evangelicals would be willing to give up funding for religious institutions and enterprises to ensure their autonomy and to avoid unwanted government regulation.

So far, pretty good—although I don't think either side will take the deal. Certainly I would welcome a reversal of the Court's recent jurisprudence that upholds school vouchers and that is close to approving most any form of direct financial aid to religious organizations. Feldman, however, goes too far on the other side dealing with religious expression and symbols. If he were only seeking to ensure that religion has a robust voice in the public square and urging more toleration for traditional, noncoersive, nonsectarian forms of "civil religion," I would be more interested. But Feldman is prepared to abandon the decades-old *Lemon* standard, as well as Justice O'Connor's endorsement test. In so doing, Feldman embraces a "coercion" theory that has been suggested by Justices Scalia, Kennedy and Thomas. Although Justice Kennedy's conception of "coercion" is broad enough to condemn many acts of governmental endorsement of religion, Justices Scalia and Thomas' notion of "coercion" is limited to actual legal compulsion where the government has to mandate a religious practice before the Establishment Clause is offended.

Thus, Feldman's Solomonic settlement, while perhaps interesting and well intentioned, calls for a paradigm shift in our understanding of church and state that would result in less, not more, protection for religious freedom and in the long run would only mask our deepest differences.

Chief among the BJC's concerns

K. Hollyn Hollman
General Counsel

News about the U.S. Supreme Court is changing at an unusually rapid rate these days. Soon after preparing the BJC's evaluation of Supreme Court nominee Judge John G. Roberts, and while still in the process of circulating it, the question changed. The Senate Judiciary Committee is not only charged with assuring that Roberts is fit for the Supreme Court, but now that he is fit to be the chief justice, one of only 17 in our nation's history.

While [Roberts'] judicial record on the First Amendment's religion clauses is non-existent, his advocacy as a government attorney raises concerns for those who value strong Establishment Clause standards.

By most accounts, this change in events raised the stakes for the nomination. By the time you read this, events at the Roberts hearing or news of another nomination may have well altered the landscape further. For now, however, it is worth considering more closely the newly announced nomination of Roberts for the chief justice position.

Our evaluation of the Roberts church-state record, based on the information released at this point, has not changed. In short, while his judicial record on the First Amendment's religion clauses is non-existent, his advocacy as a government attorney raises concerns for those who value strong Establishment Clause standards. The Establishment Clause has long been interpreted to require government neutrality toward religion. The position Roberts has advocated, if adopted by the Court, would allow much more government meddling in religious matters. (For the full evaluation, see www.BJConline.org.)

The fact that Roberts is now posed to fill a different post, one with the potential for greater influence, underscores the importance of the Senate Judiciary Committee's role in determining his judicial philosophy and commitment to specific constitutional values. The committee should examine the views of the doctrine of *stare decisis*, the doctrine of following prior decisions of the Court. His view of that doctrine and the circumstances under which he would depart from it would be useful in gauging the nominee's likely impact on Establishment Clause jurisprudence. For us, it is critical that the nominee demonstrate an understanding of the religion clauses and how they have protected religious liberty for all.

The church-state positions advocated by Roberts stand in stark contrast to Justice O'Connor's defense of religious liberty and particularly her understanding of the dangers of government's tendency to co-opt and corrupt voluntary religious practices. The positions Roberts has advocated are much closer to those of Rehnquist. Thus, in a sense, replacing a justice who is weak on Establishment Clause protections is less threatening to traditional constitutional protections than replacing one who appreciated them.

But it is hard to argue with the proposition that the position of chief justice has a greater potential for influence. The fact that Roberts, at age 50, could conceivably hold the position for more than 30 years is staggering. Some of the influence of the chief position is built-in. He or she serves in the highest judicial position in the country. In addition to serving as the administrator of the court and manager of the court building, however, the chief justice can shape the court in numerous subtle ways.

The chief justice runs the judicial conferences, where the justices meet together to determine which cases to accept for review and which opinions will be written. The chief has authority to circulate initial cases for discussion and offer the first votes. Generally thought to be the most significant influence of the chief is the ability to assign written opinions whenever the chief is in the majority in a case. If the chief is in the minority, the most senior judge in the majority assigns the justice to write the majority opinion.

According to many reports, Roberts seems to have many of the qualities that would serve him well as chief, building on some of the best of the Rehnquist legacy. He is widely viewed as having an agreeable personality, political gifts and disarming humility. Expectations are that if confirmed he will continue the leadership that Rehnquist provided for running the Court efficiently and fairly, with the apparent respect of the other members of the Court.

Of course, the news keeps changing, and until we have the next nominee, the real impact of this change on the Court is yet to be known.

Air Force issues interim guidelines on religion

The Air Force has released new interim guidelines urging its military members and civilian employees to protect the freedom of religion.

The guidelines, issued Aug. 29, were called for in a June report that investigated the religious climate at the Air Force Academy, an Air Force spokeswoman said, but affect the entire military force.

The rules direct commanders and other leaders to avoid actions and language that might lead to the impression that they are officially endorsing or disapproving of individuals' choices regarding religion.

Rabbi David Saperstein, director of the Washington-based Religious Action Center of Reform Judaism, called the guidelines "a welcome and necessary step toward addressing the recent and troubling reports of anti-Semitism and religious discrimination within the corps." But he added that they should be considered only a first step: "Their true value will not be realized until they are fully implemented."

The guidelines are "a welcome and necessary step toward addressing the recent and troubling reports of anti-Semitism and religious discrimination within the corps."

— Rabbi David Saperstein, director of the Religious Action Center of Reform Judaism

The guidelines relate to issues such as religious accommodation, e-mail communication and public prayer.

"Public prayer should not usually be included in official settings such as staff meetings, office meetings, classes, or officially sanctioned activities such as sports events or practice sessions," the guidelines read. During special, "non-routine" ceremonies, such as changes of command, "a brief nonsectarian prayer" is permitted, the guidelines say.

Lt. Gen. Roger A. Brady, Air Force deputy chief of staff for personnel, quoted in *Air Force Print News*, said that "[e]ach of us represents the government of the United States and the Air Force. ... Our responsibility to the Constitution requires that we not officially endorse or establish religion—either one specific religion, or the idea of religion over nonreligion—as the only way or the best way to build strength or serve our nation."

—RNS and staff reports

Appeals court cites Supreme Court in allowing Ten Commandments display

In a decision influenced by a recent U.S. Supreme Court ruling on a Ten Commandments display, a federal appeals court ruled Aug. 19 that a monument to the biblical laws can remain in a Nebraska park.

The Plattsmouth, Neb., monument was donated to the city in 1965 by the Fraternal Order of Eagles, which has given similar monuments to numerous municipalities.

The American Civil Liberties Union Nebraska Foundation argued on behalf of a city resident who claimed the display violated the First Amendment's Establishment Clause. A lower court agreed, as did a divided panel of the 8th U.S. Circuit Court of Appeals.

But the full appeals court reheard the case at the city's request and reversed both previous decisions. Writing for the 10-2 majority, Circuit Judge Pasco M. Bowman cited the Supreme Court's June decision in *Van Orden v. Perry*, which found a similar monument in Texas to be constitutional.

"Like the Ten Commandments monument at issue in *Van Orden*, the Plattsmouth monument makes passive—and permissible—use of the text of the Ten Commandments to acknowledge the role of religion in our nation's heritage," Bowman wrote. "Similar references to and representations of the Ten Commandments on government property are replete throughout our country."

Just as the case split the high court, the appeals court judges were not in complete agreement.

"The monument does much more than acknowledge religion; it is a command from the Judeo-Christian God on how he requires his followers to live," wrote Circuit Judge Kermit E. Bye in a dissent joined by one other judge.

"To say a monument inscribed with the Ten Commandments and various religious and patriotic symbols is nothing more than an 'acknowledgement of the role of religion' diminishes their sanctity to believers and belies the words themselves."

— Judge Kermit E. Bye, in a dissent to a recent appeals court decision allowing a Ten Commandments display in Neb.

"To say a monument inscribed with the Ten Commandments and various religious and patriotic symbols is nothing more than an 'acknowledgment of the role of religion' diminishes their sanctity to believers and belies the words themselves."

—RNS

Appeals court rules 'under God' in pledge is constitutional

A federal appeals court has upheld a lower court ruling that the recitation of "under God" in the Pledge of Allegiance by Virginia schoolchildren is constitutional.

"The Pledge, which is not a religious exercise, ... does not amount to an establishment of religion," wrote Judge Karen J. Williams in the Aug. 10 opinion of the 4th U.S. Circuit Court of Appeals.

"Accordingly, the Recitation Statute, requiring daily, voluntary recitation of the Pledge in the classrooms of Virginia's public schools, is constitutional."

Edward Myers, a Loudoun County, Va., man affiliated with the Anabaptist-Mennonite faith, sued the Loudoun County Public Schools in 2002, claiming that the recitation of the pledge violated the First Amendment's Establishment Clause. He had two children in the district's schools at the time and said he was concerned that the county was indoctrinating them with a "'God and Country' religious worldview."

He appealed when a lower court dismissed the case, saying the law requiring the pledge recitation did not have a religious purpose.

Williams affirmed the lower court's decision in her ruling, saying the pledge is a patriotic activity rather than a religious one.

"Undoubtedly the Pledge contains a religious phrase, and it is demeaning to persons of any faith to assert that the words 'under God' contain no religious significance," she wrote. "The inclusion of those two words, however, does not alter the nature of the Pledge as a patriotic activity."

Myers' lawyer, David Remes, said Wednesday that he and his client had not yet decided whether to appeal the case to the U.S. Supreme Court, The Associated Press reported.

"The problem is that young schoolchildren are quite likely to view the Pledge as affirming the existence of God and national subordination to God," Remes said. "The reference to God is one of the few things in the Pledge that children understand."

—RNS

REPORT from the Capital

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Supreme Court, cont.

tutional. Justice O'Connor sided with the majority in that case.

In 1985, Chief Justice Rehnquist dissented in *Wallace v. Jaffree*, in which the Court decided to strike down an Alabama law that had been specifically designed to provide for a daily moment of silent prayer in public schools.

Rehnquist wrote one opinion that made a positive impact on the separation of church and state. In the 2004 case of *Locke v. Davey*, Chief Justice Rehnquist, writing on behalf of a 7-2 majority, upheld the state of Washington's Promise Scholarship program, which did not allow the funding of college scholarships for the study of theology. In doing so, the Court recognized Washington's strong interest in its own constitutional religious liberty protections, which more explicitly prohibited the funding of religion.

President George W. Bush walks along the Colonnade with Judge John G. Roberts. White House photo by Eric Draper

The President's announcement to shift Robert's nomination to the chief justice spot prompted some Democrats and leaders of civil rights groups to call for greater scrutiny of Roberts and his record. If confirmed, the 50-year-old Roberts—who served as a Supreme Court law clerk to Rehnquist in 1980 and 1981—would become the 17th chief justice and could play a decisive role for decades in shaping the Supreme Court's rulings.

"This nomination certainly raises the stakes," said Sen. Charles Schumer, D-N.Y., a member of the Judiciary Committee.

President Bush is likely to also face a much more intense battle to replace Justice O'Connor, who was the court's swing voter on abortion and other controversial issues.

How Roberts will carry on the legacy of Rehnquist's position on separation of church and state is expected to be included in the line of questioning presented during the hearings on his nomination. About 30 civil rights groups have called on the Senate to reject Roberts' nomination.

Some of the groups questioning Roberts' record have focused on his previous positions on religious freedom and the role of government and religion.

The Baptist Joint Committee for Religious Liberty, in a report released Sept. 1, concluded Roberts' record was "troubling."

"[Roberts'] briefs and comments all point in the same direction: toward lowering the wall of separation," wrote K. Hollyn Hollman, the group's general counsel.

The President said he wants Roberts sworn in as chief justice before the start of the court's new term on Oct. 3.

—From The Roundtable on Religion and Social Welfare Policy, www.religionandsocialpolicy.org

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